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The Principle of Equal Treatment in the *Google Shopping* Case

Abstract: This article reflects on the principle of equal treatment as a constant feature that pervades the European Union's legal order and its specific role in competition law. Throughout history, this principle has been a foundation stone for developing the characteristics, such as freedom of movement, that one would consensually recognise as distinctive features that make the European Union a *sui generis* political construction. After a brief analysis of the principle's development and ever-expanding contours, with new instruments emerging along the way and contributing to its importance, we will focus on the application of this principle to competition law. Paying particular attention to the *Google Shopping* case, we will demonstrate how the general principle of equal treatment remains relevant when confronted with new types of discriminatory abuses.
Keywords: Google Shopping, leveraging abuse, principle of equal treatment, self-favouring

Introduction

The *Google Shopping*, involving discriminatory abuses, is a landmark case for two reasons: the Court considered self-favouring as an independent category of abuse and, in addition, invoked for the first time the principle of equal treatment as a general principle to be applied to competition cases. The prohibition of discrimination was implicit in several types of abuse of dominant position, such as exclusivity clauses, refusal to deal and margin squeeze, and was mentioned explicitly in the pro-

hibition of discriminatory prices and conditions. The existence of a general principle of equal treatment in competition law and its scope in the specific context of Article 102 TFEU remains, however, a controversial issue. In this article, we will begin by analysing the principle of equal treatment enshrined in the Charter of Fundamental Rights to set the necessary framework to discuss its application to the *Google Shopping* case and beyond.

1. The principle of equal treatment

1.1. Preliminary remarks

In varietate concordia – United in Diversity – has been the official motto of the European Union since 2000. Used as a representation of the tumultuous past that served as the motivation to bring different countries and their peoples under one common organisation, it is also a promise and a compromise with both the present and the future. Enshrined in the European legal system since its foundation, the principle of non-discrimination has assumed different forms and has expanded its scope progressively; it can now be found in multiple legal instruments, ranging from non-discrimination towards persons to non-discrimination towards products. In fact, the distinctive concept of freedom of movement across Member States, be it of workers, capital, services or goods, is based on that idea of non-discrimination.[1]

From the outset, the founding treaties made a point of incorporating this concern into their norms. The Treaty Establishing the European Economic Community (EEC Treaty) (1957) prohibited any sort of discrimination based on nationality in its Article 7. Among other provisions, Chapter 8 of the Treaty Establishing the European Coal and Steel Community (1951), dedicated to wages and labour movement, explicitly stated that Member States could not impose any restrictions on the workers of coal and steel industries based solely on their nationality. In fact, the elimination of distinctions between factors of production was 'instrumental' to the establishment of the freedom of movement and to the integration process as well.[2] This becomes clear if we imagine a scenario in which products from other Member States would have a less favourable treatment than domestic products. The same situation would apply *mutatis mutandis* to workers if nationals received better treatment than those originating from other Member States. Freedom of movement would be unattractive to any factor of production.

This was later demonstrated in 1980, in a case addressing the difference in the taxation of national and imported spirituous beverages in France. The Court con-

1 C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th ed.), Oxford 2019.

2 M. Bell, The Principle of Equal Treatment: Widening and Deepening, (in:) P. Craig, G. De Burca (eds.), *The Evolution of EU Law* (2nd ed.), Oxford 2011.

sidered that the differences between the products were not enough to legitimise tax differences and, consequently, the different handling was incompatible with the principle of equality of treatment of domestic and imported products.[3]

As such, 'the principle of equal treatment – and its corollary of non-discrimination – have been the keys to the breaking down of protectionist barriers between Member State markets and to the creation of a unified market'.[4] In fact, when speaking about the 'market-unifying role' of equal treatment, More describes its effect as restraining 'Member State action impeding access to national markets, yet without at the same time creating uniformly regulated markets'.[5]

In 1977, the Court established that the prohibition of discrimination was a 'specific enunciation of the general principle of equality' and that it constituted one of the fundamental principles of the then Community.[6] Acquiring such a status means that it is embedded in the normative core of the legal system and will permeate all areas of EU action, adopting different conformations in response to the specific challenges of each field.[7] In Watson's words, the general principles of EU law 'add flesh to the bones of Union law, which being expressed in a framework treaty, would, in their absence, have remained a mere skeleton of rules falling short of a proper legal order'.[8] Therefore, the general principles, and more specifically, the general principle of equality, act as the background melody that gives cohesion and meaning to all the different parts of EU music.

Although there has been a long discussion in legal doctrine about the distinction between the principle of equal treatment and the principle of non-discrimination, the Court and some parts of the literature have used both concepts interchangeably. As it has recently reaffirmed in its case law, 'the general principle of equal treatment and non-discrimination requires that comparable situations are not treated differently unless differentiation is objectively justified'.[9] This is a straightforward adaptation of the Aristotelian postulate of treating equivalent situations in the same manner, later elaborated by other authors and used as an end goal for socio-transformative moments such as the French Revolution.[10]

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3 Judgment of the CJEU of 27 February 1980 on the case of *Commission of the European Communities v. French Republic*, C-168/78, EU:C:1980:51, paras 5 and 16.

4 G. More, The Principle of Equal Treatment: From Market Unifier to Fundamental Right? (in:) P. Craig, G. De Burca (eds.), *The Evolution of EU Law* (1st ed.), Oxford 1999.

5 *Ibidem*.

6 Judgment of the CJEU of 19 October 1977 on the case of *Ruckdeschel and Others v. Hauptzollamt Hamburg-St. Annen*, C-117/76 and 16/77, EU:C:1977:160, para. 7.

7 S. Prechal, Non-Discrimination Does Not Fall Down from Heaven: The Context and Evolution of Non-Discrimination in EU Law, 'Eric Stein Working Paper' 2009, no. 4.

8 P. Watson, *EU Social and Employment Law*, Oxford 2014.

9 Judgment of the CJEU of 26 October 2017 on the case of *Marine Harvest v. European Commission*, T-704/14, EU:T:2017:753, para. 207.

10 Aristotle, *Nicomachean Ethics*, ed. and trans. R. Crisp (rev. ed.), Cambridge 2019.

Prior to this, the EEC Treaty had already introduced an important milestone by referring to equal pay between men and women in its Article 119. Later, the iconic *Defrenne v. Sabena* case law trilogy served as the stage for the Court to affirm the importance of the equality of pay regardless of sex, but also to highlight the sometimes-camouflaged economic interest behind it. Article 117 was described by the Court as pursuing a double aim 'which is at once economic and social'.[11] As such, besides guaranteeing better working and living conditions for their workers irrespective of sex, there was also the underlying concern of avoiding a competitive disadvantage in relation to the Member States who had already included the elimination of difference of payment in their national legislations.

The Court has, indeed, been an important propeller in the development of the principle of non-discrimination, and its jurisprudence has been reflected in several normative changes.

Until the Treaty of Amsterdam (1997), the fight against discrimination was limited to the distinction between genders and nationalities in a work context, which translates the market integration-oriented mindset.[12] Nevertheless, it is relevant to acknowledge these two factors as driving forces for the modern EU anti-discrimination realm.

The Amsterdam Treaty broadened the spectrum, encompassing racial and ethnic origin, religion, disability, age and sexual orientation. Since then, these norms have been used as bases for several European legal instruments that have materialised the principle of equality into specific measures. As such, Article 13 of the Treaty of Amsterdam (now Article 19 TFEU) is seen as a fundamental step which creates a 'new legislative competence' that allows the legislator to create specific measures tailored for each different area and challenge.[13]

In 2000, the EU gained a new legal instrument solely dedicated to the protection of fundamental rights. The Charter of Fundamental Rights of the European Union (hereinafter the Charter) appeared as a political compromise, a non-binding instrument firstly designed and enacted with the purpose of showcasing the protection of EU citizens' fundamental rights.[14] For some, it was also a first step towards a desired federal constitution.[15]

11 Judgment of the CJEU of 8 April 1976 on the case of *Defrenne v. Sabena (II)*, C-43/75, EU:C:1976:56, paras 8 and 9.

12 D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law*, Hart Publishing, 2007.

13 E. Muir, The Essence of the Fundamental Right to Equal Treatment: Back to the Origins, 'German Law Journal' 2019, vol. 20, pp. 817–839.

14 Cologne Conclusion of the Presidency, Annex IV: European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, 3–4 June 1999.

15 D. Anderson, C.C. Murphy, The Charter of Fundamental Rights, (in:) A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon*, Oxford 2012.

The Charter devotes an entire title (Title III) to the topic of equality, starting with Article 20, which opens the Title with the principle of equality before the law. With its very simple and straightforward formula 'everyone is equal before the law', the norm has more layers than what initially meets the eye, opening the door to the different components of the equality principle enlisted in the following articles. Article 21 of the Charter prohibits any kind of discrimination, irrespective of the grounds. In its second paragraph, it explicitly references the prohibition of any kind of discrimination based on nationality, within the scope of the treaties. By explicitly referring to the treaties' framework, the Charter refuses to extend this prohibition's scope beyond situations involving EU citizens in cross-border circumstances.[16] The remaining five articles that make up the equality part of the Charter are devoted to cultural, religious and linguistic diversity (Article 22), equality between men and women (Article 23), the rights of children and the elderly (Articles 24 and 25) and the integration of persons with disabilities (Article 26).

1.2. The Post-Lisbon era

1.2.1 The binding legal status of the Charter

After the failure surrounding the Constitutional Treaty (2004), the Treaty of Lisbon appeared as a halfway response to conciliate the wills of different Member States.[17] Nonetheless, despite being a middle-ground compromise, the Treaty of Lisbon introduced essential changes to the European legal landscape.

After much debate around it and about the appropriate method to do it, the Treaty of Lisbon finally recognised the full legal status of the Charter, which became legally binding and with the same legal value as the treaties. Despite not being absorbed by the treaties' text, Article 6 of the Treaty on the European Union serves as the gateway for the Charter and, consequently, for the rights, freedom and principles established therein.

The elevation of the Charter's legal status also appears as an answer to the challenge presented by the Court in some of its case law. In the *Schmiderger* case, when discussing the articulation of the fundamental freedoms guaranteed by the treaties and the protection of fundamental rights (*in casu*, those envisioned in the European Convention on Human Rights), the Court defended the need to reconcile both.[18] As mentioned above, the European Union is only in a position to achieve complete freedom of movement for its citizens if it is also able to protect their fundamental rights

16 E. Muir, The Essence…, *op. cit*.

17 European Parliament Resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)), points D–G.

18 Judgment of the CJEU of 12 June 2003 on the case of *Schmiderger*, C-112/00, EU:C:2003:333, para. 77.

to the same degree.[19] As such, by elevating the provisions of the Charter to the same level as those enshrined in the treaties, the legislator confirmed that the conciliatory approach is indeed the appropriate way forward in order to avoid a competition in which the rights and principles guaranteed by the Charter would lose due to the inferior legal status of the instrument.[20] The Court has since confirmed that the Charter is the leading standard for the protection of fundamental rights whenever the application of EU law is at stake.[21]

1.2.2. Horizontal clauses

The changes around the Charter were, however, not the only innovation arriving with the Lisbon Treaty. At the same time, it introduced a horizontal clause in the then new Treaty on the Functioning of the European Union (TFEU) establishing the need to fight discrimination in all Union policies and activities (Article 10 TFEU). Alongside Article 8, which promotes equality between men and women, Article 10 has been considered as a manifestation of the equality mainstreaming strategy. These two articles are part of a larger group of horizontal clauses inserted in the first part of the TFEU, and the fact that they are included in an initial part of the Treaty may not be an accident. They can be seen as lenses through which one should face the opportunities raised by the remaining legal text.[22]

Nevertheless, at first sight, Article 10, which actually stems from the Draft Treaty Establishing a Constitution for Europe (Article III–118), seems to introduce nothing new. It echoes the urge to ensure that the fight against discrimination is present in all Union activities and policies. The questions linked to the intention behind introducing these norms into the Treaty's text are thus legitimate, taking into consideration the existence of such a complex and complete equality framework. In fact, even before the insertion of these norms, one could already perceive the existence of non-discriminatory concerns in the EU's legislative process.[23]

Despite their apparently meaningless manifestation in the Treaty, the horizontal equality clauses have been used as an extra tool in the European toolkit. When it comes to jurisprudential activity, and since they should penetrate all areas and act as

19 A. Torres Pérez, The Federalizing Force of the EU Charter of Fundamental Rights, 'International Journal of Constitutional Law' 2017, vol. 15, no. 5, pp. 1080–1097.

20 C. Franklin, The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon, 'Tilburg Law Review' 2010, vol. 15, no. 2, pp. 137–162.

21 Judgment of the CJEU of 26 February 2013 on the case of *Melloni*, C-399/11, EU:C:2013:107, paras 56–58.

22 E. Psychogiopoulou, The Horizontal Clauses of Arts 8–13 TFEU Through the Lens of the Court of Justice, 'European Papers' 2022, vol. 7, no. 3, pp. 1357–1380.

23 E.g. the Posted Workers Directive, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

a yardstick, these norms have been used by the Court as interpretative instruments.[24] However, we can infer from the Court's case law that the use of these clauses has not been consistent, at least so far, with the Court using these instruments only when in need of an extra building block for its argument.

In 2015, in a case surrounding the losses of private investors in Greek debt instruments, the parties invoked Article 10 TFEU in conjunction with Articles 20 and 21 of the Charter to affirm the principle of equal treatment for all creditors or savers. However, when replying to the plea, the General Court only considered the norms of the Charter, disregarding the horizontal clause of the Treaty.[25] Nevertheless, in a later judgment, the Court itself invoked one of the horizontal clauses. In a case opposing Hungary to the European Parliament, and which contested the legal basis chosen to adopt the directive designed to amend the Posting of Workers Directive,[26] the Court affirmed the need to accommodate the protection of the objectives enshrined in the horizontal clause of Article 9, even when the purpose of the legislative initiative is to ensure the freedom to provide services.[27] Besides reconciling the social and economic goals of the Union, the Court drew out of the apparently vague text of Article 9 the 'legal requirement' for the legislator to respect the aims enlisted in the horizontal clauses.[28] The same decision was replicated in the parallel case initiated by Poland against the European Parliament on exactly the same grounds.[29]

Regardless of the fact that no new competences were introduced into the treaties, there is particular importance in the fact that the text of the horizontal clauses can be interpreted as generating a requirement for the legislator and for the European institutions to protect the core values of the Union in all their activities. Their capacity to be present in every single area of the European Union's action makes them a vital weapon to guarantee an effective and widespread fight against discrimination.

24 E. Muir, V. Davio, L. Van der Meulen, The Horizontal Equality Clauses (Arts 8 & 10 TFEU) and Their Contribution to the Course of EU Equality Law: Still and Empty Vessel? 'European Papers' 2022, vol. 7, no. 3, pp. 1381–1403.

25 Judgment of the CJEU of 19 June 2018 on the case of *Alessandro Accorinti v. European Central Bank*, T-79/13, EU:T:2015:756, paras 85–87.

26 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (O.J. L 173/16, 09.07.2018).

27 Judgment of the CJEU of 8 December 2020 on the case of *Hungary v. European Parliament*, C-620/18, EU:C:2020:1001, paras 45 and 46.

28 P. Pandropolous, How Should Price Discrimination Be Dealt with by Competition Authorities? 'Concurrences' 2007, vol. 3, pp. 34–38

29 Judgment of the CJEU of 8 December 2020 on the case of *Republic of Poland v. European Parliament*, C-626/18 EU:C:2020:1000.

1.2.3. The principle of equal treatment in competition law

Article 102(c) TFEU prohibits dominant undertakings from applying 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Not all discriminatory conduct by a dominant undertaking are prohibited, but in certain circumstances, price and non-price discrimination can raise competition concerns.

There are several types of discrimination. Certain literature distinguishes between exploitative and exclusionary price discrimination. Price discrimination may be exploitative if it reduces consumer welfare by 'extracting consumer surplus',[30] and it may also discriminate according to the territory, this geographic discrimination being particularly relevant in the pharmaceutical field, where prices vary across countries; or it may be exclusionary, which can be primary or secondary line.

The European Commission has focused its attention on exclusionary abuses, despite the fact that it has been suggested that the initial objective of the European legislator was to condemn exploitative abuses (which directly harmed final consumers): the expression 'trading partners' in Article 102(c) should cover consumers who buy goods or services from the dominant company and who are at a competitive disadvantage when paying higher prices for certain products, when compared to other consumers.[31] Furthermore, the Commission decision in the *Football World Cup* case also pointed in that way.[32]

Recently, the Commission explained in a note entitled 'Personalised Pricing in the Digital Era' that Article 102(c) may also be used to address abusive personalised prices.[33] In digital markets, the use of personal data allows online sellers 'the *perfect*' price discrimination, that is to say, to segment consumers into much smaller groups, and charge different prices, reflecting their maximum willingness to pay. The use of Article 102(c) in these circumstances should be considered a possibility.

Concerning exclusionary abuses, the primary line (or first degree) exclusionary price discrimination intends to exclude competitors' products and includes, predatory pricing, selective cutting prices or tying strategies, targeting costumers and foreclosing, therefore, competitors (discrimination can be a *plus* regarding other types of abuses). In *Hoffmann-La Roche*, for instance, a case involving fidelity rebates, the Court considered that price discrimination prevented competitors from selling to

30 E. Psychogiopoulou, The Horizontal Clauses…, *op. cit*.

31 P. Akman, To Abuse, or Not to Abuse: Discrimination between Consumers, 'European Law Review' 2007, vol. 32, pp. 492–512.

32 In the *Football World Cup* case, the spectators needed to have an address in France to purchase tickets for the World Cup; cf. Case IV/36.888 – 1998 Football World Cup COMP 36.888.

33 Note by the European Union, OECD, DAF/COMP/WD(2018)128, p. 9. Personalised pricing could also be considered under the category of 'excessive prices'.

Hoffmann's clients.[34] Discrimination was an additional element considered by the Court in the assessment of fidelity rebates as an abuse of dominant position. Therefore, some literature advocates that the application of Article 102(c) to first-degree discrimination is not necessary, as the conduct can be framed as another type of abuse.[35]

Secondary line (or second degree) price discrimination involves discrimination on downstream markets in which the firm is not active and which may, therefore, raise fewer competition concerns. The dominant firm discriminates against customers and suppliers, placing them at a disadvantage vis-à-vis other companies. An important element to consider in this context is whether the dominant undertaking is vertically integrated or not.[36] If it is, it may have an incentive to distort competition in other markets (namely, downstream or neighbouring markets). If it is not vertically integrated, Article 102(c) may still apply, even if, as Advocate General Nils Wahl argued in the *MEO* case, cases concerning pure second-degree discrimination are rare.[37] Nevertheless, the Court confirmed that Article 102(c) applies even if the dominant firm is not active in the market:

> The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words, between suppliers or customers of that undertaking. Co-contractors of such undertakings must not be favoured or disfavoured in the area of the competition which they practise amongst themselves […] Thus, it is not necessary that the abusive conduct affects the competitive position of the dominant undertaking itself on the same market in which it operates, compared with its own potential competitors.[38]

34 Judgment of the CJEU of 13 February 1979 on the case of *Hoffmann-La Roche v. Commission*, C-85/76 EU:C:1979:36, para. 90. Some literature claims that rebates should be assessed under Article 102(b) as exclusionary abuses; cf. D. Geradin, N. Petit, Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles, 'Journal of Competition Law & Economics' 2006, vol. 2, pp. 479–531.

35 *Ibidem*.

36 As Geradin and Petit pointed out, a seller who is not integrated vertically has no practical incentive to distort competition in the downstream market 'since it benefits from a competitive downstream market for distributing its goods' (*ibidem*, p. 502). The majority of cases have involved discrimination on the ground of nationality, as in *Corsica Ferries II*, (Judgment of the Court of 17 May 1994, C-18/93). In other cases, the European institutions applied Article 102(c) to second-degree discriminatory abuses by vertically integrated operators, such in the *Clearstrem* case, COMP/38.096, 2 June 2004.

37 Judgment of the CJEU of 19 April 2018 on the case of *MEO v. Autoridade da Concorrência*, C-525/16, EU:C:2017:1020, opinion of AG Nils Wahl, para. 80.

38 *Ibidem*, para. 24.

In the *MEO* case the dominant company, GDA, a national copyright collective company, discriminated against its customers, MEO and NOS, active in a market in which GDA did not operate.[39]

Sometimes, the pricing policy enforced by the dominant undertaking, particularly when carried out by a vertically integrated company, can generate both first- and second-line discrimination. A good example is the *Deutsche Bahn* case.[40] Deutsche Bahn is the national railway undertaking operating in Germany. It applied different tariffs to container transporters operating on western journeys for equivalent services regarding the use of rail infrastructure, placing its active trading partners at a competitive disadvantage vis-à-vis itself and its subsidiary Transfracht.[41]

In order to apply Article 102(c) TFEU, four conditions must be met. First, the dominant company applies *discriminatory conditions*; this expression covers price discrimination, which refers not only to the application of different prices at the wholesale or retail level, but also to the reduction of selective prices or target discounts. The Court of Justice clarified in the *United Brands* judgment that to assess this element, the European Commission had to take into account 'differences in transport costs, taxation, customs duties, wages of labour force, marketing conditions, the differences in the parity of currencies, [and] the density of competition', because they may lead to different retail prices in different states.

Second, this case involves *equivalent transactions* which are substitutes, as the European Commission mentioned in the *Scandlines Sverige AB* decision.[42] In this case the Commission concluded that it was not demonstrated that the dominant firm applied dissimilar conditions to equivalent transactions between ferry operators and cargo operators, when comparing all the services provided by the firm with the level of the total port charges paid respectively by the two categories of customers. Third, the dominant firm does not provide an *objective justification* for applying discriminatory conditions to equivalent transactions and, fourth, that conduct puts the customer at a *competitive disadvantage* vis-à-vis other costumers.[43]

At the beginning, the Court presumed that a discriminatory practice placed the trading partner at a competitive disadvantage.[44] The competition authority did not

39 *Ibidem*. The Court did not presume the competitive disadvantage, however, and required exclusionary effects (even potential ones).

40 Judgment of the CJEU of 21 October 1997 on the case of *Deutsche Bahn v. Commission*, T-229/94, EU:T:1997:155.

41 *Ibidem*, para. 93.

42 Decision of the European Commission of 23 July 2004 on the case of *Scandlines Sverige AB v. Port of Helsingborg*, COMP/A. 36.568/D3.

43 Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) (O.J. C 45, 24.02.2009, pp. 7–20).

44 Judgment of the CJEU of 15 March 2007 on the case of *British Airways v. Commission*, C-95/04 P, EU:C:2007:166.

have to show evidence of an 'actual quantifiable deterioration in the competitive position of the business partners taken[,] individually considered'.[45] In the *MEO* case, the Court adopted a different approach, however, based on anti-competitive effects, emphasising that all the relevant circumstances of the case must be assessed. It brought the *Intel* case into the equation and held that 'the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors' must be assessed by the authorities.[46]

The Court then concluded that the concept of 'competitive disadvantage' covers 'a situation in which that behavior is capable of distorting competition between those trade partners'; it

> does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behavior has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation.[47]

2. The Google Shopping case

2.1. The decision

The European Commission decided on 27 June 2017 that Google had abused its dominant position on the market for general search services by giving preference to its own comparison shopping site, Google Shopping, when positioning and displaying its general search results pages.[48] The Commission concluded a seven-year investigation, explaining that this case is a precedent and deciding that the dominant companies that favour their own services are infringing Article 102 TFEU, as this constitutes a new type of abuse.[49] Users usually only click on the 'ten highest-ranking generic search results on the first Google general search results page',[50] so preferential positioning of Google services is likely to increase traffic to Google services to the detriment of competitors. Google argued that it was entitled to refuse access to its general search page, but the Commission considered it a *leverage* abuse.[51] In other words, the dominant firm sought to use its dominance as a lever to expand its power

45 *Ibidem*, para. 145 and *MEO*…, *op. cit.*, para. 27.
46 *Ibidem*, para. 31.
47 *Ibidem*, para. 37.
48 Commission Decision of 27 June 2017 on the case of *Google Search (Shopping)*, case AT.39740, C(2017) 4444.
49 *Ibidem*, para. 646.
50 *Ibidem*, para. 457.
51 *Ibidem*, paras 644–647 and 649.

in general internet searching into ancillary markets for specialised search services, namely comparison shopping.[52] The remedy was to ensure that Google treated competing services no less favourably than its own within its general search results pages: all the competing services must be treated on equal terms.[53]

The Commission decision has been criticised either for considering leverage as an independent category of abuse or for applying this type of remedy. The General Court explained in the *Microsoft* case that *leveraging infringement* is an umbrella expression that covers different forms of abuse, namely refusal to supply and tying, both discussed in the *Microsoft* case, but also margin squeeze and discriminatory rebates, decided in the *TeliaSonera* and *Irish Sugar* cases.[54] So the use of this expression without further clarification might raise legal uncertainty. In addition, following the effects approach to Article 102 TFEU namely since the *Intel* case, it was claimed that the Commission should have provided a counterfactual analysis.[55] The Court, however, rejected that claim, acknowledging that it is very hard for the Commission to carry out the analysis and, on the other hand, saying that it cannot be required to do such an analysis, because competition authorities do not have to prove actual effects.[56] *Ex parte* counterfactual analysis may be submitted to the Court, as occurred in the *Google* case, but the Commission was not required to do so.[57]

Concerning the remedy applied by the Commission, some authors have argued that 'it perpetuates the abuse by hiding comparison shopping services' on a tab behind Google's default comparison shopping page; it should 'change the search default

52 *Ibidem*, para. 671. See also T. Hoppner, F. Schaper, P. Westerhoff, *Google Search (Shopping)* as a Precedent for Disintermediation in Other Sectors: The Example of Google for Jobs, 'Journal of European Competition Law & Practice' 2018, vol. 9, no. 10, pp. 627–644.

53 *Google Search (Shopping)*…, *op. cit.*, para. 699. In the American literature, several authors have considered that the anti-trust investigations of Google's search practices by the European and American agencies were not grounded in consistent competition lessons: 'Google's ranking of specialized search results in general search pages is not an attempt to monopolize vertical searches. Rather it is product improvement that enhances value for consumers'; 'punishing Google for being a successful competitor would stifle innovation and dynamic competition', R.H. Bork, J.G. Sidak, What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google? 'Journal of Competition Law & Economics' 2012, vol. 4, pp. 663–700.

54 Judgment of the CJEU of 17 September 2007 on the case of *Microsoft v. Commission*, T-201/04, EU:T:2007:289, para. 1344; judgment of the CJEU of 17 February 2011 on the case of *Konkurrensverket v. TeliaSonera Sverige*, C-52/09, EU:C:2011:83, para. 85; judgment of the CJEU of 7 October 1999 on the case of *Irish Sugar v. Commission*, T-228/97, EU:T:1999: 246, para. 166. This would be confirmed in *Google Search (Shopping)*…, *op. cit.*, paras 162–163.

55 The claim was made by Google; *ibidem*.

56 Google Search (Shopping) paras. 377–378.

57 Certain literature argues that counterfactual analysis is an analytical tool used to show effect as a causation, but it is not the only way to make that proof, as the Google judgment seems to confirm. Cf. R. di Giovanni Bezzi, Anticompetitive Effects and Allocation of the Burden of Proof in Article 102 Cases: Lessons from the *Google Shopping* Case, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 2, pp. 112–125.

to make what is invisible, visible'.[58] In other words, it was not enough to bring the infringement to an end; the remedy should also eliminate the distortive consequences resulting therefrom.[59] In the *Google* case, however, the measures adopted were apparently ineffective, according to certain literature, as there was no increase in traffic to competing services.[60]

2.2. The judgment

Google brought an appeal against the decision, and the European General Court largely upheld the decision on 10 November 2021, although framing self-preferencing as a discriminatory abuse (which is interesting, as the Commission never used the term discrimination in its decision). The Court decided that by favouring its own comparison shopping service on its general results pages through more favourable display and positioning, while demoting the results from competing comparison services in those pages by means of ranking algorithms, Google departed from competition on the merits, taking into account specific circumstances:[61] (1) the importance of the traffic generated by Google's general search engine for comparison shopping

58 P. Marsden, Google Shopping for the Empress's New Clothes: When a Remedy Isn't a Remedy (and How to Fix It), 'Journal of European Competition Law & Practice' 2020, vol. 11, no. 10, pp. 553–559.

59 J. Laitenberger, Competition Enforcement in Digital Markets: Using Our Tools Well and a Look at the Future, 'GCLC Conference', 31 January 2019, http://ec.europa.eu/competition/speeches/text/sp2019_03_en.pdf (15.05.2023).

60 On the description of Google's compliance obligations and the measures taken by the platform, the Product Listing Ads (PLA) and Comparison Listing Ads (CLA) remedies, see P. Marsden, Google Shopping…, *op. cit.*, pp. 555–557. Other authors have suggested that the problem was not only the remedy, but also the deficiencies within the substantive case. They have explained that the Commission's investigation was much broader, and, initially, competition concerns were addressed through commitments negotiations, which were abandoned in 2015. The European competition authority then issued a statement of objections limited to Google's alleged favourable treatment of its own service and imposed fines and a remedy, but did not require Google to send traffic to CSS's websites, nor did it include a restorative requirement. Cf. T. Graf, H. Mostyn, Do We Need to Regulate Equal Treatment? The *Google Shopping* Case and the Implications of Its Equal Treatment Principle for New Legislative Initiatives, 'Journal of European Competition Law & Practice' 2020, vol. 11, no. 10, pp. 561–574. Others have argued that remedies for self-preferencing abuses were 'likely to carry significant implementation risks', namely a dominant firm may apply 'the levelling down remedy', 'providing equal treatment but without procompetitive effects'. C. Ahlborn, G. Van Gerven, W. Leslie, Bronner Revisited: Google Shopping and the Resurrection of Discrimination under Article 102 TFEU, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 2, pp. 87–98.

61 *Google Search (Shopping)*…, *op. cit.*, para. 168: 'while results from competing comparison shopping services could appear only as generic results, that is to say, simple blue links that were also prone to being demoted by adjustment algorithms, results from Google's own comparison shopping service were prominently positioned at the top of Google's general results pages, displayed in rich format and incapable of being demoted by those algorithms, resulting in a difference in treatment in the form of Google's favouring of its own comparison shopping service'.

services; (2) users' behaviour when searching online, which usually concentrates on the first few results; and (3) the fact that the traffic diverted from Google's pages cannot be replaced.[62]

The Court also noted that, given the universal vocation of Google's general search engine, its conduct involved a certain form of 'abnormality', for the following reasons:[63] search engines are open to results from third-party sources, which will increase its credibility; similarities between internet access providers and the obligation of non-discrimination mean that Google cannot distort competition in the downstream market, that is to say, a system of undistorted competition can be guaranteed 'only if equality of opportunity is secured as between the various economic operators';[64] and Google changed its behaviour on the market for general search services when it entered into the market for specialised search results.[65]

Then the Court confirmed that the general results page appeared to be similar to an essential facility, as there was no economically viable available substitute on the market, but that the *Bronner* judgment was not applicable in the case. The Court distinguished between express refusal to supply, that is to say, practices that explicitly deny requested access to an input, in which case the indispensability test of *Bronner* should apply, and practices that result in an implicit refusal of access, including discriminatory practices such as self-preferencing, which should escape that test.[66] The Court moved away from traditional case law addressing disruption of supply (for instance the *Commercial Solvents* case) and refusal for the first time (the *Bronner* case) and established a new distinction between express and implicit refusal.[67] This solution has, however, been criticised, as the boundaries between these categories are difficult to draw. Some literature has therefore advocated either the demise of indispensability, which will increase the discretion of public authorities to decide competition cases, or the need to clarify the concept of indispensability: it should only be

62 *Ibidem*, paras 169–175.

63 *Ibidem*, para. 176.

64 *Ibidem*, para. 180.

65 *Ibidem*, para. 184.

66 *Ibidem*, paras 233 and 234–239. Certain literature suggests, however, that the determinant factor to decide whether indispensability should be required or not is the nature of the remedy, reactive or proactive. In other words, where positive obligations are imposed (such as the access price, amounts to be supplied or conditions of the dealing), indispensability must be required; on the contrary, it is not necessary if the remedy is reactive, that is to say, to bring the infringement to an end; cf. P. Ibáñez Colomo, Indispensability and Abuse of Dominance: From *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*, 'Journal of European Competition Law & Practice' 2019, vol. 10, no. 9, p. 542.

67 Judgment of the CJEU of 6 March 1974 on the case of *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities*, joined cases C-6/73 and C-7/73, EU:C:1974:18; judgment of the CJEU of 26 November 1998on the case of *Bronner*, C-7/97, EU:C:1998:569.

required as an element of the legal test if the case involves a vertically integrated firm and leads to the adoption of proactive remedies.[68]

The Court concluded that Google favoured its own service over competing services. Even if the results from other comparison shopping services were better, they would not receive the same treatment as the results from Google's service in terms of positioning and displaying.

The Court brought the *GT-Link*, *Aéroports de Paris* and *Irish Sugar* cases into the equation, which concern discriminatory abuses that favour the downstream services of the dominant firm.[69] Yet it did not mention the *MEO* judgment, nor did it qualify self-preferencing as an infringement of Article 102(c), because, as argued by some, it would mean applying the higher standard of infringement established in that case law.[70] Instead, the Court invoked, for the first time, the principle of equal treatment as a general principle of EU law, which requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless such treatment is objectively justified.[71]

In addition, the Court cited case law applicable to public undertakings and public bodies under Article 106 TFEU, suggesting that, in certain circumstances, common carrier obligations for super-dominant vertically integrated online platforms can be expected.[72] This solution has been criticised by some, as it may allow other companies to freeride the online platform and turn 'a private, self-made platform into a public facility', functioning as 'a means to impose a neutrality regime on digital gatekeepers'.[73]

Finally, regarding the argument that the Commission failed to show that competing services were as efficient as Google, the Court held that the Commission was

68 P. Ibáñez Colomo, Indispensability…, *op. cit*.

69 *GT-Link v. De Danske Statsbaner*, C-242/95, EU:C:1997:376; *Aéroports de Paris*, C-82/01P, EU:C:2002:617; *Irish Sugar*…, *op. cit*.

70 J. Lindeboom, Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on *Google Shopping*, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 2, pp. 63–74. In the *MEO* judgment, the Court required exclusionary effects, even potential ones, in order to consider the second condition of discriminatory abuses fulfilled.

71 *Google Search (Shopping)*…, *op. cit.*, paras 155 and 622.

72 As explained by V.M.K. Reverdin, Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position under the Legal Standards Developed by the European Courts for Article 102 TFEU? 'Journal of European Competition Law & Practice' 2021, vol. 12, no. 3, p. 195. Today, 'the telecommunication sector is bound by common carrier obligations', like third-party non-discriminatory access. The new trend is to extend those obligations to dominant firms when the input is indispensable, as the Court ruled on the *Deutsche Telekom AG v. European Commission* case, C-280/08P, para. 183.

73 É. Bruc, Google Shopping and Article 106 TFEU: A Legal Dystopia in the EU Constitutional Order, 'Journal of European Competition Law & Practice' 2023, pp. 1–12; G. Colangelo, The Case against Self-Preferencing as a New Antitrust Offense, https://truthonthemarket.com/2022/09/22/the-case-against-self-preferencing-as-a-new-antitrust-offense/ (1.06.2023).

not required to prove this: 'That competitor is not therefore in principle an actual competitor whose actual efficiency would be assessed […] [and the] use of that test, which involves comparing prices and costs, did not therefore make sense in the present case, since the competition issue identified was not one of pricing'.[74] The judgment reserved the 'as-efficient-competitor test' to price-based exclusionary abuses, although several authors maintain that there is still room for that test in non-price-based exclusionary abuses.[75]

Lastly, the Court ruled out objective justifications for Google's conduct, and concluded that the Commission did not prove the existence of (actual or potential) anti-competitive effects on the market for general search services, and annulled that part of the decision, confirming, however, the analysis in respect of the market for specialised search services for comparison shopping.

2.3. Should the Google Shopping test be applied to all discriminatory abuses?

Some literature suggests that the Court shifted the 'paradigm' with the *Google Shopping* case: 'relying on the general principle of equal treatment in the context of Article 102 TFEU opens the door for a proper non-discrimination theory of harm'.[76] A historical perspective was therefore called into the equation, in order to show that European discriminatory abuses were supposed to play a much more significant role in the digital economy: 'a non-discrimination theory of harm can at least maintain a gap-filling function alongside possible specific rules of the […] Digital Markets Act'.[77]

Some authors sustain, on the other hand, that, although the General Court's judgment shapes self-preferencing as a new category of discriminatory abuse, it should be constructed in a narrow way.[78] The new test should only be applied if two conditions are met: self-preferencing concerns '"open" products as opposed to those that are captive for the dominant firm [closed products], e.g. infrastructure which the dominant firm has reserved for its sole use';[79] and self-preferencing requires that the discriminatory practices 'compromise the "open" nature of the relevant product' (in other words, it degraded the quality of the search engine to favour its own service).[80] In this perspective, the new test is suitable for the platform economy but might not

74 *Deutsche Telekom*…, *op. cit*., paras 538–539.

75 G. Gaudin, D. Mantzari, '*Google Shopping* and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead', 'Journal of European Competition Law & Practice', 2022, vol. 13, no. 2, pp. 125–135.

76 L. Hornkohl, Article 102 TFEU, Equal Treatment Discrimination after *Google Shopping*, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 2, pp. 99–111.

77 *Ibidem*. The author suggests that this new category is relevant in other cases, for instance supermarkets or shopping malls that favour their own products.

78 C. Ahlborn, G. Van Gerven, W. Leslie, Bronner Revisited: Google Shopping …op. cit.

79 *Ibidem*, p. 89. This is different from refusal of supply, as in that case the products are only at the dominant firm's disposal.

80 *Ibidem*.

be very interesting outside that framework: if used broadly, there is a risk that it may capture pro-competitive vertical integration practices.

In the same line of reasoning, others suggest that the Court put forward several positive factors to consider self-favouring an independent abuse:[81] natural monopoly, quasi-essential facility, closure of open infrastructure, and legislative choice for non-discrimination.[82] The *Google Shopping* case is not a universal legal test for all discriminatory abuses regarding access but can only be applied if these positive factors are met.

Conclusion

The General Court held in the *Google Shopping* case that a company self-favouring its own service is, in certain circumstances, abusing its dominant position. The Court invoked, as a general principle of EU Law, the principle of equal treatment, and framed self-favouring as a new category of abuse, opening the door for national authorities to investigate new anti-competitive strategies. Some national cases, such as *Streetmap/Google* or *Funda*,[83] held before the European judgment, already discussed self-preferencing as a discriminatory conduct, although the firm's conducts, in those cases were not considered an exclusionary abuse.[84] This trend continued

81 F. Bostoen, The General Court's *Google Shopping* Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse', 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 2, pp. 75–85. Although the Court only considers Google a quasi-monopoly, certain authors hold that the general search is a monopolistic market; cf. F. Ducci, *Natural Monopolies in Digital Platform Markets*, Cambridge 2020.

82 Paras 178, 180 and 224–226. In other words, the Net Neutrality Regulation (Regulation (EU) 2015/2120 of the European Parliament and of the Council laying down measures concerning open internet access (O.J. L 310/1 [2015])) applied 'on the upstream market cannot be disregarded when analysing the practices of an operator like Google on the downstream market'; para. 180.

83 In the *Streetmap/Google* case, concerning the favourable search results given to Google Maps, the England and Wales High Court (Chancery Division) held in 2016 that 'the introduction by Google in the UK in June 2007 of the new-style Maps OneBox was not reasonably likely appreciably to affect competition in the market for online maps; [and] if […] it was likely to have such an effect, Google's conduct in that regard was objectively justified'. In the *Funda* case, the Amsterdam Court of Appeal found in 2020 that one of the largest national real-estate agencies did not abuse its dominant position; it explained that the preferential treatment of NVM agents' property listings on the platform was not similar to that in the *Google Search (Shopping)* decision, as the consumers were not guided by the ranking, and, relying on the *MEO* case, the Court dismissed the discriminatory conduct claim.

84 In the *Google AdX* case, however, the French competition authority sanctioned Google for favouring its own technologies on the online advertising market (cf. decision of 27.06.2021). In this case, Google requested the transaction procedure and proposed several commitments, which were declared binding for a period of three years by the French competition authority. At the European level, the Commission sent a statement of objection to Amazon on the 10 November 2020 for the use of non-public independent seller data to favour its own retail business.

after the *Google Shopping* judgment, and new investigations were opened by several national authorities. The German Competition Authority (BKA), for instance, has initiated a proceeding against Apple, concerning its tracking rules and the App Tracking Transparency Framework, which have raised the suspicion of self-preferencing.[85] Similarly, the Portuguese Competition Authority (AdC) has collected indicia of self-preferencing behaviour by Google; according to the national authority, the company 'used information not accessible by competitors on online advertisement auctions in order to change the outcome of those auctions in Google's favour'.[86] At the European level, the Commission also exercised its surveillance and sent on 14 June 2023 a Statement of Objections to Google over its abusive practice of favouring its own online display of advertising technology services, to the detriment of competing providers of advertising technology services, advertisers and online publishers.[87]

These enforcement actions brought by national authorities and the European Commission show that self-preferencing as a stand-alone discriminatory abuse, under the principle of equal treatment, is needed to address the anti-competitive behaviours of online platforms. Thus, the general principle of equal treatment under Article 102 TFEU paved the way for new theories of harm. Self-favouring, as well as other new categories of abuse eventually created under the general principle of equal treatment, can be particularly relevant in digital markets, outside the enforcement of the Digital Markets Act, which can only be applied to gatekeepers that offer core platform services.

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85 BKA, 14.06.2022.

86 The investigation moved to the European Commission, which took over the case in view of the scope and impact of the issue at stake; the Portuguese Competition Authority closed the case in September 2022.

87 Cf. European Commission, Antitrust: Commission Sends Statement of Objections to Google Over Abusive Practices in Online Advertising Technology, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207 (13.10.2023).

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