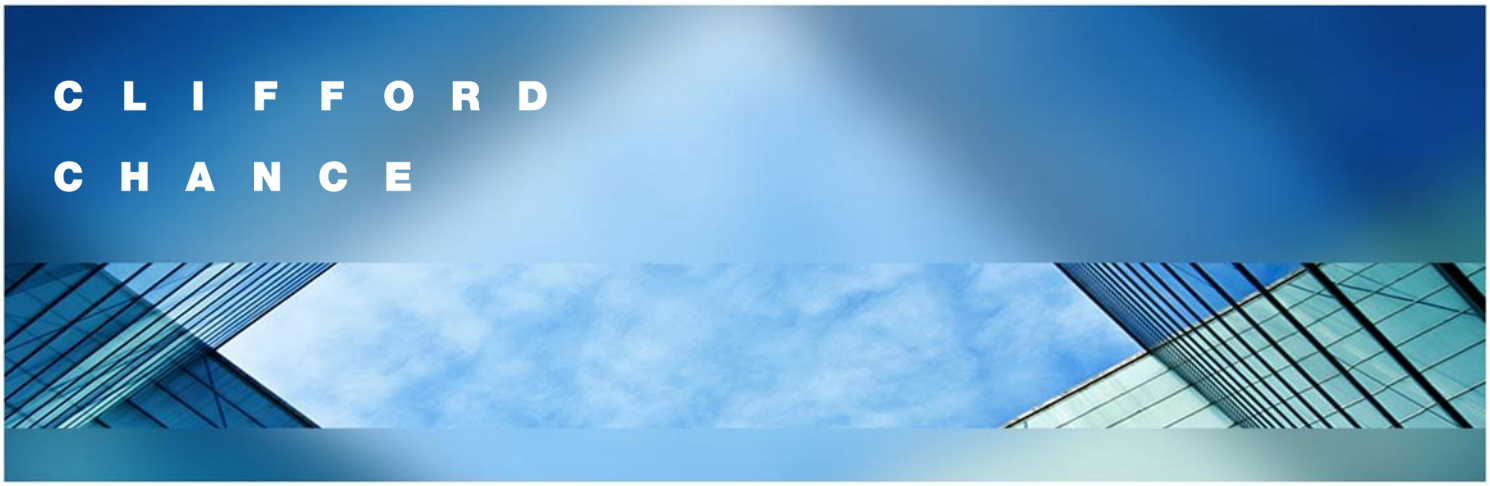

EU COURT OF JUSTICE JUDGMENT IN THE GOOGLE SHOPPING CASE UPHOLDS €2.4 BILLION FINE AGAINST GOOGLE

On 10 September 2024, the European Court of Justice (**CJEU**) upheld a European Commission (**EC**) decision finding that Google and its parent company Alphabet abused its dominant position in online search markets by favouring its own shopping service over those of its competitors in its general search results pages in breach of EU antitrust law (Article 102 TFEU). The judgment is final – no further appeal is possible.

THE CJEU'S JUDGMENT: ON FAVOURING, REFUSAL TO GRANT ACCES, COMPETITION ON THE MERITS, THE ASSESSMENT OF CAUSALITY AND EFFECTS

Favouring as an abuse of dominance under EU competition law. The CJEU reiterated that there is no general rule that prohibits a dominant undertaking from treating its own products or services more favourably than those of its competitors, irrespective of the circumstances of the case. However, it found that the General Court of the EU (**GC**) had correctly established that, in light of the characteristics of the market and the specific circumstances of this case, Google's conduct was discriminatory and did not fall within the scope of competition on the merits.

The assessment of competition other than on the merits. The CJEU confirmed that a necessary condition for a finding of abuse is that the conduct concerned involves "methods other than those which are part of competition on the merits". In this respect, it emphasised that an assessment of whether a dominant firm competes other than on the merits concerns the circumstances as a whole, including the characteristics of the market and the specific circumstances of the case. The circumstances to be taken into account are therefore not limited to the dominant firm's conduct. In Google's case, the conduct combined two discriminatory practices of: (i) the more favourable positioning and display of Google's own specialised shopping results; and (ii) the simultaneous demotion of results from competitors through adjustment algorithms. These anti-competitive practices together resulted in an advantage to Google in the comparison shopping services market, not due to the merits and efficiency of Google's service, but due to Google's discriminatory

Key takeaways

- Google's favouring of its comparison shopping service in its general search results combined with its demotion of rivals services is confirmed to be an abuse of Google's dominant position in search
- Such favouring does not need to be assessed based on case law criteria on the "refusal to grant access" abuse, as the rival comparison shopping services are already featured in Google's general shopping results
- Favouring as such does not automatically amount to an abuse of dominance, without further circumstances causing competitive harm. However, under the EU Digital Markets Act, digital gatekeepers' core platform services are subject to a prohibition on favouring in ranking.
- The assessment of whether competition is not on the merits can take into account factual circumstances unrelated to the dominant company's conduct
- There is no general requirement to assess causality on the basis of a counterfactual in all abuse of dominance cases
- There is no general requirement to assess effects by reference to as efficient competitors

practices in these specific circumstances. Google's conduct was therefore not competition on the merits.

Distinction with refusal to supply access. The CJEU found that self-preferencing does not require the satisfaction of the strict refusal of access abuse criteria as set out in prior case law including *Bronner*, a judgment concerning a request by a rival newspaper to access a dominant company's newspaper distribution network. The CJEU held that Google's favouring did not involve a refusal of access as the rival comparison shopping services already featured in Google's general search results.

The demonstration of causality does not require demonstration of a counterfactual in all cases. Google argued that the EC had failed to establish a causal link between the practices at issue and the decrease in search result traffic for competitors and claimed that the EC should have conducted a counterfactual analysis to show how the market would have developed without Google's favouring. It also claimed that, because the EC's case was that anticompetitive effects arose from the combination of the two practices (favouring and algorithmic demotion), it would suffice to consider a counterfactual in which Google had implemented only one of those two practices.

The CJEU disagreed: it found that the EC was entitled to rely on a range of evidence and was not required to put forward a counterfactual analysis to demonstrate causality, as this can be an arbitrary or impossible exercise. Moreover, as the GC found, a counterfactual analysis fails to take into account the potential (as opposed to actual) effects of a practice. Google was entitled to put forward a counterfactual analysis as part of its defence, but this counterfactual should have been based on the elimination of both practices of the combined abusive behaviour. A counterfactual that merely relies on the elimination of only one of the practices of the abusive behaviour only partially assesses effects and is therefore inadequate.

No need always to assess effects by reference to as efficient competitors. Google claimed that the reason that its competitors were unsuccessful was not because of its discriminatory practices, but because they offered lower quality services and were not, therefore, "as efficient" as Google.

The CJEU held that, while it is not the purpose of the abuse of dominance prohibition to ensure that less efficient competitors can remain on the market, it does not follow that any finding of an infringement is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor. In particular, an abuse can also be established if the conduct would have the actual or potential effect of impeding potentially competing undertakings, at an earlier stage, from even entering the market.

Moreover, the EC is not necessarily required to apply a specific test to assess whether an as-efficient (but not dominant) competitor could have profitably remained in the market, notwithstanding the dominant company's conduct. In this case, the CJEU held that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google’s competitors in the light of the specific conditions of the market in question, because those conditions had been distorted by Google's anticompetitive behaviour. A comparison shopping service’s ability to compete depended on traffic and Google's discriminatory conduct enabled Google to

redirect a large proportion of traffic in favour of its own comparison shopping service, without its competitors being able to compensate for that loss of traffic by using other sources of traffic, since increased investment in alternative sources was not an economically viable solution. The CJEU therefore agreed with the GC that, in those circumstances, an assessment of the efficiency of Google's actual competitors would not have determined whether or not its conduct was capable of excluding equally efficient competitors.

BACKGROUND

The CJEU judgment brings a 15-year dispute to a close. Following complaints against Google in 2009 and 2010, the EC found on 27 June 2017 that Google had given preference on its search page to the results of its own comparison shopping service over those of competing comparison shopping services. Google's search results were placed in a primary position accompanied with attractive imagery and text, whereas competing results were displayed in a generic format and demoted in the search results. The CJEU imposed a €2.4 billion fine on Google for abuse of dominance, for which Alphabet as Google's sole shareholder was jointly and severally liable.

In response to Google and Alphabet's challenge, the GC largely dismissed the challenge and upheld the fine (see our briefing). However, the GC did not find that Google's practice had effects on the market for general search services and annulled that part of the EC's infringement decision. Google and Alphabet subsequently lodged an appeal with the CJEU seeking an annulment of the EC's decision.

The CJEU's judgment dismisses the appeal and therefore endorses the judgment of the GC.

The Google Shopping case is one of several cases submitted for review by the CJEU. The CJEU is also considering preliminary questions in relation to a complaint to the Italian competition authority alleging refusal of access in *Android Auto* (see our blog post); Google has also appealed the GC judgment upholding the EC's infringement finding in its *Google Android* decision before the CJEU. Google has just succeeded an appeal before the (lower) GC in relation to the EC's infringement finding in the Google AdSense decision. The GC upheld the EC's findings on market definition (distinguishing search from display ads and direct from indirectly sold ads in defining the search ad intermediation market in which Google is dominant) but found that the EC had failed to demonstrate properly the exclusionary effects of the exclusively clauses in question. The EC can appeal the judgment to the CJEU and/or adopt a new decision addressing the identified deficiencies. The EC further continues to investigate Google for abuse of dominance in relation to its ad-tech business, in relation to which the EC has stated that a structural remedy such as a break-up could be part of the ultimate remedy imposed.

IMPLICATIONS

The *Google Shopping* judgment is a confirmation by the EU's highest court of the existence of a favouring abuse in specific circumstances, while it also underlines that favouring by a dominant firm as such is generally not an abuse. It confirms once more that the enforcers of EU antitrust law are not limited to finding established abuses but can identify new ones where the specific circumstances warrant it. More generally, the CJEU's judgment also provides clarity on key criteria for exclusionary abuses of dominance under

Article 102 TFEU, including competition other than on the merits, causality and the assessment of effects.

The EC has focused its efforts to enforce the remedy in the *Google Shopping* case on Google's proper implementation of the DMA's prohibition on favouring in ranking (which applies not just to shopping but other vertically integrated services as well). Google's initial proposals to implement the prohibition fell short of the EC's expectations and prompted it to open an investigation into DMA non-compliance.

Clifford Chance was co-counsel to Foundem, the first complainant in the case, in the litigation before the General Court and the Court of Justice, and represented industry association FairSearch in the administrative proceedings that led to the European Commission's infringement decision appealed by Google.

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