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Self-preferencing as an independent abuse: still clouds on the horizon

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Summary: 1. Introduction. – 2. Factual and legal background: the *Google Search (Shopping)* decision. – 3. The GC judgement. – 4. Comment. – 5. Conclusion.

1. Introduction.

The General Court («GC») judgment in the *Google Search (Shopping)* case represents a key milestone for the European Commission's approach towards digital platforms. It confirmed that self-preferencing conducts, i.e., favouring proprietary services against those of competitors, can infringe Article 102 of Treaty on the Functioning of the European Union («TFEU») even if the input at stake is not indispensable within the meaning of *Bronner*[1]. The several investigations opened against the so-called «Big Tech» on the wake of the 2017 Commission decision[2] that have sparked a tremendous debate on the EU competition policy in the digital era – and led to the introduction of the recently adopted Digital Markets Act[3] – will now be seen under a different lens.[4]

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[1] ECJ, 26 November 1998, case C-7/97, *Oscar Bronner v. Mediaprint*, E.C.R. I-7791.

[2] Commission Decision (EU) of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area on AT.39740 – *Google Search (Shopping)*.

[3] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), O.J. L 265, 12.10.2022.

[4] In particular, since its decision in *Google Search (Shopping)* the Commission has opened proceedings and sent Statement of Objections against Apple (*Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*, Press Release IP/21/2061, 30 April 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061 (all websites last accessed 15 September 2022); *Antitrust: Commission opens investigation into Apple practices regarding Apple Pay*, Press Release IP/20/1075,

The judgment came after more than ten years from the opening of the investigation in 2010[5] and it does not represent the final word, since Google has decided to appeal it before the European Court of Justice («ECJ»).[6] However, given the role it will play in shaping current and future antitrust proceedings in the digital world, it is arguably one of the most relevant rulings in EU competition law of the recent years.

The GC was in particular expected to bring clarity on the theory of abuse adopted by the Commission in its early decision. Indeed, the latter left unanswered whether «self-preferencing» constituted an independent category of abuse or fell into existing well-established categories. Much ink has been spilled by commentators on this topic, trying to give a more coherent framework to the Commission's findings. Contentions of Google's conduct being an instance of refusal to deal,[7] discrimination,[8] or tying,[9] were all advanced. The natural consequence was a situation of great uncertainty regarding the legal framework surrounding digital platforms and, on a more general note, the exact boundaries of Article 102 TFEU.

It is well-established that the list of abuses contained in Article 102 TFEU is not exhaustive,[10] and thus that new types of abuse can be developed by the Commission and EU Courts. However, this must be done in accordance with the principle of legal certainty,[11] which

16 June 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1075), Facebook (*Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook*, Press Release IP/21/2848, 4 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848), Amazon (*Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, Press Release IP/20/2077, 10 November 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077), and Google again (*Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*, Press Release IP/21/3143, 22 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143). All of them relate to scenarios of self-preferencing conducts.

[5] *Antitrust: Commission probes allegations of antitrust violations by Google*, Press Release IP/10/1624, 30 November 2010, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624.

[6] Case C-48/22 P, *Google and Alphabet v. Commission (Google Shopping)*.

[7] B. VESTERDORF, *Theories of self-preferencing and duty to deal – two sides of the same coin?*, in *Competition Law & Policy Debate*, 2015, p. 4-9.

[8] E. AGUILERA VALDIVIA, *The Scope of the 'Special Responsibility' upon Vertical Integrated Dominant Firms after the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Related Business?*, in *World Competition*, 2018, p. 58-62; C. BERGQVIST, *Discrimination and Self-favoring in the Digital Economy*, 3 Mar. 2020, available at https://ssrn.com/abstract=3531688; L. CALZOLARI, *Preliminary Comments on the Google Case: Bridging the Transatlantic Digital Divide by Widening the Antitrust One*, in *Quaderni del Sidi Blog*, 2017-2018, p. 462-463; A. LICASTRO, *Il self-preferencing come illecito antitrust?*, in *Il diritto dell'economia*, 2021, p. 419-420; N. PETIT, *Theories of Self-Preferencing and the Wishful Prerequisite of the Essential Facilities Doctrine: A Reply to Bo Vesterdof*, in *Competition Law & Policy Debate*, 2015, p. 5-6.

[9] B. EDELMAN, *Does Google Leverage Market Power Through Tying and Bundling?*, in *Journal of Competition Law & Economics*, 2015, p. 365; S. HOLZWEBER, *Tying and bundling in the digital era*, in *European Competition Journal*, 2018, p. 343; E. M. IACOBUCCI, F. DUCCI, *The Google search case in Europe: tying and the single monopoly profit theorem in two-sided markets*, in *European Journal of Law & Economics*, 2019, p. 15.

[10] ECJ, 21 February 1973, case 6-72, *Europemballage Corporation and Continental Can Company Inc v. Commission of the European Communities*, ECLI:EU:C:1973:22, para. 26.

[11] R. NAZZINI, *Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in* Google, in D. GERARD, M. MEROLA & B. MEYRINGS (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe*, Bruxelles, 2017, p. 284.

is a fundamental principle of EU law enshrined in Article 49(1) of the EU Charter on Fundamental Rights [12] and in Article 7 of the European Convention on Human Rights («ECHR»).[13] As stated by the ECJ, in the context of Article 102 TFEU, the principle of legal certainty requires that dominant undertakings must be able to assess the lawfulness of their conducts.[14] Thus, in order to comply with this principle, novel abuses should originate from clear and defined principles that make possible to reconcile them to the rationale underpinning the already existing categories. In addition, they should be accompanied by clear theories of harm.[15]

In light of the foregoing, and given the limited scope of this work, after a brief outline of the Commission decision, this case note will focus only on the fifth plea out of six raised by Google before the GC, which corresponds to that dealing with the theory of abuse.[16] Although the judgment has the merit of having reframed in a clearer manner the Commission's findings by establishing that self-preferencing represents a self-standing type of abuse, this note will argue that many obscure points still remain which maintain the situation of legal uncertainty with regards to the boundaries of Article 102 TFEU.

2. Factual and legal background: the *Google Search (Shopping)* decision.

On 27 June 2017, the Commission fined Google for abuse of dominant position rendering one of the most debated decisions since the Microsoft case. The investigation centred on Google's conduct in the market for comparison shopping services. In particular, Google was alleged to give preferential treatment to its comparison shopping service «Google Shopping». In response to a query, Google returned the results from Google Shopping in its general search results page above the generic search results (the so-called «ten blue links») and in a more attractive manner, in that they were displayed with pictures and additional information on the products and prices. [17] On the contrary, competing comparison shopping services were displayed only among the generic search results by way of a link to their website.[18] In addition, certain inherent characteristics of comparison shopping websites made them likely to be demoted by Google's ranking algorithms with the result that they were usually displayed in the

[12] O.J. 2010, C 83/02.

[13] As held in ECtHR, *Menarini Diagnostics SRL v. Italy*, no. 43509/08, the infringements under Art. 102 TFEU are considered «criminal» for the purpose of the ECHR and, therefore, Art. 7 ECHR applies. Generally on the principle of legal certainty in the EU legal order, see J. RAITIO, *The Principle of Legal Certainty in EC Law*, Dordrecht, 2003. See also M. L. TUFANO, *La certezza del diritto nella giurisprudenza della Corte di giustizia dell'Unione europea*, in *Diritto dell'Unione Europea*, 2019, p. 767.

[14] ECJ, 14 October 2010, case C-280/08 P, *Deutsche Telekom AG v. Commission*, ECLI:EU:C:2010:603, para. 202.

[15] See I. KOKKORIS, *The Google Saga: episode I*, in *European Competition Journal*, 2018, p. 469.

[16] On the third and fourth pleas regarding the anticompetitive effects of the conduct, see R. DI GIOVANNI BEZZI, *Anticompetitive Effects and Allocation of the Burden of Proof in Article 102 Cases: Lessons from the* Google Shopping *Case*, in *JECLAP*, 2022, p. 112; G. GAUDIN, D. MANTZARI, Google Shopping *and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead*, in *JECLAP*, 2022, p. 125; P. IBÁÑEZ COLOMO, *As efficient competitors in Case T-612/17, Google Shopping: the principle and the conflations*, in *Chillin'Competition*, 19 November 2021, available at https://chillingcompetition.com/2021/11/19/as-efficient-competitors-in-case-t%e2%80%91612-17-google-shopping-the-principle-and-the-conflations/.

[17] Case AT.39740 – *Google Search (Shopping)*, para. 385.

[18] *Ibid.*, paras 371-377.

second generic search results page or beyond.[19] Since Google Shopping's results were positioned above the generic search results, they were not subject to the same ranking mechanisms.[20]

In its decision, the Commission found that, first, Google held a dominant position in the market for general search services;[21] second, by providing a more favourable positioning and display to Google Shopping against competing comparison shopping services, Google abused its dominant position since: (1) it diverted traffic from rival comparison shopping services to Google Shopping since users tend to click on the most visible results,[22] (2) the diverted traffic accounted for a large proportion of the overall traffic to competing comparison shopping services and could not be effectively replaced by other sources currently available,[23] and (3) Google's conduct had potential anticompetitive effects in both the market for comparison shopping services and the market for general search services.[24]

Apart from the multi-billionaire fine, what made the decision end up on everyone's lips was the nebulous theory of harm adopted by the Commission. On the one hand, the Commission firmly rejected the qualification of Google's conduct as an existing category of abuse, in particular as instance of refusal to deal. Indeed, the Commission explicitly maintained that it was not necessary to demonstrate the indispensability of the input for the purpose of *Bronner* since the conduct under scrutiny «[did] not concern a passive refusal […] but an active behaviour».[25] On the other hand, however, whether the Commission in *Google Search (Shopping)* was seeking to develop a novel theory of abuse was anything but clear.[26] Indeed, it stated that «it is not novel to find that conduct consisting in the use of dominant position on one market to extend that dominant position to one or more adjacent markets can constitute an abuse. Such a form of conduct constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits».[27] Since the abuse at issue was described as one of extending a dominant position in a given market to a neighbouring but separate market by distorting competition, it rather seems that the Commission was considering leveraging as an independent type of abuse, and that this was «well-established» in EU competition law.[28] However, quite confusingly, in doing so it referred to four cases where leveraging actually took place but it was not treated as an abuse in itself. Rather, each of them concerns conducts qualified as specific forms of abuse: refusal to supply, tying, discriminatory rebates, and margin squeeze.[29] The reason is simple: leveraging has never been an independent form of abuse in EU

[19] *Ibid.*, paras 345-370.
[20] *Ibid.*, paras 380-383.
[21] *Ibid.*, paras 271 et seq.
[22] *Ibid.*, paras 452 et seq.
[23] *Ibid.*, paras 539 et seq.
[24] *Ibid.*, paras 589 et seq.
[25] *Ibid.*, para. 650.
[26] See M. EBEN, *Fining Google: A missed opportunity for legal certainty?*, in *European Competition Journal*, 2018, p. 129.
[27] Case AT.39740 – *Google Search (Shopping)*, para. 649.
[28] Arguing in this sense, see F. BOSTOEN, *The General Court's* Google Shopping *Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, in *JECLAP*, 2022, p. 77.
[29] See Case AT.39740 – *Google Search (Shopping)*, fn. 349. The cases cited therein are ECJ, 3 October 1985, case C-311/84, *Centre belge d'études de marché–Télémarketing v. SA Compagnie luxembourgeoise de télédiffusion*

competition law.[30] It is an umbrella term used for encompassing a range of conducts with which a dominant undertaking may seek to abusively extend its market power to adjacent markets.[31] Raising it to an independent form of abuse equates to devise a novel abuse,[32] and this needs to be done in accordance with the principle of legal certainty. It is hard to say whether this was the path followed by the Commission, since it denied such an intention stating that it is referring to «a well-established, independent, form of abuse» and, moreover, it did not set forth a clear theory of harm underpinning such a new category.

3. The GC judgment.

After years of intense debate, on 10 November 2021, in its much-awaited judgment, the GC upheld the Commission's decision establishing that Google's favouring its own service to the detriment of competing comparison shopping services constitutes an independent form of abuse. More specifically, according to the GC, Google engaged in a stand-alone type of abuse consisting in an «'active' behaviour in the form of positive acts of discrimination in the treatment of the results of Google's comparison shopping service […] and the results of competing comparison shopping services».[33] Interestingly, the judgment does not make use of the term «self-preferencing», but I guess that will be the label of this novel category in the future, as proven by the recent Italian FBA-Amazon decision.[34]

The reasoning of the GC was as follows. As a starting point, it made clear that leveraging as such is not abusive, even if it causes the departure of competitors from the market.[35] For an abuse to be established, the leveraging conduct must be engaged with by means other than normal competition. In the past, several leveraging practices, such as margin squeeze, tying and bundling, loyal rebates, and refusal to deal, have been found to depart from competition on the merits and specific theories of harm have been developed upon them. The Court considered that

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and Information publicité Benelux, ECLI:EU:C:1985:394; ECJ, 14 November, 1996, case C-333/94, *Tetra Pak International SA v. Commission*, ECLI:EU:C:1996:436; GC, 7 October 1999, case T-228/97, *Irish Sugar plc v. Commission,* ECLI:EU:T:1999:246; GC, 17 September 2007, case T-201/04, *Microsoft Corp v. Commission*, ECLI:EU:T:2007:289.

[30] R. O'DONOGHUE, J. PADILLA, *The Law and Economics of Article 102 TFEU*, London, 2nd ed., p. 307; G. MONTI, *EC Competition Law*, Cambridge, 2007, p. 186-95. Indeed, the decision – and the underlying theory of harm – was labelled as «unprecedented» by some. See B. VESTERDORF, K. FOUNTOUKAKOS, *An Appraisal of the Remedy in the Commission's* Google Search (Shopping) *Decision and a Guide to Its Interpretation in Light of an Analytical Reading of the Case Law*, in *JECLAP*, 2018, p. 3; A. LAMADRID, *Google Shopping Decision – First Urgent Comments*, in *Chillin' Competition*, 27 June 2017, available at https://chillingcompetition.com/2017/06/27/google-shopping-decision-first-urgent-comments/.

[31] See P. CROCIONI, *Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework*, in *Journal of Competition Law & Economics*, 2007, p. 454; P. F. TODD, *Digital Platforms and the Leverage Problem*, in *Nebraska Law Review*, 2019, p. 489.

[32] See C. AHLBORN, W. LESLIE, E. O'REILLY, *Self-Preferencing: Between a Rock and a Hard Place*, in *CPI Antitrust Chronicle*, 2020, Vol. 3(2), p. 9.

[33] GC, 10 November 2021, case T-612/17, *Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission*, ECLI:EU:T:2021:763, para. 240.

[34] Autorità Garante della Concorrenza e del Mercato (AGCM), Case A528, decision of 9 December 2021, available (in Italian) at <https://www.agcm.it/dotcmsdoc/allegati-news/A528_chiusura%20istruttoria.pdf>.

[35] Case T-612/17, *Google v. Commission*, para. 162 («[t]he mere extension of an undertaking's dominant position to a neighbouring market cannot in itself constitute proof of conduct that departs from normal competition, even if that extension leads to the disappearance or marginalisation of competitors»).

Google's behaviour does not fall within any of these established practices, but it cannot be considered as competition on the merits since it was contrary to the principle of equal treatment. Therefore, according to the GC, unequal treatment of competitors is a different leveraging practice which may give rise to an abuse.[36] On the abusive nature of Google's conduct, the GC established that it infringed Article 102 TFEU on the basis of three specific circumstances: (1) the importance of Google search traffic for competing comparison shopping services, (2) the behaviour of users when searching online (i.e., the consideration that users tend to concentrate on the results displayed at the top of the page), and (3) the impact of diverted traffic on comparison shopping services in the sense that it cannot be effectively replaced by alternative sources.[37] Very important in the GC's reasoning was also the «abnormality» of Google's conduct. The judgment stresses the fact that, differently from traditional infrastructures, Google's general search engine derives its value from being an «open» infrastructure, indexing and displaying results gathered from external sources. Google's favouring its own services is thus contrary to its very nature, involving «a certain form of abnormality».[38]

Further, the judgment specified that the *Bronner* criteria are not part of the legal test for establishing abusive self-preferencing. According to the GC, the application of *Bronner* is limited to instances of passive (or outright) refusal to deal which imply: (1) a request to grant access followed by an express refusal, and that (2) the exclusionary effects result from the refusal as such, and not from other forms of leveraging conducts.[39] Conversely, Google engaged in an active course of conduct, thus excluding the applicability of the *Bronner* criteria.[40]

4. Comment.

The judgment comes after years of confusion around the category of self-preferencing sprang by the nebulous approach adopted by the Commission in its decision. The GC was expected to provide clarity on the matter in order to establish an unambiguous legal framework for future digital platforms' cases. Yet, for the most part, the GC does not seem to have met the expectations.

With regards to the outcome of the case, that was, in itself, not surprising. Indeed, it was largely predicted that we were moving towards the development of a novel type of abuse prohibiting self-preferencing conducts.[41] However, pursuant to the principle of legal certainty, the formulation of a novel category should have been accompanied by a clear theory of harm. Not only the latter is missing, but also the reasons underlying the duty to equal treatment established by the GC could have been outlined more clearly. As mentioned above, Article 102 TFEU does not contain an exhaustive list of abuses, therefore there is nothing inherently

[36] A similar theory was advanced by T. HÖPPNER, *Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse*, in *European Competition & Regulation Law Review*, 2017, p. 208.

[37] Case T-612/17, *Google v. Commission*, paras 170-173.

[38] *Ibid.*, paras 176-179.

[39] *Ibid.*, para. 232.

[40] *Ibid.*, para. 240.

[41] Indeed, many commentators predicted that an independent self-preferencing abuse would be structured as laid out by the GC. See in particular AHLBORN, LESLIE, O'REILLY, *supra* n. 31, at p. 9; N. DUNNE, *Dispensing with Indispensability*, in *Journal of Competition Law & Economics*, 2020, p. 100; P. IBÁÑEZ COLOMO, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, in *World Competition*, 2020, p. 420.

problematic in developing new categories. In doing so, however, the contours of the abuse should be set without ambiguities.[42]

In support of its ruling, the GC relied upon a general principle of equal treatment inferred from the case law applicable on public entities or former State-owned monopolies.[43] The very specific circumstances underlying the case law referred to and the emphasis put by the Court on Google being «ultra-dominant»[44], «superdominant»[45], and «akin to an essential facility»[46] leaves the question open of whether the doctrine can be extended to all dominant undertakings or is limited to cases where the undertaking holds a superdominant position comparable to former State-owned monopolies.[47] In other words, was Google under a duty to treat rivals equally because it is Google or simply because it has a dominant position? Further clarifications in this regard would have been desirable.[48] But things get even more fuzzy with regard to the legal test that would underpin the abuse of self-preferencing. The circumstances that led the GC to consider Google's conduct as abusive are very fact-specific and hardly replicable. Therefore, it is hard to draw a legal test that can be uniformly applied to other cases of self-preferencing.[49]

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[42] Generally on the principle of legal certainty in the GC's ruling in *Google Search (Shopping)*, see Y. L. BOUZORAA, *Between Substance and Autonomy: Finding Legal Certainty in* Google Shopping, in *JECLAP*, 2022, p. 144.

[43] Case T-612/17, *Google v. Commission*, para. 155. The cases cited are ECJ, 17 July 1997, case C-242/95, *GT-Link A/S v. De Danske Statsbaner (DSB)*, ECLI:EU:C:1997:376; ECJ, 24 October 2002, case C-82/01, *Aéroports de Paris v. Commission*, ECLI:EU:C:2002:617; and Case T-228/97, *Irish Sugar*.

[44] Case T-612/17, *Google v. Commission*, para. 180.

[45] *Ibid.*, para. 182.

[46] *Ibid.*, para. 224 («It must be noted that Google's general results page has characteristics akin to those of an essential facility»).

[47] Significantly, «equality of opportunity» is often recalled by EU Courts in cases where Art. 102 has been applied in conjunction with Art. 106(1) TFEU. See ECJ, 13 December 1991, case C-18/88, *RTT v. GB-Inno-BM*, ECLI:EU:C:1991:474, para. 25; ECJ, 22 May 2003, case C-462/99, *Connect Austria*, ECLI:EU:C:2003:297, para. 83; ECJ, 1 July 2008, case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio,* ECLI:EU:C:2008:376, para. 51. Note that in *Deutsche Telekom* the ECJ extended the obligation of equal treatment only to dominant undertakings owning an indispensable input.

[48] See G. MONTI, *The General Court's* Google Shopping *Judgment and the scope of Article 102 TFEU*, 14 November 2021, p. 16, available at https://ssrn.com/abstract=3963336, suggesting that the GC referred to superdominance «as a basis for a more extensive menu of special responsibility than for other dominant firms». See also M. BOTTA, *The ruling of the EU General Court in Google Shopping: An endorsement of the EU Commission antitrust enforcement policy in digital markets*, in *EU Law Live*, 25 November 2021, available at https://eulawlive.com/op-ed-the-ruling-of-the-eu-general-court-in-google-shopping-an-endorsement-of-the-eu-commission-antitrust-enforcement-policy-in-digital-markets-by-marco-botta/. This is all the more the case considering that the GC reinforced its conclusion that Google had a duty to not favour its own service by referring to the obligation of network neutrality contained in Regulation 2015/2120. See Case T-612/17, *Google v. Commission*, para. 180. But see L. HORNKOHL, *Article 102 TFEU, Equal Treatment and Discrimination after* Google Shopping, in *JECLAP*, 2022, p. 100, arguing that «applying a general principle of equal treatment in Article 102 TFEU is appropriate and consistent with the historical developments and purposes of the provision».

[49] In the same vein, see C. AHLBORN, G. VAN GERVEN, W. LESLIE, *Bronner revisited: Google Shopping and the Resurrection of Discrimination Under Article 102 TFEU*, in *JECLAP*, 2022, p. 90; E. DEUTSCHER, Google Shopping *and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU*, in *EP*, 2021, p. 1351-1352. See also C. CAFFARRA, Google Shopping*: a shot in the arm for the EC's enforcement effort, but how much will it matter?*, in *e-Competitions Bulletin – Special Issue on Big Tech & Dominance*, 2021, p. 2-3; D. KATSIFIS, *General Court of the EU delivers landmark Google Shopping judgment (Google and Alphabet v Commission, T-612/17)*, in *The Platform Law Blog*, 15 November 2021, available at

This leaves the boundaries of the new category, and of Article 102 more generally, undetermined. Again, the question that arises is whether self-preferencing is an abuse tailored on Google's search engine or can and will be generalized.[50] Clarity in this sense would have been necessary since self-preferencing by undertakings towards their own services or affiliates has always occurred as a natural consequence of integration, and it has usually been considered as normal competition, or even more, as pro-competitive.[51] For instance, retailers have always used the information about third-party sellers to develop their own lines of products, supermarkets have always placed their own labelled products in more prominent positions than rivals' ones. Also, would the theory apply to digital platforms adopting a closed business model (or at least not as open as Google Search)?[52]

The only uncontroversial point seems to be that it is not required to fulfil the indispensability condition laid out in *Bronner*. That was largely expected after the ECJ ruling in *Slovak Telekom*[53], which limited the applicability of *Bronner* to instances of outright refusal and excluded it in cases of unfair access conditions. However, at a closer look, the rationale for excluding the applicability of *Bronner* is not perfectly in line with what was held by the ECJ. One the one hand, the GC endorsed the approach originated with *TeliaSonera*[54] and rationalized by *Slovak Telekom* according to which *Bronner* does not apply «when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser»,[55] i.e., in instances of constructive refusal to deal. According to the GC, being Google's conduct qualifiable as an active behaviour in the form of positive discrimination, it differs from an express refusal to supply, and thus *Bronner* does not apply even if the issue at stake pertains to the access to Google's general results.[56] However, on the other, the arguments advanced by GC appear at odds with the previous case law of the ECJ. Indeed, the GC seems to refuse the rationale laid out in *Slovak Telekom* behind the applicability of *Bronner*, that is the nature of the remedy that would be necessary to end the infringement, requiring the indispensability threshold only when the company is compelled to give access to its infrastructure.[57] The GC explicitly states that «the obligation for an undertaking which is abusively exploiting a dominant position to transfer assets, enter into agreements or give access to its service under non-discriminatory conditions

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https://theplatformlaw.blog/2021/11/15/general-court-of-the-eu-delivers-landmark-google-shopping-judgment-google-and-alphabet-v-commission-t-612-17/.

[50] In the same vein, see J. LINDEBOOM, *Rules, Discretion, and Reasoning According to Law*, in *JECLAP*, 2022, p. 71-72.

[51] IBÁÑEZ COLOMO, *supra* n. 40, at p. 427-428; A. PORTUESE, *"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing*, 2021, available at https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf; R. WOODCOCK, *How Antitrust Really Works: A Theory of Input Control and Discriminatory Supply*, 1 March 2021, available at https://ssrn.com/abstract=3794816.

[52] See J. PERSCH, *Google Shopping: The General Court takes its position*, in *Kluwer Competition Law Blog*, 15 November 2021, available at http://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/.

[53] ECJ, 25 March 2021, case C-165/19 P, *Slovak Telekom v. European Commission*, ECLI:EU:C:2021:239.

[54] ECJ, 17 February 2011, case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, ECLI:EU:C:2011:83.

[55] Case T-612/17, *Google v. Commission*, para. 236.

[56] *Ibid.*, paras 229-240.

[57] Case C-165/19 P, *Slovak Telekom*, paras 46-51.

does not necessarily involve the application of the criteria laid down in [*Bronner*]».[58] To the contrary, it justifies the exclusion of *Bronner* in the present case upon much weaker basis, namely the Opinions of the AGs Jacobs and Mazák, in *Bronner* and *TeliaSonera* respectively, which allegedly distinguished between refusal to deal and discrimination.[59] The reasoning of the GC is questionable. Not only it appears to be in conflict with the most recent case law of the ECJ on the matter, but the mentioned Opinions of AGs Jacobs and Mazák are of little relevance in the present case.[60] Indeed, AG Jacobs does mention discrimination but towards different costumers of the same undertaking, and not between the costumers and the undertaking itself, and thus within an exploitative rather than an exclusionary scenario.[61] On the other hand, AG Mazák referred to Article 102(c),[62] which is not the legal basis adopted by the GC, and the Opinion was not eventually followed by the ECJ in *TeliaSonera*. In *Slovak Telekom* the ECJ was clear in stating that the *Bronner* rationale lies in the protection of firms' freedom of contract and right to property, and thus that it should apply when the remedy might interfere with a firm's exercise of these rights. GC's stance appears hardly reconcilable with this rationale.[63]

On a more general note, the main concern with a novel type of abuse prohibiting self-preferencing conducts is that it will frequently overlap with many of the existing categories.[64] This is because the label «self-preferencing» is merely a descriptive concept identifying the effects stemming from a variety of conducts. Indeed, undertakings may favour their own activities through different means such as tying two products together, offering rebates, setting prices as to squeeze competitors' margins, or refusing to deal with them. Raising a label describing the effects of an abusive conduct to an independent type of abuse would certainly lead to confusion throughout the system. Even worse, since it would have the effect of introducing an additional category under which conducts already caught by Article 102 may fall, it would give great leeway to competition authorities in picking the category, thus the legal test, that best serves their interests.[65] The consistency and the predictability of the legal order would thus be damaged.[66] The recent Amazon-FBA decision delivered by the AGCM is iconic in this regard. The authority sanctioned Amazon for having tied a series of features indispensable to succeed on Amazon Marketplace with its logistic and delivery service. The case was clearly construed as one of tying. Indeed, the AGCM focused on establishing the various elements of tying, namely that the products concerned were distinct and that there was

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[58] Case T-612/17, *Google v. Commission*, para. 244.

[59] *Ibid.*, para. 239.

[60] See P. IBÁÑEZ COLOMO, *The General Court in Case T-612/17, Google Shopping: the rise of a doctrine of equal treatment in Article 102 TFEU*, in *Chillin'Competition*, 10 November 2021, available at https://chillingcompetition.com/2021/11/10/the-general-court-in-case-t-612-17-google-shopping-the-rise-of-a-doctrine-of-equal-treatment-in-article-102-tfeu/.

[61] See Opinion of AG Jacobs in Case C-7/97, *Bronner*, para. 54. The same holds true even for *Irish Sugar*, also mentioned by the GC in the same occasion. See Case T-228/97, *Irish Sugar*, paras 166-167.

[62] See Opinion of AG Mazák in Case C-52/09, *TeliaSonera*, para. 32.

[63] See IBÁÑEZ COLOMO, *supra* n. 59.

[64] AHLBORN, VAN GERVEN, LESLIE, *supra* n. 48; IBÁÑEZ COLOMO, *supra* n. 40, at p. 428 et seq.

[65] See IBÁÑEZ COLOMO, *supra* n. 40, at p. 442.

[66] See J. T. LANG, *Comparing Microsoft and Google: The Concept of Exclusionary Abuse*, in *World Competition*, 2016, p. 26.

«coercion», before dwelling into the anticompetitive effects.[67] However, the AGCM then concluded that Amazon had exploited its «superdominant» position among marketplaces in order to foster the demand for FBA to the detriment of rivals' logistic services, and thus that the conduct could be considered as «self-preferencing» in light of *Google v. Commission*.[68] This blurring the lines and smoothly passing from a theory of harm to another is anything but detrimental for legal certainty and for the maintenance of an efficient system capable of protecting and enhancing firms' incentives to invest in innovation. Unfortunately, the fear is that the approach of the AGCM will be followed suit in future cases.

5. Conclusion.

The first impression is that the GC failed in putting an end to the discussions around self-preferencing as was expected to do. In fact, it even revamped them, without providing a framework devoid of concerns in terms of legal certainty. Such a strong departure from existing categories, in particular refusal to deal, with which digital platforms' cases share many similarities, would have necessitated of a sounder underpinning rationale given its foreseeable impact on the competition policy in digital markets. Devising self-preferencing as a stand-alone abuse brings out a number of problematic issues which the GC should have addressed more carefully and that, therefore, will remain unsettled until the pronouncement of the ECJ on the matter. Indeed, if it is not limited to instances of superdominant undertakings - although that is what can be read between the lines of *Google v. Commission* - a self-preferencing abuse with such a low threshold would create a risk of over-enforcement neutralizing the efficiencies commonly associated to integration.[69] Exactly in order to preserve pro-competitive effects resulting from integration, instances of vertical foreclosure have always been characterized by a high liability threshold, namely indispensability of the input, that only *TeliaSonera* has softened in part, but whose rationale has been recently confirmed by the Court in S*lovak Telekom*.[70] Since self-preferencing would mostly cover conducts currently falling under the refusal to deal framework, departing from the filter of indispensability would reduce firms' incentives to innovate thereby thwarting competition in the long term, and it would constitute an unjustified interference in undertakings' commercial freedom. Establishing a level playing field has never been part of the EU competition policy's objectives, since it requires imposing on dominant undertakings a duty to assist rivals that might be justified only in exceptional circumstances.[71] Thus, although it might sound as a win for the Commission, I am doubtful on whether the GC judgment might be considered a win for the EU competition law framework.

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[67] AGCM, Case A528, paras 713-715.

[68] AGCM, Case A528, para. 716.

[69] See D. AUER, *Case closed: Google wins (for now)*, in *Truth on the Market*, 19 November 2021, available at https://truthonthemarket.com/2021/11/19/case-closed-google-wins-for-now/.

[70] See P. IBÁÑEZ COLOMO, *Exclusionary Discrimination Under Article 102 TFEU*, in *CML Rev.*, 2014, p. 158, claiming that even in the self-preferencing cases addressed under Art. 102(c) indispensability «was something akin to an implicit condition underlying intervention». In a similar vein, Nazzini argues that the principles of legal certainty and no punishment without law require that no less onerous test than the refusal to supply framework should be applied to assess Google's conduct in *Google Search*. See NAZZINI, *supra* n. 10, at p. 298.

[71] See IBÁÑEZ COLOMO, *supra* n. 40, at p. 420-422; R. NAZZINI, Google *and the (Ever-stretching) Boundaries of Article 102 TFUE*, in *JECLAP*, 2015, p. 308-309.