Competition Briefing: Big Tech Edition

The CJEU's Hammer Falls on Big Tech Giants: Key Lessons from Google Shopping and Apple State Aid Cases

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A. The Google Shopping Saga is Finally Over: How Did We End Up Here?

1. On 10 September 2024, the Court of Justice of the European Union (CJEU) delivered its long-awaited ruling on Google Shopping. The CJEU upheld the fine of €2.42bn imposed on Google for abusing its market power as a search engine, in breach of Article 102 of the TFEU, by favoring its own comparison-shopping service (Case C-48/22P).
2. The CJEU's ruling marks the end of a long-standing dispute between the European Commission (the Commission) and Google that dates back to 2010. Further to complaints against Google, the Commission initiated proceedings, including in relation to the favorable treatment, within Google's general search results pages, of links to Google's own specialized search services as compared to competitors' links.
3. The Commission found that Google abused its dominant position on the market for online general search services by positioning Google's own general search service in a more favorable manner on its general results pages, while at the same time demoting competing comparison-shopping services by the application of adjustment algorithms.
4. The self-preferencing applied by Google in relation to its own comparison-shopping service

reduced traffic from Google's general search results pages to competitors services and, inversely, increased traffic to Google's own comparison-shopping service. This conduct constituted an abuse of dominance in 13 national markets for online general search services in the EEA from 2017 to 2022.

5. Google sought to annul the Commission's decision before the General Court (GC). By way of a decision of 10 November 2021, the GC upheld the Commission's findings and the fine imposed on Google (Case T-612/17). Google appealed against the GC decision before the CJEU, resulting in the ruling of 10 September 2024.

B. Self-Preferencing as an Independent Form of Leveraging Abuse

1. The CJEU has confirmed both the Commission's and the GC's findings.
2. At first, the CJEU reiterated that holding a dominant position is not prohibited *per se* but entails a special responsibility for the dominant undertaking not to impair undistorted competition on the market with its conduct.
3. The CJEU further underlined that there is no general obligation on dominant undertakings of equal treatment between their products and those of competitors; therefore leveraging practices, such as self-preferencing, by a dominant undertaking are not prohibited per se and as a general rule it cannot be considered that a dominant undertaking that treats its own products more favorably than it treats those of its competitors is engaging in conduct that departs from competition on the merits irrespective of context. In this case, given the circumstances, Google's conduct was discriminatory and did not fall within the scope of competition on the merits.
4. Google's super-dominant market position, together with the overall characteristics of the market, such as:
   a. high barriers to entry;
   b. the importance of Google's general search engine for enabling third parties to compete,
   c. the behavior of users and the fact that they focus on the more visible results irrespective of relevance; and
   d. the fact that traffic diverted from competing comparison-shopping services could not be replaced,

   cumulatively rendered Google's practice as capable of having potential exclusionary effects on the downstream market for specialized comparison-shopping search services.

C. Refusal to Supply

1. The CJEU reaffirmed that Google's conduct did not constitute a refusal to supply, since Google did not refuse access to its general search service and general result pages. Instead, it engaged in active acts of discrimination, such as illegal self-preferencing practices, giving access to its

infrastructure but making this subject to unfair conditions.

2. Specifically, access was granted, but it was subject to discriminatory conditions, favoring Google's own comparison-shopping service over competitors. The CJEU concluded that these positive acts of discrimination in the treatment of results from Google's comparison-shopping service constituted an independent form of leveraging abuse by Google.
3. The takeaway is that in case of access restrictions, there is no requirement to necessarily prove the fulfillment of the refusal to supply test conditions set in *Bronner*. In Google Shopping, the disadvantage generated for competing comparison-shopping services did not result from a refusal to grant access but from the conditions attached to such access, which placed Google's competitors at a disadvantage.

D. 'As-Efficient Competitor' Test

1. The CJEU affirmed once again that the object of the prohibition of abuse of dominance is not to keep less efficient competitors in the market.
2. At the same time, however the CJEU also confirmed that the finding of an abuse by a dominant undertaking does not require the systematic application of the as-efficient competitor test. In other words, it is not necessary for the conduct at stake to be capable of excluding an as-efficient competitor to be considered a violation of competition rules.
3. In this case, given the specific circumstances and the fact that market conditions were distorted by Google's actions, it would have been impossible to obtain reliable data on competitor efficiency, rendering the test not only irrelevant but also unreliable. Therefore, the as-efficient competitor test need only be applied if relevant.

E. Intense Scrutiny of Big Tech by the Commission

1. The CJEU's ruling not only results in upholding the second-ever largest antitrust fine, but also validates the Commission's approach that self-preferencing may, in specific circumstances, qualify as an independent form of abusive conduct by a dominant undertaking.
2. From a policy perspective, the Google Shopping case, referred to as the mother of antitrust battles, is a landmark decision, bringing a long-lasting dispute to an end. The scrutiny that was initiated on its occasion paved the way for the European Union's strategy and efforts for intense regulation of digital platforms and big tech players and for ensuring a fairer digital marketplace. The ruling reflects the overall attempt of the EU regulator to keep a vigilant stance towards tech giants.
3. It remains to be seen how the precedent set by the CJEU will influence ongoing and future proceedings against Google and other tech giants. This includes the Commission's non-compliance investigation initiated earlier this year against Alphabet (Google's sole shareholder) to determine whether Alphabet's display of Google search results may lead to self-

preferencing in relation to Google's vertical search services (eg Google Shopping, Google Flights, Google Hotels) over similar rival services, in violation of gatekeeper's non-discrimination obligation under the Digital Markets Act.

F. Apple State Aid Case

1. On the same day, the CJEU also published its decision on the Apple state aid case. The CJEU overturned the GC ruling and reinstated the 2016 Commission decision that Ireland had previously granted unlawful state aid to Apple (Case C-465/20). The decision is final, and Ireland will now need to recoup €13bn from Apple.

G. Flash Overview of the Case

1. Briefly, pursuant to the Commission's decision, Ireland had granted unlawful state aid to two Apple group subsidiaries (the **Subsidiaries**), incorporated but not tax residents of Ireland, by considering that nearly all sales profits recorded by the Subsidiaries were attributable to the head offices outside Ireland, rather than to their Irish trading branches.
2. As a result, Ireland had only taxed the profits of the branches, therefore significantly reducing the Subsidiaries' tax burden and granting them an unlawful selective advantage under state aid rules.
3. The decision was appealed before the GC, which overturned the Commission's decision in July 2020 on grounds of erroneous assessment of the Irish tax system and failure of the Commission to prove the selective advantage granted to the Apple Subsidiaries. Consecutively, the Commission appealed the GC decision before the CJEU.

H. CJEU Ruling

1. The CJEU overturned the GC ruling and sided with the Commission, concluding that Apple's Subsidiaries had received a selective tax advantage.
2. According to both the Commission and the CJEU, the selective tax advantage consisted in the fact that the contested rulings of the Irish tax authorities reduced the profits of the Subsidiaries that were taken into account for tax purposes, and in turn reduced the amount of corporate taxation payable to the Irish State, in deviation from Irish corporate tax rules applicable at the time.

I. Closing Remarks

1. The Google Shopping and Apple rulings affirm the commitment of the EU institutions to monitor the operations of the Big Tech companies with watchfulness and ensure a level playing field in the Single Market.
2. That being said, the Commission's decisions do not go unquestioned and European Courts are

ready to strike down judgments and overturn billion-euro fines where the Commission has erred in law or procedure.

3. By its most recent judgment of 18 September 2024 in the Google AdSense case, the GC has annulled an almost €1.5bn fine imposed by the Commission on Google for abusing its market dominance in the online search advertising intermediation market (Case T-334/19). In 2019, the Commission had found that Google had infringed Article 102 of the TFEU by imposing strict exclusivity and placement clauses in contracts with publishers that restricted online competition. On appeal by Google, the GC upheld most of the Commission's findings, yet it annulled the decision in its entirety, including the massive fine imposed on Google, considering that the Commission failed to take into consideration all the relevant circumstances in its assessment of the duration of the contract clauses at stake, therefore rendering its decision insufficiently justified. It remains to be seen if the Commission will appeal the GC's ruling before the CJEU or whether Google will have scored a definite win on this one.



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