

Google's price comparator: a challenge to European Competition Law?

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In recent years, the European Commission has exercised a very active stance in terms of controlling competition in the internal market, with a special focus on digital markets, where the performance of technology companies assumes, in some cases, contours that disrespect the limits of European Competition Law. Proof of this are the cases of Intel - Commission Decision of May 13, 2009 (Proc. COMP/C-3/37,990) - and Microsoft - Commission Decision of March 24, 2004 (Case COMP/C-3/37,792 – Microsoft) and Commission Decision of 6 March 2013 (Case AT. 39539) concerning the linked sale of products (Internet Explorer browser).

In a more recent scenario, Google was the subject of investigations - Google Shopping Case: Commission Decision of June 27, 2017 (Case AT.39740 Google Search (Shopping)). As if it were not enough that we are facing a technological giant, it was determined the highest fine ever in similar cases, in the amount of 2,424 million and 495 euros, making it a paradigmatic case. Although the Commission's investigations began in 2010, it was only in 2017 that its decision was made public, sanctioning both Google Inc. and Alphabet Inc. for violating Article 102 of the TFEU, as they were acting in abuse of a dominant position. The analysis was carried out in 13 countries of the European Economic Area: Austria, Belgium, Czech Republic, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Spain, Sweden, and the United Kingdom.

After receiving numerous complaints from competing companies pointing to abusive conduct on the part of this technological giant, in particular with regard to its price comparison services, the Commission decided to deepen the investigations, formally warning Google in 2013 that some of its business practices could be in breach of EU rules. From the conclusions drawn by the Commission, it was found that Google repeatedly granted more favourable treatment to its price comparator (Google Shopping), harming competitors and making it difficult for providers of this type of service to operate in the market.

As a result of this preferential treatment given to Google Shopping to the detriment of its competitors, the latter saw the flow on their *sites* decrease, being denied

the possibility of competing on merit or innovation, given the existing services on the market. We were facing an abusive practice where Google promoted its own price comparison service in its search results and demoted those of competitors.

Agreeing with the words of the European Commissioner for Competition, Margrethe Vestager, we can say that Google's conduct is unlawful for denying “*other companies the possibility to compete on their merits and to innovate. Most importantly, it denied European consumers a genuine choice of services and the possibility to reap the full benefits of innovation.*”¹.

Faced with the Commission’s decision and the millionaire fine imposed, Google created an auction system through which any competitor providing price comparison services can bid for access to the Shopping Unit, making the process more equitable and fairer as possible. Google Shopping would start operating on a practical level as an autonomous business that would only bid up to the limits of what would be profitable for it, something that was in charge of being supervised by the EC. However, on September 11, 2017, Google Inc. and Alphabet Inc. appealed against the Commission’s decision to the General Court, which was dismissed, and the fine was confirmed.

The importance of this case and its final solution is extreme, indicating a way forward for this type of situation in digital markets. This increasingly present reality that requires a readjustment of competition law rules regarding the definition of relevant market concerns. Now, it is true that we could question how to conclude the determination of the relevant market in this case (whether or not we would include companies that operate in online shopping) and whether we would assume that Google was the only option available to consumers or not. Even so, it is more than visible that this case is proof of the arduous task of European regulators in applying the current provisions to the digital sector.

As regards the relevant market, the Commission considered that the relevant product market consisted of the market for generalized search engines and the market for price comparison services, assuming that price comparison services constituted a separate market from sales (*merchant platforms*), which means that platforms such as Amazon and eBay have not been seen as competitors of Google Shopping. However, this is justified if

¹ Press Release of 27 June 2017, Brussels, Antitrust: Commission fines Google €2.42 billion for abuse of a dominant position in the search engine market by giving an illegal advantage to its own search engine price comparison.

in the service provided by Google Shopping, users could only compare the prices of the products, with an immediate re-routing to the product seller's page, on a sales platform, such as the companies mentioned above. Different would be if they could not only compare prices but could also buy products on the same platform, taking advantage of all related customer support services and without ever being redirected to any external link from another seller.

As far as the dominant position is concerned, as is well known, its existence is not prohibited, and the European Competition Law only condemns its abuse. In the specific case, the European Commission concluded that the conduct carried out by Google constituted a *leveraging abuse*, which in other words, indicates that the company in a dominant position favours a service provided by a company of the same group in a market related to the detriment of competing companies. In view of that, there is no doubt that such conduct is liable to jeopardize competition based on merit, causing distorted competition. It should be noted that although this type of abuse is not provided for in the 102º TFEU, the enumeration contained in this normative precept is exemplary and not exhaustive.

However, as already mentioned, even though an appeal was lodged against the Commission's Decision, the General Court considered it unfounded, maintaining the fine determined in the amount of 2,424 million and 495 euros, punishing Google Inc. and Alphabet Inc. for favouring their own price comparison service to the detriment of their competitors.

Although important, we could not fail to point out that this decision clarifies the lack of tools capable of adapting to the new technological realities and emerging challenges posed by the European Competition Law in digital markets, where, although effective measures can be taken, there is plenty of room for regulatory work.