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# EU Competition Law Newsletter

## Highlights

— Google Shopping: The General Court Upholds The European Commission's Decision Finding That Google Abused Its Dominant Position In General Search By Favoring Its Own Comparison Shopping Service

— COVID-19, Green And Digital Transition, European Single Market: The Commission Outlines The New Challenges Facing EU Competition Policy

## Google Shopping: The General Court Upholds The European Commission's Decision Finding That Google Abused Its Dominant Position In General Search By Favoring Its Own Comparison Shopping Service

On November 10, 2021, the General Court upheld the Commission's decision finding that Google had committed an abuse by favoring its own comparison shopping service ("CSS").[1] The Commission previously found that Google positioned and displayed, in its general search results pages, its own CSS more prominently than competing CSSs. The Commission imposed on Google a fine of €2.42 billion.[2] In the judgment, the General Court largely dismissed Google's appeal against the Commission's decision and confirmed the amount of the fine.

### Abuse of favoring Google's own CSS in terms of prominent display and positioning

The General Court first analyzed whether Google's conduct deviates from competition on the merits. It considered how Google displayed product results on its general results pages. It found that Google favored its own CSS by (i) showing its own CSS in prominent boxes with rich display formats (called Shopping Units), while (ii) displaying competing CSSs only as generic results, which did not have rich display formats and were not prominent because they were prone to being demoted.

[1] *Google Shopping* (Case T-612/17) EU:T:2021:763.

[2] *Google Shopping* (Case AT.39740), Commission decision of June 27, 2017.

The General Court found that Google showing its own results prominently was a "form of abnormality," which departed from competition on the merits and from rational conduct for a general search service. The General Court recognized that exclusionary effects alone are not sufficient to establish a violation of Article 102 TFEU. It is necessary to demonstrate that the conduct of the dominant firm departs from competition on the merits.

The General Court found that Google's conduct departed from competition from the merits based on three specific circumstances. First, free Google traffic is an important source of traffic for CSSs. Second, users typically focus only on the top few results. And third, the proportion of traffic diverted from competing CSSs was substantial, and competing CSSs could not effectively replace it by other sources, such as winning traffic to their sites directly.

The General Court rejected Google's argument that the Commission should have established the legal conditions for a duty to supply (indispensability and risk of eliminating competition). The General Court accepted that the case is not "unrelated to the issue of access," but it found the conduct "can be distinguished in their constituent elements from the refusal to supply." On that basis, the General Court held that the conduct constituted an "independent" abuse, separate from a refusal to supply. Accordingly, the Commission was not required to show that the duty to supply conditions were met. At the same time, the General Court found (unlike the Commission) that Google's search service may have characteristics "akin to those of an essential facility" because Google's traffic is "indispensable for competing comparison shopping services."

## Analysis of anticompetitive effects of Google's conduct

The General Court found that the Commission had appropriately established the effects of Google's conduct on the traffic diverted from competing CSSs, which was sufficient to show that the conduct was liable to decrease competition on the market for the comparison shopping services.

The General Court also dismissed Google's argument that the Commission ignored the significant competitive pressure exerted by merchant platforms (*e.g.*, Amazon), which precluded a finding of anticompetitive effects in comparison shopping. The General Court found only limited substitutability between CSSs and merchant platforms, because (i) they offer product search functions under different conditions and (ii) users typically use these two types of services in different ways.

The General Court also found that, even if merchant platforms were in the same market as CSSs, the anticompetitive effects on CSSs identified by the Commission would in any event have been sufficient to find an abuse.

On the other hand, the General Court found that the Commission had failed to establish even potential anticompetitive effects of Google's conduct in general search. Accordingly, the General Court annulled the Commission's finding of a competition law infringement with respect to the national markets for general search services.

## No objective justification for Google's conduct

The General Court dismissed Google's arguments on the procompetitive rationale for showing Shopping Units and applying adjustment algorithms as improvements to its general search service. While both elements of Google's conduct may be procompetitive improvements, according to the General Court that does not justify the unequal treatment of results between Google's own CSS and competing CSSs. The Court seemed to accept that Google could not have treated competing CSSs equally as a technical matter, but found that this would not justify the competitive harm caused. The General Court concluded that Google did not demonstrate efficiency gains linked to the conduct which outweigh the competitive harm.

## Unchanged amount of Google's fine

The General Court dismissed Google's argument that the Commission should have imposed no—or

only a symbolic—fine, given the novelty of its theory of harm and its initial handling of the proceedings as a commitments case. The General Court held that the Commission was entitled to impose a fine on the basis that the infringement was "intentional." This was based on Google's awareness of (i) its dominant position, (ii) its importance as a source of traffic for CSSs, and (iii) that its conduct "undermined equality of opportunity."

The General Court found that the Commission had committed multiple errors in calculating the fine. However, it exercised its unlimited jurisdiction to reset the fine at the original amount imposed by the Commission.

### Conclusion

The *Google Shopping* judgment introduces two changes to the EU courts' case law. First, the General Court seems to extend the application of the general principle of equal treatment—so far understood to apply to State measures—to conduct by non-public dominant undertakings. Second, the General Court considers practices relating to conditions of supplying access to alleged (semi-) essential facilities as a separate form of abuse of dominance, which is not subject to the duty to supply conditions.

## COVID-19, Green And Digital Transition, European Single Market: The Commission Outlines The New Challenges Facing EU Competition Policy

On November 18, 2021, the Commission published its communication entitled "a competition policy fit for new challenges" (the "Communication").[3] The Communication identifies several areas where an adjusted competition policy could help overcome new challenges the European economy is facing. In particular, the Communication discusses competition policy's role in Europe's economic recovery from the COVID-19 pandemic, in supporting the European green[4] and digital transition,[5] and in strengthening the Single market's resilience.

### Competition policy and the COVID-19 pandemic

At the start of the COVID-19 pandemic, in March 2020, the Commission adopted the State Aid Temporary Framework ("State Aid Framework") to mitigate the pandemic's negative impact on the European economy.[6] This framework has enabled Member States to use over three trillion euro of aid to support businesses across the EU.

The Communication announced an amendment of the State Aid Framework and its progressive phase-out over the next six months (until June 30, 2022). This strategy recognises the continued economic impact of the pandemic, as well as the need to accommodate different paces of economic recovery within specific sectors in different Member States.

The amendment also aims to attract private investments to facilitate a fast, green, and digital recovery. To that end, the amendment includes two new policies.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Competition policy fit for new challenges, COM(2021) 713.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green New Deal, COM/2019/640.

[5] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842.

[6] Communication from the Commission on the Temporary Framework for State Aid measures to support the economy in the current COVID-19 outbreak, OJ 2020 C 91 I/1.

— The first policy encourages Member States to support investment in a sustainable recovery. The amendment outlines the circumstances in which the Commission will consider Member State supporting actions to be compatible with State aid rules at EU level. Member States can support private investment in the form of non-repayable grants, tax grants and subsidised interest rates on loan, but cannot grant more than ten million euro per undertaking. Member States can also support investment that overcomes an investment gap accumulated in the economy because of the COVID-19 crisis. Support is not limited to specific economic areas, but the amendment encourages the support of schemes related to environmental research projects.

— The second new policy encourages Member States to strengthen the solvency of undertakings, particularly those whose debt levels have increased due to COVID-19's economic impact. To be considered compatible with State aid rules, support must provide an incentive for private investments into equity or subordinated debt and must be limited to small and medium enterprises.

## Competition policy's role in Europe's green and digital transition

The Communication identifies competition law as an effective means to respond to new market challenges and to enhance the wider policy objectives of the EU. In particular, competition law enforcement will be used in support of two flagship policies of the current Commission: the green and the digital transitions.

In its Communication, the Commission explains that existing competition rules, such as Article 101(1) TFEU prohibiting anticompetitive agreements between undertakings, could be used to enforce the Green Deal objectives. In particular, otherwise prohibited agreements could be permitted if their anticompetitive effects are offset by environmental efficiencies stemming from those agreements, such as enabling the production of a more sustainable product.

In addition, State aid rules will also be used as a tool to foster EU policy goals. For example, one of the Commission's policy objectives is to make the EU climate neutral by 2050. In furtherance of this objective, the Commission will allow Member States to support new environmental technologies using State aid by updating the existing Energy and Environmental State aid guidelines. The new guidelines aim to facilitate initiatives that are compliant with the EU's decarbonisation objectives, and to phase out emission-intensive activities.

The Commission also emphasised the need to tackle the market power of large corporations, particularly in the tech sector. In particular, the Commission's recent proposal for a Digital Markets Act[7] aims at combating anticompetitive practices by large online platforms, especially those falling outside the scope of existing rules on abuse of market dominance. The proposed Act would also impose a new catalogue of specific obligations on online platforms having an entrenched gateway position between businesses active on the platform and final consumers (so called "online gatekeepers").

Finally, the Commission will review its existing guidelines, such as the Market Definition Notice and the Horizontal and Vertical Block Exemption Regulation and Guidelines, to reflect the policy goals of the green and digital transitions.

## Competition policy and the EU Single Market

The Commission also emphasised the importance of the EU Single Market, a trading area encompassing all EU Member States where goods and services can be traded freely and without barriers. The supply chains disruptions due the COVID-19 pandemic have shown that the Single Market is not sufficiently resilient in times of crisis.

The Communication therefore highlights the role of competition law in strengthening the Single Market and fostering economic growth. For instance, merger control enforcement will be used to preserve

[7] For a detailed analysis, see our December 2020 EU Competition Law Newsletter.

the diversification of supply chains and avoid bottlenecks in the production of crucial inputs. The impact of future mergers on reliability of supply and predictable lead times will become an important parameter in the Commission's assessment of those transactions.

Furthermore, the Commission intends to promote the establishment of industrial alliances in key strategic sectors of the Single Market, such as batteries, semiconductors, and cloud and edge computing. These industrial alliances are forums in which business actors will collaborate and cooperate with each other to tackle future crisis affecting the Single Market. A specific compliance programme will ensure that this collaboration between undertakings remains within the boundaries of EU competition laws.

## Conclusion

The Communication will undoubtedly disappoint those in hope of a relaxation on EU antitrust rules during times of crisis. According to the Commission, a successful recovery of the European economy will require a stronger enforcement of existing competition rules.[8] On top of the rules, new legislative proposals and policy instruments will ensure that the EU antitrust framework remains in sync with the ever-evolving reality of the European markets.

Moreover, the Commission highlighted that antitrust enforcement does not exist in a vacuum: it must be aligned with—and provide support to—the Commission's efforts in other strategic areas, including the green transition and the digital markets policy.

# News

## Court Updates

### *The Court Of Justice Urges Latvian Court To Think Twice Before Finding A "By Object" Infringement In The Sector Of Software Distribution*

On November 18, 2021, the Court of Justice clarified the framework for assessing anticompetitive agreements between a software developer and its distributors, and ordered a Latvian court to revisit its analysis before adjudicating on the case.[9]

#### Background

On December 9, 2013, the Latvian competition authority found that contracts which Visma, an accounting software developer, had concluded with its distributors violated Latvian competition law. These contracts provided that the distributor, which first recorded a potential customer in Visma's database, had a "priority" for completing the transaction with that customer over other distributors, unless the customer disagreed. This priority had a duration of six months.

The Latvian authority considered that the objective of the agreement was the allocation of customers among distributors, thereby limiting competition between them. The authority thus concluded that the agreement was anticompetitive "by object," meaning that it was by its very nature harmful to the proper functioning of competition, meaning that there was no need to prove that the agreement had any actual effects on the market before fining Visma.

Following Visma's appeal, and a review of the case by multiple Latvian courts, the regional administrative court in Latvia decided to stay the proceedings and request a ruling from the Court of Justice regarding the application of the EU competition rules to the case.

[8] This position echoes recent statements by Commission's officials. See mLex, "No competition enforcement let-up as Europe exits pandemic, Guersent says," available at: https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/no-competition-enforcement-let-up-as-europe-exits-pandemic-guersent-says.

[9] *Visma Enterprise v. Konkurences padome* (Case C-306/20) EU:C:2021:935. The decision is not yet available in English.

### The judgment of the Court of Justice

The core question of the Latvian Court was whether the priority provision contained in Visma's contracts with its distributors constituted an agreement restricting competition by object or by effect.

The Court of Justice recalled that the existence of a restriction by object must be assessed in the light of the provisions of the agreement, the objectives pursued, and the economic context in which it took place. When applying this test, the Court of Justice found that the content of the disputed provision was unclear. In particular, it was not apparent whether the "priority" given to distributors by the contract meant that only the first distributor registering a potential customer could conclude the contract.

Indeed, Visma disputed this interpretation of the provision. The European Commission also pointed out that the contract did not preclude discussions between a customer and competing distributors, as the customer could opt out of the priority arrangement.

The Court of Justice also found that the objective of Visma's contracts was unclear. Visma argued that their objective was actually procompetitive, in that the contracts aimed to improve the cooperation with its distributors and to ensure the quality of the products delivered to the customers. According to the Court of Justice, these considerations should be taken into account by the Latvian court before adjudicating on the case.

The Latvian court is now expected to issue a final judgment on the case based on the guidance received from the Court of Justice. If no restrictions "by object" were found, the Latvian court would have to carry out a full assessment the contracts' actual effects on the market. This assessment would have to take into account that Visma's market shares are fairly limited (below 30%), that the distributors were unaware of priorities of other distributors and, that customers had the possibility of opting-out of the priority.

### "By object" decisions must be supported by rigorous reasoning

The distinction between "by object" and "by effect" restrictions of competition is important in EU antitrust law, and it has been extensively expanded upon by the Court of Justice in several landmark judgments.[10]

If an agreement between undertakings is anticompetitive "by object," antitrust authorities can declare it void and impose fines without further assessment. Otherwise, authorities will often need to collect extensive market data and produce sophisticated economic analysis in an attempt to demonstrate the agreement's actual effects on the market. In other words, a "by effect" case requires more investigative efforts and is more difficult to defend in court.

The ruling in the *Visma* case is a reminder that antitrust authorities should not apply the "by object" standard lightheartedly. The conditions for a "by object" case—as established in the Court of Justice's case law—are typically met by price-fixing cartels and other egregious infringements of competitions rules. The analysis of commercial clauses in vertical distribution agreements however is less straightforward, and requires close and careful scrutiny.

[10] See for example, *LTM* (Case 56/65) EU:C:1966:38; *CB v. Commission*, (Case C-67/13 P) EU:C:2014:2204; and *Maxima Latvija* (Case C-345/14), EU:C:2015:784.

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