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Developmental tendencies of the European Union's antitrust law enforcement policy on digital markets – from the European Commission's decision in the Google cases to the sectoral regulation*

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The market practices of the most powerful global IT and computer companies are currently the subject of numerous antitrust proceedings. The European Commission successfully defended its decision in the Google Shopping case before the EU General Court, in which it relied on highly controversial reasoning. From a functional point of view, however, the success of the EU anti-trust authority is severely limited, and it does not appear that the ruling in question will pave the way for a fundamental overhaul of the architecture of the most salient digital markets. In the absence of any prospect of effecting the desired changes through the use of the traditional institutions of competition law, norms

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intended to apply exclusively to the digital sector were first introduced into German law and, somewhat later, also into EU law.

1. The European Commission's decisions regarding Google's market practices

On 28 June 2017, the European Commission issued a decision¹ in which it found that “in thirteen countries of the European Economic Area, Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors.” On the one hand, the Commission found the results originating from Google's product price comparison engine were positioned and displayed in a more attractive manner than the results originating from competitor search engines. On the other hand, the results from such competitive search engines, which were displayed as mere generic results (in the form of blue links), could therefore be positioned by the algorithms of Google's search engine in a lower position on Google's general results pages, in contrast to the results from Google's price comparison engine.”² A fine of €2,424,495,000 was imposed on Google for this infringement of competition law.

In a decision of 18 July 2018,³ the European Commission questioned the conformity with EU competition law of the commitments Google was imposing on Android device manufacturers and mobile network operators and fined the US company €4,342,865,000. Competition Commissioner Margrethe Vestager explained that Google sought to ensure that “web traffic on Android devices was directed to Google's search engine” and thus

¹ Google Search (Shopping), AT.39740.

² General Court of the European Union PRESS RELEASE No 197/21 Luxembourg, 10. November 2021 Judgment in Case T-612/17 Google and Alphabet / Commission (Google Shopping), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/cp210197pl.pdf> (access: 7.07.2022).

³ Google Android, AT.40099.

“used Android as a way to establish the dominant position of its web search engine.”⁴

According to the European Commission, Google’s abuse consisted in particular in the fact that the company:

- imposed a requirement on manufacturers to pre-install Google’s search engine application and web browser (Chrome) as a condition for obtaining a licence for Google’s Play Store application;
- paid some large manufacturers and mobile network operators a financial benefit for pre-installing only the Google search app on their devices; and
- prevented manufacturers wishing to pre-install Google apps from selling even one smart mobile device running on alternative versions of Android that had not been approved by Google (so-called ‘forks’ of Android).

In a further decision addressed to Google,⁵ the European Commission found that the company had abused its dominant position in the market for the intermediation of online search advertising services and fined it €1,494,459,000.

The European Commission explained that Google “first introduced an exclusivity requirement in the provision of services, preventing competitors from placing any advertising on the most commercially successful sites” and subsequently began “to use a strategy of so-called controlled exclusivity, aimed at reserving the best positions for its results and controlling the positions of the results of competitors.” The EU antitrust authority also argued that other operators “were in no position to compete with it on the merits, either because there was an explicit prohibition on displaying their results on third-party sites or because Google reserved the commercially best positions on those sites for itself, while controlling the display of competitors’ results.”⁶

⁴ Press release of 18. July 2018, https://ec.europa.eu/commission/presscorner/detail/pl/IP_18_4581 (access: 7.07.2022).

⁵ Decision of 20. March 2019, Google Search (AdSense), AT.40411.

⁶ Press release, 20. March 2019, Brussels, Antitrust: Commission fines Google €1.49 billion for online advertising market abuse https://ec.europa.eu/commission/presscorner/detail/pl/IP_19_1770 (access: 7.07.2022).

2. The Google Shopping ruling

The EU General Court, in its judgment of 10 November 2021⁷ dismissed the action of Google against the European Commission's decision of 28 June 2017 outlined above on the merits (Google Shopping), which is undoubtedly a major success for the European antitrust authority.

From a theoretical point of view, it is particularly interesting to note that the General Court considered attempts to apply in the Google Shopping case the test formulated on the basis of the judgment of the Court of Justice in Oscar Bronner⁸ to be unauthorized. One of these rulings very narrowly framed the scope of the duty to cooperate with competitors, which is sometimes referred to as the *essential facilities* doctrine. Allegations of antitrust violations raised against the dominant player, which had set up a highly efficient system of home press distribution and refused to cover titles published by rivals, were considered to be unjustified. The Court of Justice justified its ruling on the grounds that access to the distribution network of the dominant player was not necessary for the survival of its smaller competitors, and deemed it insufficient to impose an obligation on the dominant player to cooperate with them on the grounds that alternatives to the distribution system in question were not equally attractive to them.⁹

Google's argumentation with respect to the Oscar Bronner judgment was based on *a maiore ad minus* reasoning. The US company emphasized that its rivals would have been able to survive in the market even if the information relating to them had

⁷ Judgment of 10. November 2021, T612/17, ECLI:EU:T:2021:763.

⁸ Judgment of 26. November 1998, C-7/97, EU:C:1998:569.

⁹ 47 *In the light of the foregoing considerations, the answer to the first question must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.*

not appeared in Google's search engine at all, and concluded that, according to the line of case law laid down in the Oscar Bronner judgment, there was no obligation on Google to cooperate with its rivals. It was argued that, at the examined level, Google's self-preferential treatment was a solution more suited to the needs of competitors than the complete removal of results relating to them from the search engine.¹⁰

The opinion on the validity of applying the test formulated in the Oscar Bronner case to the Google Shopping case was expressed by Bo Vesterdorf. This author, already in the title of his publication, pointed out that the theories of self-preference and duty to deal are "two sides of the same coin." He also drew attention to the difference between the conclusions reached by the application of the indispensability criterion on which the Oscar Bronner judgment is based and those reached using the 'favouritism' criterion.¹¹

However, the EU General Court held that the Commission did not need to establish that the conditions set out in the Os-

¹⁰ 201 In Google's submission, the favouring claim in the contested decision really concerns the access of competing comparison shopping services to Google's 'technologies and designs,' in that the Commission does not seek to prevent Google from showing Product Universals and Shopping Units (recitals 656 and 662 of the contested decision). Instead, it objects that Google does not position and display competing comparison shopping services in the same way, which would entail their having access to those 'technologies and designs'. The same argument as that raised by the Commission in the contested decision in order to find that there was favouring could have been raised in the case giving rise to the judgment of 26 November 1998, Bronner (C7/97, EU:C:1998:569), since the press publisher concerned, Mediaprint, included its newspapers in its distribution network, but not those of its competitor [...] Thus, according to Google, if the contested decision were to be upheld, any duty to supply could be re-characterised as an act of favouring, without any need to meet the indispensability condition established by the Court of Justice in its case-law. All the judgments in which it required that condition to be met would be undermined.

¹¹ "the complaints in the Google case would seem to be designed to evade Bronner by couching their accusations in terms of "favouring" without establishing the existence of an "essential facility," and then demanding remedies or solutions that could not be justified in anything other than an essential facilities case" – B. Vesterdorf, *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*, "Competition Law & Policy Debate" 2015, Vol. 1, No. 1, p. 9.

car Bronner case were met in order to find that Google had infringed competition law. That position was justified by pointing out that the challenged practices of the addressee of the decision were clearly different from the market strategy under scrutiny in the Oscar Bronner case. The difference lay in the fact that, in the first case, the company engaged in 'active discrimination' and not merely, as in the second case, in a simple refusal of access).¹²

In the judgment under review, the EU General Court found that the European Commission's decision was supported by the fact that Google's market strategy involved a certain form of abnormality – paragraph 179, and departed from 'competition on the merits' – paragraph 175.

It is worth noting in this regard that the judgment under review is not the first time that EU jurisprudence has interpreted the scope of the duty to deal (the essential facilities doctrine), in a case involving 'super-dominant' computer programmes, in a narrower manner than at least *prima facie* as follows from the Oscar Bronner judgment.

Without any risk of error, it can be concluded that there exists a tension between the Oscar Bronner judgment referred to and the judgment of the Court of First Instance (CFI) of 17 September 2007 in the Microsoft case.¹³ The latter judgment indicated

¹² 240 It must therefore be concluded that the Commission was not required to establish that the conditions set out in the judgment of 26 November 1998, Bronner (C7/97, EU:C:1998:569), were satisfied in order to make a finding of an infringement on the basis of the practices identified, since [...] the practices at issue are an independent form of leveraging abuse which involve [...] 'active' behaviour in the form of positive acts of discrimination in the treatment of the results of Google's comparison shopping service, which are promoted within its general results pages, and the results of competing comparison shopping services, which are prone to being demoted. They can thus be distinguished from the conduct at issue in the judgment of 26 November 1998, Bronner (C7/97, EU:C:1998:569), which consisted in a simple refusal of access, as the Court of Justice moreover pointed out in the judgment of 25 March 2021, Deutsche Telekom v Commission (C152/19 P, EU:C:2021:238, paragraph 45), delivered after the hearing in the present case.

¹³ T-201/04, ECLI:EU:T:2007:289. The prevailing view in the literature is that the European Commission's decision in the Microsoft case of 24.05.2004, COMP/C-3/37.792, which was the subject matter of the proceedings in the case which ended with the above-mentioned judgment of the

that in the event that there were no grounds for concluding that the prerequisites, identified in the case law up to the date of that judgment, for the obligation to grant a licence for the use of intellectual property rights to have materialised, it would be justified to examine whether there existed other special circumstances. Paragraph 336 of that judgment reads that “it is first necessary to examine whether the circumstances raised in [...] the Magill and IMS Health judgments [...] are also present in the present case” and “once it is established that one or more of those circumstances have not arisen, the General Court will then assess the specific circumstances relied upon by the Commission.” The Court also pointed out that the Commission “found in the contested decision that the conduct attributed to Microsoft had three characteristic features capable of constituting an abuse.” More specifically:

- “the fact that the information Microsoft refuses to disclose to its competitors relates to interoperability in the software sector, that is a matter to which the Community legislature attaches particular importance;”
- “the second characteristic is that Microsoft uses the extraordinary market power it holds in the workstation operating system market to eliminate competition in the adjacent workgroup server operating system market;”
- “a third characteristic is that the behaviour under consideration involves a break with previous levels of information provision” (317).

CFI of 17.09.2007, is in clear contradiction with the earlier line of case law of the EU judiciary – cf. A. Heinemann, *Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission's Microsoft Decision*, “International Review of Industrial Property and Copyright Law” 2005, No. 1, p. 74; D. Gerardin, *Limiting the scope of article 82 EC: what can the EU learn from the US Supreme Court's judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom*, “Common Market Law Review” 2004, Vol. 41, p. 1519; D. Byrne, *Compulsory licensing of IP rights: Has EC competition law reached a clear and rational analysis following the IMS judgment and the Microsoft decision?*, “Journal of Intellectual Property Law & Practice” 2007, No. 5, p. 330. A different view is presented by J.T. Lang, *Mandating Access: The Principles and the Problems in Intellectual Property and Competition Policy*, “European Business Law Review” 2004, p. 1113.

It should also be stressed that in the Microsoft case, the Court of First Instance held “that, in order to be able to compete on a lasting basis with Windows work group server operating systems, competitors’ operating systems must be able to interoperate with the Windows domain architecture in the same way as those Windows systems” (374). Establishing that the provision of access is necessary in order to guarantee the ability to ‘sustainably compete’ is easier than attributing to it the criterion of indispensability.

3. The market impact of the Google Shopping decision and judgment

According to Article 1 of the Google Shopping decision, its addressees (Google and its parent company Alphabet) should have effectively put an end to the infringement identified therein within 90 days of its publication. They were also required to refrain from repeating the torts in question, as well as any conduct having the same or equivalent object or effect.¹⁴ Pursuant to Article 5 of the decision, in the event that the identified entities did not comply with this order, the Commission could impose on them a periodic penalty payment equal to 5% of their daily turnover in the preceding financial year.¹⁵

The decision explained that Google and Alphabet could have implemented the obligation in question in multiple ways. However, it emphasized that, in any event, they should ensure that compet-

¹⁴ Article 3 *The undertaking referred to in Article 1 shall, within 90 days from the date of notification of this Decision, bring effectively to an end the infringement referred to in that Article, in so far as it has not already done so. The undertaking referred to in Article 1 shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or an equivalent object or effect.*

¹⁵ Article 5 *If the undertaking referred to in Article 1 fails to comply with the orders set out in Articles 3 and 4, the Commission hereby imposes a daily periodic penalty payment of 5% of its average daily turnover in the business year preceding such a failure to comply.*

itors, in the overall search results, were treated no less favorably than themselves.¹⁶

David Meyer points out that, in an effort to implement the decision under review, Google launched auctions to acquire the right to determine the content of the boxes displayed above the relevant search results – in a so-called ‘carousel.’ Both Google and its competitors are involved in the price competition for this right. Such information and advertising spaces were previously dedicated to displaying results from Google’s search engine.¹⁷

The businesses affected by this tort, as well as consumer organizations and the Commissioner responsible for competition are very critical of the effectiveness of the remedy. The doctrine is of the same opinion.

Thomas Hoppner concludes that all available empirical data indicate that the manner in which Google has implemented the obligations imposed on it by the decision of 27 June 2017 has not only failed to improve the market situation for entrepreneurs offering comparison shopping sites, but has also had the effect of strengthening Google in the national price comparison mar-

¹⁶ (698) *As there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end, it is for Google and Alphabet to choose between those various ways.* (699) *Any measure chosen by Google and Alphabet should, however, ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages.*

¹⁷ *Google’s solution for compliance was to introduce an auction mechanism for places in the image-laden results carousel that tops product searches. While the boxes in the carousel were once all filled with results from Google’s own comparison-shopping service, the company said in September last year that it would let rivals bid for them. Google itself also bids for spots in its own carousel* – D. Meyer, *More Fines Incoming? Google’s Solution to Its EU Antitrust Woes Is ‘Meaningless’, Rivals Claim*, “Fortune”, 22. November 2018, <https://fortune.com/2018/11/22/google-eu-antitrust-solution-meaningless> (access: 7.07.2022). Cf. A. Caro, *Leveraging market power online: the Google Shopping case*, “Competition Law Journal” 2018, No. 1, p. 49; 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*, “Journal of European Competition Law & Practice” 2017, No. 1, p. 1.

kets and further consolidating its dominance in the search engine market.¹⁸

In a letter to Commissioner Margrethe Vestager, dated 28 November 2019, representatives of 41 online comparison shopping businesses, i.e. those affected by Google's investigated tort, operating in 21 European Union countries, called for decisive action against the addressees of the investigated decision for their failure to comply with the requirements of the 2017 decision. In their submission, they stated that ten years after they first filed a formal complaint and three years after the Google Shopping decision, effective competition in the national markets for comparison shopping sites has not been restored, with Google continuing to fail to provide them with equal treatment at the level of search results.¹⁹

Consumer organizations have also expressed their disapproval of the market transformation following the Google Shopping decision. Particularly noteworthy is the open letter to Commissioner Margrethe Vestager from the Director General Monique Goyens of The European Consumer Organization, which brings together

¹⁸ T. Hoppner, *Google's (Non-) Compliance with the EU Shopping Decision a study based upon empirical data of 25 comparison shopping services*, September 2020, p. 15, [https://www.hausfeld.com/uploads/documents/googles_\(non\)_compliance_with_google_search_\(shopping\).pdf](https://www.hausfeld.com/uploads/documents/googles_(non)_compliance_with_google_search_(shopping).pdf) (access: 7.07.2022). *All empirical economic data shows that the so-called Compliance Mechanism ("CM") that Google chose to implement the remedy imposed in the European Commission's ("Commission") Google Search (Shopping) Decision of 27 June 2017 (the "Decision") has failed to improve the market conditions for competing comparison shopping services ("CSS"). On the contrary, it has further strengthened Google's position on the national markets for CSSs and has entrenched its dominance in general search.*

¹⁹ https://www.shopalike.nl/downloads/Joint_Letter_of_41_CSSs_to_Ms_Vestager_on_Google_Shopping-Non-Compliance_28.11.2019.pdf (access: 7.07.2022), *Comparison shopping services call for vigorous actions against Google's non-compliance with the European Commission's decision in the Google Search (Shopping) case [...] ten years after the first formal complaints from within our industry and two years after the Shopping Decision, effective competition in the national markets for comparison shopping has not been re-established. Contrary to the remedy imposed by the Commission, the mechanism implemented by Google to comply (the "Compliance Mechanism") does not provide for equal treatment of CSSs on Google's general Search Engine Results Pages ("SERPs").*

45 consumer organizations from 32 countries. In it, it is pointed out that Google's reaction to the 2017 decision has not led to a significant positive impact on the real lives of consumers (*we want to ensure that the changes introduced by Google to comply with the Commission's decision have a meaningful and positive impact on the real life experience of consumers using their services. This, so far, has unfortunately not been the case*).²⁰

The fact that the decision reviewed did not lead to a real strengthening of the position of Google's competitors who fell victim to the practices covered by it was also acknowledged by Commissioner Margrethe Vestager.²¹

4. The tenth amendment to the German Antitrust Act

The German antitrust authority (*Bundeskartellamt*) is particularly sensitive to the need for effective protection of competition in digital markets. On 19 January 2021, the tenth amendment²² to the German Antitrust Act,²³ which granted it new quasi-regulatory powers in relation to entrepreneurs playing a nodal role in digital markets, came into force.

Under the newly-introduced §19a (1) GWB,²⁴ *Bundeskartellamt* may issue a decision declaring that a company operating to a sig-

²⁰ https://www.beuc.eu/publications/beucx2019020_google_noncompliant_remedy_in_antitrust_shopping_case.pdf (access: 7.07.2022).

²¹ <https://www.youtube.com/watch?v=QGvj12gd3UU> (access: 7.07.2022).

²² *Das Zehnte Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz)*.

²³ Gesetz gegen Wettbewerbsbeschränkungen (GWB), BGBl. I, 2013, p. 1750, 3245 as amended.

²⁴ § 19a(1) *Das Bundeskartellamt kann durch Verfügung feststellen, dass einem Unternehmen, das in erheblichem Umfang auf Märkten im Sinne des § 18 Absatz 3a tätig ist, eine überragende marktübergreifende Bedeutung für den Wettbewerb zukommt. Bei der Feststellung der überragenden marktübergreifenden Bedeutung eines Unternehmens für den Wettbewerb sind insbesondere zu berücksichtigen:*

1. *seine marktbeherrschende Stellung auf einem oder mehreren Märkten,*
2. *seine Finanzkraft oder sein Zugang zu sonstigen Ressourcen,*

nificant extent in multilateral markets and under network conditions is of particular importance for inter-market competition. In deciding whether it is appropriate to attribute such status to the company, the authority should take into account:

1. its dominant position in one or more markets;
2. its financial strength and access to other resources;
3. its vertical integration and activities in otherwise related markets;
4. its access to competitively relevant data;
5. the importance of its activities for third parties; access to supply and sales markets and its impact on the economic behaviour of third parties. The relevant decision remains valid for a period of five years from its issuance.

In accordance with Article 19a (2) of the GWB,²⁵ in the event of a decision under Article 19a (1), the antitrust authority may pro-

3. *seine vertikale Integration und seine Tätigkeit auf in sonstiger Weise miteinander verbundenen Märkten,*
4. *sein Zugang zu wettbewerbsrelevanten Daten,*
5. *die Bedeutung seiner Tätigkeit für den Zugang Dritter zu Beschaffungs- und Absatzmärkten sowie sein damit verbundener Einfluss auf die Geschäftstätigkeit Dritter.*

Die Verfügung nach Satz 1 ist auf fünf Jahre nach Eintritt der Bestandskraft zu befristen.

²⁵ § 19a (2) Das Bundeskartellamt kann im Falle einer Feststellung nach Absatz 1 dem Unternehmen untersagen,

1. *beim Vermitteln des Zugangs zu Beschaffungs- und Absatzmärkten die eigenen Angebote gegenüber denen von Wettbewerbern bevorzugt zu behandeln, insbesondere*
 - a) *die eigenen Angebote bei der Darstellung zu bevorzugen;*
 - b) *ausschließlich eigene Angebote auf Geräten vorzuzinstallieren oder in anderer Weise in Angebote des Unternehmens zu integrieren;*
2. *Maßnahmen zu ergreifen, die andere Unternehmen in ihrer Geschäftstätigkeit auf Beschaffungs- oder Absatzmärkten behindern, wenn die Tätigkeit des Unternehmens für den Zugang zu diesen Märkten Bedeutung hat [...]*
3. *Wettbewerber auf einem Markt, auf dem das Unternehmen seine Stellung, auch ohne marktbeherrschend zu sein, schnell ausbauen kann, unmittelbar oder mittelbar zu behindern [...]*
4. *durch die Verarbeitung wettbewerbsrelevanter Daten, die das Unternehmen gesammelt hat, Marktzutrittsschranken zu errichten oder spürbar zu erhöhen, oder andere Unternehmen in sonstiger Weise zu behindern, oder Geschäftsbedingungen zu fordern, die eine solche Verarbeitung zulassen [...]*

hibit an entrepreneur from taking a number of actions, the compliance of which with the general prohibition of abuse of a dominant position may in specific cases raise doubts. Among the types of conduct that may be prohibited under this regime are favoring one's own offerings over those of competitors in securing access to supply and sales markets and, in particular, presenting one's own offerings in a privileged manner and re-installing one's own offerings on devices subject to exclusivity or integrating them in any way into the trader's offerings; taking measures that impede other undertakings from operating on markets for the supply or sale of goods, where the undertaking's activities are important for access to those markets; impeding other undertakings from operating on a market where the undertaking concerned can rapidly strengthen its position; creating or noticeably raising barriers to entry into markets by processing data relevant for competition; preventing or hindering interoperability.

The antitrust authority may not impose the prohibitions in question where the conduct covered is objectively justified. However, the burden of proof on this level rests with the undertaking invoking it.

The German antitrust authority makes very vigorous use of the instruments granted to it by the tenth amendment and has issued decisions based on them in cases involving Google, Facebook, Amazon, and Apple.²⁶

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5. *die Interoperabilität von Produkten oder Leistungen oder die Portabilität von Daten zu verweigern oder zu erschweren und damit den Wettbewerb zu behindern;*
 6. *andere Unternehmen unzureichend über den Umfang, die Qualität oder den Erfolg der erbrachten oder beauftragten Leistung zu informieren oder ihnen in anderer Weise eine Beurteilung des Wertes dieser Leistung zu erschweren;*
 7. *für die Behandlung von Angeboten eines anderen Unternehmens Vorteile zu fordern, die in keinem angemessenen Verhältnis zum Grund der Forderung stehen [...]*

Dies gilt nicht, soweit die jeweilige Verhaltensweise sachlich gerechtfertigt ist. Die Darlegungs- und Beweislast obliegt insoweit dem Unternehmen. § 32 Absatz 2 und 3, die §§ 32a und 32b gelten entsprechend. Die Verfügung nach Absatz 2 kann mit der Feststellung nach Absatz 1 verbunden werden.

²⁶ Cf. *Ex-Ante Regulation and Competition in Digital Markets – Note by Germany*, p. 6, DAF/COMP/WD(2021)61, <https://www.oecd.org/officialdocuments/>

5. The Digital Markets Act

The direction set by German law was followed by the EU legislator. The ‘Digital Markets Act’ (DMA)²⁷ it adopted provides for the ring-fencing of a group of ‘access gatekeepers.’ The explanatory memorandum of the draft of this normative act²⁸ explains that its scope is “limited to several «core platform services» where the problems identified are particularly pronounced and significant, and the existence of a limited number of large online platforms serving as access points for business users and end-users results or is likely to result in the weak contestability of such services and the markets affected by such services.” It was also indicated that “these core platform services include: (i) online intermediation services (including, for example, commerce platforms, app shops, and online intermediation services in other sectors such as mobility, transport, or energy), (ii) search engines, (iii) social networks, (iv) video sharing platform services, (v) interpersonal communications services not using numbers, (vi) operating systems, (vii) cloud services, and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where such advertising services are linked to one or more of the other core platform services listed above.”²⁹ According to Article 3(1) of the DMA, an undertaking is designated as an access gatekeeper if:

- a) it has a significant impact on the internal market;

publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2021)61&docLanguage=En (access: 7.07.2022).

²⁷ 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), Official Journal of the European Union L 265/1.

²⁸ The proposal for a ‘Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector’ (Digital Markets Act), {SEC(2020) 437 final} – {SWD(2020) 363 final} – {SWD(2020) 364 final}; <https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52020P0842&from=en> (access: 7.07.2022).

²⁹ The proposal for a ‘Regulation of the European Parliament and of the Council’, p. 2.

- b) it provides a core platform service which is an important gateway for business users to reach end users; and
- c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

The Explanatory Memorandum of the DMA Draft explains that the proposed normative act “identifies practices by access gatekeepers that limit contestability and are unfair,” and “in particular, it sets out the automatically exercisable obligations (Article 5) and the obligations subject to further clarification (Article 6) that providers designated as access gatekeepers should fulfil in respect of each of their core platform services listed in the relevant designation decision.”³⁰

6. Conclusion

The European Commission is demonstrating a strong determination to combat undesirable conduct by the most powerful businesses in digital markets. In the sphere of competition law enforcement, it has managed to defend the highly controversial Google Shopping decision before the EU General Court. This ruling has made the antitrust standard applicable to exclusionary practices more flexible, something that is of some strategic importance in the relationship between antitrust authorities and dominant players in digital markets.

However, it should be noted that, proportionally to the increasing effectiveness of the exercise of traditional competition law institutions (prohibition of abuse of dominant positions), the predictability of adjudication is decreasing while the realm of uncertainty as to the content of the actual competition law rules in force is widening.

Notable is the fact that the European Commission has adopted a conservative attitude towards the allegations by the victims

³⁰ The proposal for a ‘Regulation of the European Parliament and of the Council’, p. 15.

of competition law infringements regarding the failure of the addressees of the Google Shopping decision to comply with the obligations imposed on them, and that there has been no significant impact of this ruling on the overall economic situation.

The coverage of digital markets with effective public law intervention requires legislative action. To the extent discussed, the solutions introduced by the German Tenth Cartel Amendment are heading in the right direction. They allow the achievement of widely accepted public objectives without departing too much from the demand for analytical rigor in antitrust cases.

SUMMARY

Developmental tendencies of the European Union's antitrust law enforcement policy on digital markets – from the European Commission's decision in the Google cases to the sectoral regulation

The article identifies developmental tendencies in the European Union's antitrust law enforcement policy on digital markets. The author begins his argument by outlining a series of the European Commission's decisions regarding Google's market practices and by analysing the theoretical and legal assumptions on which the judgment of the General Court of the European Union in the Google Shopping case is based, and subsequently attempts to present the market effects of the actions in question undertaken by the EU's competition authorities. The author is sceptical about the economic effectiveness of the European Commission's decisions and draws attention to the risks associated with increasing antitrust interventionism. In particular, the publication indicates the risk of excessive relaxation of the analytical discipline in antitrust cases. However, the article expresses the approval for legislative actions aimed at including digital markets in sectoral regulation. The author believes that such a solution will make it possible to achieve generally accepted public goals, and does not pose threats related to further tightening of the antitrust law enforcement policy.

Keywords: Google; competition law; cyber market

STRESZCZENIE

Tendencje rozwojowe polityki egzekwowania prawa antymonopolowego Unii Europejskiej na rynkach cyfrowych – od decyzji Komisji Europejskiej w sprawach Google do regulacji sektorowej

W artykule przedstawiono tendencje rozwojowe polityki egzekwowania prawa antymonopolowego Unii Europejskiej na rynkach cyfrowych. Autor rozpoczyna swoje wywody od zarysowania serii decyzji Komisji Europejskiej dotyczących praktyk rynkowych Google i analizy założeń teoretyczno-prawnych, na których opiera się wyrok Sądu Unii Europejskiej w sprawie Google Shopping, a następnie podejmuje próbę przedstawienia skutków rynkowych przedmiotowych działań unijnego organu ochrony konkurencji. Autor sceptycznie odnosi się do gospodarczej efektywności wskazanych decyzji Komisji Europejskiej oraz zwraca uwagę na zagrożenia wiążące się ze zwiększaniem antymonopolowego interwencjonizmu. W publikacji wskazano w szczególności na ryzyko nadmiernego rozluźnienia dyscypliny analitycznej w sprawach antymonopolowych. W artykule wyrażono natomiast aprobatę wobec działań legislacyjnych idących w kierunku objęcia rynków cyfrowych regulacją sektorową. Autor uważa, że takie rozwiązanie umożliwi osiągnięcie powszechnie akceptowanych celów publicznych, a nie kreuje zagrożeń wiążących się z dalszym zaostrzeniem polityki egzekwowania prawa antymonopolowego.

Słowa kluczowe: Google; prawo konkurencji; rynki cyfrowe

BIBLIOGRAPHY

- Byrne D., *Compulsory licensing of IP rights: Has EC competition law reached a clear and rational analysis following the IMS judgment and the Microsoft decision?*, "Journal of Intellectual Property Law & Practice" 2007, No. 5.
- Caro A., *Leveraging market power online: the Google Shopping case*, "Competition Law Journal" 2018, No. 1.
- Gerardin D., *Limiting the scope of article 82 EC: what can the EU learn from the US Supreme Court's judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom*, "Common Market Law Review" 2004, Vol. 41.

- Heinemann A., *Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission’s Microsoft Decision*, “International Review of Industrial Property and Copyright Law” 2005, No. 1.
- Hoppner T., *Google’s (Non-) Compliance with the EU Shopping Decision a study based upon empirical data of 25 comparison shopping services*, September 2020, [https://www.hausfeld.com/uploads/documents/googles_\(non\)_compliance_with_google_search_\(shopping\).pdf](https://www.hausfeld.com/uploads/documents/googles_(non)_compliance_with_google_search_(shopping).pdf).
- Lang J.T., *Mandating Access: The Principles and the Problems in Intellectual Property and Competition Policy*, “European Business Law Review” 2004.
- Meyer D., *More Fines Incoming? Google’s Solution to Its EU Antitrust Woes Is ‘Meaningless’, Rivals Claim*, “Fortune”, 22. November 2018, <https://fortune.com/2018/11/22/google-eu-antitrust-solution-meaningless>.
- Vesterdorf B., *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*, “Competition Law & Policy Debate” 2015 Vol. 1, No. 1.
- Vesterdorf B., Fountoukakos K., *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*, “Journal of European Competition Law & Practice” 2017, No. 1.