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Legal Analysis of *Google v EC (Shopping)*, T-612/17

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Prelims, caveats, and outline

- Ambition to clarify the law
- *Obiter dicta*
- Broad statements
- Complex facts
- Heavily redacted
- Focus on 4 points of law

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1. Antitrust duty to deal threshold?

- Can a general search engine be guilty of abusive discrimination against rival specialized search engines *independently* of any antitrust duty to index their results?
  - GC says yes. Isolated reference to GC, *Irish Sugar*, T-228/97, §239
  - Aligned w/ Art 102 TFEU case-law in *TeliaSonera*, *Huawei v ZTE* and *Slovak Telecom*
- *Why*? GC considers that a general search engine's « *universal vocation* » is to contain « *any possible content* », and to be « *open* », §§176-177
- GC then points out to « *abnormality* » of discrimination, §§176
  - Non sequitur. The Court confuses two things:
    - One. It is perhaps abnormal for a general search engine to reduce indexed content;
    - But two, it does not follow that it is abnormal to display it w/ favoring (// Netflix)
  - On this basis, the Court reverses the burden of proof: dominant firm must justify unequal treatment, §179

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1. Antitrust duty to deal threshold? (Cont'd)

- A rule/presumption against anticompetitive self-preferencing w/o an antitrust duty to deal can be socially effective *provided* complete integration is privately costly
  - But no assumption this is (or not) the average case (Coase, 1937)
  - Empirical question. Say dominant firm *can* lawfully refuse to supply under antitrust rules. *Will* it?
    - Yes. Firms completely integrate production under a closed model (eg, Apple Mac OS 8) and/or exit market segments w/ competition => self preferencing rule ineffective
    - No. Past partial integration or specialization allow an inference. Or other laws set regulatory duty to deal => self preferencing rule effective
- Problem w/ idea of 'sunk' business model selection, §181
  - Not irrational to change
  - Inapplication of no economic sense test (AKZO, 62/86, « *no interest … except that of eliminating competitors* », §71)
  - But re-contracting w/ harms to consumers and trading partners?
- Reversal of burden of proof not warranted, case specific approach

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2. Duty to « classify » practices « in law »?

'Leveraging' not a cognizable category of abuse

- Some leveraging is lawful: « *mere extension* » of a dominant position to a « *neighbouring market* » is not proof of abuse, para 162
- There are « *several kinds of leveraging* » contrary to 102 TFEU, §164. « *Leveraging* » is a « *generic term* », that may designate « *several different practices* », §163

Finer classification of practice required

- Categorical thinking as filter for pro and anticompetitive leveraging
- An element of 'plus conduct' is required
  - Tying
  - Refusal to supply
  - Margin squeeze, …
- Here: « *difference in treatment* » §168 and 237, « *favoring* » §169, « *internal discrimination* », §238

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2. Duty to « classify » practices « in law »? (Cont'd)

Selection issues

- GC rejects idea that remedy determines classification choice
  - Bc only known at end of fact finding and evaluation process (not true in practice)
  - What alternative criterion?
    - « Form of conduct » (*see* EC decision, §335)?

Unclear discrimination test

- What discrimination test under Article 102 TFEU
  - Abnormality => quasi *per se* rule?
  - Or Art 102 c) framework referred to in *Irish Sugar* mentioned at §239?
- Unequal conditions to equivalent services
  - Thin CSS v Broad Google Shopping Service (§329)
  - Absence of objective criteria? Google's own specialized search services more trusted
- Competitive disadvantage
  - No evidence between 326 CSS?

3. Do equal treatment rules differ depending on infrastructure type?

- §188, « *The infrastructure at issue is, in principle, open, which distinguishes it from other infrastructures referred to in the case law (…), consisting of tangible or intangible assets whose value depends on the proprietor's ability to retain exclusive use of them* »

- Are IP rights or physical infrastructures subject to less exacting anticompetitive discrimination rules?
- Are other digital platform infrastructures (app stores, operating systems, etc.) subject to less exacting anticompetitive discrimination rules?
- If yes, what regime of anticompetitive discrimination applies to less open platforms?
  - Display freedom, ranking neutrality?

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4. Does EU secondary legislation guide application of Treaty rules on competition?

- GC considers that EU legislation on net neutrality/roaming that applies to ISPs supports imposition of a similar legal obligation of non discrimination to online search results provided by an « *ultra dominant* » supplier, §180
- Different from application of « *effet utile* » doctrine where applying antitrust obligation on the same firms that are subject to legislation meets objective of effective competition set by legislature >< *Slovak Telecom* C-165/19 P (§55)
- Legislative interference w/ Treaty law, judicial authority, and congressional power
- Limiting principles

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5. Final questions

- « *Ultra* » and « *super* » dominance
  - 1st time in a judgment, not a Treaty concept
  - Adverse impact on special responsibility bearing on dominant firms, para 183
  - Confirm DMA approach (« *gateway* »)
- « *Akin* » to an essential facility, §224
- References to EC Guidance Paper on Article 102 TFEU (but >< w/ categorical thinking)

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Conclusions

- Judgment leans toward a vision of general search engines as public utilities
- Principles developed by GC share common blood w/ article 106 TFEU
- Parallels w/ substantive theory underpinning article 106 TFEU not ideal
  - Some self preferencing is efficient in environments w/ weak appropriability institutions, and intense risk taking
- But some power to analogy of a « reserved sector »
  - Rich display is more legitimate than demotion
- Appropriate from enforcement costs perspective to set law in terms of discrimination compared to leveraging
- But need economically literate test and first principles to limit baseless complaints

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Annex: Inconvenient Qs for G and EC

- Q to G =>
  - Did economic costs or technical constraints prevent to disable PANDA algorithm for CSS websites lacking original content, while an exclusion was reserved to your own CSS also lacking original content?
- Q to EC =>
  - How could Google favor its own CSS against 326 competitive CSS if “internet users who clicked on an ad in a shopping unit were always directed to the advertiser’s sales websites”, para 18?
  - Did Google actually compete w/ *thin* CSS, if its *broad* comparison shopping service is formed of “specialized pages”, “grouped product results”, and “product ads”, para 330?
  - If this is the case that thin and broad CSS compete in a same relevant market, why exclude Amazon?