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Ceneo's Preliminary Case: Redefining The Frontiers of Google's Operations?

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In a preliminary ruling issued on 14 March 2024, the District Court in Warsaw (DCW) granted Ceneo Ltd. an interim injunction in respect of non-monetary claims against Google Ireland Ltd. to cease acts of unfair competition on the Polish territory, consisting in the creation of market entry barriers for the plaintiff. This ruling precedes (temporarily secures) Ceneo's future lawsuit under the Act of 16 April 1993 on combating unfair competition (ACUC) – which, in Polish law, is classified under the broader heading of competition law – dealing with cases where competition exists but takes socially harmful forms. As a general rule, it applies to specific cases of unfair competition involving misrepresentation of a competitor's business or activities, as well as actions aimed at forcing customers to choose a particular entrepreneur as a counterparty or creating conditions enabling third parties to force the purchase of goods or services from a particular entrepreneur. Nonetheless, unlike antitrust law, which is governed by public law and is enforced by the administrative authority (the President of the Competition and Consumer Protection Office – CCPO), the Polish ACUC is essentially governed by private law and its provisions are enforced by a private entity. Infringements under Article 15 of the ACUC, which constitute torts, are dealt with by the civil courts, which are empowered to issue injunctions to protect the interests of competitors. The CCPO can intervene in these proceedings as an 'amicus curiae' – which is what happened at Ceneo's request in the present case.

This model follows the tradition of German law, where an analogous law (Gesetz gegen den unlauteren Wettbewerb – UWG) is in force. However, it should be emphasised that this model is a separate route for the elimination of acts of unfair competition and their consequences – from the private enforcement route established by Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. In addition to the many differences between the ACUC and the private enforcement route established by the latter Directive, it is fundamental that this Directive focuses on the recovery of damages resulting from an infringement of competition law, whereas the ACUC can be the basis for the creation of claims other than damages for the commission of an act of unfair competition – thus, a necessary element of the tort of unfair competition is not damage.

While the provisions of the ACUC and Articles 101 and 102 TFEU are fundamentally concerned with different fact patterns, it is not impossible that the scope of 'acts of unfair competition' under the ACUC and practices prohibited under the antitrust rules may overlap. This is the case in Ceneo vs. Google and the European Commission's (EC) 2017 Google Search (Shopping). The DCW

preliminary ruling of 14 March 2024 complements both the Commission's decision of 27 June 2017 as well as the prohibition under Article 6(5) of the Digital Markets Act, imposing specific bans on the defendant. While the DCW injunctions are temporary, in order to have a lasting effect for the future, Ceneo will have to adduce sufficient evidence of specific conduct by Google that is treated as unfair competition under the Polish ACUC. Despite these procedural issues, the forthcoming court proceeding – probably the first after the DMA became fully applicable for the defendant – may provide an answer on whether Google is enforcing the ban on self-preferencing in Google Shopping.

Ceneo application and DCW bans against Google

Ceneo's claims, on which the DCW granted an interim injunction for the duration of the proceedings against Google, concerning the cessation of four types of unfair competition on the territory of the Republic of Poland. The first element of Google's conduct at issue was the alleged manipulation of the presentation of its search results. In addition to the organic search results via links to websites, Google presents product and price information in a prominent position on the page within its own quasi-comparison price engine, at the expense of the organic search results presented below. The second element of the challenged practice related to the alleged diversion of traffic to Google's own quasi-comparison engine. Despite the user's clear intention to reach the results presented by Ceneo, Google is said to display results leading to its own comparison engine. These results appear as neutral results, meaning that it is not quite clear before clicking on the link that they will lead to Google's comparison engine. Nonetheless, this aspect of the contested practice does not occur for every query. The third element of Google's conduct at issue concerned the alleged blocking of access to Ceneo's comparison engine. In theory, users can avoid being redirected to their own comparison engine, but they will need to change their Google search engine settings. Such additional activity appears to be a barrier to access to Ceneo's comparison site. The fourth additional element of the challenged practice concerned the display of unauthorised Ceneo advertisements on Google's search engine. The ads are said to be placed by an entity independent of Ceneo. They are likely to be offered in order to obtain information about the preferences of users searching for offers on the ceneo.pl website.

In light of the above, the DCW first prohibited Google from favouring its own comparison engine (Google Shopping) to the detriment of competing services through the way it presents search results. Self-preferencing, prohibited by the DCW, consists of placing the results of comparison shopping – carried out by Google or other Alphabet companies – in a different position on Google's pages than the results of an organic search. Such a technique was considered by the DCW to be an act impeding the authorised party's access to the market or, in the terminology of Polish law, an act of unfair competition. Secondly, the court's proscription included redirecting traffic to Google Shopping at Ceneo's expense. In other words, the DCW forbids Google to redirect users to a comparison shopping site provided by Google or another Alphabet company by displaying a widget on Google's website, even though the user has entered a Google search query containing the word "Ceneo" and the product's description or name. Thirdly, the DCW forbade Google from obstructing access to the Polish comparison-shopping service by removing links to Ceneo's website from Google's organic search results obtained with the default setting of the filter bar for queries containing certain words, descriptions or product names. In addition, the complaint alleged Google is displaying unauthorised Ceneo advertising, which consists of placing advertisements containing the word "Ceneo" on the Google search page for users in the territory of

the Republic of Poland by entities not entitled by the authorised company. According to Ceneo, the purpose may be to obtain information about the preferences of users searching for offers on Ceneo.

Opinion of the CCPO as amicus curiae

CCPO, using the powers conferred on it by Article 31d of the Act of 16 February 2007 on Competition and Consumer Protection (ACCP), submitted a written opinion to the DCW in the context of the interlocutory proceedings under consideration. CCPO stated that Google's conduct, if confirmed, could lead to a distortion of competition by giving it a competitive advantage without providing a level playing field for its competitors, including Ceneo.

According to the CCPO, Google's dominant position is not in doubt, especially as Google has not challenged its dominance in the relevant markets identified by the EC. The conduct alleged by Ceneo could, if proven, fall within the scope of the prohibition of abuse of a dominant position. The CCPO saw a possible correlation between the form, object and effect of the infringement found in the Google Shopping case and the conduct identified by Ceneo. This concerns Google's practices in extending its dominance from the primary search engine market to the related market for comparison shopping services. In addition, the effects of the alleged practices in restricting access to the users' attention may not only be a manifestation of self-preferencing and a transfer of dominance to the related market but also a way of foreclosing competitors or depriving them of growth opportunities.

Displaying more visually appealing elements may keep users on Google's price comparison engine. In this context, linking phrases consisting of the name of the price comparison engine to the display of additional widgets with such features (if this is indeed the case) may constitute a restriction of competition. According to the CCPO, it is not possible to provide direct evidence of the anti-competitive nature of Google's actions at the stage of filing the complaint, as only Google has this type of information.

Ultimately, the CCPO considers that if the DCW confirms Ceneo's allegations, it is Google's described behaviour that could potentially lead to a restriction of competition. In the present case, Google's described conduct may be primarily exclusionary in nature, i.e., it may constitute conduct by the dominant undertaking which affects the structure of the market and by using methods different from those used under normal competitive conditions, creates an obstacle to the maintenance or development of competition.

Is DCW bound by the Commission's findings?

According to Article 15c of the ACUC, an act of unfair competition constitutes a violation of the prohibition of restrictive practices under Articles 101 and 102 of the TFEU and Articles 6 and 9 of the ACCP. In this context, it does not require any special analysis to conclude that, in essence, the interim order of the DCW refers to the same exclusionary practices as defined by the European Commission (EC) in its 2017 decision (…), subject to judicial review by the Court of Justice of the EU (Case C-48/22 P). By and large, Google placed search results from its comparison-shopping service at the top of the page, highlighting them as 'Shopping Units' with attractive images and text. Google's conduct has been found by the EC to decrease traffic from Google's general search

results pages to competing comparison-shopping services and to increase traffic from Google's general search results pages to Google's own comparison-shopping services.

As a result, users clicked on the results of Google's comparison-shopping service more often than those of its competitors. The resulting traffic diversion from Google's general results page was not due to the superior quality of Google's comparison-shopping service. Rather, it resulted from the effect of self-preferencing and leveraging on Google's general results page, i.e., the exploitation of its dominant position in the market for general online search services (in Poland).

According to the EC, Google's conduct had the potential to foreclose competing comparison-shopping services, which lead to higher prices for merchants, higher prices for consumers, and less innovation (paras 593-7). The General Court (GC) essentially dismissed the appeal and confirmed the fine. However, the GC did not consider it proven that Google's conduct at issue had anticompetitive effects, or even potential effects, on the market for general search services. It, therefore, annulled the decision in so far as the Commission had also found an infringement of the prohibition of abuse of a dominant position on that market (Case T-612/17).

According to Article 16(1) of Regulation (EC) No 1/2003, the national court may not take decisions which run counter to the decision adopted by the Commission. However, the extent to which the DCW will be bound if the trial is to be initiated – this will have to be examined in the course of the judicial proceedings. The court will assess whether, or how far, the facts of the case (Ceneo v Google) intersect with the circumstances of the Google Shopping case set out in the EC decision. The DCW, as an independent EU court, enjoys a discretionary power to assess whether or not this applies. In this context, attention should be drawn to the judgment of 23 November 2017 in Case C-547/16, *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, which provides some guidance on the application of Article 7(1) of Regulation 1/2003. The CJEU explained that it is clear from Recitals 13 and 22 of Regulation 1/2003 that commitment decisions cannot prevent Member States' competition authorities and courts from deciding a case and are without prejudice to their power to apply Articles 101 and 102 TFEU. At the same time, the CJEU noted that national courts cannot ignore EC commitment decisions. Both in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU and in pursuit of the objective of effective and uniform application of EU competition law, the national court is obliged to take into account the Commission's assessment and to consider as a premise, or even as evidence, the anti-competitive nature of the practice in question. *Argumentum a minori ad maius*, the national court should take all the more account of the Commission's decisions in a case where an obligation to bring the infringement to an effective end has been imposed on an undertaking (Article 7(1) of Regulation 1/2003).

Assuming that the CJEU will resolve the uncertainty as to the correctness of the Commission's decision in the Google Search (Shopping) case, the legal circumstances of the Ceneo v Google case should essentially be clear. Advocate General Kokkot's opinion of 11 January 2024 suggests that the CJEU's findings will be in a similar vein. From her standpoint, self-preferencing constitutes an independent form of abuse through the application of unreasonable conditions of access to competing comparison shopping services, provided that it has at least potentially anticompetitive effects. Assuming the DCW's order of 14 March 2024 is based on the same concept as that of the EC decision – if the findings of the General Court are confirmed, Ceneo will be able to proceed with its civil case against Google knowing where to start. However, since 'if the ball goes out of bounds, the ball is still in play' – it cannot be ruled out that the CJEU will take a different view from that of the General Court, thereby overturning the EC's position in whole or in part. This

would put Ceneo at a disadvantage in terms of the legal findings of the case, as the question of DCW being bound by the EC's assessment would no longer arise (in whole or in part).

Unfair competition law (ACUC) burden of proof challenges

In terms of factual findings, this case is much more complex and uncertain. First of all, the Polish courts accept that the concept of market under the ACUC is not the same as the concept of market under antitrust law. This was expressed, for example, by the Court of Appeals in Warsaw on 6 December 2018, which stated that the concept of a market under the ACUC has an autonomous meaning and should be identified with the concept of the place where economic turnover is produced, i.e. the place where goods and services are exchanged. There is no need to refer to the definition of the relevant market contained in Article 4(9) of the ACCP and to designate such a market, It is a market created between certain parties (VII AGa 578/18, LEX no. 2725373). This feature underlines the specificity of the Polish regulation on unfair competition. It has, among other things, an evolutionary rationale and was inspired by German law.

Second, Article 15(1)-(2) of the ACUC defines an 'act of unfair competition' as an act impeding access of other entrepreneurs to the market by, inter alia, unreasonably discriminating between certain customers or an act aimed at forcing customers to choose a particular trader as their counterparty or creating conditions that enable third parties to force the purchase of goods or services from a particular trader). The latter may in particular consist in:

- Substantially restricting or excluding the customer's ability to purchase from another trader; or
- Creating situations which result in third parties directly or indirectly imposing on customers the need to purchase from a particular trader or from a trader with whom the trader has a business relationship.

In the case of an act of unfair competition, a trader whose interests have been threatened or infringed may, in accordance with general principles, demand, inter alia, the cessation of the unlawful activity, the elimination of the effects of the unlawful activity or the surrender of the unjustly obtained benefits.

Of particular relevance, by virtue of the amendment of 24 September 2021, Article 15c was introduced into the ACUC, which equated an act of unfair competition to a breach of the prohibition of restrictive practices within the meanings of Articles 6 and 9 of the ACCP as well as Articles 101 and 102 TFEU. This illustrates the potential overlap between ACUC and antitrust, as noted above.

However, in terms of the procedural issue – the burden of proof – this new provision will not change much on the basis of the Ceneo v Google case. Indeed, the burden of proof for the EC in a case under Article 102 TFEU differs from the burden in unfair competition cases under Article 15 UC. It is clear from established case law that the EC does not need to prove that the conduct actually steers the traffic away from competing comparison shopping services and in favour of Google's comparison-shopping services. It is sufficient for the Commission to show that the conduct is capable or likely to have such effects. As noted in the doctrine, Google Shopping has highlighted the uncertainty that remains in the context of Article 102 TFEU as to the precise meaning of the concept of anti-competitive effects. As a result, the GC did not consider it proven that Google's conduct at issue had anti-competitive effects, or even potential effects, on the market

for general search services.

In the civil case against Google before the Warsaw District Court, Ceneo will be forced to demonstrate a number of circumstances concerning the harmful effects of the mentioned practices on competition and consumer welfare as a whole. The entity seeking judicial protection – in this case, Ceneo – must prove the existence of at least one of the acts of unfair competition referred to in Article 15(1)(1)-(5) ACUC. On the other hand, it is presumed that the fulfilment of the elements listed in Article 15(1)-(5) ACUC leads to the tort of obstruction of access to the market – unless the defendant (Google) proves to the contrary that there was no obstruction of access to the market. However, certainty in this regard is weakened by those decisions of the Supreme Court which accept that the entrepreneur claiming protection under Article 18 of the CCL has the burden of proving not only that an "*act of unfair competition*" has occurred – but also that the act consisted in "*hindering access to the market*" (III CSK 23/08, LEX no. 449921). This latter view imposes an extremely high burden of proof on the plaintiff.

As the CCPO has reasonably pointed out in this case, in order to assess Google's conduct, it is necessary to determine whether and to what extent it redirected traffic from its search engine to its own products and services (or provided an advantage to Google's entire network of price comparison services, e.g. to advertisements or sponsored material acting as a quasi-comparison engine) or to those of other Alphabet entities, at the expense of Ceneo – and, more broadly, of other competing price comparison sites. Events relating to the way in which Google presents search results are observable, although not for all queries.

However, the CCPO reasonably pointed out that the key issue in the present case is not the mere frequency of occurrence of any of the alleged Google actions, but the determination of their impact on Ceneo's ability to compete and operate in the market. In particular, it is necessary to determine the extent to which the described Google actions may lead to a diversion of traffic from Ceneo's comparison engine to Google's own price comparison engine. Confirmation of the actual presence of Google's behaviour described by Ceneo and its effects on competition will only be possible by obtaining data from Google in the course of a civil lawsuit. If Ceneo were to file a lawsuit against Google, information on the design and operation of the algorithms responsible for the presentation and positioning of search results in Google's search engine would be crucial.

Interim remedies ordered by the DCW – compared to the EC Google Shopping and the DMA

Unlike in the Google Shopping case, where the EC did not prescribe a specific remedy (it ordered Google merely to bring the infringement to an end and to apply the principles mentioned in recital 700), in the Ceneo case the DCW adopted concrete interim measures. Pursuant to Art. 755(1) of the Code of Civil Procedure, the court has wide discretion as to the interim measures it considers appropriate, depending on the circumstances of the case.

In the Ceneo case, DCW has decisively secured far-reaching future claims for the company, which – should they prove to be justified – will significantly interfere with Google's freedom of action in the area of Google Shopping services. The latter is of particular importance – as the DCW is bound by the findings of the Commission's 2017 decision, which is likely to be upheld in the forthcoming ECJ ruling regarding Google Shopping's self-preferencing. In this context, the powers of the civil court (DCW) may appear to be a more effective weapon against Google, and this case may provide

an answer to whether Google is enforcing the ban on self-preferencing in Google Shopping.

At the same time, it is worth noting that all three systems, the DMA, the EU competition law and the Polish ACUC, are parallel but not conflicting. They complement each other. Thus, the interim measures imposed on Google by the DCW are in line with DMA standards. Recital 52 of this Regulation indicates that the "*gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, and related indexing and crawling, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls*. (…) *Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results and should also include instances where a core platform service presents or communicates only one result to the end user*". Thus, the prohibition of self-preferencing is expressly set out in Article 6(5) of the DMA, which provides that: "[*t]he gatekeeper shall not, in its ranking and related indexing and crawling, give more favourable treatment to services and products offered by the gatekeeper itself than to similar services or products offered by third parties*". If the DCW considers it established in the upcoming proceedings that Google applies self-preferencing for Google Shopping services on the territory of the Republic of Poland, it may enforce *per facta concludentia* Article 6(5) of the DMA. Nonetheless, in any event, the DCW may, where it considers it justified, request information or an opinion from the EC under Article 39(1) of the DMA on any matter relating to the application of this Act.

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