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Google Shopping (C 48/22 P) – Implications and Outlook after the ECJ's Judgment

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The recent *Google Shopping* ruling has already sparked much debate, and an earlier blog post offers a detailed overview of the judgment itself. Building on this, this contribution's focus is to emphasize and discuss some aspects in the academic analysis, the judgment's broader implications and outlook for further actions. It builds upon a recently published working paper.

What we took from *Google Shopping* in a nutshell

At the heart of our analysis is the nuanced approach to defining self-preferencing as an independent form of abuse under Article 102 TFEU. We argue that the ruling moves beyond purely economic assessments, incorporating a principled interpretation of fairness and market structure and discrimination as an independent form of abuse. We underline the necessity of demonstrating significant foreclosure effects alongside specific circumstances to establish a self-preferencing abuse, ensuring that not all self-preferencing is treated as inherently harmful.

The discrimination itself needs to be of double degree: self-favouring and demotion of competitors. However, one of the ruling's most notable outcomes is its articulation of this "plus" required for self-preferencing to constitute abuse. While mere discrimination is insufficient, the Court emphasized the necessity of evidence showing significant foreclosure effects and specific circumstances amplifying the harm. This avoids treating all self-preferencing as inherently harmful but provides a robust framework for evaluating its impact on competition.

Importantly, the judgment also underscores the EC's procedural latitude in proving abuse. The Court affirmed that indirect and circumstantial evidence can suffice to establish an infringement, provided it is cogent and plausible. While a counterfactual analysis may enhance the robustness of evidence, the EC is not obligated to employ such tools unless warranted by the complexity of the case or the nature of the defence raised. This pragmatic approach enables more timely enforcement, particularly in fast-moving markets, but also raises questions about the evidentiary burden for defendants seeking to rebut claims of abuse.

Broader implications and outlook of the case

The procedural delays in *Google Shopping* clearly highlight the limitations of ex-post enforcement in the digital economy. The years-long litigation allowed Google to entrench its market position, diminishing the practical impact of the judgment. This underscores the need for swifter remedies, e.g. through interim measures or complementary ex-ante regulations like the DMA. However, striking the right balance between flexibility and legal certainty remains a challenge, particularly as national authorities adopt their own approaches, such as Germany's § 19a GWB. Despite some notable advancements, the ruling leaves significant questions unanswered. The threshold for "specific circumstances" in self-preferencing cases remains open to interpretation, necessitating future jurisprudence to refine its contours. Furthermore, the interplay between Article 102 TFEU and emerging regulatory frameworks, such as the Digital Markets Act (DMA) or § 19a GWB, introduces potential conflicts. The DMA's explicit prohibition of self-preferencing by gatekeepers contrasts with the case-specific, effects-based analysis endorsed in *Google Shopping*, suggesting a divergence in enforcement priorities that may complicate compliance for digital platforms.

Looking ahead, the *Google Shopping* ruling serves as both a milestone and a cautionary tale. It reinforces the importance of adapting competition law to the realities of digital markets while respecting fundamental procedural safeguards. Yet, it also calls for a more integrated enforcement ecosystem that bridges the gap between ex-ante and ex-post mechanisms. As new regulatory initiatives unfold, the true legacy of this case will depend on how well policymakers and enforcers navigate these complex dynamics. For now, *Google Shopping* stands as a compelling reminder of the enduring tension between innovation, competition, and regulation in the digital age.

While the public enforcement phase of *Google Shopping* may be complete, private enforcement is ongoing. Several private actions have been initiated at the national level, many on hold pending this final ECJ decision and now back on track. Let us all remind *Heureka* (discussed also here): limitation periods have been on hold during the Commission investigation and any now finally closed follow-up court proceedings. This gives many possible harmed parties sufficient room for private follow-on actions on national level now despite the overall long duration of the proceedings on EU level. The only thing left to tackle is proving harm and causality in self-preferencing cases – a possible courageous but still to overcome endeavour!

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