

*The EU General Court upholds Google's fine and gives wings to the EU policy on online platforms*

Declares that Google's generic search service has characteristics similar to those of an essential facility

Pedro Callol

REUTERS

Share on FacebookShare on TwitterShare on LinkedInShare on LinkedInSend by mailGo to comments

Madrid 11 NOV 2021 - 10:58 CET

The General Court of the European Union (GCEU) has just upheld the Commission's 2017 decision condemning Google for infringement of Article 102 TFEU. The imputed conduct consisted of more favorable treatment (better presentation or ranking in search results) of Google's own comparison shopping services over those of competitors.

The decision of the GCEU has attracted a great deal of attention by solving the first of several pending proceedings on Internet platforms, raising issues of great importance, not only for the pending litigation, but more broadly for the policy and *ex ante* regulation of the platforms, which is currently being debated in the European Parliament (Digital Markets Act). The dismissal of the appeal gives arguments to the advocates of intervening on the conduct of these platforms on both sides of the Atlantic.

The facts and legal arguments discussed are numerous and complex. Perhaps one of the most striking aspects is the essential facility treatment with which the GCEU equates Google's search services (although the GCEU is careful to specify that Google is something "akin to" an essential facility). In general, this essential facility treatment has been attributed to network industries (local loop in telecommunications, transport and distribution networks in energy) or transport (railways, ports) endowed with some economically irreplicable infrastructure (natural monopoly). Common carrier obligations have been imposed on many of these companies, such as the obligation to guarantee third party access to networks under non-discriminatory conditions. Underlying the Google case is a debate on the extent to which it is legitimate to impose such obligations: it is not a physical monopoly like those of the industries mentioned above, which operate essential infrastructures for historical reasons (former State monopolies).

The GCEU states that Google's generic search service has features similar to those of an essential infrastructure: there are no substitutes capable of replacing Google's service on the market. However, it is not obvious that a search algorithm, however sophisticated, cannot be replicated, as is the case with a "traditional" natural monopoly. But the facts indicate that Google is a super-dominant company, with market shares close to monopoly; furthermore, that Google is able to discriminate in favor of its own services and that this is not met with a migration of its customers is indicative of Google's market power. In the absence of entry barriers, it would not be possible for Google to sustain such discrimination.

The GCEU explains (with express reference to European common carrier telecommunications regulation) that even in the absence of a specific regulatory obligation requiring Google to share its infrastructure, Article 102 TFEU and the case law surrounding it preclude differences in treatment by a dominant undertaking in certain circumstances. From there, the GCEU will conclude that this case is not one of access (Google Shopping competitors do appear in Google searches), but of discrimination (although they gain access, competitors are treated worse). This allows the GC to distinguish the case from the precedent invoked by Google (*Oscar Bronner*), although putting the bandage before the wound, the GC insists on the irreplicability of Google

search (although it is careful not to state categorically that Google is an essential facility). The GC seems to want to make an articulated appeal on this issue more difficult.

The GCEU also rejects the argument that the European Commission did not take into account in its analysis the competitive pressure exerted by commercial platforms, some of which are of enormous importance (Amazon). The GCEU upholds the relevant market definition delineated by the European Commission, which would not include services provided by Amazon-type platforms, distinguishable from Google's comparison shopping services.

Google still has the possibility of appealing in cassation, an appeal that is not easy and must be based on points of law, such as perhaps an argument regarding the erroneous application of the case law outlined above.

**Pedro Callol**, founder of Callol, Coca & Asociados, a law firm specialized in competition law. President of the Fulbright Association of Spain. Member of the Advisory Board, American Antitrust Institute, Washington, D.C.