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Alessia Sophia D'Amico & Baskaran Balasingham

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Super-dominant and super-problematic? The degree of dominance in the Google Shopping judgement

Alessia Sophia D'Amico and Baskaran Balasingham

School of Law, Utrecht University, Utrecht, Netherlands

ABSTRACT

In the *Google Shopping* judgment, the General Court refers to Google's super-dominance and with it its stronger obligation not to allow its behaviour to impair effective competition. The concept of super-dominance suggests that certain conduct could breach Article 102 TFEU only when adopted by super-dominant undertakings, but it remains uncertain how exactly it contributes to finding an abuse. The aim of this paper is to analyze the *Google Shopping* judgment in relation to the concept of super-dominance. We explore how the concept has evolved in the case-law and what role it has played when establishing an abuse of dominance and analyze whether reliance on super-dominance in the case law is consistent with the effects-based approach. Finally, we examine how Google Shopping fits with the evolution of super-dominance in the case law and the effects-based approach and what it means for the regulation of digital gatekeepers going forward.

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1. Introduction

EU competition law distinguishes between dominant and non-dominant undertakings, placing upon the former a special responsibility not to undermine the market functioning. Accordingly, while dominant undertakings can breach Article 102 TFEU,[1] when they abuse their position in the market, the same does not apply to non-dominant undertakings. In *Compagnie Maritime Belge (CMB)*,[2] a further distinction pertaining to the degree of dominance was introduced with the concept of super-

CONTACT Alessia Sophia D'Amico a.s.damico@uu.nl

[1]Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326(47).

[2]Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge NV and Dafra-Lines v Commission*, ECLI:EU:C:2000:132.

dominance.[3] This new distinction appears to imply that the same conduct may breach Article 102 when performed by a super-dominant, but not by a "regular" dominant undertaking. Although this further differentiation might seem to follow from the distinction between dominant and non-dominant undertakings, the concept of super-dominance sits uneasily both with the text and the enforcement of Article 102. The reason is that it could be used to impose obligations on super-dominant undertakings that regular dominant undertakings do not have, meaning that obligations could be attached to undertakings based on their market position rather than their actual conduct, which is not foreseen by the Treaty.[4] In *Michelin I*, the Court famously held that dominance

> is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a *special responsibility* not to allow its conduct to impair genuine undistorted competition on the common market.[5]

Finally, it is doubtful whether the concept of super-dominance is compatible with contemporary economic thinking.

Since *CMB*, the concept of super-dominance and the notion of the degree or extent of dominance have occasionally reappeared in cases of the European Commission and the Court of Justice of the European Union. However, it remained unclear what the concept's implications are and how coherence with Article 102 can be secured. In *TeliaSonera*, the European Court of Justice (ECJ) attempted to clarify the use of the concept of super-dominance and ensure a consistent application of Article 102, by stating that

> the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.[6]

A decade later, the concept reappeared in the *Google Shopping* judgment of the General Court (GC),[7] where it refers to Google's super-dominance and with it its stronger obligation not to allow its behaviour to impair competition.

The aim of this paper is to explore the concept of super-dominance, with a focus on the role it has played in the *Google Shopping* judgment.

[3] J. Appeldoorn, 'He Who Spareth His Rod, Hateth His Son? Microsoft, Super-dominance and Article 82 EC' (2005) 26 *European Competition Law Review* 653, 656–657.
[4] Ibid.
[5] Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission*, ECLI:EU:C:1983:313, para. 57. Emphasis added by the authors.
[6] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige*, ECLI:EU:C:2011:83, para. 81.
[7] Case T-612/17, *Google and Alphabet v Commission* (hereafter '*Google Shopping*'), ECLI:EU:T:2021:763.

First, we give a brief overview of the *Google Shopping* judgment and illustrate how the concept of super-dominance was used by the GC. Secondly, we analyse how the concept has evolved in the case law and what role it has played when establishing an abuse of dominance. Thirdly, we analyse to what extent the reliance on super-dominance in the case law is consistent with the effects-based approach. Finally, we discuss how the *Google Shopping* judgment fits with the evolution of super-dominance in the case law and the effects-based approach and what it could mean for the regulation of digital gatekeepers going forward.

2. The *Google Shopping* judgment

In its investigation, the European Commission found that at the time Google was holding a dominant position in the general internet search market in all 13 Member States where the Commission investigated its conduct.[8] Google competes with other firms in the related market for specialized search services for shopping ('comparison shopping services'). Consumers typically use general internet search in order to reach comparison shopping websites. The Commission accused Google of leveraging its dominance in the general internet search market to exclude competitors in the comparison shopping services market. It was concerned about

> the fact that Google was not applying the same processes and methods in order to decide the positioning and display of results from its own comparison shopping service and from competing comparison shopping services that could appear on its general results pages, in so far as the application of different processes and methods for positioning and displaying its own results and those from competing comparison shopping services led to the favouring of results from its own comparison service and the demotion of results from competing comparison shopping services in the general search pages.[9]

Google's abuse, according to the Commission, was a combination of the promotion of its own comparison shopping service and the demotion of competing services. When discussing whether Google's practices indeed constituted an abusive leveraging, as claimed by the Commission, or whether they represented a quality improvement and hence competition on the merits, as claimed by Google, the GC reiterated that the scope of a dominant undertaking's special responsibility must be considered in light of the specific

[8]Commission Decision of 27 June 2017, Case AT.39740 *Google Search* (Shopping).
[9]*Google Shopping*, para. 574.

circumstances of each case.[10] The Court explained that Google entered the market for specialized comparison shopping services when providers of such services had already existed and in view "of its 'superdominant' position, its role as a gateway to the internet and the very high barriers to entry on the market for general search services",[11] Google had a stronger obligation not to undermine competition in that market. The GC then held that the Commission had sufficiently demonstrated why Google's conduct constituted abusive leveraging by (1) explaining why its practices departed from competition on the merits, stating that they diverted traffic and were capable of having anticompetitive effects; and (2) making reference to the importance of traffic generated by Google's general search engine for comparison shopping services, user behaviour when carrying out online searches and the fact that the traffic diverted could not be effectively replaced.[12] As to the effects on comparison shopping services markets, it was revealed that 38% of the 361 competitors in that market were no longer active (another statement put the figure at 21%).[13] Besides the exit of competitors, other anticompetitive effects of the conduct were competitors' and Google's reduced incentives to innovate and reduced consumer choice.

We now look at the evolution of the concept of super-dominance in the case law and assess to what extent its use is consistent with the effects-based approach, before evaluating how *Google Shopping* fits with the evolution of super-dominance and the effects-based approach.

3. Evolution of super-dominance

Before Advocate General (AG) Fennelly spoke about "super-dominance" in his opinion in *CMB*,[14] the degree of an undertaking's dominance already played a role in the ECJ's *Tetra Pak II* judgment, in which the Court submitted that "the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case".[15] The ECJ confirmed the findings of the GC, holding that

> the quasi-monopoly enjoyed by Tetra Pak on the aseptic markets and its leading position on the distinct, though closely associated, non-aseptic

[10]Ibid, para. 165.
[11]Ibid, para. 183.
[12]Ibid, paras. 195–196.
[13]Ibid, para. 452.
[14]Opinion of Advocate General Fennelly delivered on 29 October 1998 in Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge NV and Dafra-Lines v Commission*, ECLI:EU:C:1998:518.
[15]Case C-333/94 P, *Tetra Pak v Commission* ECLI:EU:C:1996:436, para. 24.

> markets placed it in a situation comparable to that of holding a dominant position on the markets in question as a whole.[16]

The high degree of dominance in one market was used by the Court to conclude that, for the purposes of competition law, the undertaking was also dominant in a neighbouring market in which it held a leading position and thus had a special responsibility not to undermine competition in both markets. This seems to indicate that had Tetra Pak had only a regular dominant position in the first market, it might not have been considered dominant in the second one, meaning that its conduct on that market could not have infringed Article 102 TFEU.

CMB was concerned about the abuse of a collective dominant position by members of a liner shipping conference. The maritime transport market was a very specialized sector; a block exemption regulation[17] permitted liner conferences to cooperate in fixing rates for maritime transport. The Commission found that members of a liner conference, the Central and West African Conference (Cewal), had abused their dominant position through an exclusivity agreement, price-cutting and loyalty rebates, in an attempt to eliminate their main rival. In his opinion,[18] AG Fennelly claimed that Article 102 "cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their superdominance confers so as to preclude the emergence either of a new or additional competitor".[19] First, according to AG Fennelly, super-dominance appears to refer to a monopolistic or quasi-monopolistic position. Second, similarly to the Court's findings in *Tetra Pak II*, the opinion of the AG specifies that undertakings with an exceedingly high degree of dominance have a "particularly onerous special obligation"[20] not to impair the competitive process, implying that the special responsibility is stricter the higher the degree of dominance. In other words, "the risks of being found to be acting abusively are higher due to the effects of a 'super-dominant' firm's conduct on the market".[21]

A year after the AG's opinion, the GC in *Irish Sugar*[22] referred to the defendant's "extensive" dominant position and argued that although

[16]Ibid, para. 31.
[17]Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (1986) OJ L 378(4).
[18]Opinion of Advocate General Fennelly delivered on 29 October 1998 in Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge and Dafra-Lines v Commission*, ECLI:EU:C:1998:518.
[19]Ibid, para. 137.
[20]Ibid.
[21]R. Whish and D. Bailey, *Competition Law* (10th ed., OUP, 2021), p. 193.
[22]Case T-228/97, *Irish Sugar v Commission*, ECLI:EU:T:1999:246.

every undertaking has the right to protect its commercial interest, an undertaking with a high degree of dominance "must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers".[23] Here, again, we see that the GC associates greater market power with greater responsibility (towards the competitive process and, ultimately, the interests of consumers). What follows from the GC's judgment is that an undertaking in a regular dominant position has more leeway to protect its own commercial interests than a super-dominant undertaking.

Also the Commission referred to the degree of an undertaking's dominance in a few decisions. In *Football World Cup*[24] and *Deutsche Post*[25] the Commission maintained that the scope of an undertaking's responsibility must be considered in relation to its degree of dominance. In *Microsoft*,[26] the Commission deemed that Microsoft's market share of over 90% in the client PC operating systems market put it in a "quasi-monopoly" and an "overwhelmingly dominant" position. The Commission argued that Microsoft's special responsibility and the competitive significance of its refusal to give access to interoperability information derived from its quasi-monopoly. The GC[27] found that the Commission was "correct to state … that that particular responsibility derived from Microsoft's 'quasi-monopoly'".[28] Appeldoorn criticized the role that super-dominance played in the *Microsoft* decision and stressed that under Article 102 super-dominance by itself cannot be considered an infringement.[29] He illustrates the danger of a misuse of the concept of super-dominance in abuse cases, by saying that "a company in a (near) monopoly position, or a company like Microsoft for that matter, will find itself with almost no room to compete, lest it risks being found guilty of contravening [Article 102]".[30]

After *Microsoft*, the transition towards a "more economic approach" in EU competition law began,[31] which also affected the concept of super-dominance. The Court and the AG sought to redefine the role of

[23] Ibid, para. 189.
[24] Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 *Football World Cup*), para. 86.
[25] Commission Decision of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 — *Deutsche Post AG* — Interception of cross-border mail), para. 103.
[26] Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*).
[27] Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.
[28] Ibid, para. 775.
[29] Appeldoorn (2005), 656–57.
[30] Ibid, 656.
[31] See Section 4 below.

super-dominance in Article 102 cases in *TeliaSonera*. In his opinion,[32] AG Mazák emphasized that there is no reference to the concept of super-dominance in the Treaty and explained that:

> Admittedly, there is case-law of the General Court that the greater the extent of an undertaking's dominance, the higher the probability that a practice which seeks to protect the undertaking's position will result in a restriction on competition. In my view, however, the degree of market power of the dominant undertaking should not be decisive for the existence of the abuse. Indeed, the concept of a dominant position arguably already implies a high threshold so that it is not necessary to grade market power on the basis of its degree.[33]

The ECJ[34] agreed with the AG and explained that the strength of an undertaking is relevant when assessing the lawfulness of conduct under Article 102, as it has done in *Tetra Pak II* and *CMB*. It goes on saying that

> nonetheless the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.[35]

Despite the apparent restriction of the role of the degree of dominance, with the formulation "as a general rule", the ECJ created a caveat that leaves open the possibility for super-dominance to play a role when assessing whether an abuse exists.[36] The fact that the degree of dominance continues to play a role in Article 102 cases was confirmed by the ECJ in *Post Danmark II*,[37] in which it argued that

> having regard to the particularities of the present case, it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market.[38]

A closer look at the cases in which the degree of dominance was relied on reveals that in all of them particularly high entry barriers were present (see Table 1). This could be interpreted as meaning that a greater responsibility is placed upon undertakings when their market position is not purely based on merit but on external factors. In other words, the source of dominance is considered when assessing the degree of

[32]Opinion of Advocate General Mazák delivered on 2 September 2010 in Case C-52/09, *Konkurrensverket v TeliaSonera*, ECLI:EU:C:2010:483.
[33]Ibid, para. 41.
[34]Case C-52/09, *Konkurrensverket v TeliaSonera Sverige*, ECLI:EU:C:2011:83.
[35]Ibid, para. 81.
[36]A. Jones et al., *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (OUP 7th ed., 2019), 369.
[37]Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651.
[38]Ibid, para. 30.

responsibility and, correspondingly, finding an abuse. The most relevant category in this regard is the existence of a statutory monopoly or other legal framework that contributes to market power (as in *CMB*, in which collective dominance was achieved due to a block exemption). While super-dominance has been addressed only in a very small number of cases, the concept has come up relatively more frequently in cases dealing with statutory monopolies. Similarly, Sauter states that the concept "appears to concern entrenched monopolies".[39] In *Post Danmark I*,[40] the ECJ argued that the fact that the dominant position originated from a former statutory monopoly must be taken into account.[41] According to commentators, a previous statutory monopoly in some cases may be a substitute for super-dominance as a relevant factor.[42] An alternative interpretation of the Table 1, however, could be that exceedingly high entry barriers go hand in hand with super-dominance. It is almost impossible for an undertaking to achieve such an extensive dominance, if not protected by such entry barriers. Interestingly, in *Post Danmark I*, AG Mengozzi seems to claim that super-dominance itself is a barrier to entry that needs to be taken into account.[43]

When looking at early case law surrounding the concept of super-dominance, it appears that a high degree of dominance lowers the threshold for intervention in Article 102 cases. According to the wording of Article 102, the degree of market power alone does not

Table 1. Entry barriers in super-dominance cases.

Case	Institution/ instance	Year	Statutory monopoly	IP rights	Other entry barriers
Tetra Pak II	ECJ	1996	No	No	Yes
CMB	AG	1998	No	No	Yes[44]
Irish Sugar	GC	1999	Yes	No	Yes
Football World Cup	EC	2000	No	No	Yes[45]
Deutsche Post	EC	2001	Yes	No	No
Microsoft	EC; GC	2004; 2007	No	Yes	Yes
TeliaSonera	AG; ECJ	2011	Yes	No	No
Post Danmark II	ECJ	2015	Yes	No	Yes

[39]W. Sauter, 'A duty of care to prevent online exploitation of consumers? Digital dominance and special responsibility in EU competition law' (2020) 8 *Journal of Antitrust Enforcement* 406, 414.
[40]Case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172.
[41]Ibid, para. 23.
[42]Jones et al. (2019), 369.
[43]Opinion of Advocate General Mengozzi delivered on 24 May 2011 in Case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2011:342, para. 92.
[44]Collective dominance through block exemption (Regulation No 4056/86).
[45]The CFO represented the sole outlet for blind sales to the general public in 1996 and 1997 of Pass France 98 and individual entry tickets (in agreement with FIFA).

justify finding an abuse. What needs to be carried out to establish if the conduct is abusive is an assessment of the *effects* of the behaviour.[46] What the effects-based approach entails and what role it has played in the evolution of the concept of super-dominance is discussed in the next section.

4. Super-dominance and the effects-based approach

At the end of the 1990s, the European Commission launched a major reform in the enforcement of EU competition law. The Commission took various steps to adopt the so-called "more economic approach" with the aim of realigning EU competition law with contemporary economic thinking.[47] This "modernization" of EU competition law stretched over the period of ten years and concluded with the reform of Article 102 TFEU in 2009.[48] Already four years before the adoption of the Guidance on Article 102,[49] the staff of DG Competition published a discussion paper on exclusionary abuses. Therein, it stated that in applying Article 102 "the Commission would adopt an approach which is based on likely effects on the market".[50] It is under Article 102 that the more economic approach has had the most impact.[51] Prior to the review, the Commission faced continued criticism for its reliance on form-based presumptions of illegality in its enforcement of Article 102.[52] The Discussion Paper and the Guidance on Article 102 were welcomed by many academics and the business community for its departure from the formalistic approach.[53] However, the Commission's commitment to more in-depth analysis in the context of exclusionary abuses clashed with the indifference and, in some cases, outright opposition of the EU Courts.[54] Nonetheless, in some more recent cases, the EU Courts appeared to "indicate some change in direction and a higher receptivity to some of the precepts of the economic approach".[55]

[46]It is, of course, possible that the effects of undertakings' conduct are influenced by their degree of dominance.
[47]A. Witt, 'The European Court of Justice and the More Economic Approach - Is the Tide Turning?' (2019) 64 Antitrust Bulletin 172, 172.
[48]Ibid, 172–174.
[49]Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009 OJ C 45/7).
[50]DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005), para. 4.
[51]Witt (2019), 185.
[52]Ibid. See also L. Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010) 14; R. O'Donoghue and J. Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006) 16-20.
[53]I. Lianos and V. Korah, 'Competition Law: Analysis, Cases & Materials' (OUP 2019), 60.
[54]Ibid. See also W. Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37 *World Competition* 405.
[55]Lianos and Korah (2019), 60.

Besides relying less on presumptions, the more economic approach also highlighted the notion of "competition on the merits". This notion, as stated by the Court in *Post Danmark I*, clarifies that the purpose of Article 102 is not to protect less efficient competitors and that not every exclusionary effect is necessarily detrimental to competition.[56] Like the notion of the special responsibility of a dominant undertaking, the notion of competition on the merits finds its origin in the definition of "abuse of dominance" in *Hoffmann-La Roche*, specifically the recourse to methods different from those of normal competition.[57]

The early cases mentioned above show that the concept of super-dominance stems from a formalistic approach to competition law analysis. In *Tetra Pak II*, the ECJ confirmed the GC's finding that, on the basis of its quasi-monopolistic position in the aseptic packaging market, the defendant also enjoyed a dominant position in the non-aseptic packaging market, which was a distinct but closely associated to the former market.[58] It added that an "undertaking in such a situation must be able to foresee that its conduct may be caught by [Article 102 TFEU]".[59] The ECJ appears to have established a presumption that a quasi-monopolistic position on one market may lead to dominance in an adjacent market.

The concept of super-dominance has been criticized by legal commentators and economists. First, Article 102 makes no reference to varying degrees of dominance and corresponding levels of responsibility. O'Donoghue and Padilla state:

> The rule is clear: all dominant companies should be free to compete by legitimate means, and none should be allowed to compete by exclusionary means. There is no obvious or identifiable reason why companies with especially high market shares should have additional duties not applicable to other dominant companies.[60]

Following the Commission's decision in *Microsoft*, Appeldoorn argued that "super-dominance should be a thing of the past"[61] and called for a greater focus on actual harm done to competition. It is clear that super-dominance does not sit easily with the more economic approach. Like ordinary dominance, the concept of super-dominance is binary –

[56]C-209/10, *Post Danmark v Konkurrencerådet*, paras. 21–22.
[57]See OECD Policy Roundtables 'Competition on the Merits', DAF/COMP(2005)27, p. 223.
[58]C-333/94 P *Tetra Pak v Commission*, para. 31.
[59]Ibid, para. 32.
[60]O'Donoghue and Padilla (2006) 168.
[61]Appeldoorn (2005), 657.

an undertaking is either super-dominant or it is not.[62] The more accepted view, however, is that market power is a continuum.[63] There is no basis in economics for identifying a point along that continuum that indicates that a firm could be said to have acquired a super-dominant position.[64] Instead of relying on a form-based presumption of harm against super-dominant firms, it would be more accurate to use the extent of dominance to directly assess the likely effect on competition and harm to consumer welfare.[65] In the Guidance on Article 102, the Commission suggests that the degree of dominance will be *a* factor in establishing foreclosure effects. The Guidance states that "in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anticompetitive foreclosure".[66] The conditions on the relevant market also need to be considered including barriers to entry, such as the existence of economies of scale and/or scope and network effects.[67] Moreover, the Guidance considers the extent of the allegedly abusive conduct, noting that "in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect".[68] This represents a shift in the direction advocated for by Appeldoorn, as it seems to indicate that the degree of market power should no longer be relied on to prove the existence of an abuse but is relevant when assessing the effects of the dominant undertaking's conduct.

As mentioned above, in *TeliaSonera* the ECJ rejected the notion that a dominant undertaking's special responsibility increases with the degree of its dominance. The *TeliaSonera* judgment was handed down at a time when the more economic approach in the context of Article 102 had come to find larger acceptance by the EU Courts. With regard to the defendant's ability to leverage its dominant position from one market into another the ECJ changed its course from *Tetra Pak II*. In both cases, the Court held that the application of Article 102

[62]It is not clear when a 'dominant' undertaking actually crosses the threshold into 'super-dominance'. Moreover, the determining factor may not be a firm's market share, but other factors (OECD, 'Evidentiary Issues in Proving Dominance' (2006), 186).
[63]OECD, 'Evidentiary Issues in Proving Dominance' (2006), 185, available at https://www-oecd-org.proxy.library.uu.nl/competition/abuse/41651328.pdf; O'Donoghue and Padilla (2006), 168.
[64]O'Donoghue and Padilla (2006), 168.
[65]OECD, 'Evidentiary Issues in Proving Dominance' (2006), 185.
[66]Guidance on Article 102, para. 20.
[67]Ibid. The Guidance notes with regard to network effects that "the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour or to further entrench its position on such a market." (para. 20).
[68]Ibid.

> presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market, the fact remains that in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated, market and having effects on that associated market can be justified by special circumstances.[69]

Yet, the Court's consideration of the special circumstances was very different in the two cases. In *Tetra Pak II*, the Court indicated that the special circumstance was Tetra Pak's quasi-monopolistic position in the aseptic market.[70] The Court did not assess how Tetra Pak leveraged its position from the aseptic market into the non-aseptic market. In *TeliaSonera*, by contrast, the Court noted that such special circumstances may be present where a vertically integrated dominant undertaking tries to foreclose an as-efficient competitor and that such practice is likely to arise due to the close links between the markets concerned, resulting in the weakening of competition in the downstream market.[71] Hence, the Court emphasized that the foreclosure of competition on the retail market does not depend on whether a dominant position on that market had been leveraged from the dominant position on the wholesale market. It rather depends on whether the defendant relies on practices contrary to competition on the merits.[72]

Following its judgment in *TeliaSonera*, the ECJ continued to highlight that the extent of an undertaking's dominance is relevant only in establishing anticompetitive effects. In *Post Danmark II*, the ECJ followed the GC's approach in *Intel*[73] by emphasizing that, among other factors, the extent of the defendant's dominant position needs to be considered in establishing whether rebates of the third category are abusive. More unequivocally than the GC in *Intel*, the ECJ referred to the extent of Post Danmark's dominant position[74] and argued that Post Danmark's very large market share made it an unavoidable trading partner, making it particularly difficult for competitors to outbid it in the face of rebates based on overall sales volume.[75] Nevertheless, the Court also stated the "fact that the rebates applied by Post Danmark concern a large proportion of customers on the market

[69] C-52/09, *Konkurrensverket v TeliaSonera Sverige*, para. 86; C-333/94 P *Tetra Pak v Commission*, para. 27.
[70] C-333/94 P *Tetra Pak v Commission*, para. 28.
[71] C-52/09, *Konkurrensverket v TeliaSonera Sverige*, para. 87.
[72] Ibid, paras. 88-89.
[73] Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632.
[74] Case C-23/14, *Post Danmark v Konkurrencerådet*, para. 39.
[75] Ibid, para. 40.

does not, in itself, constitute evidence of abusive conduct by that undertaking"[76] and that it "may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect".[77] It follows from this judgment, and in accordance with the more economic approach, that the degree of dominance cannot be used as a presumption of illegality but merely as a "useful indication". In this judgment, the Court also held that "applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible".[78] This very much aligns with the Court's finding in *Post Danmark I* that dominance originating from a former statutory monopoly is a factor that needs to be taken into account.[79] Considering that a super-dominant position stems from market characteristics (e.g. due to a statutory monopoly, IP right, or other high barriers to entry) that virtually exclude the possibility of an as-efficient competitor from emerging, the concept of super-dominance can arguably be reconciled with the more economic approach.

5. *Google Shopping* and digital gatekeepers

In line with the more economic approach and *TeliaSonera*, Google's super-dominance was not in itself relevant for proving the existence of the abuse; an economic assessment was used to establish the anticompetitive effects of Google's conduct. Nonetheless, the fact that the Court explicitly referred to super-dominance and the special responsibility that comes with it cannot be ignored. The Court does not explain what weight Google's super-dominance had in the finding of the abuse, opening the door for interpretation. As a starting point, the Court notes that not every exclusionary effect is necessarily detrimental to competition and that, by definition competition on the merits may lead to the foreclosure of less efficient competitors.[80] Later, the Court clarifies that not every extension of dominance from one market to an adjacent market necessarily amounts to an abuse, even if that extensions results in the departure or marginalization of rivals. Only when the dominant undertaking uses practices that "fall outside the scope of competition

[76]Ibid, para. 44.
[77]Ibid, para. 46.
[78]Ibid, para. 59.
[79]C-209/10, *Post Danmark v Konkurrencerådet*, para. 23.
[80]Google Shopping para. 157, reference to Case C-413/14 P, *Intel v Commission*, EU:C:2017:632, paragraph 134 and the case law cited.

on the merits"[81] does such an extension of market power constitute an abuse. Arguably, the factors that made Google's practice anticompetitive are related to its gatekeeper position, which renders traffic generated by Google fundamental and irreplaceable.[82]

By referring to Google's role as a gateway to the internet, the GC indicated that because of the characteristics of the market and Google's gatekeeper position, its responsibility went beyond what a regular dominant undertaking would have had. In the case of regular dominance, the market has not tipped towards one firm and is, thus, more likely to be contestable. Arguably, the general internet search market in the countries considered in the Commission's investigation has almost entirely tipped towards Google (as suggested by the lasting market share of nearly 90% in most national markets). The company was, therefore, able to manipulate search results on that market as it was facing little competition, allowing it to leverage its super-dominant position into the comparison shopping services market without fear of retaliation. Comparison shopping services depend on traffic generated by Google's general search engine and did not have a way to effectively replace diverted traffic resulting from Google's conduct. The high barriers of entry in the general internet search market and the market having tipped in favour of Google make Google's position as a gatekeeper particularly powerful.

Google Shopping is, in this way, comparable to cases in which a special responsibility was imposed on statutory monopolies and dominant undertakings benefitting from exclusive rights, bringing us back to Table 1.[83] What strengthens this argument is the Court's affirmation that "a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators".[84] In relation to this statement, Monti argued that "this passage is normally used to motivate abuse cases where the dominant firm enjoys exclusive rights or has enjoyed a state guaranteed monopoly in the past".[85] Arguably, the GC in *Google Shopping* extends this to gatekeepers. Consequently, although an economic assessment was relied on to establish that Google's conduct was anticompetitive, the decision to find

[81] Ibid, para. 610.
[82] Ibid, paras. 195–196.
[83] The table shows that super-dominance was more likely to be relevant in a case in which the dominance derived from a statutory monopoly or the relevant market was characterised by very high barriers to entry.
[84] *Google Shopping*, para. 180.
[85] G. Monti, 'The General Court's Google Shopping Judgment and the scope of Article 102 TFEU' (November 14, 2021), available at SSRN: https://ssrn.com/abstract=3963336, p. 9.

Google responsible for what was a rather novel type of abuse was ostensibly justified by Google's all-pervading role in the digital market and the great impact its behaviour could have on the competitive process.

Although the GC's judgment can be reconciled with the case law, especially in light of the caveat created by the ECJ in *TeliaSonera*, it appears that the need to stretch the application of competition law was a result of the regulatory gap in the digital marketplace rather than a deliberate adaptation of the case law. In its proposal for a Digital Market Act (DMA),[86] the Commission explains that:

> A small number of large providers of core platform services have emerged with considerable economic power. Typically, they feature an ability to connect many business users with many end users through their services which, in turn, allows them to leverage their advantages, such as their access to large amounts of data, from one area of their activity to new ones. Some of these providers exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient these may be.[87]

The Commission acknowledges that the characteristics of gatekeepers, which benefit from very high barriers to entry, including significant economies of scale and network effects, increase the likelihood that the underlying markets do not function well.[88] This means that "the market processes are often incapable of ensuring fair economic outcomes with regard to core platform services".[89] Although Article 102 TFEU is applicable to these gatekeepers, as was the case in *Google Shopping*, the Commission draws attention to the limits that come with the necessity to focus on specific anticompetitive behaviour and the ex-post nature of competition law enforcement.

The DMA addresses problems in the digital market posed by the core platform services, which cannot easily be addressed by competition law. It is not difficult to see that the current DMA proposal was drafted with some of the Commission's decisions against Google in mind.[90] Article 6 (1)(d) of the DMA stipulates that a platform shall

[86]Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.
[87]Ibid, recital 3.
[88]Ibid, recitals 2 and 3.
[89]Ibid, recital 5.
[90]Article 6(1)(b) and (c) of the DMA reflect Google's conduct in *Google Android* (Commission Decision of 18 July 2018, Case AT.40099), while Article 6(1)(d) reflects Google's conduct in *Google Shopping* (Commission Decision of 27 June 2017, Case AT.39740).

> refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking.[91]

This prohibition corresponds to the self-preferencing practice in *Google Shopping*. Andreas Schwab, rapporteur for the DMA, said that with its anticompetitive behaviour, Google

> has not only damaged European companies, but also other online shopping platforms by deliberately downgrading their offers compared to its own. With the [DMA], we will ensure that, in future, the European Commission can intervene before such enormous damage is done.[92]

The objective of the DMA is, indeed, "to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market".[93]

It has been argued that the GC's findings in *Google Shopping*, specifically its reference to the responsibilities deriving from Google's super-dominance and its gatekeeper position, should have an impact on the wider regulation of digital gatekeepers.[94] In particular, "equalising Google's general search results pages with an essential infrastructure that should be open and needs to grant equal access backs up all calls for a tough regulatory stance against any favouring practices by a gatekeeper".[95] The *Google Shopping* case can certainly teach us something about the threats that big tech gatekeepers constitute in digital markets and the limits of competition law when addressing these threats. The DMA is a step in the right direction; the next years will show how effective it will prove to be in curbing the market power of digital gatekeepers and supplementing Article 102.

[91] Ibid, Article 6(1)(d).
[92] The Parliament Magazine, 'EU Court's Google ruling highlights urgency of need to tackle monopoly position of 'Big Tech' say MEPs' by Andreas Rogal (11 November 2021), available at https://www.theparliamentmagazine.eu/news/article/eu-courts-google-ruling-highlights-urgency-of-need-to-tackle-monopoly-position-of-big-tech-say-meps.
[93] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final, recital 10.
[94] T. Höppner, 'EU Shopping Judgment: What Does Equal Access to Google's General Results Pages Mean?' (November 16, 2021). *Hausfeld Competition Bulletin* - Fall 2021, available at SSRN: https://ssrn.com/abstract=3965075, p. 11.
[95] Ibid, p. 11.

6. Conclusion

Google Shopping enhanced our understanding of the role of super-dominance in Article 102 TFEU cases and showed how the concept translates to digital markets. The judgment is in line with the more economic approach, but also shows that the EU Courts are willing to consider the broader role that a dominant undertaking plays in a market and impose responsibilities accordingly. The existence of super-dominance in itself is not enough to show that an abuse exists if anticompetitive effects are not established. Nonetheless, once effects are established, the position of the dominant undertaking on the market can move the needle when it comes to finding an infringement. Greater responsibility not to impair effective competition is imposed on undertakings that are not only super-dominant, but also have a gatekeeper position in the market, which can be due to a statutory monopoly, exclusive rights or other market characteristics. These are markets in which, without equality of opportunity being guaranteed by the gatekeeper, equally-efficient competitors cannot compete. The decision to intervene in the functioning of markets always carries with it a decision over the risks of both over- and under-enforcement. When a market is already not functioning well, the risk of competition authorities unduly undermining it through competition law enforcement is lower, justifying a higher level of intervention. Although we have seen that competition law can protect the functioning of markets in which gatekeepers are present, the inadequacy of the tools available to competition authorities has also become apparent. The DMA might be able to supplement competition law in this respect by ensuring that gatekeepers cannot use their strategic position to distort the competitive process.

Disclosure statement

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