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FAO: Executive Vice-President Margrethe Vestager
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Re: Comparison shopping services call for actions to end Google's Shopping Units

Dear Executive Vice-President Vestager,
Dear Commissioner Breton,

We, the undersigned 43 comparison shopping services ("**CSSs**") from across Europe, are renewing our call for enforcement measures against Google's self-preferencing practices on general search results pages, under EU competition law and/or the Digital Markets Act ("**DMA**").

We welcome the recent judgments *Google Search (Shopping)* and *Android* as well as the adoption of a ban of self-favouring by search engines in the DMA. Both further strengthen the Commission's stance to finally open up Google's general search results pages for the most relevant CSSs by removing Google's self-serving, price-enhancing and inferior "Shopping Units".

Following such landmark competition cases and pioneering legislation, it is time to ensure compliance. Having suffered first-hand from Google's failure to ensure equal treatment within general search results pages, we have been requesting formal steps against Google's non-compliance with the *Google Search (Shopping)* decision since 2017.[1] Recent developments have confirmed our observations, increased our concerns and strengthened our arguments. With this joint letter of the few CSSs that succeeded to stay in business despite Google's non-compliance, we submit that implementing the ban of self-favouring in search results should be the Commission's top priority; either by

- enforcing Google's compliance with the *Google Search (Shopping)* decision,[2] and/or
- addressing compliance with Art. 6(5) DMA once *Google Search* has been designated as a core platform service.

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1 See, for example, joint letter of the founders and CEOs of 41 European CSSs of 28 November 2019 or joint industry letter of 135 companies and 30 industry associations of 12 November 2020.

2 Case AT.39740 – *Google Search (Shopping)*.

A non-compliance proceeding is possible even after the expiration of the 5-year reporting period[3]. Such action would have several benefits, including to safeguard the deterrent effect of EU competition law and to avoid further delays discussing the validity and awaiting the binding effect of the DMA. However, acknowledging that the Commission's policy priorities might favour achieving the Union's digital competition and innovation goals by means of the DMA now, we care less about the procedural path and more about the timely adoption of enforcement measures. Our industry has been stalled by Google's confirmed abuse and the subsequent non-compliance for over 13 years. The Commission needs to re-open space on general search results pages for the most relevant providers, by removing Google's Shopping Units that allow no competition but lead to higher prices and less choice for consumers and an unfair transfer of profit margins from merchants and competing CSSs to Google.

Today, there is clear evidence that Google's chosen mechanism to comply with the* Google Search (Shopping) *decision is both economically ineffective and legally insufficient. The General Court's judgment[4] clarified that equal treatment within search results pages is more than equal treatment within any element of a page such as Shopping Units. The General Court listed several factors that Google needs to fulfil to treat rivals equally. Inter alia, it found that Shopping Units constitute a Google CSS in themselves that directly compete with rival CSSs[5] and that the ability for CSSs to "participate" in such units by bidding for ads within them entails no equal treatment.[6] Google has not changed this mechanism after the decision and therefore does not fulfil the Court's requirements.

The General Court also shuttered the only argument that we have ever heard in favour of the mechanism Google chose to adopt, namely that by now over 90% of the Shopping Units displayed contain at least one product ad (offer) that was served by a rival service. The Court clarified that "*there is nothing in the contested decision to suggest that the Commission, ultimately, indirectly approved the method of integrating ads from competing [CSSs] in the Shopping Units*".[7] The Court itself rejected the mechanism that Google still uses today because to appear in Shopping Units requires rivals "*to become customers of Google's comparison shopping service and stop being its direct competitors*".[8]

Empirical data confirms that Google's mechanism requires a market exit. According to a study of over one million Shopping Units in Summer 2022, "*93% of Google Shopping ads in Shopping Units are published by just the top 20 [Google] CSS partners*". Yet "*the top 20 CSS partners only account for 1.4% of organic search results for the dataset".* This is *"because these CSS partners primarily facilitate Google Shopping Units - they don't offer an online product comparison service themselves*".[9] Put differently, today 93% of the offers in Shopping Units originate from companies that do not compete with Google on any relevant market for comparison shopping services but that have become mere resellers of Google Shopping Ads which they buy at a marginal profit on behalf of merchants. Shopping Units thus continue to constitute a Google-own CSS[10] that is favoured within general search results pages.

While useless for rivals, Google's "compliance mechanism" is highly profitable for Google. "Rival ads" were the biggest driver for tripling Google's search advertising revenues from USD 89 billion in 2016 to USD 257 billion in year 2021. Consumers had to pay the price: Studies repeatedly found that Shopping Units recommend more expensive products than genuine CSSs would, causing

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3 See, for example, answer by European Commission of 8 August 2022, parliamentary question E-002414/2022.

4 Judgment of 10 November 2021 in Case T-612/17 –*Google Shopping*, ECLI:EU:T:2021:763.

5 Ibid., para. 312.

6 Ibid., para. 346 *et seq*., as already set out at recital (439) of the *Google Search (Shopping)* decision.

7 Ibid., para. 593.

8 Ibid., paras 348-355 "*[CSSs] can be included only [..] by adding a 'buy' button or if they act as intermediaries to submit products to Google on behalf of online sellers. Yet [..] these options fundamentally change the business model of a [CSS] in that their role then involves placing products on Google's comparison shopping service as a seller would do, and no longer to compare products. [T]he arguments put forward by Google [...], according to which competing [CSS] were already included in the Shopping Units and therefore there could not have been any favouring, must be rejected*".

9 Searchmetrics, Understanding Google Shopping Ads in 2022, p. 5, 15.

10 See General Court (n. 5), para. 312 "*Shopping Units [..] are in competition with competing [CSSs]. Google does not therefore show how the comparison shopping service offered to internet users by the Shopping Units is intrinsically different from that offered by other comparison shopping services. On the contrary, it appears that both are designed to compare products on the internet and that they are substitutable from the point of view of internet users*".

overpayments in the billions.[11] This is thanks, not despite, the "compliance mechanism". That the Turkish[12] and the South African[13] competition authorities denounced Google's chosen "compliance mechanism" as ineffective and counter-productive, came as no surprise but confirms our position.

Google's prominent embedding of Shopping Units is a prima facie infringement of the DMA's ban on self-preferencing. In addition to its non-compliance with the *Google Search (Shopping)* decision, the current "compliance mechanism" clearly falls short of Google's obligations under the DMA. According to Art. 6(5) DMA, Google "*shall not treat more favourably, in ranking [..] services and products offered by the gatekeeper itself than similar services or products of a third party*". The notion of favored "*search results*" entails the partial or entire "*embedding*" of a service in general results pages.[14] Recital (51) explains that the obligation is supposed to prevent "*the situation whereby a gatekeeper provides its own online intermediation services through an online search engine. When offering those products or services on the core platform service, gatekeepers can reserve a better position, in terms of ranking [..], for their own offering [..]. This can occur for instance with products or services [..] which are [..] partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine*." This could not have described the current situation as regards Google's favouring of its own CSS (Shopping Units) any better:

- Google's Shopping Units provide an online intermediation service that is considered and used by end users as a service distinct and additional to Google's general search service.[15]
- Google is embedding such distinct intermediation service in its general search engine results pages and thereby provides such separate service through its online search engine.[16]
- No competing CSS is entitled to compile and display equivalent groups of specialised product results sourced from its own product index and selected by its own specialised algorithms.

The *per-se* ban in Art. 6(5) DMA of any "embedding" of a separate service, such as a CSS, within search results pages, leaves no room for any justification based upon alleged advantages of Shopping Units for consumers or merchants. In any event, the General Court found that "*Google's conduct could not generate efficiency gains by improving the user experience"* and that *"those efficiency gains, assuming they exist, do not appear in any way to be likely to counteract the significant actual or potential anticompetitive effects generated by those practices"*.[17] Irrespectively, we note that enforcing a ban on self-preferencing under EU competition law or Art. 6(5) DMA would not require a return to "ten blue links", as Google has falsely claimed. There are no technical limits to ensure an equal treatment of CSSs without reducing the quality of general search results pages for consumers and merchants.[18] An end of Google's self-serving Shopping Units would not necessitate an end of product images and or other enriched formats that Google considers helpful for consumers, as long as Google does not use such features to provide a price and product comparison service directly within its general search results pages (thereby embedding its own CSS). Conversely, the positive reactions of consumers and merchants in countries without Shopping Units suggest that an end of such units would pave the way for more innovation and competition in the markets for comparison shopping services, which, by definition, are of high significance for consumer welfare as they promote and encourage low product prices.

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11 A study by Grant Thornton showed that in some markets, prices of products displayed in Google's Shopping Unit were more than 30% higher than the prices for the same products found on the websites of competing (genuine) CSSs. Google's Shopping Units also contained more incorrect offers as compared to leading competitors.

12 TCA, decision of 12 February 2020, 20-20/119-69, recitals (298), (310): "[*P]lacement of competing CSSs in* [Shopping Units] *cannot provide a solution* [..] *While Google can compare the offers selected by itself or competing CSSs when competitors enter this space, competing CSSs can be listed in this space with only one or a limited number of offers*. […] [I]t *does not seem possible to eliminate the effects in question simply by allowing competitors to enter this space*."

13 Online Intermediation Platforms Inquiry, Provisional Summary Report, 2022, para. 129: "*On self-preferencing, the Inquiry does not believe the EU Google Shopping remedy has been effective, nor does it address high marketing costs as there is still payment to appear at the top even if it now comes from other platforms rather than directly from businesses.*"

14 Art. 2(23) DMA.

15 General Court (n. 5), para. 312 (cited above in footnote 11).

16 General Court (n. 5), paras. 222, 331.

17 General Court (n. 5), para. 572.

18 See recital (671) of the *Google Search (Shopping)* decision.

Removing Shopping Units is the best solution: We have patiently waited for the General Court's endorsement of the *Shopping* decision and the DMA's ban on self-preferencing and assisted you along the way. Considering the unambiguous new legal framework, it is now time to walk the talk. The most paramount case at the heart of the calls for the DMA needs to be brought to an effective end. We have weighed up all alternative solutions but came to agree with Recital (51) DMA: the only effective end is that Google no longer displays groups of specialised search results that enable the comparison of products and prices directly within Google's general results pages. Shopping Units need to go.

It is our understanding that intermediation services specialised in other areas such as for accommodation, travel or jobs share our concerns and equally call for an end of Google's boxes. Enforcing compliance with the *Shopping* remedy will thus have an impact far beyond markets for comparison shopping. Conversely, any failure to act resolutely would only invite even more abuses of dominance.

Yours sincerely,

in alphabetical order,

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