Fining Google: A Missed Opportunity for Legal Certainty?

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Abstract

In December 2017 the European Commission imposed a record fine of €2.42 billion on Google in the *Google Search (Shopping)* Case for breach of Article 102TFEU. This article criticizes this fine as an infringement of the principle of legal certainty, since Google could not reasonably have foreseen that its conduct would amount to a breach of Article 102TFEU. It discusses the importance of legal certainty, as well as the broad powers and wide discretion the Commission enjoys in abuse of dominance cases, including the ability not to impose a fine. The article also provides an overview of the uncertainty which surrounded the application of the law at the time of the investigation, as well as the lack of clarity subsequently provided by the Decision. It is argued that, in imposing this record fine, the Commission has missed an opportunity to respect legal certainty, and combine the objective of deterrence with a desire to stimulate pro-competitive behaviour.

Google Search (Shopping); Commission; abuse of dominance; fine; legal certainty

I. Introduction

The European Commission's *Google Search (Shopping)* Decision has sparked considerable debate, both during the investigation, and since the Decision was published.[1] One thing is beyond a doubt, however: the Commission has taken a strong stance against Google's conduct, imposing the highest fine in an abuse of dominance case to date. Although high fines can contribute effectively to deterrence, it can be questioned whether they are always appropriate. When the illegality of conduct is not clear ex ante, imposing severe sanctions may run counter to the principle of legal certainty,[2] and even deter pro-competitive conduct. This article will argue that the Commission has failed to seize the opportunity to fight the cause of legal certainty. In doing so, it will articulate the reasons why imposing a symbolic fine, or even no fine at all, may have been justified in the *Google Search (Shopping)* Decision. The article will examine four key issues: the importance of legal certainty (section II); the powers and discretion of the European Commission in abuse of dominance cases (section III); the uncertainty as to the legal framework of the *Google Search (Shopping)* case during the

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[1] G. A. Manne and J. D. Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2011) 34 Harvard Journal of Law and Public Policy 171; J. Verhaert, 'The Challenges Involved with the Application of Article 102 TFEU to the New Economy: A Case Study of Google' (2014) 35(6) European Competition Law Review 265; R. Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102 TFEU' (2015) 6(5) Journal of European Competition Law and Practice 301; P. Akman, 'A Preliminary Assessment of the European Commission's Google Search Decision' (2017) 3 CPI Antitrust Chronicle 7.

[2] Found in, inter alia, Article 47 of the European Charter on Fundamental Rights and Article 7 of the European Convention on Human Rights.

investigation (section IV); and the lack of clarity in the ultimate *Google Search (Shopping)* Decision. The article concludes that the Commission could, and should, have done more to protect legal certainty in the Google Shopping case, in particular by by imposing a merely symbolic fine. As it stands, the Decision may have increased the uncertainty which other undertakings feel, and jeopardized long-term competition and innovation.

II. The Importance of Legal Certainty

Legal certainty is a fundamental principle of EU law,[3] and elemental in any jurisdiction founded on respect for the rule of law.[4] Legal certainty requires that laws be clear and predictable, so that legal subjects know which conduct is lawful and which behaviour is prohibited.[5] It is enshrined in Article 49 of the Charter on Fundamental Rights of the European Union. It also has a legal basis in Article 7 of the European Convention on Human Rights, to which all EU Member States are signatories. Legal certainty means that legal rules should be *clear and precise*, so that their application to situations is *foreseeable,* and individuals are able to discern their rights and obligations.[6] It also implies, more specifically, that sanctions for the breach of a law can only be imposed if they follow from a clear and unambiguous legal basis. Individuals should be able to know from the law which acts and omissions will make them liable, and which penalties they could incur.[7]

A reasonable person should be able to understand the law, and to foresee its application. 'Law' does not refer to statutory provisions alone, but includes decisional practice and case law.[8] The wording of the provision need not be so precise that its meaning can be discerned without guidance from legal authorities.[9] It is sufficient that individuals (with legal advice if necessary) can understand the provision with assistance of the courts' jurisprudence or authorities' decisions.[10] This means that open-ended provisions, like Article 102TFEU, are not in themselves problematic, if previous case law or decisional practice has provided guidance on their meaning and scope. Liability for conduct which breaches such a broad provision is

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[3] Case C-143/93, *van Es Douane Agenten* [1996] ECR I-43 [27]; Case C-453/00, *Kühne and Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837 [24]; Case C-110/03, *Belgium v Commission* [2005] ECR I-2801 [30]; Case C-94/05, *Emsland-Stärke GmbH v Landwirthschaftskammer Hannover* [2006] ECR I-2619 [43]

[4] H. C.H. Hoffmann, 'General principles of EU Law and EU Administrative Law' in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford University Press 2017) 208; P. Popelier, 'Legal Certainty and Principles of Law-Making' (2000) 2(3) European Journal of Law Reform 321; T. Bingham, 'The Rule of Law' (2007) 66(1) Cambridge Law Journal 69.

[5] Opinion of Advocate General Mischo in Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023 [8].

[6] Case C-63/93, *Duff and Others* [1996] ECR I-569 [20]; Case C-107/97, *Rombi and Arkopharma* [2000] ECR I-3367 [66]; Case C-199/03, *Ireland v Commission* [2005] ECR I-8027 [69]; Case C-17/03, *VEMW and Others* [2005] ECR I-4983 [80]; Case C-158/06, *ROM-Projecten* [2007] ECR I-5103 [25].

[7] Case T-138/07, *Schindler Holding and Others v Commission* [2011] ECR II-489 [96]; and appeal Case C-501/11 P, *Schindler Holding and Others v Commission* [2013] ECLI:EU:C:2013:522 [57].

[8] Schindler, supra 7, [99] (t-138/07) and [57] (c-501/11); as well as European Court of Human Rights: *G. v. France*, ECtHR, Judgment of 27 September 1995, Series A no. 325-B, § 25.

[9] Case T-279/02, *Degussa* v *Commission* [2006] ECR II-897 [71]; Case T-446/05, *Amann & Söhne and Cousin Filterie v Commission* [2010] ECR II-1255 [128].

[10] *Degussa v Commission,* supra 9, [69]; *Amann & Söhn*e, supra 9, [127]; *Coëme and Others v. Belgium*, ECtHR, Judgment of 22 June 2000, *Reports of Judgments and Decisions* 2000-VII, p. 1, § 145.

possible, according to the General Court, if "the individual concerned is in a position, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretation of it given by the courts, to know which acts or omissions will make him liable."[11] If any ambiguities occur, these should be resolved in favour of the individual.[12]

The need for legal certainty to establish liability, and impose sanctions, is expressed in the Latin adage *'nullem crimen, nulla poena, sine lege certa'* (no crime, no punishment, without a certain law). Both the Latin adage and the articles in the Charter and the Convention refer to 'criminal' acts specifically. Nonetheless, the General Court of the EU has confirmed that the principle of legal certainty applies in administrative proceedings.[13] This is in line with the view of the European Court of Human Rights (ECtHR), which interprets 'criminal' broadly, assessing not only the formal legal classification, but also the nature and severity of the offence and penalty.[14] In *Menarini*,[15] the ECtHR held in particular that competition law fines can be of a criminal nature for the purposes of the Convention, and the CJEU has followed suit. The Court has accepted, despite their explicit legal classification as 'non-criminal', that the fines imposed by the Commission in competition law decisions can be 'criminal charges', within the scope of the articles in the Charter and the Convention.[16]

Legal certainty is *fundamental*, because it is an essential cornerstone of a democratic, rule-based, society. It protects natural and legal persons from insecurity, helps discourage them from breaking the law, and gives them the room to develop new activities. It does this in a number of ways. First and foremost, legal certainty guarantees personal freedom by protecting individuals against arbitrary action by the State. It allows them to take the initiative and fulfil their goals, within the limits of the law.[17] Because they have the security of knowing which conduct is lawful, they are not stifled by the fear that their activities will be declared illegal retroactively. Second, legal certainty contributes to deterrence, because it enables individuals to understand the law properly and be aware which conduct is prohibited.[18] People can only actively refrain from breaking the law, if they know what the law is. Third, legal certainty may reduce the risk that individuals lose respect for the law, as argued by Whelan in the context of

[11] Case T-167/08, *Microsoft v Commission* [2012] ECLI:EU:T:2012:323 [84].
[12] As demonstrated by, for example, Case C-169/80, *Gondrand and Garancinipara* [1981] ECR 1931 [17] and [18].
[13] Case 137/85, *Maizena and Others* [1987] ECR 4587 [15]; Case C-511/06 P, *Archer Daniels Midland v Commission* [2009] ECR I-5843 [84*]; Amann & Söhne*, supra 9, [125].
[14] *Engels v Netherlands* (Application No. 5101/71) (1976) 1 EHRR 647; *Özturk v Germany* (Application No. 8544/79) (1984) 6 EHRR 409; *Bendenoun* (Application No. 12547/86) (1994) 18 EHRR 54, 47.
[15] *Menarini Diagnostics v Italy* (43509/08), ECtHR, 27 September 2011.
[16] Case C-199/92 P, *Hüls v Commission* [1999] ECR I-4287 [150]; Case C-189/02, *Dansk Rørindustri and others v Commission* [2005] ECR I-5425 [202]; Opinion of Advocate General Léger in Case C-185/95 P, *Baustahlgewebe v Commission* [1998] ECR I-8422 [31]; Opinion of Advocate Sharpston in Case C-272/09 P, *KME Germany and Others v Commission* [2011] ECR I-12789 [64].
[17] Popelier, supra 4, 325; J.L.M. H. Gribnau, 'Legal Certainty: A Matter of Principle' in H. Gribnau and M. Pauwels (eds.), *Retroactivity of Tax Legislation* (European Association of Tax Law Professors, Amsterdam 2013) 80 (available at ssrn.com/abstract=2447386); M. Fenwick, M. S Siems and S. Wrbka, 'The State of the Art and Shifting Meaning of Legal Certainty' in M. Fenwick, M. S Siems and S. Wrbka (eds.) *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart Publishing 2017) 1.
[18] P. Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71(3) The Cambridge Law Journal 681.

cartel criminalisation.[19] When rules are deemed unjust, unclear, or wrong, individuals are less likely to abide by them. Last, legal certainty reduces costs, as fewer resources need to be dedicated to enforcing and clarifying the law.[20] Both at the level of the individual, and of government, savings are made which could be used to pursue activities or policies which benefit society. Thus, legal certainty can discourage unlawful behaviour, whilst stimulating lawful and potentially beneficial activities. This holds true as well in a commercial setting. Companies can only abide by the law, if they understand the law. They can only plan their activities in line with the law, adopt new strategies, and launch new products or services, to the benefit of consumers, if they have the legal room to do so. When taking into account the costs their business plan implies, businesses have regard for the legal context in which they operate. If that context is marked by uncertainty, they may refrain from adopting those actions which could have been beneficial to society. We would argue this is in conflict with what competition law strives to do.

The Commission's main objective in the enforcement of Article 102TFEU is to safeguard competition and ensure that markets function properly, to the benefit of consumers and business.[21] This includes goals such as restoration (repairing competition in the market), and deterrence (to discourage future infringement).[22] Through its decisions (and the remedies it imposes[23]), the Commission tries to restore competition in the market, and discourage both the perpetrator and other undertakings from adopting anti-competitive conduct in the future. Its decisions signal which conduct is prohibited (through its analysis of the facts and the law) and how serious the consequences of infringement can be (through the fines and remedies imposed). This reduces future harm to competition, and to consumers.

Fines are an important means to achieve deterrence, and avoid future harm to competition (and consumers). Nonetheless, imposing fines in the context of legal uncertainty may do more harm than good. Punishing behaviour, for which it was not clear ex ante that it constituted illegal conduct, could deter *pro-competitive* conduct as well.[24] Companies would refrain from adopting novel practices out of fear that they be deemed illegal in the future. This may reduce incentives to innovate, and decrease activities which could provide benefits to competition and consumers.[25] This risk is particularly poignant in dynamic settings, where the risk of false positives is said to be higher, and companies may therefore want to exercize more

[19] Whelan, supra 18, 682.
[20] C. F. Rule and D. L. Meyer, 'An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers' (1988) 33(4) The Antitrust Bulletin 699; Whelan, supra 18, 681.
[21] European Commission, Communication from the Commission — Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2009) 864 final, Brussels, 9 February 2009, paragraphs 1, 5 and 6; General Court (in Case T-201/04*, Microsoft v Commission* [2007] ECLI:EU:T:2007:289 [561]) stated that the objective of Article 102TFEU is 'to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market'.
[22] W. P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 185; Note that the Commission does not directly pursue compensation (to repair harm suffered as a consequence of infringement) in its enforcement activities.
[23] See section III.
[24] R. A. Posner, *Antitrust Law* (University of Chicago Press, 2001, 2nd ed.) 267.
[25] D. L. Rubinfeld, 'Antitrust Enforcement in Dynamic Network Industries' (1998) 43(3) Antitrust Bulletin 870.

caution.[26] If they think that "success will be punished", business will be less likely to innovate.[27] Marrying legal certainty with the need to punish anti-competitive behaviour requires a fine balancing act. This is particularly true in the context of Article 102TFEU, a broad and open-ended provision. Judge Bo Vesterdorf summarized the uncertain nature of Article 102TFEU: "The least that can be said is that art. 102 does not create a situation of great legal certainty. Quite the opposite in fact. (…) Even a careful and law-abiding undertaking may easily find itself in a situation in which it is not (at all) clear whether it is dominant and/or whether its conduct might be deemed to be abusive."[28] The nature of Article 102TFEU means authorities can be flexible, adapting the law to changing economic circumstances. Although this flexibility can be commended because it allows for a quick response to new anti-competitive practices, it also comes with the risk that companies will be overly cautious, to the detriment of competition and consumers. Innovation, which can spur competition and provide consumers with new or improved products, may take a hit if businesses are wary of change in an uncertain legal environment.[29]

Enforcement of EU competition law can only legitimately take place if it respects the fundamental principles of EU law.[30] This is acknowledged by Recital 37 of Regulation 1/2003.[31] Recital 38 follows this acknowledgment by recognizing the importance of legal certainty for innovation: "Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment." As legal certainty is a fundamental principle of EU law, and recognized in Regulation 1/2003, it stands to reason that the Commission will show it proper consideration. The principle of legal certainty arguably requires the Commission to exercise a degree of caution when imposing sanctions for a breach of Article 102TFEU. If the law is not clear, or has not yet been clarified in previous decisions or case-law, it may be just to wave or significantly reduce the fine which could be imposed. This respect for legal certainty does not need to conflict with the Commission's desire for effective enforcement and deterrence.[32] As set out, legal certainty contributes to deterrence, by providing clarity as to the conduct which is unlawful, whilst leaving room to undertakings to take new initiatives.

The protection of legal certainty does not mean that *novel* abuses can never be found. The open wording of Article 102TFEU has the merit of allowing the law to keep up with a changing society. Technological and social progress may cause industries and markets to take new

[26] F. H. Easterbrook, 'Limits of Antitrust' (1984) 63(1) Texas Law Review 2; Rubinfeld, supra 25, 860; G. A. Manne and J. D. Wright, 'Innovation and the Limits of Antitrust' (2010) 6(1) Journal of Competition Law and Economics 170.
[27] Rubinfeld, supra 25, 870.
[28] B. Vesterdorf, 'Article 102 TFEU and Sanctions: Appropriate When?' (2011) 32(11) European Competition Law Review 575.
[29] L. Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press 2010) 154; Vesterdorf, supra 28, 579.
[30] The institutions of the Union are under an obligation to act with due respect for the Charter of Fundamental Rights of the European Union (see Article 51 of said Charter); A. Jones and B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press 2016, 6th ed.) 895.
[31] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (hereafter 'Regulation 1/2003): This is the main source of rules on the enforcement of Articles 101 and 102 TFEU.
[32] M. Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014) 74.

shapes, and new anticompetitive behaviour may emerge. It is necessary to be able to intervene when this happens. But this does not mean that no leniency should be expected where the novelty of an abuse means undertakings could not have foreseen that their actions would breach the law. The Commission has wide discretion in deciding whether a fine ought to be imposed, and how high it should be.[33] It has, in the past, waived the fine or imposed a symbolic fine, when the state of the law did not provide an undertaking with the means to reasonably foresee that its conduct would fall foul of Article 102TFEU.[34] In doing so, the Commission struck a balance between competition and deterrence, on the one hand, and legal certainty, on the other. It gave room for clarification of the law, imposed remedies to restore competition, and acknowledged the need not to stifle competition through intervention. The powers and discretion of the Commission, and the way in which the Commission has, in the past, used them to strike the right balance, will now be discussed.

III. The Powers and Discretion of the Commission

Regulation 1/2003 provides the Commission with a variety of measures it can adopt when faced with an infringement of Article 102TFEU. From interim measures to structural remedies and fines, the Commission has a wide range of measures at its disposal to restore competition in the market, and to sanction the undertaking if it appropriate.[35]

First, the Commission can adopt a finding of infringement (in the past, but also the present).[36] Generally, such findings will be accompanied by remedies and fines. This is not mandatory, however, and, if it has a legitimate reason to do so, the Commission can adopt a purely declaratory decision, without punishing the undertaking.[37] Such a declaratory decision may be a way to clarify the law, if no precedent exists, and the undertaking could not have reasonably foreseen that the conduct fell within the scope of Article 102TFEU. By doing so, the decision could provide legal certainty and reduce future infringements.[38] Second, to address the conduct and restore competition, the Commission can impose behavioural and structural remedies,[39] and levy penalty payments if the undertaking fails to comply.[40] Finally, the Commission can punish the undertaking, by imposing a fine.[41]

[33] *Dansk Rørindustri,* supra 16, [172]; Guidelines on the method of setting fines imposed pursuant to art.23(2)(a) of Regulation 1/2003, [2006] OJ C210/2 (hereafter 'Fining Guidelines') paragraph 2.
[34] See discussion of cases in Section III.
[35] Regulation 1/2003; P. Craig and G. De Búrca, *EU Law: text, Cases and Materials* (Oxford University Press 2015, 6th ed.) 407; Jones and Sufrin, supra note 30, 893.
[36] Article 7(1) Regulation 1/2003; Example of a declaratory decision: Commission Decision IV/324, *Vereniging van Cementhandelaren* (OJ L 13, 34, 1971) (approved by Court in Case 8/72, *Cementhandelaren v Commissie* [1972] ECR 977).
[37] Article 7 Regulation 1/2003; Note by the European Commission, *Roundtable on Remedies and Sanctions in Abuse of Dominance Case* (OECD 2006) [23].
[38] Frese, supra 32, 163.
[39] Article 7 Regulation 1/2003.
[40] Article 24 Regulation 1/2003.
[41] Article 23(2)(a) Regulation 1/2003.

The Commission has considerable discretion in deciding whether or not to impose a fine, and in determining the amount of the fine it wishes to impose.[42] Even so, this power is not unlimited. The Commission can only impose a fine upon undertakings who have *intentionally or negligently* infringed Article 102TFEU (or Article 101TFEU).[43] Arguably, this requirement could be wielded as written protection of legal certainty.[44] Intent or negligence implies a degree of awareness: active awareness, or the reasonable expectation of awareness, on the part of the undertaking. However, the Commission and Courts have interpreted the intent or negligence requirement so broadly, that it does not protect legal certainty to its fullest extent. According to case law, this requirement is fulfilled from the moment an undertaking is aware of the *anticompetitive nature* of its conduct.[45] Thus, the awareness that it constitutes an *infringement* of EU competition law is not a necessary precondition to the imposition of a fine, only awareness of the anticompetitive nature.[46] This interpretation does not protect legal certainty in its strictest sense: that conduct can only be punished if its *illegality* could be foreseen by a reasonable person. Moreover, it is not an easy feat to figure out which conduct is 'anti-competitive'. According to the General Court, "an undertaking is aware of the anti-competitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position."[47] This is a vague, and perhaps even circular argument: awareness of the facts which justify the Commission's decision finding of a breach of the law, amounts to awareness of the illegality of those facts. The Court of Justice subsequently clarified in *AstraZeneca* that the company's conduct had the "deliberate aim of keeping competitors away from the market' and was 'manifestly contrary to competition on the merits", so that the undertaking was aware of the "highly anti-competitive" nature of its conduct and should have expected it to fall foul of Article 102TFEU.[48] This cannot be said to clarify very much, as which practices constitute 'competition on the merits' is yet unclear.[49]

In short, the requirement of intent or negligence before a fine can be imposed does not go far enough in protecting legal certainty. Awareness of the anti-competitive nature of conduct is not the same as awareness that the conduct is illegal, and those two situations should be distinguished. Some might argue that, if an undertaking ought to know that its conduct is anticompetitive, it should be able to foresee that it would be a breach of the provisions aimed at protecting competition. This hinges on an assumption which seems unlikely to always hold

[42] *Dansk Rørindustri,* supra 16, [172]; Case C-499/11 P, *Dow Chemical and Others v Commission* [2013] ECLI:EU:C:2013:482 [44]; Case T-332/09, *Electrabel v Commission* [2012] ECLI:EU:T:2012:672 [299]; Fining Guidelines paragraph 2.
[43] See the wording of Article 23(2)(a) Regulation 1/2003, reiterated in the 2006 Fining Guidelines paragraph 1.
[44] F. Dethmers and H. Engelen, 'Fines under article 102 of the Treaty on the Functioning of the European Union' (2011) 32(2) European Competition Law Review 96; Vesterdorf, supra 28, 578.
[45] Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, [1983] ECR 3461 [107]; Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931 [157]; Joined Cases T-259/02 to T-264/02 and T-271/02,[2006] ECR II-5169 [205]; Opinion of Advocate General Mazák in Case C-280/08 P, *Deutsche Telekom* v *Commission* [2010] ECR I-09555 [39].
[46] Case T-336/07, *Telefónica and Telefónica de España v Commission* [2012] ECLI:EU:T:2012:172 [319].
[47] *Telefónica*, supra 46, [320].
[48] Case C-457/10 P, *AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770 [164].
[49] Vesterdorf, supra 28, 575; Pinar Akman, 'The Tests of Illegality under Articles 101 and 102 TFEU' (2016) 61(1) The Antitrust Bulletin 102.

in practice: that it is easy to distinguish 'normal' competition from anti-competitive practices. In a context where undertakings strive to overtake their rivals, that distinction is not always clear-cut. Thus, placing a double burden on the undertaking – of realizing both that its conduct is reducing competition *and* that it is doing so in ways that break the law – may arguably hollow out the protection of legal certainty in those circumstances where the conduct is not an obvious abuse and/or the law is ambiguous in nature.

Luckily, the requirement of intent or negligence is not the only avenue open to the Commission to take legal certainty into account. When setting the amount of the fine, the Commission considers the gravity and duration of the infringement, and any mitigating circumstances which may exist.[50] The 1998 version of the Fining Guidelines explicitly included legal certainty considerations: the existence of reasonable doubt as to whether the conduct constituted *an infringement w*as considered a mitigating circumstance.[51] The 2006 version of the Fining Guidelines no longer explicitly includes legal uncertainty as a mitigating circumstance, but the list it contains is not exhaustive.[52] Thus, the Commission could choose to lower the amount of the fine in the case of an abuse which is so novel that the undertaking could not reasonably have foreseen its illegality. The case for this is strengthened by paragraph 36 of the Fining Guidelines, according to which the Commission may impose a symbolic fine. The Commission has in fact done this in a few cases, where previous decisional practice or case law had not been sufficiently clear to enable the undertaking to reasonably be aware of the illegality of its conduct.[53] In its *Clearstream* and *Motorola* Decisions, the Commission even decided not to impose any fine because there was no preceding decisional practice or case-law clarifying the, arguably, confusing legal application.[54] It argued that, as the decisions analysed complex issues of market definition and/or abuse for the first time, in an "evolving sector" in the case of *Clearstream,*[55] in which previous case law or decisional practice was lacking and diverging conclusions possible, it was not "sufficiently clear" to the undertakings that their "behaviour would constitute and infringement of the competition rules of the Treaty".[56] The Commission felt that these objective reasons justified the use of its discretion not to impose a fine.[57] Its resolution to do so seems to be strong, in particular if the undertaking has taken steps or put forward proposal to ensure its conduct complies with the law.[58]

[50] Article 23 Regulation 1/2003; Paragraph 29 Fining Guidelines.
[51] Paragraph 3, 1998 Fining Guidelines.
[52] Paragraph 29, 2006 Fining Guidelines: 'such as'.
[53] Commission Decision COMP/C-1/36.915, *Deutsche Post AG- Interception cross-border mail* (OJ L 331, 15.12.2001, p. 40) [192] and [193]; Commission Decision IV/36.888, *1998 Football World Cup* (OJ L 5, 8.1.2000, p. 55) [123] and [125].
[54] Commission Decision COMP/38.096 *Clearstream – Clearing and Settlement* (OJ C 165, 2009, p. 7) [344] and [345]; Commission Decision, AT.39985 *Motorola - Enforcement of GPRS Standard Essential Patents* (Motorola) (OJ (C 344), 2014, p. 6) [561].
[55] *Clearstream*, supra 54, [344].
[56] *Motorola*, supra 54, [561]; *Clearstream*, supra 54, [344].
[57] *Motorola*, supra 54, [559].
[58] *Deutsche Post,* supra 53, [193]; *1998 Football World Cup*, supra 53, [124].

The Courts have acknowledged that the Commission can impose a symbolic fine, or completely forego the imposition of a fine in the absence of clear legal precedent.[59] According to the General Court, "(…) it is well established in case-law that, in fixing the amount of the fine, account may be taken of the fact that the infringements fall within an area of the law in which the competition rules have never been clearly stated (…)."[60] Thus, the Commission has the ability (and in some cases the willingness) to take into account the novelty of an abuse, or at least the lack of clarity of legal precedent, to minimize or forego the imposition of a fine. It does not seem a stretch, then, to say that if there is no clear and unambiguous legal basis, it might be reasonable to impose no fine.[61] It is important to note that the lack of fine for an abuse does not mean that the undertaking is given free rein to continue its anti-competitive conduct. Not only can the undertaking be ordered to terminate its conduct, and can remedies be imposed to ensure this happens (under threat of penalty payments for failure to comply), but the undertaking is not immune from future infringement proceedings against it. Although the regulation does not expressly provide the ability to fine an undertaking for actions contrary to a declaratory Decision under Article 7, behaviour which amounts to an abuse of dominance *after* the date of the Decision will undoubtedly infringe Article 102TFEU and constitute a new ground for action.[62] Furthermore, the lack of fine in one decision on the conduct of one undertaking does not mean no fines will be imposed if other undertakings were to commit the same abuse. In such a case, the abuse would no longer be 'novel', as the former decision will have clarified the law. The General Court warned companies, in the *Telefónica* judgment, that "the Commission's decision not to impose a fine in certain decisions on account of the relative novelty of the infringements found does not grant 'immunity' to undertakings subsequently committing the same type of infringement."[63]

Thus, the decision not to fine (or merely to impose a symbolic fine) does not mean the Commission waives its rights for the future, nor even that it feels the abuse in question is not of a serious nature. The Commission merely uses its discretion to choose, amongst the broad range of methods available to it, the (combination) of actions which will achieve the best outcome: striking a balance between the need to reduce anticompetitive behaviour, and the protection of legal certainty. In doing so, the Commission protects competition in the long run, by stimulating innovative behaviour and a greater ability to comply with the law.

Evidently, legal certainty should not be pushed too far, to a purely form-based approach to competition law. Such an approach – in which conduct can only be considered a breach of the legal provisions if it clearly corresponds to a previously determined category – would detract from the flexibility required to adapt the law to changing circumstances. Nonetheless, as with most fundamental principles in the EU, legal certainty should be balanced against the need for judicial interpretation, and the result of this balancing exercise should be fair and proportionate. Though a novel breach of the law can be found, the imposition of a fine for this

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[59] Case C-62/86 *Akzo Chemie BV v Commission* [1991] ECR I-03359 [163]; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-02969 [291]; *Dow Chemical,* supra 42, [47]; *Telefónica,* supra 46, [357].
[60] *Irish Sugar*, supra note 59, [291].
[61] Dethmers and Engelen, supra 44, 96.
[62] Frese, supra 32, 171.
[63] *Telefónica,* supra 46, [357].

breach cannot be proportionate to its aim if the illegality of the conduct was not foreseeable ex ante. Konstadinides argues that an unforeseeable change in policy which causes financial harm violates the principle of legitimate expectations.[64] The same can be argued for a change in the Commission's approach to the law in its decisions, which results in a record fine.

The debate on the right balance between the form-based approach of competition law and the effects-based approach is beyond the scope of the article. Nonetheless, it may be worth pointing out that these approaches are not necessarily in conflict with each other, but merely two points on a spectrum, reflecting the required degree of evidence of anti-competitive effects. This article does not put forward a one-off choice between either approach, as the correct extent to which one or the other is applied will depend on the facts of the case, legal constraints, and community consensus. However, it would be wrong to argue that an effects-based approach is incompatible with the principle of legal certainty. The assessment of the effects of the conduct under scrutiny still provides room to the Commission to consider some circumscribed categories of conduct as abusive prima facie, on the condition that there is a possibility to put forward evidence on the actual effects of that conduct. If the scrutinised conduct did not foreseeably correspond to an established category of abuse, and the anti-competitive effect of the conduct was not clear ex ante, it is unreasonable to impose a high fine on the undertaking which adopted it. This does not mean that no other enforcement measures can be taken, such as a declaration of illegality, or that no other remedies can be imposed. Nor does it mean that subsequent adoption of this conduct, now known to be illegal, may not lead to high fines.

In the *Google Search (Shopping)* Decision, the Commission took full advantage of the powers at its disposal. It required Google to terminate the infringement, imposed remedies under threat of penalty payments, *and* imposed a (substantial) fine. The next section will provide more information on the Decision, and will argue that the imposition of a record fine of €2.42 billion may be undermining the principle of legal certainty. Google has been punished for what seems, at first sight, to be a novel abuse or a very novel interpretation of abuse. In addition, there was considerable disagreement on the existence of anti-competitive effect and/or harm to consumers, which arguably persists even after the final decision. Unfortunately, when deciding on the remedies in the *Google Search (Shopping) Decision, t*he Commission did not use its considerable discretion to take into account the lack of clarity of the law at the time of the conduct.

IV. Legal Certainty during the *Google Search (Shopping)* investigation

In June 2017, the Commission published a summary (in the form of a Press Release and a Factsheet) of its long-awaited decision in the *Google Search (Shopping)* case. In December, the publication of the full Decision followed, with any sensitive information redacted. The key points communicated were: 1) that there were two markets, one for general internet search, in which Google is said to be dominant, and another market, for comparison shopping services; 2) that Google abused its dominance in the first market, leveraging it into the second market, by treating its comparison shopping service more favourably than similar products by rivals; 3) that Google had to terminate its abusive conduct within 90 days, in particular by giving equal

[64] T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimensions* (Hart Publishing, 2017) 92.

treatment to rival comparison shopping services; 4) that non-compliance with this order would lead to penalty payments of up to 5% of the average daily worldwide turnover of parent company Alphabet; and 5) that Google had to pay a record fine of €2.42 billion.[65]

It is important to remember, throughout the discussion, that the Commission can find an abuse, even when this abuse would be novel. This article does not mean to untangle the legal reasoning in the Decision, nor to cast definitive judgment on the validity of the conclusions by the Commission. The main contribution it makes is to scrutinize how likely it was, ex ante, that the illegality of its conduct could have been foreseen by Google, and, following from that, how reasonable the imposition of a high fine really was. To achieve this, the article will explore the concerns regarding the application of the law which were raised during the investigation. That being said, it is impossible to discuss the legal certainty in this case without touching upon the final Decision itself. Therefore, the article will also briefly consider, in subsequent section V, why the end-conclusions of the Commission in the Decision did not alleviate the concerns raised.

The investigation into *Google Search (Shopping)* was not an obvious one, at least from a legal perspective. Indeed, when the Commission announced its investigation into *Google Search (Shopping)*, commentators were quick to question its legal basis. The announcements of the Commission inspired two main concerns: the definition of the market and the potential finding of an abuse. First, the market definition proposed by the Commission was not unanimously accepted. Are 'general internet search' and 'comparison shopping services' really two antitrust markets, for example, separate from each other, and with no other substitutes? Initial comment on the Commission's market definition in the Statement of Objections revealed that these markets were not self-evident, in the minds of many commentators.[66] These market delineations exclude important competitors, such as Amazon and Facebook, it was argued, and fail to acknowledge that the search engine's main goal is to capture consumer attention and sell ads.[67] The Commission's conclusion in the Decision that "[c]ontrary to what Google claims, there is also limited substitutability between comparison shopping services and merchant platforms, such as Amazon Marketplace and eBay Marketplaces" was not a foregone conclusion to commentators prior to the Decision. More debate on this score will undoubtedly occur in the coming months. The market definition in the Decision could be the subject of a stand-alone extensive article and take us outside of the scope of this discussion. What is worth noting at this stage, however, is the degree of uncertainty which surrounded (and potentially

[65] 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet,' (6 June 2017), http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm; 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison

[66] M. Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' (2013) 11(5) Northwestern Journal of Technology and Intellectual Property 292; J. D. Ratliff and D. L. Rubinfeld, 'Is There a Market for Organic Search Engine Results and Can their Manipulation Give Rise to Antitrust Liability?' (2014) 10(3) Journal of Competition law and Economics 518; A. Daly, *Private Power, Online Information Flows and EU Law: Mind the Gap* (Bloomsbury 2016) 73; F. Thépot, 'Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets' (2013) 36(2) World Competition 195.

[67] H. Singer, 'Who Competes with Google Search? Just Amazon, Apple and Facebook', Forbes, 18 September 2012 (http://www.forbes.com/sites/halsinger/2012/09/18/who-competes-withgoogle-in-search-just-amazon-apple-and-facebook/); A. Renda, 'Searching for Harm or Harming Search? A Look at the European Commission's Antitrust Investigation Against Google' (2015) 118 CEPS Special Report 26.

still surrounds) market definition in online markets at the time of the investigation. It is true that market definition is often a source of contention in unilateral conduct cases, giving rise to intense debate between the respective parties. It is particularly noteworthy in the case at hand, however, because of the ongoing debate between academic experts as to the proper delineation of markets in the context of online services, which pose particular challenges. In light of this, as of yet unresolved, point of contention, the Commission's seeming lack of in-depth analysis of the specific issues of digital markets is surprising.

Second, it was unclear how the facts of the case tallied with existing types of abuses. The Commission alleged, in its Statement of Objections, that Google abused its dominant position "by systematically favouring its own comparison shopping product in its general search results pages".[68] To remedy this, the Commission stated, Google would have to treat its own comparison shopping service, and that of its rivals, in the same way.[69] This rather nebulous description left much room for speculation as to the precise nature of the abuse. It was not clear, from the outset, whether the case concerned a new abuse, or a new interpretation of an existing abuse. It seemed unlikely to correspond, fully, to established case law. As Akman put it: "[…] fitting the publicly available facts of Google Search into one of these existing types of abuse is equivalent to trying to fit a square peg in a round hole."[70] Multiple authors tried to do so (with considerable difficulty and creativity), reviewing the available facts in light of known types of abuses, such as refusal to deal, tying, and even discrimination.[71] The description of the abuse and the potential remedy suggested the existence of a duty to deal, although the existence of a potential 'essential facility' was far from evident.[72] Some authors, on the other hand, were more inclined to see the potential for a tying abuse in the combination of Google's search engine with its own content.[73] Lastly, the reference to a 'principle of equal treatment'[74] reminded some of the 'search neutrality' argument that results returned in a search engine should be non-discriminatory.[75] There did not seem to be one abuse which fit unequivocally.

Did Google's self-preferential behaviour constitute an existing abuse, or should it be qualified as a new abuse? There did not seem to be a clear answer at the time of the investigation. Conduct by a dominant undertaking is an abuse, according to the Court of Justice,

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[68] European Commission Fact Sheet, 'Antitrust: Commission sends Statement of Objections to Google on comparison shopping service', 15 April 2015, 1 ('Statement of Objections') http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm

[69] Statement of Objections, supra 68, 1.

[70] P. Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2017) (forthcoming) Journal of Law, Technology and Policy 81 (available at http://illinoisjltp.com/journal/wp-content/uploads/2017/06/Akman.pdf).

[71] I.a.: B. Edelman, 'Does Google Leverage Market Power through Tying and Bundling?' (2015) 11(2) Journal of Competition Law and Economics 365; Lao, supra note 66, 276; B. Vesterdorf , 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?' (2015) 1(1) Competition Law and Policy Debate 4 (and reply by N. Petit).

[72] Pinar, supra 70, 307.

[73] Akman, supra 70, 344; Edelman, supra 71, 365; I. Lianos and E. Motchenkova, 'Market Dominance and Search Quality in the Search Engine Market' (2013) 9(2) Journal of Competition Law and Economics 422.

[74] Factsheet, supra 65, page 3.

[75] A. Odlyzko, 'Network Neutrality, Search Neutrality, and the Never-Ending Conflict between Efficiency and Fairness in markets' (2009) 8(1) Review of Network Economics 1, available at http://www.dtc.umn.edu/~odlyzko/doc/net.neutrality.pdf; F. Pasquale, 'Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines' (2008) 1 University of Chicago Legal Forum 263.

if it hinders the maintenance or growth of competition in a market, through methods which do not constitute normal competition, and this to the detriment of consumers.[76] There is currently no consensus on what 'normal competition' would be in the search, search advertising, and comparison shopping 'markets'. Doubts were raised about whether Google's conduct was at all harmful to competition and/or consumers.[77] This doubt is not wholly surprising, in light of the dynamic nature of digital markets, and the business model of search. Search engines are 'online platforms'.[78] These platforms, including but not limited to search engines, have been called 'internet intermediaries' or 'gatekeepers of information'.[79] Their value lies in their capacity to sort through billions of web pages and serve only the results which are most relevant to their users.[80] They do not, however, perform this 'sorting' as a public service, but derive revenue from the attention of their users, mainly through advertising.[81] In fact, there is a difference between the links Google displays in its organic search results, on the one hand, and the links which display advertising at the top or right of the page. These advertising results include the 'comparison shopping' box. As the company was at pains to point out, "Google shows shopping ads, connecting our users with thousands of advertisers."[82] The organic search results draw consumers, whose attention is monetized through the ads and comparison shopping results.[83] Google depends on the advertising, such as that shown in the comparison shopping box, to offer its service. This reality – that Google provides a for-profit service, generating revenue through advertising - raises some difficult questions. First, it was unclear at the time of the Google investigation, and arguably still is unclear to date, why Google should

[76] Hoffmann-La Roche formula as used, for example, in Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 [24].

[77] I.a.: Akman, supra 1, 8; A. Daly, 'Beyond 'Hipster Antitrust': A Critical Perspective on the European Commission's Google Decision' (2017) 3(1) European Competition and Regulatory Law Review 188; T. Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) A Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 3(1) European Competition and Regulatory Law Review 208; A. Lamadrid, 'Google Shopping Decision – First Urgent Comments' (Chillin'Competition Blog, 27 June 2017), available at https://chillingcompetition.com/2017/06/27/google-shopping-decision-first-urgent-comments/; N. Petit, 'A few thoughts on the European Commission decision against Google' (Truth on the Market blog, 29 June 2017), available at https://truthonthemarket.com/2017/06/29/a-few-thoughts-on-the-european-commission-decision-against-google/; G. A. Manne, 'The Washington Post Editorial Board understands online competition better than the European Commission does' (Truth on the Market blog, 10 July 2017), available at https://truthonthemarket.com/2017/07/10/the-washington-post-editorial-board-understands-online-competition-better-than-the-european-commission-does/;

[78] D. A. Crane, 'After Search Neutrality: Drawing a Line between Promotion and Demotion' (2014) 9(3) I/S: A Journal of Law and Policy for the Information Society 397; G. A. Manne and J. D. Wright, 'If Search Neutrality is the Answer, What's the Question?' (2012) Columbia Business Law Review 151.

[79] Daly, supra 77, 191; Daly, supra 66, 66; Lianos and Motchenkova, supra 73, 422.

[80] M. Ammori, 'Failed Analogies vs. 'Search' and 'Platform' Neutrality' in A. Ortiz (ed.), *Internet: Competition and Regulation of Online Platforms* (CPI 2016) 52; A. Renda, 'Antitrust Regulation and the Neutrality Trap: A plea for a Smart, Evidence-Based Internet Policy' in A. Ortiz (ed.), *Internet: Competition and Regulation of Online Platforms* (CPI 2016) 71.

[81] D. S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets (2003) 20(2) Yale Journal on Regulation 335; J-C. Rochet and J. Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990; Zhu Li, 'Legal Boundaries of Competition in the Era of the Internet: Challenges and Judicial Responses' in A. Ortiz (ed.), *Internet: Competition and Regulation of Online Platforms* (CPI 2016) 144; Thépot, supra 66, 196.

[82] K. Walker, 'The European Commission decision on online shopping: the other side of the story' (27 June 2017) Google Blog (available at https://www.blog.google/topics/google-europe/european-commission-decision-shopping-google-story/).

[83] Ratliff and Rubinfeld, supra note 66, 527.

provide 'equal treatment' to results appearing in its search engine, especially when there is a distinction between free and paid-for advertising.[84] Even if there may be a case for equal treatment, it is equally unclear what that should entail. This brings us to the second issue. A search engine, like Google, attracts users by providing them with the most relevant results, and even the most relevant ads.[85] The Statement of Objections did not make it clear what the Commission would consider 'equal treatment' or 'relevant' results, and how these can be reconciled, under 'normal competition'.[86] These questions not only impact competition law, but may have considerable political repercussions, involving discussions on the nature and future of the World Wide Web, and how much Government intervention is justified in dynamic industries. This may go some way in explaining why the Commission does not, in its Factsheet, object to the search engine's design in general, or even to demotions specifically, but merely to the design and demotions in so far as they constitute the leveraging of dominance into a secondary market.[87]

In sum, even if there were a duty of equality for dominant search engines (and potentially other 'internet gatekeepers') under competition law, it was not clear ex ante what such a duty would entail. The definitional questions regarding the relevance or equality of results were not settled, ex ante, by the Commission, and thus constituted a considerable source of uncertainty. Moreover, the legal certainty in this case was undermined by the confusion as to the harm of caused by the company's conduct. It is unclear what the theory of harm is upon which the Commission relies in the *Google Search (Shopping)* case.[88] If the results deemed relevant by Google's search engine results are also the ones preferred by consumers, it is not obvious that the search engine's conduct has harmed them. To the contrary, it has been argued that the design of the search engine algorithm benefitted consumers. According to the US Federal Trade Commission, which closed a similar investigation into Google practices under US antitrust law, Google's conduct did not harm competition. Quite the opposite in fact, as its decisions were deemed pro-competitive, and to the benefit of consumers: the changes to Google's search engine design were seen as product improvements, and any negative impact on Google's competitors was deemed to be a normal result of vigorous 'competition on the merits'.[89] (The FTC in the US was not the only international authority to come to this conclusion. In fact, Chinese, Taiwanese and Brazilian authorities came to similar results in search cases.[90]) It is also worth noting that the previous European Commissioner for Competition, Joaquín Almunia, had nearly closed the case with a Commitment Decision. The commitments given by Google at the time did not, as far as we can tell, include the promise to change the way the algorithm asserts the 'relevance' of results, but merely that, whenever

[84] F. Wagner-von Papp, 'Should Google's Secret Sauce be Organic?' (2015) 16(2) Melbourne Journal of International Law, 33 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2639081).
[85] K Walker, 'Improving quality isn't anti-competitive' (27 August 2015) Google Europe Blog (available at https://europe.googleblog.com/2015/08/improving-quality-isnt-anti-competitive.html).
[86] Wagner-von Papp, supra note 84, 34; Ratliff and Rubinfeld, supra note 66, 525.
[87] Factsheet, supra 65, page 2.
[88] Akman, supra 1, 4; Renda, supra 67, 26.
[89] 'Statement of Federal Trade Commission Regarding Google's Search Practices,' In the Matter of Google Inc., FTC File Number 111-0163, 3/1/2013, 2 https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.
[90] See discussion in Renda, supra note 67, 12-13.

Google's own products were shown at the top of the search engine, at least three, objectively selected, rival products would also be shown.[91] According to Almunia, "Google should not be prevented from trying to provide users with what they're looking for. What Google should do is also give rivals a prominent space on Google's search results, in a visual format which will attract users."[92] It seems even the former Commissioner felt that that Google's ranking system provided benefits to consumers.

This rather begs the question as to how Google could have reasonably foreseen that its conduct would not be deemed 'normal competition' or 'competition on the merits' in the EU, when it had been considered so by scholars and even by authorities in other jurisdictions. Of course, the law does not have to be the same in the EU as in the US, and different verdicts can be delivered on the same conduct. But Google's conduct is likely to be a novel abuse, or, at the very least, a novel interpretation of an existing abuse. In that context, the ambiguity of the notion 'competition on the merits', and the disagreement on the case between scholars, increase the legal uncertainty a company like Google faces. It is doubtful that Google could reasonably have foreseen that its conduct would constitute an infringement of Article 102TFEU, when even experts failed to agree on that point. It is extraordinary, therefore, that the Commission was planning to impose a fine which was *more than double* the amount of the last record fine in an abuse of dominance case (the Intel case).[93]

V. Legal Certainty and Discretion in the *Google Search (Shopping)* Decision

The lack of clarity as to the actual abuse was not alleviated by the Commission in its ultimate Decision. According to the Commission, Google had abused its dominant position through "the more favourable positioning and display, in Google's general search results pages, of Google's own comparison shopping service compared to competing comparison shopping services".[94] This, the Commission clarified, amounts to the leveraging of dominance in one market (the general internet search market) into another (the comparison shopping market) by giving illegal advantages to its own comparison shopping products.[95] The Commission asserts that it did not find a *novel* abuse, because leveraging (or, in the Commission's words, the extension of a dominant position to a neighbouring but separate market by distorting competition[96]) constitutes a "well-established, independent, form of abuse".[97] This argument is unconvincing. It is difficult to contend, based on the existing case law, that 'leveraging' is an established abuse in and of itself. On the contrary, it can be argued that 'leveraging' is the common denominator for different types of abuses which concern two or more different markets.[98] In fact, the cases cited by the Commission to underpin its argument all concern known abuses,

[91] European Commission Press Release IP/14/116, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals,' 5 February 2014, http://europa.eu/rapid/press-release_IP-14-116_en.htm.
[92] 'Statement on the Google Investigation', 5 February 2014, 3 http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.
[93] Commission Decision, COMP/37.990 *Intel Corporation* (OJ C 227, 22.9.2009).
[94] Commission Decision, AT.39740 *Google Search (Shopping)* (C(2017) 4444, 27.6.2017) 7.2.
[95] Factsheet, supra 65, page 2; Google Decision, supra 94, [334].
[96] Google Decision, supra 94, [334].
[97] Google Decision, supra 94, [649].
[98] G. Monti, *EC Competition Law* (Cambridge University Press 2007) 187.

such as tying or refusal to deal, and do not concern leveraging as a stand-alone anticompetitive practice.[99] Even Höppner, who agrees with the Commission's assessment that Google's conduct fulfils the "long-established criteria for an anti-competitive extension of dominance"[100] recognizes in the same article that the Commission has, in effect, created "a new 'sub-type' of abusive monopoly leveraging, akin, but distinct from, the well-established other sub-types, namely tying, margin squeeze and (some) refusals to deal".[101] If criteria have been set out for leveraging abuses in jurisprudence, this has only occurred for a specific type of leveraging, and not for leveraging as an 'independent' abuse. It is possible, of course, that the Commission created such an independent abuse in this Decision, consciously or not. If it did, this is a novel finding. If it did not, then the Commission has failed to clearly fit the case within the legal framework, either by showing Google's conduct satisfies the criteria of a known abuse, or by arguing why the facts merit a different understanding of a known abuse.

The Commission did, at some point in the decision, seem to evoke the possibility that general search engine traffic (on the first page) is an essential facility. It made declarations about "the importance of traffic", in particular "the first three to five generic search results on the first general search results page", and put forward the argument that "the generic search traffic from Google's general search results pages (…) cannot be effectively replaced by other sources of traffic" because of "the low overall profitability for traffic from AdWords compared to generic search traffic".[102] It never committed to this line of reasoning, however. On the contrary, the Commission expressly argued further in the Decision that the facts of the case did not amount to a refusal to deal, and that thus the case law on refusals to deal did not apply.[103] This is, to say the least, quite confusing. How is Google, or any other company for that matter, supposed to understand what it can and cannot do? This insecurity is not reduced, furthermore, by the Commission's attempt, in the Decision, to show that Google's conduct did not constitute normal competition. It is not competition on the merits, the Commission finds, to adopt conduct which diverts traffic your competitors' product to your product, and the conduct is likely or capable of having anticompetitive effects.[104] The discussion following this statement, which includes a discussion of the importance of traffic and description of the way in which Google positions and displays its own comparison shopping service compared to that of competitors, arguably does not provide much guidance as to what is understood by 'competition on the merits'.

In addition, the Commission's further attempts to emphasize that Google "could not have been unaware of the fact that the conduct constitutes an abuse"[105] as it is a "well-established form of abuse" which was clearly explained by the Preliminary Assessment[106] lacks

[99] See Case 311/84 *Telemarketing* [1985] ECR 3261 [23] (refusal to supply, imposed contractual condition); Case C-333/94 *Tetra Pak* [1996] ECR I-05951 (tying); Case T-228/97 *Irish Sugar* [1999] ECR II-02969 (discriminatory price rebates); Case T-201/04 *Microsoft* [2007] ECR II-03601 (about tying and refusal to supply). All cases cited in footnote 349 to recital [334].
[100] Höppner, supra 77, 86.
[101] Höppner, supra 77, 90.
[102] Google Decision, supra 94, [342], [453], [539], [563].
[103] Google Decision, supra 94, [650]-[651].
[104] Google Decision, supra 94, [341].
[105] Google Decision, supra 94, [726].
[106] Google Decision, supra 94, [727]-[728].

conviction, because of the uncertainty which its preliminary conclusions caused amongst commentators, set out in the previous section. Moreover, despite these assertions, and other informal statements that the abuses at issue are "old school",[107] the Commission seems to have acknowledged in the Factsheet that this Decision is the first of its kind: "Today's Decision is a precedent which establishes the framework for the assessment of the legality of this type of conduct."[108] As such, it would not have been unreasonable for the Commission to use this case as an opportunity to clarify the law and signal to companies in digital industries which conduct would not be accepted, whilst at the same time showing some leniency to Google who could not reasonably have known what not to do *before* the law was set out.

This rings true in particular in light of the wide range of options open to the Commission, and the discretion it enjoys, when deciding on the imposition of a fine in the context of a novel (interpretation of) abuse. The choice to impose a symbolic fine (or even no fine at all) would not have been unreasonable. It arguably would not even have meant an unequivocal choice of legal certainty over competition and deterrence, as remedies and penalty payments would have remained an option. In the present iteration of the Decision, the Commission has imposed the obligation on Google to cease its abusive conduct by giving comparison shopping services 'equal treatment' to its own. How this is achieved remains up to Google, but will be monitored by the Commission. Non-compliance will be sanctioned financially.[109] It remains to be seen whether the implementation of this 'equal treatment' remedy as adopted by Google will satisfy the Commission. It can be assumed that extensive discussion between the Commission and Google will be necessary to come to a satisfactory solution. This remedy would have been possible even without imposing such a harsh fine. The anti-competitive conduct could still have been brought to an end. Not imposing a record fine of €2.42 billion would not have impeded the Commission in its objective of restoring and safeguarding competition. In fact, by clarifying the law, and providing practical guidance on the concept of 'equal treatment', the Commission could have provided both Google and other 'Internet intermediaries' with the clarity they needed to foresee how Article 102TFEU applies to their actions, and to cease their anticompetitive conduct.

The Commission could have taken up this Decision as a chance to provide much-needed guidance on how it thinks Article 102TFEU applies in this dynamic setting, whilst at the same time showing that it wishes to promote legal certainty and foster a creative environment. In doing so, the Commission would have struck a better balance between legal certainty, competition, and deterrence, without stifling incentives to innovate. Although the Commission is correct in stating that new features in a case do not prevent the imposition of a fine,[110] imposing a high fine in this case is arguably an unjustified intrusion on the principle of legal certainty.[111] It is the more shocking, as the Commission arrived at the record amount of €2.42

[107] N. Hirst, 'How Google Could Win Its Fight with Brussels' (12 July 2017) Politico, available at https://www.politico.eu/article/google-fight-with-brussels-margrethe-vestager-antitrust-fine-technology-company/; http://ec.europa.eu/avservices/video/player.cfm?ref=I141017.
[108] Factsheet, supra 65, page 4.
[109] Factsheet, supra 65, page 3.
[110] Google Decision, supra 94, [729].
[111] Akman, supra note 1, 8.

billion by applying a 1.3 multiplier "for deterrence".[112] The aim of deterrence may well have been better served by issuing a merely declaratory decision. Companies cannot know what *not* to do if the law is unclear, and their respect for the law may be undermined if they perceive enforcement to be unjust and arbitrary. The Commission could have taken up this Decision as a chance to provide much-needed guidance on how it thinks Article 102TFEU applies in this dynamic setting, whilst at the same time showing that it wishes to promote legal certainty and foster a creative environment. In doing so, the Commission would have struck a better balance between legal certainty, competition, and deterrence, without stifling incentives to innovate.

VI. Conclusion

This article has argued that the imposition of a fine of €2.42 billion in the Google Shopping Decision may have gone too far, in light of the legal uncertainty surrounding the abusive nature of Google's conduct. It has justified this argument through a discussion of the importance of the principle of legal certainty, the powers of the Commission in abuse of dominance cases, a discussion of the uncertainty surrounding the Google case and the use by the Commission of its powers in that case.

This article has not attempted to argue whether or not Google's conduct should be considered abusive. It may well have been justified to bring the conduct to a halt, for the sake of competition and consumers. What has been argued is that Google's conduct was not clearly abusive prior to the Decision. It seems that Google has been fined for a novel abuse, or at least a novel interpretation of an existing abuse. Although this is not an issue in itself, as Article 102TFEU is an open-ended provision, it does raise the question whether Google could have reasonably foreseen that its conduct would constitute an abuse. The extensive discussion amongst scholars and practitioners indicates, in our view, that Google could not have foreseen it.

In light of this uncertainty, imposing a record fine seems unjustified. By not using its discretion to waive the fine, or impose a mere symbolic fine, the Commission may have missed an opportunity to not only protect competition, but also to make it clear that it will respect the principle of legal certainty, which is fundamental to individual and commercial activities, and contributes to deterrence. It remains to be seen whether the General Court will be more deferential to the principle of legal certainty in the case on appeal.

[112] Google Decision, supra 94, [752]-[753].