



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPČÍ SUD EUROPSKE UNIE
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

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REPORT FOR THE HEARING *

(Competition — Abuse of dominant position — General search services and specialised product search services offered online — Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement)

In Case T-612/17,

Google LLC, formerly Google Inc., established in Mountain View, California (United States),

Alphabet, Inc., established in Mountain View, California,

represented by T. Graf, R. Snelders and C. Thomas, lawyers, K. Fountoukakos-Kyriakakos, Solicitor, R. O'Donoghue QC, D. Piccinin, Barrister, and M. Pickford QC,

applicants,

supported by

Computer & Communications Industry Association, established in Washington, DC (United States), represented by J. Killick and A. Komninos, lawyers,

intervener,

v

European Commission, represented by T. Christoforou, N. Khan, A. Dawes, H. Leupold and C. Urraca Caviedes, acting as Agents,

defendant,

supported by

* Language of the case: English.

Bureau européen des unions de consommateurs (BEUC), established in Brussels (Belgium), represented by A. Fratini, lawyer,

by

Infederation Ltd, established in Crowthorne (United Kingdom), represented by A. Morfey, N. Boyle, S. Gartagani, L. Hannah, A. D’heygere, K. Gwilliam and T. Vinje, Solicitors, S. Ford QC, and D. Paemen, lawyer,

by

EFTA Surveillance Authority, represented by C. Zatschler and C. Simpson, acting as Agents,

by

Kelkoo, established in Paris (France), represented by J. Koponen and B. Meyring, lawyers,

by

Verband Deutscher Zeitschriftenverleger eV, established in Berlin (Germany), represented by T. Höppner, university teacher, and P. Westerhoff and J. Weber, lawyers,

by

Visual Meta GmbH, established in Berlin, represented by T. Höppner, university teacher, and P. Westerhoff and J. Weber, lawyers,

by

Bundesverband Deutscher Zeitungsverleger eV, established in Berlin, represented by T. Höppner, university teacher, and P. Westerhoff and J. Weber, lawyers,

by

Federal Republic of Germany, represented by J. Möller, acting as Agent,

and by

Twenga, established in Paris, represented by L. Godfroid, S. Hautbourg and S. Pelsy, lawyers,

intervenors,

APPLICATION under Articles 261 and 263 TFEU seeking, principally, annulment of Commission Decision C(2017) 4444 final of 27 June 2017 relating

to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)) and, in the alternative, annulment or reduction of the fine imposed on the applicants,

I. Background to the dispute

A. Context

- 1 Google LLC, formerly Google Inc., is a US company specialising in products and services related to internet use. It is mainly known for its search engine, which allows internet users to locate and access websites catering to their needs with the browser they are using and by means of hyperlinks. Since 2 October 2015, Google LLC, formerly Google Inc., has been a wholly owned subsidiary of Alphabet Inc., the ultimate parent company of the group. Unless otherwise required, these two companies will be referred to together as ‘Google’.
- 2 Google’s search engine — accessible at www.google.com or at similar addresses with a country extension — enables search results to be displayed on pages appearing on internet users’ screens. Those results are either selected by the search engine according to general criteria (‘general search results’ or ‘generic results’) or selected according to a specialised algorithm for the specific type of search carried out (‘specialised search results’). Specialised search results may appear without any specific intervention on the part of the user alongside general search results on the same page. They may also appear alone in response to a query entered by the user on one of the specialised pages of Google’s search engine or after activating links appearing in certain areas of its general results pages. Google has developed a number of specialised search services, for example for news, local business information and offers, flights and shopping. It is the last category that is at issue in this case.
- 3 Specialised search services for shopping (‘comparison shopping services’) do not ‘sell’ products themselves, but compare and select online sellers offering the desired product. Those sellers may be direct sellers or sales platforms grouping together numerous sellers’ offers from which shoppers can immediately order the product they are looking for (eBay, Amazon, PriceMinister and Fnac are among the best known).
- 4 General and specialised search results may be so-called ‘natural’ results, that is, results that are not paid for by the websites they link to, even if they are retail websites. The order in which those natural results appear on the results pages is also independent of payment.
- 5 Google’s results pages, like those of other search engines, additionally contain results that, on the contrary, are paid for by the websites they link to. Those results, commonly known as ‘ads’, are also related to the internet user’s search.

They are identified in such a way that internet users are able to distinguish them from the natural results of a general or specialised search, for example by using the words ‘ad’ or ‘sponsored’. They appear either in specific spaces on the results pages or among the other results. They may take the form of specialised search results and, in fact, some of Google’s specialised search services are based on a paid inclusion model. The display of those results is linked to payment commitments entered into by advertisers at auctions. If necessary, additional selection criteria are used. Advertisers pay Google when a user activates (‘clicks on’) the hyperlink in their ad, which directs the user to their own website.

- 6 Other search engines besides Google offer or have offered general search services and specialised search services, such as Alta Vista, Yahoo, Bing (Microsoft) and Qwant. There are also specific search engines for comparison shopping, such as Bestlist, Nextag, IdealPrice, Twenga, Kelkoo and Prix.net.
- 7 Google explains that it began providing a comparison shopping service to internet users in 2002, after or at the same time as other search engines such as Alta Vista, Yahoo, AskJeeves and America On Line (AOL). That initiative was in recognition of the fact that the processes that had hitherto been used by search engines did not necessarily return the most relevant results in response to specific queries, such as those relating to news or shopping. Google thus began providing comparison shopping results in late 2002 in the United States and, around two years later, gradually extended that practice to a number of countries in Europe. Those results were not the outcome of applying its ordinary general search algorithms to information automatically extracted from websites by a process known as ‘crawling’ and subsequently indexed, but of applying specific criteria to information contained in a database powered by the sellers themselves, called the ‘product index’. The results were first of all provided through a specialised search page, called ‘Froogle’, that was separate from the search engine’s general search page. Thereafter, as from 2003 in the United States and 2005 in a number of countries in Europe, they were also available from the search engine’s general search page. In the latter case, comparison shopping results were grouped together on the general results pages in a ‘Product OneBox’, either below or parallel to the advertisements at the top or on the side of the page and above the general search results, as shown below:



- 8 If internet users used the general search page to enter their query, the answers provided by the search engine included both those produced by the specialised search and those produced by the general search. When users clicked on the result link in a Product OneBox, they were taken directly to the appropriate page of the website of the seller offering the desired product, allowing them to purchase it. Furthermore, a special link contained within the Product OneBox directed users to a Froogle results page with a wider selection of results. Google states that, in line with its own principle never to show its own webpages in the general search results — which is still observed to this day — Froogle’s results never appeared in those results, while the results of other specialised search engines for comparison shopping did.
- 9 Google explains that, in 2007, it started significantly improving the way it drew up specialised search results for products, particularly in order to match the quality of the websites of sales platforms such as Amazon or eBay. Google states that it worked on the organisation of the database, transforming the product index into a more finely tuned catalogue and improving its selection criteria, essentially taking account of purchasers’ expectations that online shopping should be a painless experience.
- 10 As a consequence of those changes, Google renamed its specialised search page for comparison shopping from Froogle to ‘Product Search’.
- 11 As for specialised search results for comparison shopping displayed from the general search page on the general results pages, Google enriched the content of Product OneBoxes by adding images to them. Google has provided the following illustration of the first type of image addition:

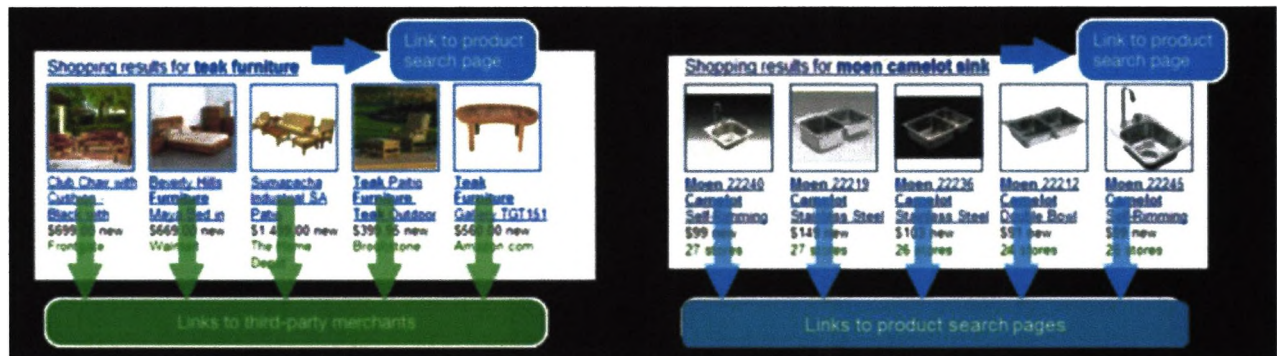
Shopping results for bagel toaster



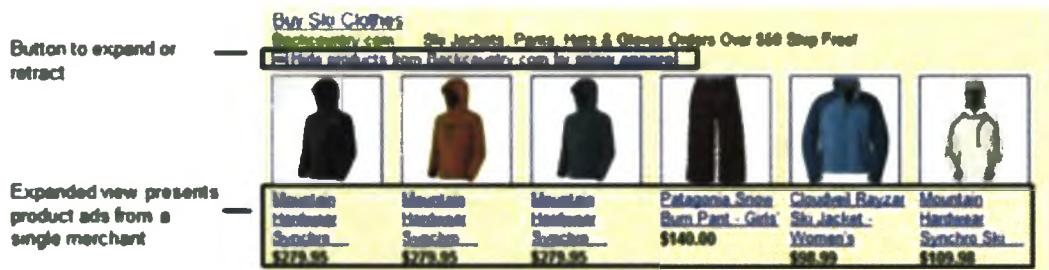
[Toastermaster Cool Touch Bagel Toaster...](#) \$29.99 - Target
[Black & Decker T3550 B&d T3550/toaster...](#) \$29.99 - BeachAudio.com
[Proctor-Silex® Bagel Smart® Toaster \(22605\)](#) \$13.49 - Ace Hardware
www.google.com/products

See bagel toaster results available through Google Checkout

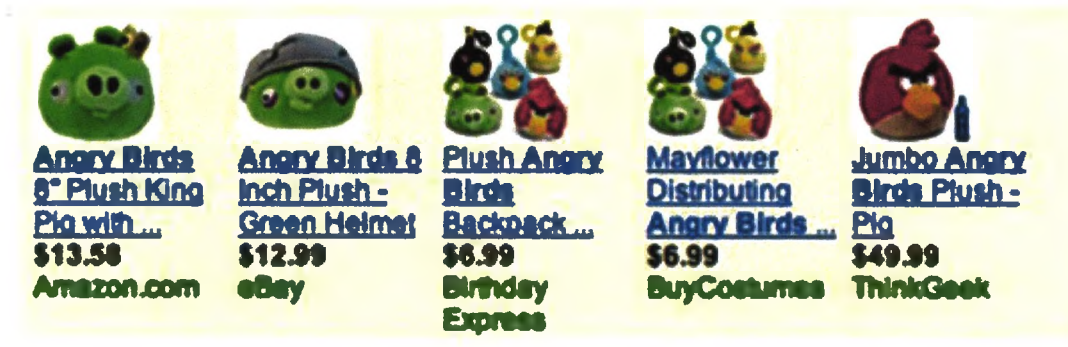
- 12 Google also diversified the possible outcomes of the action of clicking on a result link appearing therein: depending on the circumstances, internet users were taken directly to the appropriate page of the website of the seller offering the desired product, allowing them, as before, to purchase that product, or they were taken to the specialised Product Search results page to view more offers for the same product. Over time, Product OneBox was renamed ‘Product Universal’ in different countries (this occurred, for example, in the United Kingdom and Germany in 2008) and at the same time its attractiveness was enhanced. Google has provided the following illustration of the two variants of a Product Universal:



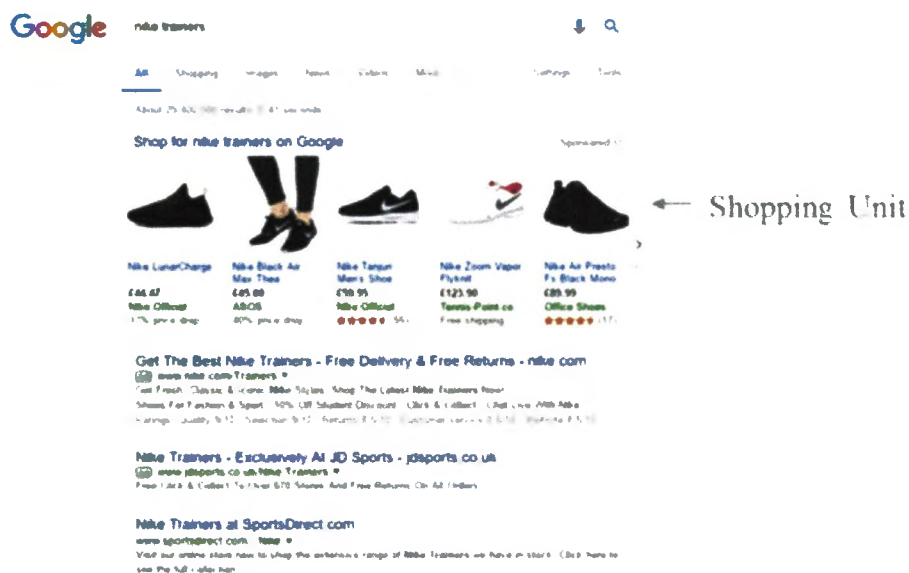
- 13 Google also established a mechanism (known as ‘Universal Search’) that made it possible to rank, on the general results page, Product OneBoxes (subsequently Product Universals) against general search results. It explains, in essence, that if specialised search results appeared to be more relevant to internet users than general search results, they had to be placed higher up, and vice versa, so that Product OneBoxes or Product Universals could, depending on the circumstances, be in a higher or lower position on the results list. Product OneBoxes or Product Universals might not appear on the general results pages at all. Google states that this ranking mechanism required significant research efforts and that one of the difficulties lay in determining whether or not the user’s query reflected a desire to perform a search with a view to purchasing a product.
- 14 Regarding product advertisements appearing on its results pages, in September 2010, Google introduced in Europe an enriched format compared to that of text-only ads (‘text ads’) that had appeared previously. If the advertiser so wished, by clicking on the text, internet users could see, in a larger format than the initial text ad, images of the products searched for and the prices charged by the advertiser. Google has provided an illustration of such a text ad extension:



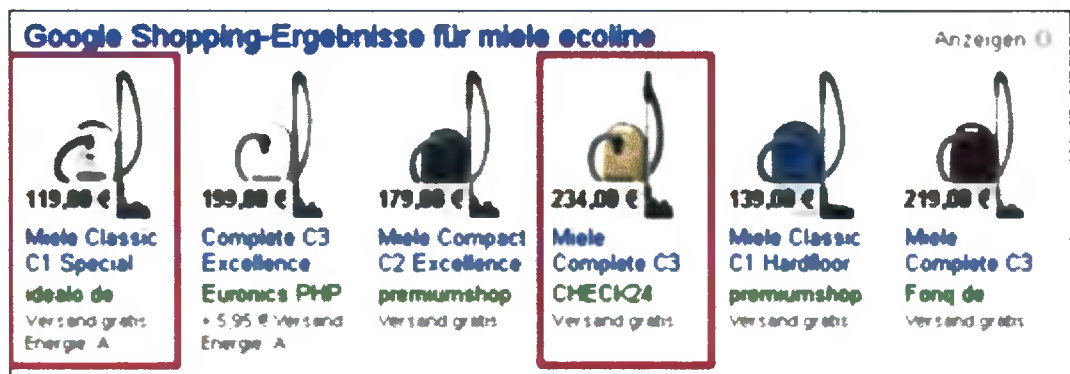
- 15 In November 2011, Google began to supplement its text ad extension facility in Europe with the direct display, on its general results pages, of groups of ads from several advertisers, with images and prices, which it called 'product listing ads', or 'product ads' for short, and which appeared either on the right-hand side or at the top of the results page. By clicking on an ad in the group, internet users were directed to the advertiser's website. Google has provided the following illustration of a product ad:



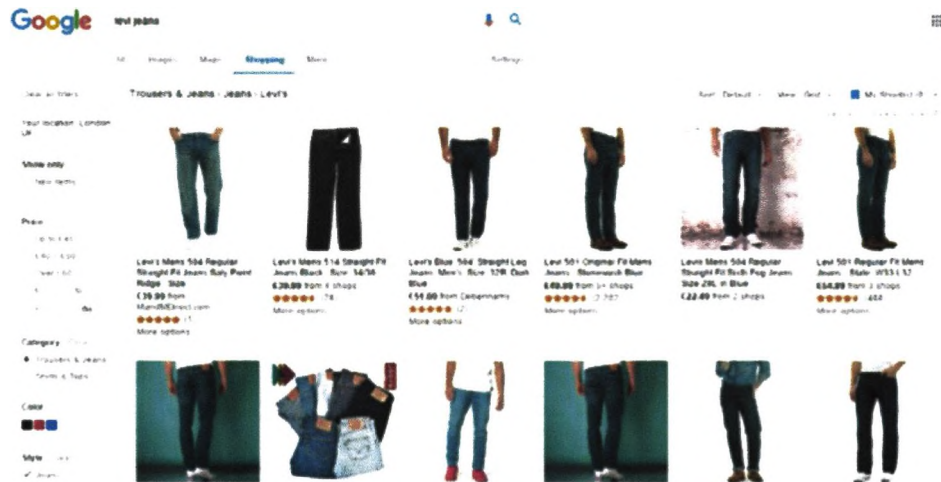
- 16 Google subsequently took the view that the simultaneous presence on the same general results page of grouped specialised search results (Product Universals), product ads, text ads, text ads extensions, if any, and general search results was confusing for internet users and product sellers and that it was not advisable for that situation continue to. In 2013, Google therefore discontinued in Europe the display of Product Universals and text ad extensions on its general results pages. As a result, those pages thereafter only displayed product ads, renamed 'Shopping Commercial Units', or 'Shopping Units' for short, text ads and general search results. In the contested decision, the Commission takes the view that Shopping Units are the evolution of Product Universals. Google has provided the following illustration of a Shopping Unit, appearing above text ads and a general search result:



- 17 Accordingly, Google submits that internet users who clicked on an ad in a Shopping Unit were always directed to the advertiser's sales website. They would access Google's specialised search page for comparison shopping, containing further ads, from the general results page only if they clicked on a specific link in the Shopping Unit header or on a link accessible from the general navigation banner.
- 18 Google states that the selection of ads for a Shopping Unit involved not only the auction mechanism mentioned in paragraph 5 above, but also similar criteria to those it applied to generate its natural specialised search results for products mentioned in paragraph 9 above. It explains that the selection could result in text ads being ranked higher on the general results page than Shopping Units, or vice versa, or could even result in the latter not appearing at all if the number of quality ads was insufficient. Google notes that competing comparison shopping services could appear, like other advertisers, in Shopping Units provided that clicking on the ad at issue would take users to pages of the comparison site where they could buy the product in question or take them directly to the retail website of the comparison site's partner. Google has provided an illustration in that regard:



- 19 Google states that at the same time as it removed Product Universals from its general results page, it also stopped displaying the natural results of specialised product searches on its specialised Product Search results page, which had become a single page containing ads only, known as ‘Google Shopping’. Google has provided the following illustration of a Google Shopping page:



B. Administrative procedure

- 20 These proceedings are the result of several complaints filed with the Commission beginning in November 2009 by undertakings, associations of undertakings and consumer associations, as well as cases referred to the Commission by national competition authorities (in particular, the Bundeskartellamt).
- 21 On 30 November 2010, the Commission initiated proceedings against Google on the basis of Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).
- 22 On 13 March 2013, the Commission adopted a preliminary assessment under Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) with a view to the possible acceptance of commitments by Google that would address its concerns. In its preliminary assessment, the Commission considered, in particular, that the favourable treatment, within Google's general search results pages, of links to its own specialised search services as compared to links to competing specialised search services was capable of infringing Article 102 TFEU and Article 54 of the EEA Agreement.
- 23 Although Google stated that it did not agree with the legal analysis set out in the preliminary assessment and challenged the claim that the practices described by the Commission infringed Article 102 TFEU, it submitted three sets of

commitments: the first on 3 April 2013, the second on 21 October 2013 and the third on 31 January 2014.

- 24 Between 27 May 2014 and 11 August 2014, the Commission sent letters pursuant to Article 7(1) of Regulation No 773/2004 to the complainants who had lodged a complaint before 27 May 2014, informing them that it intended to reject their complaints. The letters outlined the Commission's provisional view that the third set of commitments submitted by Google could address the competition concerns expressed in the preliminary assessment.
- 25 Nineteen complainants submitted comments in response to those letters. After reviewing those comments, the Commission considered that it was not in a position to adopt a commitments decision under Article 9 of Regulation No 1/2003 and informed Google thereof on 4 September 2014.
- 26 On 15 April 2015, the Commission reverted to the infringement procedure provided for in Article 7(1) of Regulation No 1/2003 and adopted a statement of objections addressed to Google, in which it reached the provisional conclusion that the practice at issue constituted an abuse of a dominant position and therefore infringed Article 102 TFEU.
- 27 On 27 April 2015, the Commission granted Google access to the file.
- 28 Between June and September 2015, the Commission sent a non-confidential version of the statement of objections to 24 complainants and 10 interested parties. Comments were submitted by 20 complainants and 7 interested parties.
- 29 On 27 August 2015, Google submitted its response to the statement of objections.
- 30 Between October and November 2015, the Commission sent a non-confidential version of the response to the statement of objections to 23 complainants and 9 interested parties. Comments were submitted by 14 complainants and 7 interested parties.
- 31 On 14 July 2016, the Commission adopted a supplementary statement of objections.
- 32 On 27 July 2016, the Commission granted Google further access to the file.
- 33 Between September and October 2016, the Commission sent a non-confidential version of the supplementary statement of objections to 20 complainants and 6 interested parties. Comments on the supplementary statement of objections were submitted by 9 complainants and 3 interested parties.
- 34 On 3 November 2016, Google submitted its response to the supplementary statement of objections.

- 35 On 28 February 2017, the Commission sent Google a letter of facts drawing its attention to evidence that was not expressly relied on in the statement of objections and the supplementary statement of objections, but that, on further analysis of the file, could be potentially relevant to support the preliminary conclusion drawn from those documents.
- 36 On 1 March 2017, the Commission granted Google further access to the file.
- 37 On 18 April 2017, Google replied to the letter of facts.
- 38 On 27 June 2017, the Commission adopted the contested decision.

C. The contested decision

- 39 In the contested decision, after setting out the stages of the procedure leading to its adoption and rebutting Google's complaints concerning the conduct of that procedure, the Commission first of all defined the relevant markets, within the meaning of the competition rules.
- 40 It recalled that, when investigating the possible dominant position of an undertaking on a market, it was required to take account not only of the characteristics of the products or services concerned, but also the structure of supply and demand, in order to identify the relevant market or markets. In that respect, it referred, in particular, to the judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission* (322/81, EU:C:1983:313, paragraph 37). The Commission stated that the distinctness of products or services must be assessed by reference to consumer demand and mentioned, to that effect, the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289, paragraphs 917 and 925).
- 41 The Commission took the view that the relevant product markets for the case were the market for general search services and the market for comparison shopping services.
- 42 With regard to the first market, the Commission stated that offering an online general search service was an economic activity because internet users, by using that service (even though they do not pay to do so), agree to allow the search engine operator to collect data concerning them, which it may subsequently monetise, particularly with advertisers wishing to display advertisements on the results pages. Generally speaking, on 'two-sided' platforms, a free side for one type of user (in this case, internet users) makes it possible, if the platform functions well, to strengthen demand for the other side, which is not free for its type of user (in this case, advertisers who want to reach as many internet users as possible). To that extent, the different online general search services compete to attract both internet users and advertisers through the quality of their search engine.

- 43 Next, the Commission found that, from the standpoint of internet users' demand, there was limited substitutability between general search services and other services offered online.
- 44 Content websites (like Wikipedia or the websites of major newspapers) are mainly websites providing the information internet users are ultimately looking for, while a general search service directs users upstream to websites capable of answering their queries. Although content sites themselves may direct users to other websites or provide search functionalities, they do so always within their own field of specialisation and do not allow users to search in all fields.
- 45 For the same reason, there is limited substitutability between specialised search services and general search services. Moreover, the former mostly provide retail offers only, whereas the latter provide all types of online service. The way in which those different search services return answers is also different, even if only in terms of the composition of their databases. Their financial models differ too: general search services are financed solely by payments for the display of advertisements on the results pages, while specialised search services are financed also by payments from undertakings whose websites are mentioned in the search results when internet users take follow-up action (payments linked to clicks or subsequent transactions). Specific examples, such as Google, confirm those differences. Thus, many undertakings offering specialised search services, such as Shopzilla (a comparison shopping service) or Kayak a (travel fare comparison service) do not offer a general search service. Google itself clearly distinguishes between the two types of search service and, as a matter of course, has specific search pages and results pages for its specialised search services. Industry analysts also draw a distinction between the two types of service. The Commission drew attention to further distinctions concerning the functionalities or use of both types of service, even though they may sometimes provide answers to the same query.
- 46 The Commission also stated that there was limited substitutability between social networking sites and general search services. Those two services perform different functions: social networks are designed to make internet users interact with each other, which is not the case for general search services. Although some social networks offer a general search service on their own websites, they use third-party technology to do so and their activity in that respect is negligible compared to that of general search services as a whole. The Commission pointed out that, although Facebook had used the technology of Microsoft's general search service Bing, it had offered that service in Europe only in the past and only to users who had chosen US English as their user language, and its database was purely 'internal', that is to say, powered solely by contributions from its users.
- 47 As regards supply-side substitutability, the Commission also noted that there was limited substitutability between general search services and other services offered online. In that regard, it cited the existence of barriers to entry in general search services for operators of other online services to demonstrate that it would be

difficult for them, in the short term and without incurring significant additional costs or risks, to compete with existing providers of general search services.

- 48 In essence, the Commission maintained that a provider of online services wishing to offer a new general search service would have to make very substantial investments. A number of major internet players reported the existence of serious barriers to entry in that respect. If a general search service is to function smoothly and be viable, it needs to receive a significant volume of search queries. Since the quality of the answers to internet users' queries has undergone considerable change, a shift in market positions of the kind witnessed in the past when Google overtook the former leading search engines, Alta Vista and Lycos, is no longer likely today. The development of advertising on the general results pages also favours the leader which attracts more advertisers given the number of users using its general search service. This makes it all the more difficult for new operators to emerge and, since 2007, a number of operators have abandoned the business or confined themselves to a particular national market or linguistic area. Only Microsoft has been able to pursue that business in any meaningful way with its search engine Bing. However, its market share does not exceed 10% in any EEA country.
- 49 Next, the Commission found that online general search services should not be distinguished according to whether internet users use them on computers or on other devices such as tablets or smartphones. It thus concluded that there was a product market for online general search services.
- 50 In addition, the Commission gave the following reasons for its finding that there was a market for online comparison shopping services.
- 51 Comparison shopping services can be distinguished from other online specialised search services. From the demand-side perspective, each specialised search service deals with queries focussing on a specific subject matter and provides answers on that subject matter alone, such that there is no substitutability between the different specialised search services. From the supply-side perspective, the criteria for selecting answers, the content of databases, the nature and sphere of activity of the operators of websites to which a specialised search service may direct users and the contractual relationships with those operators are so varied depending on the type of specialised search involved that it would be difficult for the provider of a specialised search service to offer, in the short term and without incurring significant additional costs, a different type of specialised search service and therefore to compete in that respect. Accordingly, supply-side substitutability does not exist either between the different types of specialised search service.
- 52 For various reasons, there is also limited substitutability between the display of general advertisements on the general results pages, referred to as 'online search advertising platforms' in the contested decision, and comparison shopping services. The Commission essentially put forward reasons relating to the development and functioning of the two types of service, particularly the fact that

internet users do not specifically look for advertising, whereas they deliberately turn to a comparison shopping service for results.

- 53 There is also limited substitutability between the services of online direct sellers and comparison shopping services. The Commission pointed out, in essence, that direct sellers focus on the products or services that they themselves sell and the fact that internet users can purchase an item from them without having a comparison shopping service run a search does not mean that there is substitutability between the two types of service, which are very different.
- 54 There is limited substitutability between the services of online sales platforms and comparison shopping services. In response to a number of arguments put forward by Google to the contrary, the Commission carried out a detailed analysis of the differences between those two types of service, mainly relating to the fact that, unlike online sales platforms, comparison shopping services do not sell products and thus do not provide services or assume obligations linked to the sale.
- 55 Concerning the geographical scope of the relevant markets, the Commission concluded that both the markets for general search services and the markets for specialised comparison shopping search services were national in scope. Even though websites can be accessed anywhere, factors related to national partitioning, particularly of a linguistic nature, and the existence of ‘national’ search engines led to that conclusion, which Google does not dispute.
- 56 Next, the Commission stated that, since 2008, Google has held a dominant position on the market for general search services in every EEA country except the Czech Republic, where it has held such a position only since 2011. The Commission relied on a number of factors in that respect. It drew attention to Google’s very high and stable market shares by volume, as observed in various studies, which have almost always exceeded 80% since 2008, except in the Czech Republic, where Google nevertheless became the undisputed leader in January 2011 with a market share exceeding 70%. The Commission pointed to the low market shares of Google’s competitors, such as Bing and Yahoo. It restated its considerations on barriers to market entry as set out in its earlier analysis of the market definition (see paragraphs 47 and 48 above) and also stated that few internet users use more than one general search engine, that Google has a strong reputation and that users, who are independent of each other, do not exert any countervailing buyer power. The Commission rejected Google’s arguments that the fact that its service was offered to users free of charge changed matters and stated that Google’s dominant position existed in relation to searches carried out using both desktop computers and mobile devices. In its action, Google does not deny that it holds a dominant position on the national markets for general search services within the EEA.
- 57 The Commission found that Google had, at different times, coinciding for each country concerned with the launch of Product Universals or Shopping Units and dating back as far as January 2008, abused its dominant position on 13 national

markets for general search services within the EEA by decreasing traffic from its general results pages to competing comparison shopping services and increasing traffic to its own comparison shopping service, which was capable of having, or was likely to have, anticompetitive effects on the 13 corresponding national markets for specialised comparison shopping search services and on those national markets for general search services. The countries concerned are Belgium, the Czech Republic, Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the United Kingdom and Norway. The Commission described the abuse that Google was alleged to have committed in more detail as follows.

- 58 As regards the principles at issue, the Commission stated that Article 102 TFEU not only refers to the conduct of an undertaking that tends to strengthen its position on the market in which it is already dominant, but also covers the conduct of an undertaking in a dominant position on a given market that tends to extend its position to a neighbouring market by distorting competition. The Commission — referring, in particular, to the judgment of 21 February 1973, *Europemballage and Continental Can v Commission* (6/72, EU:C:1973:22, paragraphs 27 and 29) — recalled that an abuse of a dominant position was prohibited regardless of the means and procedure by which it was achieved and irrespective of any fault. Nevertheless, it was open to the undertaking concerned to provide a justification by demonstrating that its conduct was objectively necessary or that the exclusionary effect produced could be counterbalanced by advantages in terms of efficiency gains that also benefit consumers.
- 59 The Commission stated that the abuse identified in the present case consisted in the more favourable positioning and display, in Google’s general results pages, of its own comparison shopping service compared to competing comparison shopping services.
- 60 To demonstrate why that practice was abusive and departed from competition on the merits, the Commission described, in the first place, how Google positioned and displayed its own comparison shopping service more favourably than competing comparison shopping services. The Commission examined, first, how competing comparison shopping services were positioned and displayed among Google’s generic results, and then, in comparison, how Google’s comparison shopping service was positioned and displayed within its general results pages.
- 61 As regards the positioning of competing comparison shopping services, the Commission observed that those comparison services appeared through the generic results, in the form of links to their results pages capable of answering a user’s query. At the same time, they were liable to demotion within the ranking of generic results due to the application of ‘adjustment’ algorithms, in particular the Panda algorithm, on account of, inter alia, the characteristics of the comparison shopping services and especially their lack of original content. The Commission stated, among other things, that since their launch, two of the algorithms at issue had been applied at least once to most of the 361 comparison shopping services

that had submitted comments following the statement of objections ('the 361 competing comparison shopping services that participated in the administrative procedure'). Furthermore, in the United Kingdom, Germany, France, Italy and Spain between 2 August 2010 and 2 December 2016, the visibility of competing comparison shopping services on Google's general results pages, which was at its highest at the end of 2010 and the beginning of 2011, suffered a sudden drop after the launch of the Panda algorithm and never recovered.

- 62 As regards the display of competing comparison shopping services, the Commission pointed out that those comparison services could only be displayed as generic results on Google's general results pages, that is to say, in the form of simple blue links, and could not, therefore, be displayed in an enriched format with images and additional information on the products, prices and seller, when such information increases the click-through rate. The Commission mentioned a number of items of evidence to support that assertion, including studies and experiments.
- 63 Next, the Commission examined, comparatively, how Google's comparison shopping service was positioned and displayed on the general results pages. As regards its positioning, the Commission identified two differences with respect to the positioning of competing comparison shopping services: (i) Google's comparison shopping service was not subject to the same ranking mechanisms, particularly the adjustment algorithms such as Panda; and (ii) when Google's comparison shopping service was displayed in a 'box', it appeared in a highly visible place. Concerning the application of adjustment mechanisms, the Commission noted that those algorithms did not apply, despite the fact that Google's comparison shopping service had numerous characteristics in common with competing comparison shopping services, which would have made it prone to the same demotions in the generic results. As regards the visibility of Google's comparison shopping service in the general results pages, the Commission specifically stated that, since the launch of Product Universals, Google has in most cases positioned the results of its own comparison shopping service either above all the generic results or at the level of the first generic results, the objective being, according to an internal email of Google, to 'dramatically increase traffic'. After describing the evolution of Product Universals between 2007 and 2012, the Commission examined the positioning of Shopping Units and found that they were still positioned above the first generic results of Google. In response to Google's argument that the trigger rate of Shopping Units was low, the Commission pointed out that, in most cases, their trigger rate exceeded the trigger rate of the 361 competing comparison shopping services that participated in the administrative procedure, both in the first four generic results and as the first generic result. In support of that assertion, the Commission provided figures for the 13 geographic markets at issue.
- 64 Concerning the display of Google's comparison shopping service, the Commission found that the main difference in display compared to competing comparison shopping services was that Google's comparison shopping service

was displayed with richer graphical features, including images and dynamic information. According to the Commission, those enriched graphical features resulted in higher click-through rates for Google and therefore increased its revenue. The Commission listed several reasons in support of that assertion, based on Google's own explanations and on another undertaking's submissions in the administrative procedure.

65 Next, the Commission replied to Google's arguments challenging the claim of favouritism. In particular, it set out various reasons why the display and use of Product Universals and Shopping Units favoured Google's comparison shopping service.

66 In order to demonstrate the abusive nature of the practice at issue, the Commission examined, in the second place, the importance of traffic volume for comparison shopping services. The Commission noted that traffic was important in many respects for the ability of a comparison shopping service to compete. After quoting the owner of several comparison shopping services, who was of the view that traffic is the most important asset of a specialised search engine because, for a number of reasons, it increases the relevance of search services, the Commission confirmed, in particular, on the basis of numerous statements, that the relevance of a specialised search service was related to the breadth and freshness of the information provided. Traffic enables comparison shopping services to convince sellers to provide them with more data on their products, thus increasing the online comparison shopping services they offer and, in turn, their revenue. The Commission also noted, quoting numerous statements in that regard, that traffic led to machine learning effects, making it possible to increase the relevance of search results and, consequently, the usefulness of the comparison shopping service offered to internet users. Finally, the Commission explained that traffic allowed comparison shopping services to carry out experiments to improve their search services and suggest other search terms that may be of interest to users.

67 In order to demonstrate the abusive nature of the practice at issue, the Commission explained, in the third place, that that practice decreased traffic from Google's general results pages to competing comparison shopping services and increased traffic from those pages to Google's comparison shopping service. The Commission gave three reasons to support that finding. First of all, based on an analysis of internet users' behaviour, the Commission concluded that generic results generated significant traffic to a website when they were ranked in the first three to five positions on the first general results page ('above the fold'); users pay little or no attention to subsequent results, which often do not appear directly on screen. The Commission added that the first ten results received approximately 95% of internet users' clicks. Based on studies conducted by Microsoft, the Commission specified that the position of a given link in the generic results had a major impact on the click-through rate of that link, irrespective of the relevance of the webpage to which it led, and that a change in the ranking of a search result on Google's general results pages had a major impact on traffic flowing from the general search. Next, the Commission stated that the practice at issue had led to a

decrease in traffic from Google's general results pages to almost all competing comparison shopping services over a significant period of time in each of the 13 EEA countries where that practice had been implemented. Lastly, the Commission found that the practice at issue had led to an increase in Google's traffic to its own comparison shopping service. The Commission relied on various items of evidence to support those findings. It contested the arguments Google had put forward to challenge the identified traffic trends and the causal link between its conduct and those trends.

- 68 In order to demonstrate the abusive nature of the practice at issue, the Commission submitted, in the fourth place, that the traffic diverted by that practice accounted for a large proportion of the traffic to competing comparison shopping services and could not be effectively replaced by the other sources of traffic currently available to competing comparison shopping services, namely AdWords text ads, mobile telephone applications, direct traffic, referrals from other partner websites, social networks and other general search engines.
- 69 In order to demonstrate the abusive nature of the practice at issue, the Commission explained, in the fifth place, that that practice had potential anticompetitive effects on the 13 national markets for specialised comparison shopping search services and the 13 national markets for general search services mentioned in paragraph 57 above. Regarding the national markets for specialised comparison shopping search services, the Commission sought to show that the practice at issue could cause competing comparison shopping services to cease trading, have a negative impact on innovation and therefore diminish consumers' ability to access the most efficient services. The competitive structure of those markets would thus be affected. If retail platforms were to be included in those markets, the Commission considered that the same effects would be felt by Google's closest competitors, namely competing comparison shopping services. Concerning the national markets for general search services, the Commission stated that the anticompetitive effects of the practice at issue arise from the fact that the additional resources generated by Google's comparison shopping service from the general results pages enable it to strengthen its general search service.
- 70 In summary, in the contested decision, the Commission sought to demonstrate that Google positioned and promoted its comparison shopping service on its general results pages more favourably than competing comparison shopping services (section 7.2.1 of the contested decision); that significant traffic, in other words, a high number of visits, is essential for comparison shopping services (section 7.2.2 of the contested decision); that Google's conduct increased traffic to its comparison shopping service and decreased traffic to competing comparison shopping services (section 7.2.3 of the contested decision); that traffic from Google's general results pages accounts for a large proportion of the traffic of those competing comparison services and cannot be effectively replaced by other sources of traffic (section 7.2.4 of the contested decision); that the conduct in issue could result in Google's dominant position being extended to markets other than the market on which that position is already held, namely the markets for

specialised comparison shopping search services (section 7.3.1 of the contested decision); that even if comparison shopping services were included in broad markets also encompassing the services of online sales platforms, the same anticompetitive effects would be felt in the comparison shopping services segment (section 7.3.2 of the contested decision); and that the conduct in issue also protected Google's dominant position on the markets for general search services (section 7.3.3 of the contested decision). In particular, the Commission drew attention to the harm that could be caused to consumers as a result of the situation. It rebutted the arguments put forward by Google challenging that analysis, to the effect that the legal criteria used (legal test) were wrong (section 7.4 of the contested decision). The Commission also rejected the reasons given by Google to show that its conduct was not abusive (section 7.5 of the contested decision) because it was objectively necessary or because any resulting anticompetitive effects were offset by efficiency gains benefiting consumers.

- 71 As is apparent from recitals 344 and 512 of the contested decision, the conduct specifically identified by the Commission as the source of Google's abuse is, in essence, the fact that it displayed its comparison shopping service on its general results pages in a prominent, eye-catching manner in dedicated 'boxes', without that comparison service being subject to the adjustment algorithms Google used for general searches, whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results (blue links) and tended to be given a low ranking due to the application of those algorithms. The Commission pointed out in recitals 440 and 537 of the contested decision that it did not object, per se, to the various selection criteria chosen by Google, described as relevance criteria, but to the fact that the same positioning and display criteria do not apply to both its own comparison shopping service and to competing comparison services. Similarly, in recital 538 of the contested decision, it stated that it did not call in question, as such, the promotion of specialised comparison shopping results that Google considered to be relevant, but the fact that the same promotion effort was not made in respect of both its own comparison shopping service and competing comparison services.
- 72 After setting out the above evidence, the Commission declared, in Article 1 of the contested decision, that Google Inc. (renamed Google LLC) and Alphabet Inc., since its takeover of Google Inc., had infringed Article 102 TFEU and Article 54 of the EEA Agreement in the 13 countries mentioned in paragraph 57 above, which are either EU Member States or other States party to the EEA Agreement, at different times coinciding with the introduction of specialised product results or product ads on Google's general results page.
- 73 The Commission considered that the situation was such that Google should be ordered bring an end to the conduct in issue within 90 days and to refrain from similar conduct having the same object or effect. It made clear that although Google could comply with that order in different ways, a number of principles had to be respected, regardless of whether or not Google decided to retain Shopping Units or other groups of comparison shopping search results on its general results

pages. Those principles included, in essence, the principle of non-discrimination between Google's comparison shopping service and competing comparison services. The order requiring Google to bring an end to the conduct in issue appears in Article 3 of the operative part of the contested decision.

- 74 Finally, the Commission explained why a financial penalty should be imposed on Google. It recalled that under Article 23(2)(a) of Regulation No 1/2003 and Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ 1994 L 305, p. 6), it may impose such a penalty on undertakings that have intentionally or negligently infringed Article 102 TFEU and Article 54 EEA. It also drew attention to the general parameters for determining financial penalties set out in Article 23(3) of Regulation No 1/2003, namely the gravity and duration of the infringement, and how it had stated it would apply those parameters in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines').
- 75 It considered that Google could not have been unaware of its dominant position on the national markets for general search services or of the abusive nature of its conduct, even though some aspects of the situation had not been examined in previous cases. Google therefore acted intentionally or negligently. The Commission denied that the fact that discussions had been held, at a given point in time in the procedure, to address the competition problem it had identified by way of commitments by Google prevented a fine from being imposed.
- 76 The Commission then stated that, in view of the control Alphabet Inc. had exerted over Google Inc. (renamed Google LLC) since 2 October 2015, Alphabet Inc. was jointly and severally liable for the fine imposed in so far as it relates to the period from that date.
- 77 Next, the Commission determined the basic amount for calculating the financial penalty (defined in paragraphs 12 to 19 of the Guidelines as the 'value of sales') as the revenue generated in 2016, in the 13 countries in which it had identified the conduct in issue, by product ads appearing in Shopping Units or on the specialised Google Shopping page and by text ads also appearing on that page.
- 78 The Commission considered that, in view of the economic importance of the 13 national markets for comparison shopping services and the fact that Google not only held a dominant position in the countries concerned on the market for general search services, but was also far ahead of its competitors in terms of market shares, the gravity multiplier to be used to calculate the financial penalty, as provided for in paragraphs 20 to 23 of the Guidelines, had to be [between 5% and 20% – the actual figure is confidential] of the basic amount described in the previous paragraph. As provided for in paragraph 24 of the Guidelines, the Commission then, for each of the 13 countries concerned by the finding of infringement, multiplied that amount by the number of years of infringement that

had elapsed since the launch of Product Universals or, failing which, Shopping Units.

- 79 In order to ensure, in essence, that the penalty has a deterrent effect on undertakings of the same size and financial capacity as Google (noting that its total turnover stood at EUR 81 597 000 000 in 2016), the Commission applied an additional amount, as provided for in paragraph 25 of the Guidelines, corresponding to a specific percentage of the basic amount referred to in paragraph 77 above, and multiplied the resulting figure by 1.3. It did not find that there were any aggravating or mitigating circumstances that would have increased or decreased the fine.
- 80 Thus, by Article 2 of the contested decision, the Commission imposed on Google Inc. (renamed Google LLC) a financial penalty of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet Inc.

II. Procedure

- 81 By application lodged at the Court Registry on 11 September 2017, Google brought the present action.
- 82 By document lodged at the Court Registry on 28 November 2017, the Bureau européen des unions de consommateurs ('BEUC') applied for leave to intervene in support of the form of order sought by the Commission.
- 83 By document lodged at the Court Registry on 4 December 2017, Connexity Inc., Connexity UK Ltd, Connexity Europe GmbH and Pricegrabber.com (taken together, 'Connexity') applied for leave to intervene in support of the form of order sought by the Commission.
- 84 By document lodged at the Court Registry on 7 December 2017, Infederation Ltd ('Foundem') applied for leave to intervene in support of the form of order sought by the Commission.
- 85 By documents lodged at the Court Registry on 11 December 2017, the EFTA Surveillance Authority and the association Initiative for a Competitive Online Marketplace ('ICOMP') applied for leave to intervene in support of the form of order sought by the Commission.
- 86 By document lodged at the Court Registry on 19 December 2017, Prestige Gifting Ltd applied for leave to intervene in support of the form of order sought by Google.
- 87 By document lodged at the Court Registry on 19 December 2017, Kelkoo SAS applied for leave to intervene in support of the form of order sought by the Commission.

- 88 By document lodged at the Court Registry on 20 December 2017, Computer & Communication Industry Association ('CCIA') applied for leave to intervene in support of the form of order sought by Google.
- 89 By documents filed at the General Court on 20 December 2017, Consumer Watchdog, Yelp Inc., Verband Deutscher Zeitschriftenverleger eV ('VDZ'), Visual Meta GmbH, Bundesverband der Deutschen Zeitschriftenverleger eV ('BDZV'), the Federal Republic of Germany, Open Internet Project or OIP ('OIP') and Twenga SA applied for leave to intervene in support of the form of order sought by the Commission.
- 90 By document lodged at the Court Registry on 21 December 2017, FairSearch applied for leave to intervene in support of the form of order sought by the Commission.
- 91 The Commission lodged its defence at the Court Registry on 31 January 2018.
- 92 By document lodged at the Court Registry on 20 March 2018, StyleLounge GmbH applied for leave to intervene in support of the form of order sought by the Commission.
- 93 By letter of 23 March 2018, Google and the Commission asked the Court, under Article 144 of the Rules of Procedure of the General Court, not to communicate some of the information in the file to the interveners granted leave to intervene because it was confidential. Google and the Commission submitted requests with identical content with regard to all of the applicants for leave to intervene, including the EFTA Surveillance Authority.
- 94 Google lodged its reply at the Court Registry on 7 May 2018.
- 95 By order of 16 May 2018, *Google and Alphabet v Commission* (T-612/17, not published, EU:T:2018:292), the President of the Ninth Chamber of the General Court dismissed StyleLounge's application for leave to intervene in the proceedings in support of the Commission as it was out of time.
- 96 The Commission lodged its rejoinder at the Court Registry on 20 July 2018.
- 97 Following a measure of organisation of procedure adopted by the Court, Google and the Commission submitted, in relation to all of the applicants for leave to intervene, revised requests for confidential treatment concerning the application and the defence on 28 September 2018 and, subsequently, requests for confidential treatment concerning the reply and the rejoinder on 12 October 2018. Those requests were also identical in content with regard to all of the applicants for leave to intervene.
- 98 By orders of 7 December 2018, *Google and Alphabet v Commission* (T-612/17, not published, EU:T:2018:978; T-612/17, not published, EU:T:2018:982; T-612/17, not published, EU:T:2018:996; T-612/17, not published,

EU:T:2018:1001; and T-612/17, not published, EU:T:2018:1002), the President of the Ninth Chamber of the General Court dismissed the applications for leave to intervene filed by, respectively, Prestige Gifting, FairSearch, Consumer Watchdog, Yelp, Connexity and ICOMP for failure to establish a sufficient interest to intervene.

- 99 By orders of 17 December 2018, *Google and Alphabet v Commission* (T-612/17, not published, EU:T:2018:1007; T-612/17, not published, EU:T:2018:1008; T-612/17, not published, EU:T:2018:1009; T-612/17, not published, EU:T:2018:1010; T-612/17, not published, EU:T:2018:1011; T-612/17, not published, EU:T:2018:1028; and T-612/17, not published, EU:T:2018:1029), the President of the Ninth Chamber of the General Court granted leave to intervene, respectively, to BEUC, Foundem, CCIA, VDZ, BDZV, Visual Meta, Twenga, the EFTA Surveillance Authority, Kelkoo and the Federal Republic of Germany. In those orders, costs related to the interventions were reserved.
- 100 By order of 17 December 2018, *Google and Alphabet v Commission* (T-612/17, not published, EU:T:2018:1005), the President of the Ninth Chamber of the General Court dismissed OIP's application for leave to intervene for failure to establish a sufficient interest to intervene.
- 101 In the orders granting leave to intervene, the decision as to the merits of the requests for confidential treatment was reserved and a non-confidential version of the procedural documents was sent to the interveners pending the submission of any observations on their part on the requests for confidential treatment.
- 102 By document lodged at the Court Registry on 15 January 2019, Foundem contested in part Google's requests for confidential treatment.
- 103 By document lodged at the Court Registry on 15 January 2019, clarified by a letter lodged on 25 January 2019, the EFTA Surveillance Authority stated that, so far as it was concerned, the requests for confidential treatment of the Commission and of Google were, in full or in part, devoid of purpose or unfounded. Notwithstanding that, it stated that it was not asking to be provided with the confidential versions of the documents in the file.
- 104 By order of 11 April 2019, *Google and Alphabet v Commission* (T-612/17, not published, EU:T:2019:250), the President of the Ninth Chamber of the General Court granted some of the revised requests for confidential treatment concerning information in the application and the defence and some of the requests for confidential treatment concerning information in the reply and the rejoinder. It rejected the requests for confidential treatment as to the remainder. Consequently, a time limit was set for Google and the Commission to submit new non-confidential versions of a number of documents in the file and a time limit was also set for Foundem to supplement its statement in intervention in the light of the information arising as a result of confidentiality being lifted. In response to the observations of the EFTA Surveillance Authority, which raised questions relating

to its special position in administrative procedures leading to decisions of the Commission finding an infringement of the competition rules laid down in the Agreement on the European Economic Area, the President of the Ninth Chamber of the General Court stated that, in the present case, since Google and the Commission had applied for confidential treatment of information in relation to all the interveners, the EFTA Surveillance Authority was subject to the same requirements as the other interveners if it wished to be exempted from all or part of that treatment. He pointed out that the EFTA Surveillance Authority had not satisfied those requirements because it had not identified precisely the items of information in respect of which confidential treatment should not be raised against it. In those circumstances, the observations of the EFTA Surveillance Authority were not acted upon.

- 105 The interveners mentioned in paragraph 99 above each filed their statement in intervention on 15 March 2019 and Foundem filed a supplementary statement in intervention on 11 June 2019. The Commission submitted observations on CCIA's statement in intervention on 20 May 2019 and Google submitted observations on the statements in intervention of the other interveners on 21 June 2019 and 1 July 2019, specifically concerning that of Foundem.
- 106 By decision of the Plenary Conference of 10 July 2019, the case was referred to the Ninth Chamber, Extended Composition, of the General Court.
- 107 By letters of 9 and 23 August 2019, the Commission and Google respectively asked the Court not to communicate some of the information in Google's observations to the interveners because it was confidential.
- 108 Upon hearing the Judge-Rapporteur, the Court (Ninth Chamber, Extended Composition) decided to open the oral part of the procedure and, pursuant to Article 89(2) and (3) of its Rules of Procedure, invited the main parties to reply to a number of questions, either in writing or at the hearing.

III. Forms of order sought by the parties

- 109 Google claims that the Court should:
- annul the contested decision;
 - in the alternative, annul or reduce the fine in exercise of the Court's unlimited jurisdiction;
 - in any event, order the Commission to pay the costs; and
 - order the interveners in support of the Commission to pay the costs relating to their intervention.
- 110 The Commission contends that the Court should:

- dismiss the action;
- order Google to pay the costs; and
- order CCIA to pay the costs incurred by the Commission in connection with its intervention.

111 CCIA submits that the Court should:

- annul the contested decision;
- order the Commission to pay the costs of its intervention.

112 BEUC submits that the Court should:

- dismiss the action;
- order Google to pay the costs of its intervention.

113 Foundem submits that the Court should:

- dismiss the action;
- order Google to pay the costs.

114 Kelkoo submits that the Court should:

- dismiss the action;
- order Google to bear its own costs and to pay those of the proceedings.

115 VDZ submits that the Court should:

- dismiss the action;
- order Google to bear its own costs and to pay those of the proceedings.

116 Visual Meta submits that the Court should:

- dismiss the action;
- order Google to bear its own costs and to pay those of the proceedings.

117 BDZV contends that the Court should:

- dismiss the action;
- order Google to bear its own costs and to pay those of the proceedings.

118 The Federal Republic of Germany submits that the Court should dismiss the action.

119 Twenga submits that the Court should:

- dismiss the action;
- order Google to pay the costs.

IV. Pleas in law and arguments of the parties

120 Google sets out six pleas supporting the claim for annulment of the contested decision, worded as follows: ‘The First and Second pleas show that the Decision errs in finding that Google favours a Google comparison shopping service by showing Product Universals and Shopping Units. The Third plea explains that the Decision errs in finding that the positioning and display of Product Universals and Shopping Units diverted Google search traffic. The Fourth plea demonstrates that the Decision’s speculation about anticompetitive effects is unfounded. The Fifth plea shows that the Decision errs in law by treating quality improvements that constitute competition on the merits as abusive. The Sixth plea sets out why the Decision errs in imposing a fine.’

121 The arguments of the interveners and those submitted in response by the main parties are set out separately below only in so far as they are not broadly identical to the arguments already exchanged between the main parties.

A. First plea in law: the Commission erred in finding that Google favoured its own comparison shopping service by displaying Product Universals

122 The first plea is divided into three parts. In the first part, **Google** submits that the Commission misrepresented the facts in the contested decision. Google introduced grouped product results (‘Product Universals’ in their last incarnation) to improve the quality of its services, not to direct traffic to its own comparison shopping service. In the second part, Google argues that the Commission erred in finding that treating Product Universals and generic results differently amounted to favouritism, when there was no discrimination. In the third part, Google states that the Commission infringed the legal rules for assessing the objective justifications concerning the display of Product Universals.

1. First part of the first plea in law: misrepresentation of the facts because Google introduced grouped product results to improve the quality of its services, not to direct traffic to its own comparison shopping service

123 In the first place, **Google** claims that it developed grouped product results to improve its general search service in order to attract users to that service. It disputes the Commission’s assertion based on the interpretation of two emails to

the effect that it introduced grouped product results on its general results pages only to ‘dramatically increase’ traffic to its own comparison shopping service (recital 386 of the contested decision).

- 124 In actual fact, Google’s aim was pro-competitive. It was concerned with improving its general search service to attract users to that service.
- 125 Google explains that, in order to achieve its goal, it could not rely on general search mechanisms to process product queries. Its mechanisms for generating generic results — based on crawled data and generic relevance signals — did not produce the best results for product queries.
- 126 To address those shortcomings, Google developed specialised technologies and algorithms to collect data via feeds directly from retailers, organise the data in a product index, and use signals that are better at identifying and measuring the relevance of product results. Universal Search, introduced in 2007, increased the precision of Google’s ranking and the relevance and quality of those results by ensuring that Product Universals were displayed by Google only if they were more relevant than generic results.
- 127 Google maintains that the Commission ignored consistent evidence in its file demonstrating the pro-competitive rationale for showing grouped product results. The Commission relied only on extracts from two emails mentioned in paragraph 123 above that have nothing to do with grouped product results and were moreover taken out of context and artificially put together, in breach of the fundamental principles requiring the Commission to examine the evidence carefully.
- 128 In the second place, Google contends that Product Universals did not harm users but improved the quality and relevance of its results. According to Google, the Commission was wrong to claim that Product Universals provided low-quality results.
- 129 First of all, Google explains that one of the innovations it developed to meet and exceed the quality benchmark of its competitors, especially Amazon, was its product cataloguing system, which prevented duplicates or the wrong products from being displayed. Google implemented that project because of the prospect of significant quality gains. It succeeded in 2007.
- 130 Next, Google states that the Commission was wrong to claim, in support of its proposition that the display of Product Universals harmed users, that Google was losing traffic in 2007 and that traffic doubled after the launch of Universal Search (recitals 490, 492, 535 and 598 of the contested decision), and also that Google ‘did not always show to users the most relevant results (as ranked by its generic search algorithms)’ (recital 598 of the contested decision).
- 131 According to Google, the claim that it ‘did not always show to users the most relevant results (as ranked by its generic search algorithms)’ is untrue. On the

contrary, the Universal Search mechanism enabled Google to compare the relevance of grouped product results and generic results directly and it displayed Product Universals only if they were more relevant for a query than the generic results ranked below them.

132 In short, the Commission ignored the evidence of Google's rationale for developing grouped product results, the technical solutions that improved the quality of its general search service and actual traffic developments.

133 Google argues that search services compete based on the relevance of their results, the way they present them, their response time and their comprehensiveness and that it improved its technologies so that it would be more competitive on those parameters.

134 In the reply, **Google** submits that its focus on the relevance of the results displayed on its general results page is corroborated by the cautious triggering of Product Universals, the documentary evidence and traffic data.

135 In that connection, Google makes the following observations, among others.

- First of all, on average, for six of the countries concerned by the contested decision, it triggered Product Universals only for a small proportion of product queries and displayed them at the top much less still. This confirms Google's explanation that it displayed Product Universals only when they were relevant and that they were therefore a means of improving the general search results, not an artificial means of generating traffic to Google's comparison shopping service. In 2008, Google implemented an 'aggressive demotion' for Product Universals and, in mid-2009, prevented the triggering of Product Universals in the top position entirely, before introducing strict criteria for such triggering. Thus, between December 2009 and February 2013, competing comparison shopping services appeared on the first general results page almost twice as often as Product Universals. The Commission failed to take account of the fact that, out of the billions of queries in response to which comparison shopping services appeared in the top three generic results, the vast majority of queries did not return a single Product Universal. Specifically, contrary to the claim made in the defence, when comparison shopping services appeared in the top three generic results, Google displayed a Product Universal above them only in a very small minority of cases. This shows that Google's goal was not to generate more traffic to its comparison shopping service, but to improve the quality of its general search service.
- Next, the assertion set out in the defence that Froogle was losing traffic prior to the launch of Product Universals and that Froogle's traffic sharply increased after the launch is incorrect. The authoritative traffic data from Google's logs directly contradict that claim.

- 136 **The Commission** replies that, in the contested decision, it did not dispute the pro-competitive rationale for developing Product Universals as such. The Commission states that it took issue with Google for having shown Product Universals in an eye-catching manner while, at the same time, competing comparison shopping services could appear only through the generic search results, without any enriched display features, and the algorithms were liable to demote them within those results (recitals 344 and 512 of the contested decision).
- 137 Thus, according to the Commission, the chain of correspondence prompted by the email of 30 March 2006 indicates that the inclusion of pages from the comparison shopping service Froogle in Google's general search process would have been insufficient to 'dramatically increase traffic' from Google's generic results to Froogle. Similarly, those emails and the email of 26 March 2007, read together, confirm that Google knew that displaying Product Universals would 'drive the bulk of the increase in traffic' to its own comparison shopping service. Furthermore, the abovementioned emails are not the only evidence supporting the finding regarding Google's rationale for showing Product Universals in an eye-catching manner. The Commission refers to recitals 382 and 389 of the contested decision, according to which Google was aware that, by displaying Product Universals favourably, it was favouring its own comparison shopping service. Moreover, the Commission did not find that Product Universals provided low-quality results.
- 138 Finally, contrary to Google's assertion, prior to it displaying Product Universals in an eye-catching manner, its comparison shopping service had been unsuccessful in generating traffic, according to the Commission. The Commission thus argues that, when Google started to display Product Universals prominently, traffic to its comparison shopping service increased considerably. That finding is based on data other than the data contained in Foundem's complaint, namely, in particular, Google's internal note of 24 October 2008 (recital 492 of the contested decision). In addition, to support its arguments, Google never requested access to the third-party data on which Foundem's complaint was based and never gave access to the logs it relies on to assert that traffic to Froogle was increasing before specialised product results began to appear on the general results page.
- 139 In the rejoinder, **the Commission** states that the fact that Google displayed Product Universals only in response to very few 'product queries' is irrelevant since what matters is not the number of times Product Universals were displayed in response to a product query but the comparison between the number of queries in response to which Google showed Product Universals prominently on its first general search results page and the number of queries in response to which Google prominently showed at least one competing comparison shopping service on its first general results page. Between December 2009 and February 2013, Google did show some competing comparison shopping services 'less often' on its first general results page than Product Universals.

- 140 Furthermore, the Commission contends that the documents produced by Google to support its claims are inadmissible. Annex C7, which seeks to show that competing comparison shopping services appeared on the first general results page almost twice as often as Product Universals, is inadmissible because it was submitted late with the reply without any explanation. In any event, it is inconclusive. It simply suggests that Google displayed ‘at least’ one competing comparison shopping service on its first general results page in response to queries numbering in the billions. This means that Google displayed each competing comparison shopping service far less than Product Universals, which appeared in response to half of those queries. In addition, Google did not provide the data on which the figures set out in that annex are based.
- 141 The Commission also maintains that Google did not implement an ‘aggressive demotion’ of Product Universals in 2008, nor did it ‘in mid-2009, [prevent] the triggering of Product Universals in the top position entirely’ as submitted in paragraph 76 of the reply/. Finally, even if, at a certain point in 2009, Google may have ‘made it harder for Product Universals to trigger at the top even though it was aware that it would mean fewer clicks’, this does not show that its ‘rationale for showing Product Universals was not to drive traffic to a Google [comparison shopping service]’.
- 142 Moreover, according to the Commission, Google did use the presence of a competing comparison shopping service in the top three generic results on its first general results page to increase displays of Product Universals at the top of that page. The internal emails of Google quoted in paragraphs 44 to 47 of the defence confirm the finding in recital 386 of the contested decision that Google’s rationale for prominently showing Product Universals was to remedy the failure of Froogle.
- 143 **BEUC** argues that Google’s real motivation was to protect and maximise its revenue by systematically appropriating the most profitable section of screen for its own results, which it displayed with eye-catching graphical features, even though those results were not necessarily the most relevant for a given query. Therefore, the ‘pro-competitive rationale’ accorded to the practices cannot truly coincide with providing internet users with the most relevant results in a neutral manner. Moreover, Google’s general search service could not possibly have been improved when comparison shopping services capable of providing answers to internet users’ queries were excluded from view to allow Google to favour its own products.
- 144 **Kelkoo** states that Google engaged in anticompetitive conduct to exclude its competitors and promote its own comparison shopping service. Google thus implemented a deliberate exclusion strategy designed to demote its competitors by applying its adjustment algorithms and favour its own comparison shopping service through preferential display and positioning. In that connection, Kelkoo draws attention to the development of Google’s adjustment algorithms and the different versions of its comparison shopping service.

145 **Visual Meta** contends that Product Universals do not constitute a genuine improvement in the quality of Google's service. Google introduced Product Universals to promote its own comparison shopping service, not to improve the quality of its general search service. A genuine improvement in that service would have meant including the product results of competing comparison services in Product Universals. Far from being a technical innovation, Product Universals are nothing more than a graphical user interface. Visual Meta also states that the allegedly pro-competitive rationale behind Google's introduction of Product Universals is irrelevant, according to the case-law, and that, in any event, since the alleged improvements made by Google by means of Product Universals did not benefit all competing comparison shopping services, they could not improve the relevance of its results (as a whole).

146 In response to those interventions, **Google** makes the following submissions.

- In reply to BEUC's arguments, Google maintains that BEUC actually objects to the fact that Google displays advertisements and is thus opposed to its ad-funded business model. Consequently, BEUC's arguments differ from those set out in the contested decision. Google refers, in particular, to recital 664 of that decision, which does not state that the Commission objected to Google 'monetising its general search results pages' by showing advertisements. Google concludes from this that BEUC's arguments are inadmissible. Google also asserts that BEUC's arguments are unfounded because, in a two-sided ad-funded model, it is normal for an undertaking to display its ads in the most profitable section of its results pages and to generate revenue from those ads. Google states, in that regard, that it makes clear that those results are advertising, which its competitors do not necessarily do. BEUC's allegation that Google 'does not have the honesty to admit' that it does not show the results appearing at the top of the screen in a neutral manner is therefore unfounded. Product ads enhance the quality of Google's service for both users and advertisers alike.
- In reply to Kelkoo's arguments, Google submits that Kelkoo advances a different case to that under consideration in the contested decision, in breach of Article 142(3) of the Rules of Procedure and the case-law. The demotion of Kelkoo's results is unrelated to the practices in issue. In particular, Kelkoo's comparison shopping service fell into decline in 2006 due to a lack of sufficient investment, not because of Google's conduct as perceived by the Commission.
- In reply to Visual Meta's arguments, Google maintains that Visual Meta identifies the alleged abuse as the fact that Google reserved access to Product Universals and Shopping Units for itself. Google replies that it could not include competing comparison shopping services in Product Universals, as it had done for Shopping Units, without diminishing the quality of its service. In addition, a number of Visual Meta's arguments are inadmissible in so far as they do not appear in the contested decision.

2. *Second part of the first plea: the Commission erred in finding that treating product results and generic results differently amounted to favouritism, when there was no discrimination*

- 147 **Google** claims that the Commission erred in finding that it favoured Product Universals without having examined the requirements for establishing discrimination.
- 148 First of all, Google states that its mechanisms for generating product results and generic results treated different situations differently for legitimate reasons. Google does not dispute that it applied different mechanisms to generate product results and generic results. It explains that, on the one hand, for generic results, it relied on crawled data and generic relevance signals derived from those data. On the other hand, for product results, Google relied on data feeds provided directly by retailers and product-specific relevance signals. By applying different technologies to generic results and product results, Google did not treat similar situations differently. It treated different situations differently for a legitimate reason, namely to improve the quality of its results.
- 149 Google claims that it then applied the same relevance standards to trigger the appearance of grouped product results and generic results on the general results pages in a consistent manner. It argues that the claim made in the contested decision that Product Universals received more favourable positioning and display than generic results is also incorrect because the differences in treatment at issue did not give Product Universals an undeserved position on the general results pages. Google states that, in the contested decision, the Commission failed to take account of the way in which Universal Search and its constituent elements operate, thanks to which a consistent ranking system for all of Google's results categories was established. Accordingly, Product Universals should have earned their positioning on a given results page based on the same relevance standards as those applied by Google to generic results. Thus, when a Product Universal showed in a given position on the general search page, it was because it was more relevant than the generic results below it, not because of favourable treatment, so that there was no discrimination or favouritism.
- 150 In Google's view, the response given to those arguments in the contested decision is incorrect. In the first place, the Commission wrongly stated that it was irrelevant whether Google held Product Universals to the same relevance standards as generic results (recital 440 of the contested decision). Since Google showed Product Universals only when they were more relevant than the generic results below them, the former did not receive favourable treatment. They deserved the positioning they received on the general results page. Ranking results based on relevance is the opposite of favouritism.
- 151 In the second place, the Commission was wrong to say that Google did not demonstrate that it actually applied the same relevance standards to Product Universals and generic results (recital 441 of the contested decision). By so doing,

it seeks to reverse the burden of proof. It is for the Commission to prove that Google did not apply consistent relevance standards when showing Product Universals. Otherwise, it cannot prove that there was favouritism. In any event, Google adduced the required evidence.

152 First of all, in recital 442 of the contested decision, the Commission wrongly claimed that Google relied on just two comparative evaluation reports to demonstrate that it applied consistent relevance standards. Those reports show that users find Product Universals useful compared to results from competing comparison shopping services appearing as the first generic result. However, Google also provided the Commission with a large body of evidence on the operation of its ranking framework and the consistent relevance standards it applied.

153 Google claims that the Commission's criticism of those two reports in the contested decision is misplaced. Google challenges each of the three arguments put forward in recital 442(i), (ii) and (iii) of the contested decision to demonstrate that those reports have no evidential value. It argues that:

- first, competing comparison shopping services indeed appear in the tested results, as shown by the screenshots;
- secondly, the differences in display were taken into account; and
- thirdly, in numerous tests, Google compared its own results against those of other comparison shopping services. According to Google, data on the positioning of its product results confirms its adherence to rigorous relevance standards. As explained in paragraph 135 above, on average, for six of the countries concerned by the contested decision, Google displayed no Product Universals in response to a high proportion of product queries. Google showed Product Universals at the top of the results in response to only very few product queries.

154 Lastly, Google asserts that the Commission was wrong to claim that, between 2009 and September 2010, it adopted an internal policy to ensure that Product Universals 'would always be positioned at the top' whenever a result showing a competing comparison shopping service was ranked in the first three generic results (recital 390 of the contested decision). This refers to a proposal that was never implemented. The contested decision also referred to a submission sent to the Commission explaining that Google had used, as a trigger signal for Product Universals, the number of sellers and comparison shopping services appearing in the top generic results (recital 391 of the contested decision). The purpose of that signal was not to display Product Universals artificially. Data on the positioning of Product Universals when a comparison shopping service appeared in the top three results between December 2009 and September 2010 (the period during which the Commission maintains that the internal policy was in place) contradict the Commission's claim.

- 155 In the reply, Google argues that by showing more relevant results more prominently, it did not engage in any act of discrimination and competed on the merits as a general search service. The Commission erred in finding that Google ‘did not always show to users the most relevant results (as ranked by its generic search algorithms)’ (recital 598 of the contested decision).
- 156 **The Commission** contends, in the first place, that it did not assume in the contested decision that Google’s generic search algorithms produce more relevant results than Google’s specialised product search algorithms. Google misinterprets recitals 535 and 598 of the contested decision in that regard. The Commission maintains, however, that as stated in recital 534 of the contested decision, it is unlikely that users will click on Product Universals and Shopping Units because they consider that those results accurately reflect what they are looking for.
- 157 In the second place, the Commission notes that, in the contested decision, it did not object to the different mechanisms used by Google to produce Product Universals and generic search results. The Commission asserts, supported by **Kelkoo**, that it was the combination of subsequent practices that it called in question, namely that Google displayed Product Universals in an eye-catching manner while competing comparison shopping services could appear only through the generic results, without any enriched display features, and were moreover prone to being demoted by its generic search algorithms. Kelkoo reaffirms, in particular, that the adjustment algorithms did not apply to Google’s comparison shopping service and that the display formats applicable to that comparison service were not available to competing comparison shopping services.
- 158 In the third place, the Commission submits that, as set out in recital 441 of the contested decision, Google did not prove that Product Universals earned their prominent place on Google’s general results pages based on the same relevance standards as generic search results. The experiments referred to in recital 442 of the contested decision do not constitute such proof.
- 159 Those experiments, which Google put forward in response to the statement of objections to demonstrate that internet users found Product Universals useful compared to the top generic results displayed by Google at that time, are not conclusive, despite Google’s arguments in the application suggesting that they are.
- First of all, the contested decision did not state that competing comparison shopping services were ‘not visible in the tests’ and that, in consequence, users could not compare them against Google’s specialised search results (paragraph 118 of the application). The contested decision simply stated that competing comparison shopping services were ‘rarely visible’ on Google’s first general search results page and that, therefore, the comparison between those two types of search results can only be limited.
 - Next, the screenshots reproduced in paragraph 118 of the application and Annex A43 thereto, which were used in the abovementioned experiments to

show that Product Universals were valued by internet users, do not call in question the finding in recital 442(ii) of the contested decision that ‘users may find the Google comparison shopping service useful ... because it is displayed with richer features’.

- Finally, the results of those experiments provided by Google do not demonstrate ‘a strong user preference for product results’ (paragraph 119 of the application). They show that users have a similar view of the usefulness of specialised product search results and generic results, as shown by the internal summary drawn up by Google. In any case, even if users had a preference for specialised results, this in no way demonstrates that they prefer Google’s comparison shopping service to the specialised results of other comparison shopping services.

160 Moreover, the de-linking experiment referred to in footnote 101 of the application also fails to demonstrate that Google applied the same relevance standards to Product Universals and comparison shopping services capable of appearing in the generic results. In addition, Annex A44 to Google’s application, relating to that experiment, is not conclusive. The aim of the experiment was simply to measure variations in the click-through rates on Product Universals when they were made to look like generic results, which does not show that both categories of results are subject to the same relevance standards for their display. Furthermore, Google provided neither a screenshot nor a description of the positioning and display of the results during the experiment and Annex A44, a sort of two-page summary of the experiment, is unusable.

161 In the same vein, three other tests relied on by Google in the application failed to specifically evaluate Product Universals against the results of competing comparison shopping services. As such, they are also inconclusive.

162 In the fourth place, it is irrelevant whether Product Universals appear (were triggered) in response to only a small proportion of ‘product queries’, since Google does not compare those trigger rates against the rates of competing comparison services. In any event, the Commission and the Court have no way of verifying the methodology used or the accuracy of Google’s claims, because Google does not explain what is meant by ‘product query’.

163 In the fifth place, between 2009 and September 2010, Google prominently displayed Product Universals at the top of its first general search results page whenever a competing comparison shopping service appeared as the first generic search result or even in the first three generic results. Google did not demonstrate the opposite during the administrative procedure or in its application.

164 In the rejoinder, the Commission confirms nonetheless that it is irrelevant whether or not Google displayed Product Universals ‘only when they were more relevant than generic search results below them’, as Google states in paragraph 54 of the reply. The issue is how they were shown when they did appear.

165 The Commission notes, however, that contrary to Google's assertions, the latter did not create a single unified framework for Product Universals and competing comparison shopping services based on 'consistent ranking'. According to the Commission, Google did not 'compare the relevance' of Product Universals and competing comparison shopping services. Google did not hold Product Universals to the same standards as other search results. On the contrary, it used different mechanisms to display its own comparison shopping service and competing comparison shopping services.

166 The Commission also states that, in the contested decision and the defence, it criticised only the two experiments mentioned in recital 442 of the contested decision because, as explained in the defence, (i) of all the experiments submitted by Google during the administrative procedure, only those two compared, albeit only partially and inconclusively, Product Universals against the top generic search results displayed at the time by Google, and (ii) Google did not identify, in the application, any other experiments to demonstrate that Product Universals earned their prominent place on Google's general results pages based on the same relevance standards as competing comparison shopping services. The same is true of the reply.

167 The following submissions are also put forward in support of the Commission.

- **BEUC** contends that Google's product search results were not determined solely by their relevance to consumers, as there were commercial considerations underlying the processing of those results. This is at odds with consumers' legitimate expectation that Google will process results neutrally. Google manipulates the search results by hiding competing comparison shopping services' results from view. BEUC gives the example of a product query that returns only text ads or product ads from Google.
- **Foundem** claims that Product Universals artificially promoted Google's comparison shopping service without any regard for whether other comparison shopping services provided more relevant answers to a user's query. Thus, although the results provided by Google's comparison shopping service could be 'relevant', they were not necessarily 'more relevant' than those of competing comparison shopping services. There is a certain ambiguity on that point in Google's pleadings. Foundem also submits that, in addition to Universal Search not being the 'single unified ranking framework' Google claims it to be, prior to mid-2011, Google had absolutely no ability to compare the relevance of Product Universals against the results of competing comparison shopping services appearing in the generic results; only the probability that a Product Universal might be relevant to the internet user's query was taken into account to trigger its appearance. When Google was finally able to compare, albeit in relative terms, the relevance of Product Universals against the results of competing comparison shopping services appearing in the generic results, those comparison services had already been eradicated by the Panda algorithm.

Specifically regarding the adjustment algorithms giving rise to demotions, Foundem states that they were originally designed to eliminate ‘spam’ websites. However, they are currently calibrated in such a way that they can override other ranking signals and have an exclusionary effect. According to Foundem, the Commission distinguished between ‘anti-spam’ demotion algorithms that have a legitimate purpose and the demotion algorithms at issue that are anticompetitive in nature because they are discriminatory.

- **Twenga** states that Google’s algorithms downgraded competing comparison shopping services in its search results.
- **Visual Meta** contends that Google’s claim that it displayed Product Universals only when they were more relevant than the generic results below is meaningless. It refers in particular to recital 440 of the contested decision, according to which ‘the Commission does not object to Google applying certain relevance standards but to the fact that Google’s own comparison shopping service is not subject to those same standards as competing comparison shopping services’. Visual Meta states that while generic results are ranked according to their content (‘content related’), with the most relevant results shown at the top of Google’s general results pages, Google’s specialised results powered by feeds from retail partners are ranked according to the query (‘query related’). The sole aim of Google’s specialised search algorithm is to ‘fill up’ the Product Universal ‘boxes’ using data feeds from retail partners, without any particular consideration for the potential relevance of other results provided by competing comparison services. The products available in the databases of competing comparison shopping services are included in Google’s generic results only when Google is unable to display a Product Universal. In that way, Google, by introducing Product Universals, did not improve the relevance of its results since, by favouring its own comparison shopping services, it disregarded competing comparison shopping services with access to much larger databases containing many more offers than Google’s database. By contrast, it favoured its own comparison shopping service by limiting the products displayed with an enriched format and enriched positioning to its own selection of products, which explains why the results appearing in Product Universals have a higher conversion rate. In addition, Visual Meta maintains that the Commission did not complain that Google did not apply its adjustment algorithms for generic results to specialised product results.

168 In response to BEUC’s observations, Google makes the following submissions:

- BEUC’s arguments that Google prevents users from accessing competing comparison shopping services by manipulating the relevance of its search results for commercial reasons are unfounded and also depart from the grounds for the contested decision;

- Product Universals were ranked above generic results only when they were more relevant;
- the display of advertisements (Shopping Units) that were better than their predecessors (text ads) cannot be regarded as manipulation of the search results;
- the demotion of comparison shopping services in the generic results did not amount to manipulation of the relevance of those results, since the algorithms used were designed to uphold the relevance and quality of the results, as acknowledged in recitals 16, 345 and 661 of the contested decision.

169 In response to Foundem’s observations, Google makes the following submissions:

- it was able to compare generic results and specialised results prior to 2011, even though the placement options for specialised results (top, middle and bottom) were less sophisticated than they were later on and the evidence on file indicates a cautious triggering of Product Universals. Google strived at all times to show the best possible results by comparing its own specialised results against generic results directing users to competing comparison shopping services;
- its demotion algorithms were designed to uphold the quality of its search results and those algorithms were not triggered by the characteristics of specialised search services. Google points out that it brought in one of those algorithms in 2004, long before the practice at issue began, and that it introduced Panda in response to criticism that those generic results returned too many low-quality services. Panda was recognised by industry players as having markedly improved the quality of Google’s results. Google demoted competing comparison shopping services only when its signals indicated that the services in question were not relevant or useful for users.

170 In response to Twenga’s arguments, Google states that, in the contested decision, the Commission did not object to the application, as such, of its adjustment algorithms and did not require Google to refrain from applying them. By challenging the adjustment algorithms in isolation, Twenga seeks to extend the subject matter of the proceedings, in breach of Article 142(3) of the Rules of Procedure. Furthermore, Twenga does not identify any anticompetitive conduct by Google. The demotion of Twenga’s results in the generic results is not related to the practices in issue.

171 In response to Visual Meta’s arguments, Google maintains that it did not show Product Universals without regard to their relevance. Google refers, in that respect, to the explanations it provided in the application on the functioning of Universal Search and notes that it did not display Product Universals in reply to most product queries by internet users.

3. *Third part of the first plea in law: the Commission infringed the legal rules for assessing Google's objective justifications concerning the display of Product Universals*

172 **Google** states that it provided the Commission with detailed reasons and evidence to demonstrate the benefits for users of showing Product Universals and to justify why it developed them in the way that it did. The improvement in quality that Google achieved by means of Product Universals is a pro-competitive justification for their positioning and display.

173 However, Google claims that the Commission did not examine whether the evidence put forward offset the alleged restrictive effects. Google makes the following submissions:

- in the contested decision, the Commission fails to rebut Google's justifications for its conduct. CCIA also puts forward the same argument, stating that the defence devotes only 3 out of almost 250 pages to Google's objective justifications and just one paragraph to whether the remedy required of Google was technically feasible;
- in the contested decision, the Commission maintains, in recitals 662 and 700 of the contested decision, that Google should have shown specialised product results from comparison shopping services based on the 'same underlying processes and methods' as it used for its own specialised product results. By that reasoning, the Commission circumvented its obligation to respond first and foremost to Google's justifications.

174 Moreover, at no point in the contested decision did the Commission explain how Google could have shown results generated by comparison shopping services' algorithms using the same processes and methods it used for its own product search results. In that connection, it infringed the principles it set out in its Guidelines on the application of Article 81(3) of the Treaty (OJ 2004 C 101, p. 97), according to which the Commission should intervene only where there are realistic possibilities that the undertaking in question may act otherwise.

175 Google submits that it was able to display more relevant specialised product results because it obtained data from feeds provided by retailers themselves rather than from crawling websites. But it did not have comparable information on the results of competing comparison shopping services.

176 In addition, Google could not have built a Universal Search-type infrastructure to compare its results against those generated by the algorithms of competing comparison shopping services.

- First, Google knew nothing about how competing comparison shopping services ranked and rated their results. Therefore, it could not compare the relevance of its own results against the results generated by third parties'

algorithms in the same way as Universal Search allowed it to do for its own different result categories.

- Secondly, Google did not know what results comparison shopping services would return in response to a given query. It would have had to send each user query to every comparison shopping service and wait for their results before comparing them to each other and to Google's results. At the very least, this would have created serious delays in responding to user queries, which would have diminished the quality of Google's services.
- Thirdly, Google would also have lost the ability to apply the quality controls that it relies on at the stage of cataloguing and indexing.

177 The Commission does not dispute Google's explanations. Nor does it identify 'realistic and attainable alternatives', as it was required to do. Consequently, because the Commission 'did not refute' Google's justifications, the contested decision 'is vitiated by a failure to carry out a proper examination'.

178 The Commission gave only two reasons for its view that using the 'same ... processes and methods' was technically feasible. In the first place, it invoked the 'scenarios proposed and considered by Google during the commitment discussions' (recital 671 of the contested decision). Yet the proposed commitments did not envisage ranking the results of comparison shopping services according to the same processes and methods as Google used for its product results, but reserving a section of advertising space for ads of competing comparison shopping services. In fact, during the commitment discussions, the Commission specifically rejected the demand that 'the same ... procedures and methods' be used, as indicated in a note from the Commissioner responsible for competition at the time.

179 In short, the Commission's approach infringes the principles for assessing objective justifications set out in the judgments of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289, paragraph 1144), of 27 September 2006, *GlaxoSmithKline Services v Commission* (T-168/01, EU:T:2006:265, paragraphs 275 and 301), and of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 140).

180 In the reply, Google states that, according to the defence, there were two options open to it to avoid the alleged abuse in 2008: either to refrain from showing Product Universals or to include the results of competing comparison shopping services in Product Universals. But both options would have diminished the quality of the results from Google's search engine and undermined its innovations.

181 **The Commission** contends that, in the contested decision, it was right to reject Google's allegedly objective justification for displaying Product Universals for the following reasons:

- both during the administrative procedure and in the application, Google merely asserted that the display of Product Universals based on different mechanisms from those used for generic search results was objectively justified. However, Google never put forward any objective justification for the conduct that the Commission found to be abusive, namely, in essence, the promotion of Product Universals while the generic results through which competing comparison shopping services could appear were, by contrast, given substandard treatment;
- it was for Google, not the Commission, to demonstrate that there were no ‘realistic and attainable alternatives’ to the conduct at issue. The abusive conduct of an undertaking in a dominant position is ‘objectively necessary’ if and only if that undertaking can demonstrate that there are no realistic and accessible alternatives to its conduct. This is particularly the case where, as here, Google is ‘naturally better placed’ than the Commission to give reasons for the absence of such alternatives. **BDZV**, in support of the Commission, states that it was not for the Commission to impose specific technical solutions to bring the abuse identified to an end;
- in any event, the contested decision shows that Google could have used the same processes and methods to display Product Universals and the results of competing comparison shopping services on its general search results pages. First of all, during the commitment discussions, the Commission did not reach the preliminary conclusion that it was impracticable for Google to use the same processes and methods to display Product Universals and the results of competing comparison shopping services. Next, the internal Google email mentioned in recital 671 of the contested decision suggests that, by applying pictures, prices and other enriched information to competing comparison shopping services, Google could have used the same processes and methods to display Product Universals and the results of competing comparison shopping services on its general search results pages.

182 The Commission, supported by **BDZV**, argues, in particular, in the rejoinder, that Google could have, for example, included results from competing comparison shopping services in Product Universals to avoid the alleged abuse. That is borne out by the scenarios proposed and considered by Google during the commitment discussions.

183 **Foundem** notes that some proposed solutions that Google put to the Commission in June 2012 in a discussion paper contradict the former’s arguments regarding the alleged objective justifications for its conduct, particularly its argument that it could not have used its general search algorithms to select the most relevant results returned by a competing comparison shopping service in response to a product query. As is apparent from that document, Google’s proposal was to ‘algorithmically select’ the three most relevant results returned in response to product queries on competing comparison shopping services and, where possible, direct the user to their most relevant web pages.

184 **BDZV** adds that the technologies developed to promote Google's comparison shopping service and the products of its retail partners could have been used for competing comparison shopping services by encouraging those comparison services to provide their feeds to Google. Google has already done this for its hotel booking platform. Google would not have needed any insights into the algorithms of its competitors, contrary to what it claims in its pleadings.

185 **The German Government** states that the improvement that Google claimed to have made to its own specialised search service is not such as to provide an objective justification. In its view, only an improvement applicable to the results of other comparison shopping services would be relevant as an objective justification. However, no such justification was put forward by Google. **BDZV** states, in that regard, that if Product Universals genuinely improved Google's service, they would have been rolled out to all competing comparison shopping services.

186 **Google** makes the following submissions:

- in response to the German Government, Google states that the improvement in its general search service is relevant because it demonstrates that Google competes on the merits. In the *Akzo* judgment of 3 July 1991 (*AKZO v Commission*, C-62/86, EU:C:1991:286), the Court thus specifically distinguished 'competition on the basis of quality' from abusive conduct;
- in response to **BDZV**, Google contends that it could not include the results of competing comparison services in Product Universals without affecting the quality of its service and that **BDZV's** attempts to explain how Google could have done so are inadmissible because they seek to supplement the reasoning set out in the contested decision. Those arguments are also unfounded because, by claiming that Google could have included competing comparison shopping services in Product Universals, **BDZV** wrongly assumes that Product Universals are identical to Shopping Units from a technical point of view. Moreover, **BDZV** does not explain why the options open to comparison shopping services in order to place product ads in Shopping Units were tantamount to treating them less favourably than a Google comparison shopping service. The Commission should have explained what those options were and why they were insufficient under competition law. Finally, Google demonstrated that it used its adjustment algorithms for legitimate reasons based on the pursuit of quality. In any event, the Commission did not object to Google using adjustment algorithms. On the contrary, it considered that those algorithms improved the quality of Google's results.

B. Second plea in law: the Commission erred in finding that Google favoured its own comparison shopping service by displaying Shopping Units

187 **Google** states that, in the same way as for Product Universals, the Commission claimed that the positioning and display of product ads, particularly Shopping Units, were more favourable than the positioning and display of generic results reproducing the results of competing comparison shopping services (recitals 345 to 377 and 394 to 396 of the contested decision). This allegedly benefited Google's comparison shopping service, 'the standalone Google Shopping website' (recitals 421 to 423 and 630 of the contested decision). However, unlike the view taken in relation to Product Universals, the Commission considered that most of this benefit came not from clicks on links to the Google Shopping website, but from clicks on product ads linking to third party websites.

188 **CCIA** argues that the Commission's position, to the effect that an online operator can no longer show ads linked to one of its services in order to fund another service, unless it accepts advertising for its competitors, is concerning, since it is part and parcel of two-sided ad-funded markets that undertakings promote their own advertising to fund a service on another market.

189 Specifically, in support of the second plea, Google puts forward three lines of argument. First, the Commission erred in finding that treating grouped product ads and generic results differently amounted to favouritism, when there was no discrimination. Secondly, the Commission erred in finding that product ads in Shopping Units benefited Google's comparison shopping service. Thirdly, the Commission infringed the legal rules for assessing Google's objective justifications concerning the display of Shopping Units.

1. First part of the second plea: the Commission erred in finding that treating product ads and free generic results differently amounted to favouritism, when there was no discrimination

190 In the first place, **Google** submits that the Commission wrongly compared the treatment of product ads and the treatment of free generic results, which are two different things.

191 Google asserts that paid ads, including product ads, fund its general search service. Therefore, Google necessarily shows those ads in a different way from free generic results, which is a natural consequence of its two-sided ad-funded business model. Google's ability to compete as a general search service depends on its ability to show paid ads differently from free search results. As Professor Shapiro noted in an opinion produced by Google, the Commission 'badly mixes up organic search results and paid advertisements, effectively ignoring the two-sided nature of Google's search business'. The grievance that Google positions and displays ads differently from free results fails to take account of the nature of Google's ad-funded business model.

- 192 Google maintains that it identifies Shopping Units on the general results page as ‘sponsored’ to flag up their paid nature. The claim in the contested decision that the word ‘sponsored’ ‘is likely to be understandable only by the most knowledgeable users’ (recitals 536, 599 and 663 of the contested decision) is not based on any evidence and does not undermine the three Google user surveys proving the opposite. Thus, although the decision lists 12 differences between product ads and text ads to support the proposition that they are different (recitals 426 to 438 of the contested decision), none of those differences shows that product ads are comparable to free generic results.
- 193 According to Google, treating different results differently is not favouritism and does not raise any competition law issues. Google has, in accordance with the case-law, ‘legitimate commercial reasons’ to set aside space for paid ads and to use that space differently than for free generic results.
- 194 In the second place, Google claims that it displays Shopping Units because they contain better ads for a product query than text ads, not to promote them. The Commission failed to show that Shopping Units do not deserve the space allocated to them on the general results pages.
- 195 High-quality ads are more useful to users and more effective for advertisers and enhance the value of the search service for both categories. Thus, the differences between text ads and product ads identified in the contested decision are factors that make product ads better than text ads for product offers. Google ensures that the product ads it shows in Shopping Units are of a high quality by applying stringent quality controls. Therefore, Google shows Shopping Units only when its product ads provide better responses to a query than text ads. By the same token, Shopping Units appear in response to only a small proportion of product queries, which is at odds with the Commission’s claim that Google ‘always’ positions Shopping Units at the top of the page (recital 395 of the contested decision). The Commission itself acknowledged that Shopping Units are ‘displayed only in response to a limited subset’ of product queries (recital 530 of the contested decision).
- 196 The Commission’s claim in the contested decision that Google did not demonstrate that it ‘holds the Shopping Unit to the same relevance standards that it applies to [text] ads’ (recital 441 of the contested decision) is at odds with the fact that Google established a mechanism that directly compares product ads against text ads. Product ads and text ads compete to appear based on the same standards of relevance and value. The Commission recognised this in another part of the contested decision (recital 415b of the contested decision). Furthermore, empirical data demonstrate that product ads in Shopping Units are better for users and advertisers than text ads. Data from advertisers show that conversions per euro spent by an advertiser are higher for product ads than for text ads. Studies confirm the high quality and relevance of product ads on Google’s general pages.

197 **The Commission** replies, in the first place, that it did not object in the contested decision to the different mechanisms used by Google to produce Shopping Units and generic search results. In that regard, Google misquotes a number of recitals of the decision. It was only the combination of subsequent practices that the Commission found to be abusive: the fact that Google displayed Shopping Units prominently while competing comparison shopping services could appear only through the generic search results, without any enriched display features, and were moreover prone to being demoted in those results (recitals 344 and 512 of the contested decision).

198 In the second place, the Commission states that it does not level any criticism at Google in connection with text ads because, unlike Shopping Units, they are not a means by which Google favours its own comparison shopping service.

199 The Commission notes that Google does not challenge the findings in the contested decision (recitals 425 to 438) concerning infrastructure and technologies, bidding conditions, invoicing, link destinations and business strategy, which distinguish Shopping Units from text ads. Google also does not dispute the findings that retailers and users perceive text ads and Shopping Units differently. It follows that the similarities observed by Google between text ads and results in Shopping Units are either irrelevant or unfounded. In addition, recitals 536, 599 and 669 of the contested decision relied on by Google do not state that users do not understand that the ads in Shopping Units are paid ads. Rather, they state that only the most knowledgeable users interpret the word ‘sponsored’ as suggesting that different criteria for appearance on the general results pages apply to Shopping Units and to the results of competing comparison shopping services. Moreover, in recital 424 of the contested decision, the Commission found that Shopping Units were indeed the evolution of Product Universals, not an improved version of text ads, and that they were part of Google’s comparison shopping service.

200 Finally, the Commission asserts that recital 395 of the contested decision does not state that Google ‘always positions Shopping Units at the top’ of a given general search results page. This is what happens when Shopping Units appear. Moreover, as is apparent from recital 396 of the contested decision, the fact that ‘the Shopping Unit is triggered ... for a limited percentage of product queries’ (paragraphs 168 and 169 of the application) does not alter the fact that the trigger rate of Shopping Units exceeds, in most instances, the trigger rate of the 361 competing comparison shopping services that participated in the administrative procedure (taken together) in the first four generic results and, in all instances, the trigger rate of the 361 competing comparison shopping services that participated in the administrative procedure (taken together) in the first generic result.

201 **Visual Meta** contends that:

- Google’s argument that it shows Shopping Units only when they are more relevant than text ads or generic results must be rejected because the fact

that its ads, with their enriched format, are more visible to consumers than mere ‘blue links’ is the very reason why Google cannot appropriate them for its own services without depriving consumers of more relevant results from other comparison shopping services;

- it is precisely because product ads, on account of their enriched format, are better for users and advertisers that Google is required to display the results of other comparison shopping services in the same format;
- the decision is not concerned with discrimination between Shopping Units and other types of results, but with discrimination against comparison shopping services due to the unequal treatment they receive vis-à-vis different types of search results.

202 Visual Meta also puts forward the following arguments:

- clicks on ads in Shopping Units first go to a server operated by Google and fund Google Shopping on account of the its role in the organisation of Shopping Units;
- clicks on ads in Shopping Units generate traffic to Google’s comparison shopping service because Shopping Units are part of Google Shopping;
- after attracting sellers with free product results, Google switched to a paid comparison shopping service model with this almost captive client base. Shopping Units are now an incentive for retailers to join Google Shopping by uploading their product feeds to the platform, because Shopping Units generate traffic for them.

203 In response to Visual Meta’s observations, Google makes the following submissions:

- first, it gave competing comparison shopping services access to Shopping Units, thereby depriving Visual Meta’s arguments of relevance in the same way as the arguments set out in the contested decision to the effect that competing comparison shopping services could ‘appear only as generic results’. Google refers in that respect to the possibilities mentioned in paragraph 18 above. Moreover, in so far as Visual Meta claims that comparison shopping services could only appear in Shopping Units by changing their business model (either by adding a ‘buy’ button or by acting as intermediaries), Google replies that those two options are identical to those currently available to competing comparison shopping services;
- secondly, revenue from its ads did not go to Google Shopping. Visual Meta does not adduce any evidence to support that assertion, which does not appear in the contested decision. The same is also true of the assertion that clicks on Shopping Units go to a Google server entirely operated by Google Shopping. Google also disputes Visual Meta’s claim that Shopping Units are

part of Google Shopping. Shopping Units do not fit within the contested decision's definition of a comparison shopping service. Finally, the contested decision does not contain any assertion to the effect that retailers joined Google Shopping as a consequence of Shopping Units (on the contrary, it states in footnote 466 that no finding is made on that matter) and Visual Meta does not support that assertion with evidence.

- 204 **Foundem** argues that Shopping Units exacerbate the anticompetitive nature of Google's conduct inasmuch as Google replaced relevance-based results with paid advertisements that are displayed depending on the profits they generate for Google. In addition to maximising Google's revenue and exacerbating the anticompetitive nature of its conduct, the development of Shopping Units was designed to create a smokescreen to enable Google to evade the competition investigations then under way in Europe and the United States and even the proposed commitments put forward by Google at that time offering free access based on the relevance of competing comparison shopping services alongside Product Universals. It thus involved converting free relevance-based access into access based on the 'pay for placement' principle through an auction mechanism.
- 205 In response to Foundem's arguments, Google reiterates that Shopping Units are not the successors of Product Universals but rather an improvement in text ads and states that it does not only take account of the advertiser's bid when placing Shopping Units, but also the relevance and quality of the ad.
- 206 **BEUC** submits the same arguments as those put forward in the second part of the first plea (see paragraph 167 above).

2. *Second part of the second plea in law: the Commission erred in finding that product ads in Shopping Units benefit Google's comparison shopping service*

- 207 **Google** claims that the Commission committed an error because the true position is that product ads in Shopping Units do not benefit its comparison shopping service. Their links do not lead to that service or generate any revenue for it. The Commission expressly acknowledged this, particularly in recital 421 of the contested decision.
- 208 Google states that, in the contested decision, the Commission listed eight reasons explaining why the display of Shopping Units was a means of favouring the Google Shopping website (recitals 414 to 421 of the contested decision). However, seven of them did not identify any benefit that the Google Shopping website derived from product ads in Shopping Units, let alone a benefit that could justify counting product ad clicks as traffic to the Google Shopping website. It is true that the contested decision mentioned, among other things, header links and 'view all' links in Shopping Units that indeed lead to the Google Shopping website (recital 419 of the contested decision). But that does not justify objections to product ads in Shopping Units nor does it provide a reason for counting product

ad clicks as traffic to the Google Shopping website. Clicks on header links and ‘view all’ links account for a small proportion of all clicks on Shopping Units. The Commission did not claim that those clicks, on their own, raise competition law concerns. The contested decision also noted that clicks on product ads in Shopping Units and on the Google Shopping website may lead to the pages of the same retailers (recital 418). That explains the benefit of product ads (irrespective of their source) for advertisers, but does not explain how the Google Shopping website benefits from clicks on product ads in Shopping Units. The other reasons relied on in the contested decision (recitals 414 to 417 and 420) also fail to explain how the Google Shopping website benefits from clicks on product ads in Shopping Units.

- 209 In particular, the Commission maintains that Google’s comparison shopping service benefits from product ad clicks because Shopping Units and the specialised Shopping page share common infrastructure (defence, paragraphs 139 and 140). But infrastructure sharing does not mean that clicks on product ads in Shopping Units benefit Google’s comparison shopping service.
- 210 Similarly, the Commission claims that Google’s comparison shopping service benefits from product ad clicks due to common bidding and invoicing for product ads in Shopping Units and on the specialised Shopping page (defence, paragraphs 130 and 141 to 142). But this has nothing to do with user traffic.
- 211 The only reason the contested decision gives for counting clicks on product ads in Shopping Units as traffic to the Google Shopping website is that those clicks trigger a payment to Google, bringing an economic benefit to Google’s comparison shopping service (recitals 421 and 630 of the contested decision). However, that assertion is incorrect because revenue from product ads in Shopping Units does not accrue to the Google Shopping website. Google allocates revenue from product ads in Shopping Units to its general search service. The Commission moreover acknowledged this in recital 642 of the contested decision, where it observed that Google’s display of Shopping Units ‘serves to finance its general search service’.
- 212 The reasoning set out in the contested decision is also wrong in law because, in essence, it raises a claim of cross-subsidisation (by stating that Google subsidises the Google Shopping website with revenue from product ads on the general results pages). But even if revenue from Shopping Units were to accrue to the Google Shopping website (which is not the case), that would not provide a basis for a finding of abuse.
- 213 **The Commission** contends that it was right to conclude in the contested decision that the way in which Google displays Shopping Units favours its own comparison shopping service. It explains, first, that Shopping Units are part of Google’s comparison shopping service and that displaying Shopping Units prominently is a way for Google to favour that comparison service. Secondly, the Commission states that each click on Shopping Units benefits Google’s

comparison shopping service, notwithstanding the fact that such clicks link to the websites of retailers and not to the standalone specialised Google Shopping page. Thirdly, even if revenue generated by product ads in Shopping Units does not accrue to the Google Shopping website, Google presents Shopping Units and the standalone Google Shopping page to retailers and users as part of a single service or experience. So far as they are concerned, the allocation of Google's revenue is unimportant (recital 420 of the contested decision).

- 214 According to the Commission, internal accounting decisions on the allocation of revenue are irrelevant. Furthermore, recital 642 of the contested decision cannot be interpreted as meaning that the revenue of Shopping Units 'serves to finance its general search service', but rather that the conduct in question was intended to ensure that internet users stayed on Google's general search service for their product searches. In addition, the Commission acknowledged that 'cross-subsidisation' did not seem to be 'at issue'.
- 215 The Commission argues that Google attempts to link the identification of the benefits for Google's comparison shopping service to the way in which revenue generated by clicks on Shopping Units is allocated, without taking account of the various other benefits for Google deriving from clicks on Shopping Units, identified in recitals 445, 447 and 450 of the contested decision.
- 216 In relation to those matters, **Visual Meta** contends, in particular, that the internal allocation of Google's revenue cannot allow it to evade a finding of abuse within the meaning of Article 102 TFEU. Visual Meta also agrees with the Commission's analysis in recital 630 of the contested decision, according to which Google's comparison shopping service benefits 'economically' from clicks on Shopping Unit links in the same way as if the user had taken the intermediate step of visiting the standalone Google Shopping website first and clicking on the retail partner's product. It states that, as is apparent from recital 421 of the contested decision, the links in Shopping Units and in Google Shopping fulfil the same economic function. **Foundem** and **Twenga** put forward essentially the same arguments. Foundem contends that the ads in Shopping Units are the same as those on the specialised Google Shopping page, which Google denies by pointing to technical differences between the technologies, infrastructure and formats of those two types of ads.
- 217 The Commission notes that recitals 414 to 420 of the contested decision contain seven reasons for the finding that clicks on Shopping Units favour Google's comparison shopping service. It states, first, that Google's comparison shopping service benefits from the fact that Shopping Units and the specialised Google Shopping page share the same product database, the same retailers (recital 414 of the contested decision) and several common technological features and mechanisms for selecting results (recital 415 of the contested decision). Therefore, Google's comparison shopping service as a whole can be improved by traffic generated by Shopping Units. The Commission refers in that regard to the explanations provided in section 7.2.2 of the contested decision on the importance

of traffic volume for comparison shopping services. Secondly, the Commission notes that, so far as retailers are concerned, Shopping Units and the specialised Google Shopping page offer the same service, namely to attract traffic to their websites, and that retailers cannot choose to receive only part of that service. Thirdly, the Commission observes that users perceive Shopping Units as an integral part of Google's comparison shopping service, just like the specialised Google Shopping page, and that they can access that page via Shopping Units.

218 In the reply, **Google** maintains that the Commission, in the defence, raises new arguments to justify counting product ads clicks as traffic to Google's comparison shopping service (defence, paragraphs 139 to 144). Those arguments are inadmissible because they are new.

219 However, Google specifically mentions in that respect only the argument referred to in paragraph 217 above to the effect that traffic linked to Shopping Units enables Google's comparison shopping service as a whole to be improved.

3. *Third part of the second plea in law: the Commission infringed the legal rules for assessing Google's objective justifications concerning the display of Shopping Units*

220 **Google** submits, first, that the Commission failed to explain in the contested decision why the pro-competitive benefits of Google's approach did not justify that approach.

221 Secondly, Google argues that the contested decision did not identify 'realistic and attainable' alternatives for positioning and displaying competing comparison shopping services in the same way as its own comparison shopping service. Google cannot show product ads generated by competing comparison shopping services' algorithms because it cannot compare the relevance of ads that are generated by different services and scored by different methods. The Commission did not address those issues as it was required to do, in accordance with the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289, paragraph 1144).

222 Thirdly, Google observes that it already includes product ads requested by comparison shopping services in Shopping Units when those ads link to the comparison shopping service where the user can buy the desired product or to the website of the comparison service's retail partners. Google organises those ads using its cataloguing and indexing systems and performs the same quality controls that it applies to ads from other advertisers. Several comparison shopping services in Europe — including Idealo, Twenga, Ceneo, Check24, Heureka and Kelkoo — successfully use those opportunities, placing millions of product ads on Google's general results pages. The Commission does not dispute the fact that comparison shopping services can thus use Shopping Units. On the contrary, in its letter of facts, the Commission pointed to the way in which the search engine Bing shows product ads and to proposed corrective measures put forward by Kelkoo as ways

of bringing an end the alleged infringement (paragraphs 51b and 51c of the letter of facts). Yet both of those approaches reflect what Google was already doing. The Commission did not identify anything to distinguish Google's approach from that of Bing or the approach outlined in Kelkoo's proposal. By holding out those approaches as a means of ending the alleged infringement without identifying factors distinguishing them from Google's approach, the Commission accepted that Google's practices concerning the display of product ads are not abusive. The Commission complained that access to Shopping Units required comparison shopping services to change their business model by adding a purchase functionality or acting 'as intermediaries' (recital 439 of the contested decision). However, the Commission did not explain or substantiate that complaint in the contested decision.

- 223 Google observes that the fact that its competitors could appear in Shopping Units only by adding a 'buy' button or by acting as intermediaries for placing the results of their retail partners in Shopping Units does not mean that comparison shopping services were unable to place product ads in Shopping Units before the contested decision was adopted. Google states that the Commission also fails to explain in the defence why the requirement that the page in question must allow users to purchase the advertised product is problematic. Furthermore, the same participation requirements apply to Google's product ads. The Commission's theory is that the results of competing comparison shopping services 'can appear only' in the generic results. The evidence demonstrates that this is incorrect.
- 224 **The Commission** contends that it was right to reject Google's justifications for its conduct. It asserts, first, that both during the administrative procedure and in the application, Google claimed only that the display of Shopping Units and of generic results was based on different mechanisms.
- 225 However, at no point did Google provide an objective justification for the conduct in issue, namely that it displays Shopping Units in an eye-catching manner while competing comparison shopping services can appear only through the generic search results, without any enriched display features, and are moreover prone to being demoted by general search algorithms (recitals 344 and 512 of the contested decision). The onus was on Google to demonstrate that there were no 'realistic and attainable alternatives' to the conduct in issue. Neither recital 662 nor any other recital of the contested decision requires Google to show the results of competing comparison shopping services with 'product ads generated by algorithms of [comparison shopping services]' (paragraph 196 of the request). Google is simply required to 'ensure that [it] treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages', including by subjecting Google's comparison shopping service to the same 'underlying processes and methods' as those used for competing comparison shopping services (recitals 699 and 700 of the contested decision). Google accepts that it can do this, provided it 'obtains data via feeds, organises the data ... and ranks them based on its algorithms' (paragraph 195 of the request).

- 226 The Commission, supported by **BDZV**, explains that before the adoption of the contested decision, competing comparison shopping services could appear in Shopping Units only if they added a ‘buy’ button or if they acted as intermediaries for placing the results of their retail partners in Shopping Units, namely by changing their business model. However, Google could have included competing comparison shopping services in Shopping Units. **BDZV** states that Google succeeded in doing so within three months as part of its compliance mechanism introduced in September 2017 to comply with the contested decision. The results of competing comparison services are now presented in the same way as Google’s results. **BDZV** adds that in its third set of proposed commitments, Google had offered to include ‘rival links’ with the same display format in its Shopping Units. The mechanism was based on the same technical solution as that used in the current compliance mechanism, including the full integration of competing comparison services’ product portfolio.
- 227 Google replies that **BDZV** does not explain why the options that comparison shopping services had to place product ads in Shopping Units resulted in them being treated less favourably than Google’s own comparison shopping service.
- 228 The Commission adds that, in its letter of facts, it did not state that Bing’s approach to displaying competing comparison shopping services or Kelkoo’s proposed approach as to how Google could display competing comparison shopping services was ‘an approach to end the ... infringement’.
- 229 Finally, the Commission argues that the results of Google’s comparison shopping service can appear in Shopping Units without having to satisfy any of the conditions required of competing comparison shopping services.
- 230 In that respect, **Kelkoo** disputes Google’s argument that it was already implementing the corrective measures proposed by Kelkoo during the administrative procedure.
- 231 Google replies that the only difference between Kelkoo’s proposal and what it was in the process of doing was that Kelkoo wanted guaranteed slots in Shopping Units and access to those slots for free or at nominal cost. But the decision does not prevent Google from monetising its advertising space.

C. Third and fourth pleas in law: the practices in issue did not produce anticompetitive effects

- 232 By its third plea, Google denies that its practices caused traffic to be diverted from its general results pages to the detriment of competing comparison shopping services and to the benefit of its own comparison shopping service. By its fourth plea, it challenges more generally the finding that those practices may have produced anticompetitive effects.

233 Google's third and fourth pleas thus both deal with the effects of the practices in issue. The third plea disputes their practical consequences, as described by the Commission, on traffic from Google's general results pages to the different comparison shopping services, while the fourth plea denies that those practices had anticompetitive effects on the different markets identified.

1. First part of the third plea in law: the Commission did not prove that the practices in issue led to a decrease in Google's general search traffic to competing comparison shopping services

234 In the first part of the third plea, **Google** argues that the Commission was wrong to claim, in section 7.2.3.2. of the contested decision, that the practices in issue 'led to a decrease in generic search traffic' to almost all competing comparison shopping services 'on a lasting basis'. Although the Commission presented multiple graphs showing the change of Google's search traffic to competing comparison shopping services, it failed to establish any causal link between that development and the practices in issue. CCIA also claims that no such link was established. The Commission should have demonstrated that the decrease it identified was attributable to the positioning and display of Product Universals and Shopping Units. The Commission could not simply presume a causal link, as transpires from the judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 199).

235 According to Google, supported by CCIA, the Commission was required to conduct a counterfactual analysis and examine how Google's search traffic would have developed had the practices in issue concerning the positioning and display of Product Universals and Shopping Units not been adopted. And yet, in the contested decision, the Commission attributed the decrease in Google's search traffic towards competing comparison shopping services to other practices, which it considered lawful, namely the changes in generic ranking. Contrary to the Commission's assertions in the defence, the counterfactual analysis should not be based on a scenario in which Google no longer uses adjustment algorithms liable to demote comparison shopping services in the generic results, since those algorithms are not in issue, which Google repeats in its observations on a number of statements in intervention, for example Kelkoo's, which criticises such algorithms. Neither of the alternatives offered to Google to comply with the contested decision, set out in paragraph 342(b) of the Commission's defence, namely to discontinue Shopping Units or include competing comparison shopping services in them, involves withdrawing those algorithms. CCIA observes that the appropriate counterfactual scenario is simply the situation in which none of the alleged abuse exists, in other words, the situation in which Product Universals and Shopping Units have been discontinued, but not the changes in generic ranking. In response to the argument put forward by Foundem in its statement in intervention to the effect that it would be absurd for Google to withdraw product results or product ads without also withdrawing its adjustment algorithms capable of demoting competing comparison shopping services in the generic results, Google states that this is what it does in many countries, including in Europe,

demonstrating that its proposed counterfactual scenario is not hypothetical and that those algorithms can be explained only by concerns for the quality of its results.

- 236 According to Google, two sets of facts relied on by the Commission should properly result in those traffic decreases to competing comparison shopping services being attributed to the changes in generic ranking, not to the positioning and display of Product Universals and Shopping Units. Thus, it is apparent from recitals 464 to 474 of the contested decision that none of the competing comparison shopping services mentioned in those recitals claims that the display of Product Universals and Shopping Units caused traffic losses. In fact, some of them expressly rejected such a link. Similarly, the second set of facts invoked by the Commission in recitals 475 to 477 of the contested decision concern changes in the visibility of competing comparison shopping services in the generic results ‘following the introduction or update of the Panda algorithm’. Elsewhere, the decision also contains the assessment that the visibility of those comparison services dropped ‘after the launch of the Panda algorithm’, or similar assessments (recitals 361, 367, 513 and 514 of the contested decision), even though Google’s ranking of competing comparison services in the generic results, including the application of quality control mechanisms such as Panda, is not part of the practices considered to be abusive.
- 237 Recital 661 of the contested decision states that the practices in issue consist solely in the fact that Google ‘does not apply’ its quality control mechanisms for generic results (specifically, Panda) to Product Universals and Shopping Units. This is readily apparent from the contested decision’s definition of the geographical scope and duration of the alleged abuse, which does not cover countries or periods not concerned by the use of Product Universals or Shopping Units. This is why today, according to Google, since Product Universals have been discontinued, the mere removal of Shopping Units would bring an end to the infringement identified by the Commission.
- 238 A proper counterfactual analysis would have confirmed that the practices challenged by the Commission did not, in themselves, have any impact on traffic from Google’s general results pages to competing comparison shopping services.
- 239 Thus, first, that traffic would have developed in a similar way in countries with and without Product Universals and Shopping Units. Google refers to a ‘difference-in-differences’ analysis involving the counterfactual scenario of countries where Product Universals and Shopping Units were not introduced or were introduced belatedly. Google thus compares the situation between 2004 and 2014 in the United Kingdom and Ireland, in Germany and Austria, in France and Belgium, and in the Netherlands and Belgium, in each instance for 10 or so comparison shopping services competing with Google’s own comparison service, active in both countries under comparison. The comparison is illustrated in the form of diagrams showing the traffic curves for each comparison shopping service in the two countries compared. For example, the traffic trends from Google’s

general results pages of the comparison shopping service Twenga in France, where Product Universals and Shopping Units were in place, is compared against its traffic trends in Belgium, where they were not. Although traffic volumes may be different, in each set of pair countries, traffic trends over time seem to be broadly similar. The Commission's assessment of that analysis in the contested decision is incorrect on two counts. In the first place, it wrongly stated, in recital 520, that the analysis does not take account of the effect of general search algorithms, particularly Panda. In the second place, it wrongly stated, in recital 521, that traffic was not evolving in the same way in the pair countries prior to the launch of Product Universals and Shopping Units in one of those countries.

- 240 Secondly, in a similar vein, traffic to competing comparison shopping services does not change when Product Universals and Shopping Units are removed. In 2011, the Commission asked Microsoft to conduct an experiment (the 'Bing Answers Experiment') that involved removing Product Universal-type search results on Bing, its search engine, for one group of users and comparing the situation with that of another group of users who continued to see those specialised results. The data from this experiment show that the display, or not, of Product Universal-type results has an insignificant impact on traffic to comparison shopping services. Google conducted its own experiment (the 'ablation experiment') with Shopping Units and achieved similar results: the difference between traffic to competing comparison shopping services generated by the group of users who did not see Shopping Units and that generated by the control group was less than [0% – 10%, the exact figure is confidential] of the total traffic of those comparison services. This is well below the level identified by the Commission as being competitively irrelevant in the statement of objections (paragraph 446) and the contested decision (recitals 571 and 581), being approximately 20% of direct traffic received by comparison shopping services. Moreover, the Commission was wrong to claim, in recital 523 of the contested decision, that the ablation experiment also failed to take account of the effect of general search algorithms, particularly Panda.
- 241 As for the two calculations the Commission performed by reusing data from the ablation experiment in order, it says, to correct that experiment, which are mentioned in recitals 524 to 535 of the contested decision, Google claims that these are incorrect. Concerning the first calculation, illustrated in table 22 of the contested decision, there is no basis for assuming a scenario in which comparison shopping services always appear in the top four generic results, as the Commission did. Moreover, Google was not given the opportunity to comment on that calculation during the administrative procedure, in breach of its rights of the defence. Concerning the second calculation, illustrated in table 23 of the contested decision, based on a scenario of product-only queries that the Commission treated in the same way as queries normally returning Shopping Units, the Commission ignored the fact that comparison shopping services also receive significant generic traffic from many product queries in response to which Shopping Units do not appear. The Commission also failed to have regard to the fact that comparison

shopping services receive around 50% of their traffic from sources other than Google's generic results, which is apparent from table 24 of the contested decision. That traffic must be taken into account when assessing the effect of Shopping Units on traffic. If it were found that the decrease in search traffic from Google was small compared to comparison shopping services' total traffic, it could not be competitively relevant. However, the Commission simply stated, in recital 539 of the contested decision, that the traffic allegedly diverted accounted for 'a large proportion of traffic' to comparison shopping services without ever demonstrating that to be the case.

- 242 Thirdly, in the contested decision, the Commission did not take account of broader industry developments or shifting user preferences, as illustrated by the growing popularity of retail platforms such as Amazon, which are alternative options for comparison shopping searches. As the popularity of retail platforms has increased, their ranking in Google's generic results has improved compared to comparison shopping services, regardless of whether they are active in the same market. A comparison of trends in traffic from Google's generic results to retail platforms, on the one hand, and to comparison shopping services, on the other, confirms this analysis (since 2008, traffic to comparison services has stagnated whereas traffic to platforms has continued to grow). While, according to Google's internal documents, Amazon has established itself as the 'benchmark in search results, speed [and] quality' for product searches, comparison shopping services have not improved their services. This is borne out by statements made by a Nextag executive and a letter from that comparison shopping service to Google explaining that, in recent years, its role has been 'usurped by direct electronic commerce companies (like Amazon)'.
- 243 With regard to the first part of Google's third plea, **the Commission** states, in the first place, that the practices it found to be abusive are not solely the 'positioning and display of Product Universals and Shopping Units', but their combination with other practices leading to the situation whereby competing comparison shopping services can appear only as generic search results, without any enriched display features, and are moreover prone to being demoted in those results by general search adjustment algorithms such as Panda. In that connection, the Commission refers to recitals 344 and 512 of the contested decision. Foundem maintains that Google attempts to gloss over the fact that those adjustment algorithms, which demote competing comparison shopping services in the generic results but do not apply to Google's comparison shopping service, contribute to the anticompetitive practices identified by the Commission. The German Government, Visual Meta and Twenga essentially take the same view. Therefore, according to the Commission, Google cannot claim that it 'attributes decreases in Google search traffic to conduct that it recognises as lawful (changes in generic ranking)'.
- 244 In the second place, the Commission states that, in the application, Google fails to clarify whether its case is that it must be exonerated because the conduct in issue

is not the sole cause of the decrease in traffic to competing comparison shopping services or because it is not one of the causes of that decrease.

- 245 The Commission asserts, in the third place, with the support of Foundem and Visual Meta, that since the conduct in issue is a combination of the practices described in paragraph 243 above, a proper ‘counterfactual’ analysis would need to compare that conduct with the situation in which Product Universals and Shopping Units were not present and in which competing comparison shopping services were no longer prone to being demoted by Google’s general search adjustment algorithms, as follows from recitals 380 to 383 and 661 of the contested decision. Foundem adds that it would make no sense for Google to continue to demote competing comparison shopping services in the generic results if it no longer displayed product results or product ads on its general results pages: internet users would be unhappy at not having any visible comparison shopping services on those pages. The Commission states that the evidence referred to in recitals 475 to 488 of the contested decision shows a parallel fall in the Sixtrix Visibility Index and traffic from Google’s general results pages to competing comparison shopping services after the introduction of the Panda algorithm, although other factors may also influence traffic to a website. As indicated in footnote 398 of the contested decision, the Sixtrix Visibility Index is an index of statistical data published once a week by a company of the same name, which takes into account both the trigger rate of a website in the general search results and its ranking among them. In its statement in intervention, in particular, Twenga provides data on trends in France in the visibility index of various comparison shopping services between 1 and 17 August 2011, when the Panda algorithm was introduced, showing decreases ranging from more than 80% to around 50%. Twenga also provides data on the decline in traffic from Google’s general results pages to its different websites in several Member States between 2011 and 2014, noting that it always took great care when developing content, which it claims shows that those decreases were not of its own doing. So far as the Commission is concerned, the examples of parallel decreases in the visibility index and traffic set out in the contested decision are evidence that the conduct in issue indeed had an effect on traffic from Google’s general results pages to competing comparison shopping services. Moreover, the fact that the Commission considers that the reduction in traffic to competing comparison shopping services caused by general search adjustment algorithms, particularly Panda, is attributable to the conduct in issue is in no way undermined by the definition given in the decision of the geographical scope and duration of that conduct.
- 246 In the fourth place, the Commission asserts that neither the ‘difference-in-differences’ analysis nor the ablation experiment demonstrates that the conduct in issue had no significant effect on traffic to competing comparison shopping services.
- 247 Concerning the ‘difference-in-differences’ analysis, the Commission states, as it did in the contested decision, that that analysis does not show that traffic to competing comparison shopping services followed the same trend in the countries

in which the practices complained of had been observed and those in which they had not. The parameters used in the comparison are not appropriate because they do not take account of the effect of general search adjustment algorithms. It would have been necessary to compare countries in which, in addition to Product Universals and Shopping Units, those algorithms were used against countries in which they were not. Furthermore, the analysis does not examine whether traffic actually developed in the same way in the pair countries before Google introduced Product Universals and Shopping Units in one of them. Trends in traffic from Google's general results pages to competing comparison shopping services in the pair countries reflect substantial changes in the period before Google introduced Product Universals and Shopping Units. The Commission cites the example of the comparison shopping service Ciao in the United Kingdom and Ireland and in Germany and Austria.

- 248 Finally, the ablation experiment, like the experiment with Microsoft's Bing, is not conclusive. It also fails to take account of the effect of general search adjustment algorithms and the effect of Product Universals and Shopping Units on traffic to Google's comparison shopping service.
- 249 Furthermore, the Commission maintains that its two sets of calculations based on data from the ablation experiment are correct. First of all, it is normal, in order to assess the effect of withdrawing Product Universals and Shopping Units, to focus on situations in which competing comparison shopping services are prominently displayed for internet users, namely within the top four generic results on the first general results page. Table 22 of the contested decision is based on the data provided by Google in table 20 and on the trigger rates of competing comparison shopping services in the first four generic results, set out in table 21, which themselves are taken from objective data in the file. Accordingly, Google's rights of the defence were not infringed, contrary to Google's claims. Next, although competing comparison shopping services may indeed appear in the generic results without a Shopping Unit also appearing, the assessment of the effect of removing Shopping Units makes sense only when compared against situations in which they do appear. It is therefore reasonable for table 23 to be based on those situations. That is why the baseline for the ablation experiment as conducted by Google is overly broad. A fortiori, the baseline proposed by Google in its application is far too broad. It encompasses all comparison shopping services' traffic, whereas about half of that traffic comes from sources other than Google's general results pages, sources that are not affected by the conduct in issue.
- 250 In the fifth place, the Commission contends that, in the contested decision, it did indeed take account of the growing popularity of retail platforms, contrary to Google's assertions. It notes, with reference to various recitals, that the contested decision made clear that those platforms were not affected by the practices in issue since they were not prone to being demoted in the general search results by general search adjustment algorithms, unlike comparison shopping services. It also observes that if the popularity of retail platforms was the sole cause of the decline in traffic to comparison shopping services, Google's comparison service

should have been affected in the same way. Moreover, Google does not demonstrate that retail platforms specifically improved their services when the fall in traffic to comparison shopping services occurred, namely in 2011 onwards, after the introduction of the Panda algorithm. The Commission states that Annex A36, which Google produced to show that Amazon was a benchmark for it, dates back to 2007. Conversely, Google's claim that comparison shopping services did not innovate is questionable in the light of some of the statements filed during the administrative procedure. It is true that other comparison shopping services stated that they had stopped innovating, but this was against the background of the difficult situation Google had put them in. In addition, Nextag's views — which Google relied on — are inconsistent with the views Nextag expressed during the administrative procedure and lack credibility in the light of the discussions that took place between those two undertakings when those views were put forward.

2. Second part of the third plea in law: the Commission did not prove that the practices in issue led to an increase in Google's general search traffic to its own comparison shopping service

- 251 In the second part of the third plea, Google argues that the Commission was wrong to claim, in section 7.2.3.3. of the contested decision, that the practices in issue increased traffic to its own comparison shopping service.
- 252 In the first place, **Google** claims that since those practices did not lead to a decrease in traffic to competing comparison shopping services, any increase in traffic to its own comparison shopping service could not have been at their expense and exclusionary. Exclusionary practices must by their very nature enable the undertaking engaging in such practices to take sales that competitors would have made in their absence. Product Universals and Shopping Units only caused the market to expand as a whole, without any adverse consequences for competing comparison shopping services. In the reply, Google adds that while accepting, as the Commission maintains, that traffic to competing comparison shopping services decreased after the launch of the Panda algorithm, the trends in traffic to Google's comparison shopping service associated with that event did not change, which shows that Google may have favoured retail platforms but not its own comparison service.
- 253 In the second place, Google, supported by CCIA, submits that the Commission exaggerated the volume of traffic received by its comparison shopping service. First, it included in that traffic clicks on ads in Shopping Units, even though those clicks do not link to the specialised Google Shopping results page, but to third-party retail websites. Visual Meta's argument that that mechanism encouraged the sellers concerned to join Google Shopping, thereby benefiting that comparison service, does not appear in the contested decision. The only reason for the Commission to count clicks on product ads is its claim that the revenue from Shopping Units benefits the Google Shopping website. However, as already argued in the second plea, that is incorrect. Thus, Visual Meta is wrong to assert

that revenue from Shopping Units goes directly to Google Shopping. Moreover, the Commission did not say that was the case in the contested decision. In its observations on the statements in intervention of Foundem and Visual Meta, Google also states that the contested decision is inconsistent inasmuch as it finds, in rejecting that Google is a unified entity, that one of its individual services — its comparison shopping service — is favoured by those clicks even though they trigger payments for Google in general. Visual Meta departs from the contested decision by arguing that the internal allocation of revenue or Google's structure is irrelevant. In the same vein, CCIA contends that Product Universals and Shopping Units are not part of Google's comparison shopping service, which the Commission acknowledged in recitals 408, 412 and 423 of the contested decision. Google maintains, for instance in its observations on Foundem's statement in intervention, that the advertisements in Shopping Units do not come from the specialised Google Shopping page. Their technologies, infrastructure and formats are different, which was demonstrated to the Commission during the administrative procedure and is not contested by it. Google also states, in its observations on VDZ's statement in intervention, that Shopping Units cannot be regarded as comparison shopping services any more than Product Universals. Shopping Units do not enable different offers for the same product to be compared, as comparison shopping services should do, but instead suggest a range of products capable of answering an internet user's query. During the administrative procedure, a number of interveners endorsed that view, which the Commission took into account in the wording of recitals 408, 412 and 423 mentioned above. Secondly, according to Google, the Commission was also wrong to take account of clicks on the Shopping menu link at the top of the results page. The existence of that menu link is not one of the components of the practices identified as abusive, only the effects of which should be assessed. Furthermore, in the defence, the Commission does not dispute that the menu link is not a search result. As a result of those two errors, the Commission overestimated the volume of traffic from Product Universals and Shopping Units to Google's comparison shopping service several times over. The truth of the matter is that, as shown by a chart drawn up based on connection data during the infringement period, Google sent several times more search traffic to competing comparison shopping services and three times more search traffic to retail platforms than to its own comparison shopping service.

- 254 In the third place, clicks on Product Universals and Shopping Units reflect their relevance and user preferences. The contested decision's reasoning is flawed in that respect because the Commission simply observed, in recital 494, that clicks on Product Universals and Shopping Units were all the higher because their trigger rate was high. But it disregarded the fact that Google triggers Shopping Units (and, in the past, Product Universals) based on their relevance, in the same way as all search engines, and that users click on them because they are useful, not because they appear. The visibility of Product Universals and Shopping Units and the clicks they generate are the result of improvements in the quality of Google's product results and product ads, as well as user preferences. Thus, Microsoft's experiment with its search engine Bing (the 'Bing Algo Experiment'),

described in recitals 460 and 461 of the contested decision, shows that users react sensitively to the relevance of results. Inverting the positions of less relevant results and the most relevant results appearing high up on Bing's general results pages showed that users notice the deterioration in quality resulting from the promotion of less relevant results and react immediately. Microsoft had to abort the experiment after one week. In addition, Google submits that images in Product Universals or Shopping Units make it easier for users to gauge the relevance of the proposed result because they have a preview of the product they are looking for. The consequence of this is that they readily click on those specialised graphic results when they consider them a priori to be useful for their search and vice versa. Studies tracking the eye movements of internet users (eye-tracking in English or *oculométrie* in French), which Google conducted, bear this out. Images are thus a quality aspect of Google's specialised product results, not an artificial aspect designed to generate clicks. Therefore, the reason users clicked on Product Universals and Shopping Units for years is because of their relevance, not their positioning or display. The Commission has never shown the opposite to be true. While the rise of retail platforms did not affect traffic to Google's comparison shopping service in the same way as traffic to competing comparison shopping services, this was because Google, unlike those comparison services, innovated in terms of its product results and product ads so as to keep up with Amazon and other retail platforms, not because of the positioning and display of Product Universals and Shopping Units as the Commission suggested in recital 517 of the contested decision.

- 255 In that regard, **the Commission** contends, in the first place, that it was right to find that the increase in traffic to Google's comparison shopping service was due to the conduct in issue. This is demonstrated by section 7.2.3.3. of the contested decision, which contradicts the argument put forward in the reply that the launch of the Panda algorithm did not alter the trends in traffic to Google's comparison shopping service. The increase in such traffic was at the expense of competing comparison shopping services. As with the effect of the conduct in issue on competing comparison shopping services, Google overlooks the fact that that increase was the result of two practices combined. Since the contested decision showed that the conduct in issue reduced traffic to those comparison services and thus had a detrimental exclusionary effect on them, there is nothing to suggest that the increase in traffic to Google's comparison service was not to the detriment of its competitors. Even if the 'difference-in-differences' analysis or the ablation experiment were to show that the display of Product Universals and Shopping Units alone did not reduce traffic to competing comparison shopping services, this would in no way alter the fact that the conduct in issue as a whole increased traffic to Google's comparison shopping service.
- 256 In the second place, the Commission argues, together with the German Government, Twenga and Foundem, that it was right to find, in the contested decision, that clicks on Shopping Units constitute traffic to Google's comparison shopping service. The Commission also contends that Google misinterprets the contested decision where it claims that, according to that decision, Shopping Units

favoured only ‘the Shopping website’. The decision actually states that Shopping Units are part of Google’s comparison shopping service, just like the specialised Google Shopping search page, and that their display favours that comparison service. As mentioned above, recitals 414 to 421 of the contested decision set out eight reasons why Shopping Units are part of Google’s comparison shopping service. Foundem submits that the first seven reasons justify the eighth, appearing in recital 421 of the contested decision, namely that the links in Shopping Units and those on the specialised Google Shopping results page direct users in the same way to the websites of sellers who pay Google, displaying the same product ads and providing the same economic benefit to Google. Furthermore, Foundem states that, as indicated in recitals 420 and 422 of the contested decision, Shopping Units existed without the simultaneous presence of the specialised Google Shopping page in 6 of the 13 countries concerned by the abuse identified by the Commission, which proves that they are part of Google’s comparison shopping service. The Commission also explains that counting the clicks on the ‘Shopping’ menu link of the search engine to calculate the traffic from Google’s general results pages to its comparison shopping service is justified. That link appears only in response to a product query. Counting those clicks in the two analyses mentioned in recitals 496 and 497 of the contested decision thus enables a meaningful comparison to be made between, on the one hand, traffic from those general results pages to competing comparison shopping services and, on the other, traffic from the same pages to Google’s comparison shopping service in the same countries. In particular, Google has never demonstrated that a modified version of the first analysis excluding those clicks would show that the conduct in issue did not increase traffic to its comparison shopping service.

- 257 In the third place, the Commission maintains that, in the contested decision, it did not find that users clicked on Product Universals and Shopping Units without having regard to their relevance.
- 258 The Commission explains that Google bases its claims on a misreading of the contested decision. The contested decision does not state that users click on Product Universals and Shopping Units regardless of their relevance, but simply that a given link will generate more clicks if it is clearly visible. That is readily apparent from many of the recitals in the contested decision. The Commission refers to recitals 455 to 461, 463 to 472 and 475 to 477 of the contested decision, which concern the relationship between the positioning of generic results and the likelihood that users will click on the links they display; recitals 492, 493 and 494 of the contested decision, which concern the relationship between the display of product results and product ads and the number of visits to Google’s comparison shopping service; and recitals 372 to 377 and 399 to 401 of the contested decision, which concern the likelihood that users will click on specialised product results containing enriched information, particularly images.
- 259 Furthermore, the Commission submits, first of all, that Google misinterpreted the Bing Algo experiment. It follows from that study that the alteration by a general search service of the ranking of a generic link on the first general search results

page has a major impact on clicks on that link. A demoted link receives fewer clicks than before, even though it receives more clicks from particularly discerning users than a less useful link artificially placed above it. The negative reactions of users to artificial rankings of results as described by Google is irrelevant when assessing the conduct in issue. The results promoted in Product Universals and Shopping Units and those downgraded in the generic results are not of the same kind, unlike those used in the Bing Algo experiment. Even if a user were disappointed by the results in Product Universals and Shopping Units, he would have difficulty finding a useful generic result given its likely poor positioning in the generic results. Moreover, Google has never adduced any evidence, either during the administrative procedure or in the annexes to the application, to challenge the conclusions drawn by the Commission from the Bing Algo experiment, for example by submitting a study concerning display-related alterations in its own generic results. The Commission also maintains that the contested decision does not in any way state that internet users consistently prefer the first result displayed simply because it is the first. It refers to recitals 459 and 535.

- 260 Next, the Commission asserts that the eye-tracking studies submitted by Google do not show that adding images to search results helps users gauge their relevance. The Commission also recalls that it did not take issue with Google for having enriched the display of some results; it criticised Google, *inter alia*, for applying that enriched display only to its own comparison shopping service and not to competing comparison shopping services.
- 261 Finally, according to the Commission, Google failed to demonstrate that it improved its comparison shopping service in order to keep up with retail platforms, while competing comparison services did nothing in that regard. It could have, for example, included a direct purchase functionality in its comparison site, developed a mobile application or established an after-sales service.

3. First part of the fourth plea in law: the Commission speculated about the anticompetitive effects of the practices in issue

- 262 By its fourth plea, **Google** submits in general terms that the Commission failed to demonstrate that the practices in issue may have had anticompetitive effects that, in turn, led to higher prices for sellers and consumers and less innovation. In the contested decision, in particular, the role of Google's strongest competitors in comparison shopping services, namely retail platforms such as Amazon, was not taken into account and no explanation was given as to the alleged effects on prices and innovation.
- 263 In the first part of its fourth plea, Google argues that the contested decision is based on pure speculation about potential effects and does not examine the actual situation and development of the markets. **CCIA** levels the same criticism, particularly concerning the increased prices and reduced innovation mentioned by

the Commission. Google points out that, according to the contested decision, the conduct in issue ‘is capable of having, or is likely to have, anticompetitive effects’ (recital 589) and ‘has the potential to foreclose competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers and less innovation’ (recital 593), as mentioned above. There is no evidence that those eventualities came to pass.

- 264 The contested decision is not based on proof that the conduct in issue is, by its nature, anticompetitive. Referring to the judgment of 11 September 2014, *CB v Commission* (C-67/13 P, EU:C:2014:2204, paragraph 58), Google maintains that the Commission was required, under those circumstances, to prove the actual anticompetitive effects of that conduct. Moreover, in its judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 139), the Court held that even in cases involving conduct by a dominant undertaking that is in principle abusive, the Commission cannot rely solely on evidence relating to the share of the market concerned by that conduct to find that it is indeed abusive, but must take all the circumstances into account. In that case, the Advocate General stated that a fully fledged analysis of the effects must be carried out (Opinion of Advocate General Wahl in *Intel Corporation v Commission*, C-413/14 P, EU:C:2016:788, point 120). That was the approach taken by the Commission in Case COMP/C-337.792 – Microsoft, which gave rise to its decision of 24 March 2004 and subsequently the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289).
- 265 Furthermore, the contested decision failed to establish that Google held a dominant position on the national markets for comparison shopping services, which would have meant that competition on those markets had been weakened. That is a further reason why the Commission should have identified actual exclusionary effects on the markets in question.
- 266 According to Google, the fact that the conduct complained of improved the service provided to internet users from its general search page by displaying specialised product search results and product ads on that page, based on competition on the merits, is yet another reason why it was necessary to identify specific exclusionary effects. The Commission and the Court have done so in similar situations. Google refers to the Commission’s decision of 21 December 1988 in Case IV/30.979, *Decca Navigator Systems*, paragraph 114, the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289, paragraphs 868, 869 and 1010), and the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 140). In the instant case, Google’s arguments on improving the services provided to consumers were well documented and the Commission should therefore have demonstrated that the anticompetitive effects outweighed the interest in such improvements.
- 267 Finally, since the conduct complained of spanned many years, its anticompetitive effects ought to have been visible if it had genuinely been harmful to competition. The duration of the conduct should therefore also have prompted the Commission

to ascertain whether that was actually the case. Google and CCIA state that, in the judgment of 12 December 2018, *Servier and Others v Commission* (T-691/14, EU:T:2018:922, paragraphs 1122 to 1128), the Court held that where the conduct in issue has already been implemented, the Commission cannot — except in the case of restrictions of competition by object — merely demonstrate potential anticompetitive effects; it must demonstrate actual anticompetitive effects because, otherwise, the distinction between restrictions of competition by object and restrictions of competition by effect would be illusory. Although the findings of the Court were made in the context of an anticompetitive cartel, it would nevertheless be logical to apply them to alleged cases of abuse of a dominant position too. In the instant case, the practices complained of did not have an anticompetitive object and the Commission should therefore have followed the Court's approach. In any event, proof of the existence of actual effects would have enabled the Commission to substantiate the likelihood of potential effects, as the Commission itself stated in paragraph 20 of its Guidance on enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings.

268 However, according to Google, the Commission did not demonstrate any tangible effects. Section 7.2.3. of the contested decision, to which the Commission refers to explain that it took account of specific aspects of the market, examines only the development of traffic from Google's general results pages to competing comparison shopping services, not traffic as a whole. The fact of the matter is that the material in the file shows that Google is not able to drive up prices or restrain innovation and that competition in the markets for comparison shopping services is robust and internet users have a wide range of choice, as the United Kingdom's competition authority found in a study published in April 2017, entitled 'Online search: Consumer and firm behaviour'. So far as prices are concerned, Google states that it demonstrated that they had fallen for sellers wishing to appear in Shopping Units.

269 Furthermore, in reply to BEUC's arguments that it harmed consumers by limiting their access to competing comparison shopping services and a wider range of sellers, Google essentially maintains that its relevance criteria for results shown to users in the generic results, Product Universals or Shopping Units are objective, particularly because Universal Search is used. In the contested decision, the Commission did not object to the adjustment algorithms for generic results or the relevance criteria and it was only the absence of competing comparison shopping services in Product Universals and Shopping Units that it identified as problematic. Consequently, BEUC puts forward a theory that was not taken up by the Commission in the contested decision. Google also makes clear that it sent billions of free clicks of traffic to competing comparison shopping services in the 10 years preceding the adoption of the contested decision and that some of them, such as Which? in the United Kingdom, a BEUC member, saw traffic from Google's general results pages significantly increase, as did retail platforms. The Commission did not argue in the contested decision that Google limited consumers' access to competing comparison shopping services. Google puts

forward studies, including those BEUC relied on, to show that comparison shopping services are widely used by internet users. It denies that it is itself the main entry point for online product searches and states that the file relating to the procedure before the Commission bears that out. One of the studies mentioned above shows that, in the United Kingdom, Germany and France, the instances in which Google's search engine is used as a starting point to search for a product online or at a given point in time during that search are far from being in the majority. In addition, contrary to BEUC's claims, small sellers appear in advertisements on Google's general results pages.

- 270 On that point, **the Commission**, like most of the interveners supporting it, contends that the case-law, most recently illustrated by the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632), only requires it to show, in the light of the circumstances of the case, that the conduct in issue is capable of foreclosing competitors; it does not require the Commission to prove the actual effects of that conduct, even when the decision finding the infringement is taken several years after that conduct began. The protection of the market structure, and thus of competition itself, which forms part of the objectives set out in Articles 101 and 102 TFEU, means that a finding of infringement of those provisions should not be made subject to proof that the conduct in issue had actual effects. It would be paradoxical for a more stringent standard for a finding of infringement to be imposed in relation to anticompetitive practices that have already been implemented than in relation to practices that have not, which would be the outcome of CCIA's position referred to in paragraph 267 above. That position was also rejected by the Court in its judgment of 6 December 2012, *AstraZeneca v Commission* (C-457/10 P, EU:C:2012:770, paragraph 110). The fact that the abuse has consequences on a market other than the market on which the undertaking responsible for the conduct in issue holds a dominant position alters nothing in that respect, even though, in this instance, the Commission also found in the contested decision that the national markets for general search services and for comparison shopping services alike could be affected.
- 271 In the present case, the Commission did not assume that the conduct in issue had exclusionary effects; it demonstrated, based on an extensive body of evidence, that it was capable of having such effects. Twenga and Kelkoo state that the decline in traffic to competing comparison shopping services from Google's general results pages was accompanied by a deterioration in the quality of their own traffic, namely a decrease in the rate at which visits to sellers' websites from those comparison sites were converted into purchases. In addition, traffic from Google's comparison shopping service to sellers increased. Twenga and Kelkoo were therefore less attractive to sellers who, moreover, had no interest in having their products appear on several websites, short of having their own sales websites also demoted in the generic results by the Panda algorithm that downgrades sites with similar content. Twenga provides some examples of sellers who decided to dispense with its services, either due to the decline in the quality of traffic from Twenga or because, having chosen to supply Google's comparison shopping service, they did not wish to continue appearing in the results of another

comparison site. Kelkoo adds that the decrease in traffic to its site from Google's general results pages itself led to a decrease in direct traffic to its site, which, like traffic from generic results, is 'good quality' traffic generating good conversion rates. Direct traffic stems from an initial visit prompted by a discovery in the generic results. The Commission also disputes that the conduct in issue improved the service provided to users: Google was not a pioneer in comparison shopping services and Google itself stated in 2010, in response to Foundem's complaint, that displaying product results based on what sellers pay was not particularly attractive, although it ultimately used that system for Shopping Units. Contrary to Google's assertions (see paragraph 266 above), the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 140), does not imply that abuse of a dominant position may be redeemed by the improvements it entails for consumers. Paragraph 140 of that judgment, relied on by Google, is concerned only with practices that can be 'objectively justified'. The *Microsoft* case, which Google relies on too (also see paragraph 266 above), shows that the standard of proof to be met is that the conduct in issue is capable of foreclosing competition. The Commission refers, in particular, to paragraph 1010 of the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289), and states, among other things, that the Court observed in that judgment that the Commission had also, for the sake of completeness, analysed the actual foreclosure effects of the conduct in issue.

- 272 In the present case, section 7.2.3. of the contested decision, entitled 'The Conduct decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service', contains evidence on actual developments in the national markets for comparison shopping services, showing that the conduct in issue was capable of foreclosing competition on those markets. The positive effects on prices and innovation put forward by Google do not alter that. In any event, the Commission denies that the prices Google charged to advertisers actually decreased. Google measured that decrease only by comparing the prices of Shopping Units against those of Google's text ads and it was disproved by a number of advertisers during the administrative procedure. The relevance of invoking such a price decrease, from which only the separate market of online advertising could have benefited, is also questionable.
- 273 More broadly, BEUC argues that, by limiting the visibility of competing comparison shopping services on its general results pages and favouring its own comparison shopping service and its advertisements, which are used by the largest sellers, Google not only reduced competition in the market for specialised comparison shopping search services, but also restricted consumers' ability to access a wider range of sellers and curtailed the possibility for sellers to compete with each other. BEUC states that, in its judgment of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 20), the Court pointed out that Article 102 TFEU covers not only practices that directly cause harm to consumers, but also practices that cause consumers harm through their impact on competition.

4. *Second part of the fourth plea in law: the role of retail platforms was not taken into account in the analysis of effects*

274 In the second part of its fourth plea, **Google** claims that the Commission failed to take account of the competitive pressure exerted by retail platforms when they are drivers of competition and innovation in the markets for comparison shopping services. Google states in the reply that this constitutes an error of law. That pressure prevents Google's conduct on the market from having any anticompetitive effects. The Commission did not take that pressure into account in either its main analysis that retail platforms are not players in the national comparison shopping markets or in its alternative analysis that they are. In the second analysis, the Commission examined only the market 'segment' of comparison shopping services on the ground that those comparison services are Google's closest competitors. Even if that were true, retail platforms should not have been ignored: their market share is several times greater than that of comparison shopping services, particularly Amazon. The Commission also essentially states, in its Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5, paragraphs 28 to 30), that when assessing planned horizontal mergers, it is necessary to take account of sources of competition, even if they are not the closest.

275 Google, supported by CCIA, first of all sets out various arguments to show that retail platforms and comparison shopping services are active on the same market for comparison shopping services. Both provide internet users with the same product search features free of charge, including price information. The services offered are therefore substitutable, which is sufficient for both types of provider to be included in the market for comparison shopping services, even though retail platforms provide additional services. Three surveys submitted by Google to the Commission during the administrative procedure, concerning Germany, France and the United Kingdom, demonstrate that the vast majority of consumers in those countries consider the Amazon platform to be a good substitute for the most well-known comparison shopping services. The Commission was wrong to claim that those surveys have no evidential value because the respondents were not required to state reasons for their answers and only Amazon was mentioned in the question. It is true that the study put forward by the Commission in recital 220(6) of the contested decision to support the definition of the product markets it used is not concerned with the substitutability of retail platform services and comparison shopping services, but it does state that Amazon and eBay are 'prime examples of multi-trader platforms whose design offers important price comparison functionality for consumers'. In addition, several independent studies show that most users wishing to purchase a product start their search on a retail platform and complete their purchase only after comparing products. In reply to the statements in intervention of BEUC and BDZV, Google moreover cites a decision of the Bundeskartellamt and a judgment of the Court of Appeal of Schleswig (Germany) that essentially state that retail platforms are comparison shopping services that also perform the functions of a sales intermediary. Furthermore, Google disputes

BEUC's claim that retail platforms are shops selling a wide range of products while comparison shopping services enable users to compare the price of a single product sold in different shops; a retail platform is not a shop, but brings together the offers of many shops and allows users to compare them for free, in the same way as comparison shopping services. The Commission's argument that retail platforms rarely provide access to the largest sellers, implying that they are not substitutable for comparison shopping services that relay those sellers' offers, is contradicted by the responses the platforms themselves submitted to the Commission. Even if that argument were true, it would not alter the demand of users who consider those two types of website to be substitutable for their comparison shopping searches. The Commission did not demonstrate the opposite or genuinely examine substitutability on the side of user demand. Internal documents from a 'non-suspect period' show that Google itself considered Amazon and eBay to be leaders in the market for comparison shopping services and, in particular, viewed Amazon as a benchmark and its main competitor, driving its own innovation efforts. Similarly, numerous statements placed on the file relating to the administrative procedure by providers of general search services or comparison shopping services and by retail platforms confirm that the latter compete with comparison shopping services.

- 276 Instead of taking that information into account, the Commission pointed to a number of superficial differences between the services of retail platforms and those of comparison shopping services, which have no bearing on their substitutability from the standpoint of user demand, to reach the erroneous conclusion that the former do not exert any competitive pressure on the latter. CCIA observes that, in paragraph 36 of its Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), the Commission states that differences in (service) characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value those differences. Moreover, according to Google, one of the differences highlighted in the defence, namely that comparison shopping services competing with Google cannot appear in Shopping Units, unlike retail platforms, is inaccurate. All they would have to do is include an advertising link that takes users directly to an online purchasing page, which some of them have done. Google cites three examples. Since the product market on which the conduct in issue produced anticompetitive effects was defined as the market for comparison shopping services, the Commission should not only have examined what alternatives users had to run online comparisons before making a purchase (it would have found that there are retail platforms and comparison sites for the purchase of products), but also whether Google could have increased, in a sustainable way, the prices for appearing on its results pages without losing advertisers to retail platforms. The additional services offered by such platforms as opposed to comparison shopping services, which were identified by the Commission as distinguishing factors, rather increase the competitive pressure that those platforms exert on comparison shopping services. They also explain why retail platforms are better ranked in Google's general search results by the Panda algorithm and why traffic to them has improved, while traffic to

comparison shopping services has decreased. This is precisely why a number of those comparison services also offer additional services, such as allowing users to proceed directly to purchase. Google itself began offering that service, although its main focus was on improving the quality of its responses to users' queries in order to compete with retail platforms on product searches. Moreover, the fact that retail platforms and comparison shopping services, such as Amazon and Google, establish vertical relationships, particularly the fact that the latter link to products sold by the former and that the former are the latter's main customers, as the Commission pointed out in recital 220 of the contested decision, does not alter the obligation the Commission was under to examine the substitutability of their services and the evidence submitted to show that they compete with each other. In response to the argument put forward by Twenga in its statement in intervention that retail platforms operate downstream of Google and depend largely on traffic from its general results pages, Google observes that the latter claim is not made in the contested decision and challenges both the admissibility and the evidential value of the study concerning France submitted in that respect by Twenga. According to evidence adduced by Google in support of its application, most of the traffic of retail platforms is direct traffic, which is at odds with the figure of 46% of traffic from its general results pages. Google also submits that, in its defence, the Commission seeks to reverse the burden of proof by arguing that it is for Google to prove that internet users visit the websites of retail platforms not only to make purchases, but also to run comparative searches with a view to making a purchase, when the onus actually lies with the Commission to demonstrate that that is not the case if it intends to exclude those platforms from the relevant market. The material in the file relating to the administrative procedure does not contain the necessary evidence for that purpose. In particular, the finding of a 2014 study showing that internet users perceive sales platforms to be mainly dedicated to the purchase of products does not reveal the extent to which the comparative search functions of those platforms are used. In addition, the number of visits (traffic) to retail platforms from comparison shopping services is insignificant compared to the total number of visits made to them. The considerations set out in recitals 224 to 226 of the contested decision concerning the differences from the perspective of online sellers (referred to in that decision as the 'supply side') are not relevant because substitutability on the side of user demand exists. Moreover, it is incorrect to say that retail platforms do not work with large sellers when comparison shopping services give priority to those partners. According to Google, if the Commission had taken account of the competitive position of retail platforms between 2011 and 2016 in the 13 countries concerned by the abuse of a dominant position it had identified, it would have found that they held the vast majority of the market share, around [60% — 90%, the exact figure is confidential] in 2016, while the share held by comparison shopping services and that held by the specialised search page for comparison shopping, Google Shopping, were much lower. That situation prevented Google from raising its prices in a sustainable way or from restraining innovation.

- 277 On that point, **the Commission** — supported by most of the interveners in its favour — states that, in the application, Google does not clearly object to the

relevant product market used in the contested decision, which is limited to comparison shopping services. Consequently, retail platforms could not, by definition, have significant market power on that market. In the rejoinder, the Commission maintains that Google's arguments on the competitive pressure exerted by retail platforms are concerned with the assessment of the effects of the conduct in issue, not the definition of the relevant market that is considered at an earlier stage in the competitive analysis. In the defence, the Commission notes that, in practice, Google does not treat retail platforms as competitors, but as partners in a vertical relationship, as demonstrated, *inter alia*, by the fact that they appear in Shopping Units, unlike comparison shopping services competing with Google's comparison service. **Twenga** adds that in France, according to a study, 46% of the traffic of the largest retail platforms in 2015 came from Google, 83% of which originated from its generic results. The Commission expresses surprise that Google does not offer a purchasing function on its comparison shopping service, in the light of Google's claim that platforms are serious competitors it has to keep up with. In the same vein, it states that very few comparison shopping services offer such a function as part of their services. In truth, it is apparent from Google's documents that Google did not want to enter into a relationship of the same kind as that between retail platforms and users because it risked losing its partnerships with large direct sellers. The aim of the conduct in issue was really to make comparison shopping services competing with Google's own comparison service more akin to retail platforms, that is, to convert them from competitors into customers, in other words to remove them from the market.

- 278 The contested decision did not overlook possible competitive pressure from retail platforms. But the fact that such platforms, like comparison shopping services, offer search and selection functionalities does not prevent those functionalities being used for different purposes, since only retail platforms allow direct purchases on their websites, which is their main feature and which Google has not reproduced in the EEA. In that regard, the Commission refers to recital 217 of the contested decision. **BEUC** adds that users do not use the services of comparison shopping services interchangeably with those of retail platforms because consulting and comparing different offers for the same product is not the same as using an online sales website offering many products. The fact that both types of website have a search function is irrelevant. The assessment set out in the contested decision that retail platforms do not exert a competitive constraint on Google's comparison shopping service is justified. Retail platforms can exert power as customers of Google, but not as competitors.
- 279 The Commission rejects the criticism that Google levelled at its methodology regarding the use of open or closed questions in market definition surveys. Recalling that Amazon is not a competitor of Google, it submits that the arguments concerning Amazon cannot be deemed valid for other retail platforms unless Google demonstrates otherwise. The Commission also states that, in one of its studies from 2014, it did examine substitutability between the services of retail platforms and those of comparison shopping services, but found that the comparison function was not a priority for the websites of retail platforms. In the

rejoinder, the Commission states that the purpose of that study was to understand better, *inter alia*, ‘whether consumers make any distinction between ... comparison tools, search engines and multi-trader e-commerce platforms’. In particular, question 13 asked about the specific functionalities of, respectively, comparison shopping services, search engines and retail platforms. Google’s arguments do not, therefore, call into question the finding in recital 220(6) of the contested decision that consumers clearly distinguish between the role of comparison shopping services and that of retail platforms. In particular, the high ranking of retail platforms in Google’s general search results cannot be attributed to the fact that they are more efficient competitors than comparison shopping services for such comparison functions, since Google’s algorithms take account of multiple criteria related to their other functions, particularly those related to originality of content.

280 Furthermore, as regards the independent studies relied on by Google, the Commission maintains that they mostly concern the United States and do not show that internet users visiting the website of a retail platform want to run a comparative search with a view to purchasing a given product. One of those studies disregarded searches started on Google’s general search page, but nevertheless concluded that retail platforms ‘differ from traditional comparison shopping sites in that price comparisons are not the central focus of these sites’.

281 Contrary to Google’s assertions, it appears that large sellers are generally absent from retail platforms, which is not inconsistent with the fact that they provide access to the offers of many sellers. In that connection, the Commission refers to recitals 223 and 228 of the contested decision. However, large sellers are, as already mentioned, very important for Google and some of its documents indicate that it did not want to change its comparison shopping model to avoid the risk of them withdrawing their participation. BDZV also states that comparison shopping services and retail platforms are aimed at different types of sellers.

282 In consequence, although the studies cited by Google may show that many internet users visit retail platforms as part of their shopping journey, they do not show that they are sought after, or even preferred, for pre-purchase comparative searches. Moreover, the fact that Google may have feared losing users’ searches to direct searches on Amazon does not mean that Google and Amazon offer the same service. As one comparison shopping service reported, the range of sellers accessible through comparison shopping services is far wider than the range accessible through retail platforms, particularly because the former are able to display offers from various retail platforms. The merger decisions of the Commission and the Office of Fair Trading of the United Kingdom did not find that these two types of players operate on the same market. As BEUC and BDZV also submit, Google and comparison shopping services essentially play the role of prospective intermediary between users and online sellers, notably retail platforms such as Amazon, but they do not themselves seek to act as a point of sale, particularly for small sellers. The roles are therefore quite separate. Google was

not concerned about Amazon as it would be about a competitor, but about ‘staying on the track’ leading to that retail platform.

- 283 The Commission also explains that comparison shopping markets are two-sided markets whose users are both internet users and online sellers. It demonstrated in the contested decision that there is no substitutability between comparison shopping services and retail platforms from the perspective of either of them, the types of sellers being different for those two categories, as shown by different documents in the file relating to the administrative procedure. Recitals 221 to 223 of the contested decision contain an analysis of the lack of substitutability for sellers, referring in particular to the greater autonomy comparison services give them and also to the broader range of sales-related services platforms provide them with. BEUC states that the liability regime for these two types of players is different. BDZV identifies many differences between comparison shopping services and retail platforms, both from the perspective of internet users and that of online sellers, and states, in particular, that sellers pay comparison shopping services when a user clicks on the link to the sellers’ website, but then bear the risk that the visit will not end in a purchase, while sellers registered on a retail platform pay the platform only if the purchase of their product goes through.
- 284 In the rejoinder, in reply to Google’s criticism of the allocation of the burden of proof, the Commission submits that the case-law only requires it to adduce tangible evidence of the matters it relied on to conclude that the conduct in issue was capable of restricting competition. It refers in that regard to the judgment of 6 December 2012, *AstraZeneca v Commission* (C-457/10 P, EU:C:2012:770, paragraph 196). The Commission adds that it is also apparent from the case-law that it had a measure of discretion when assessing the competitive constraints that retail platforms exerted on comparison shopping services. It refers in that regard to the judgment of 8 December 2011, *KME Germany and Others v Commission* (C-389/10 P, EU:C:2011:816, paragraph 121).
- 285 In view of the arguments summarised above, the Commission asserts in the defence that it is not necessary to determine the market share held by retail platforms in a market where they are grouped together with comparison shopping services or the consequences that should be drawn from that.
- 286 As regards the competition situation in the strict sense and its impact on the effects of the conduct complained of, **Google** claims that if the Commission had taken account of the competitive position of retail platforms between 2011 and 2016 in the 13 countries concerned by the abuse of a dominant position that it believed it could identify, it would have found that they held a very large majority share of the comparison shopping market, while the share of competing comparison shopping services and that of the specialised Google Shopping search page were much lower. Google illustrates this with a numerical table and a histogram in paragraph 349 of the application. That situation prevented Google from raising its prices in a sustainable way or from restraining innovation.

- 287 Moreover, even where the Commission included retail platforms in the two studies mentioned in paragraphs 248 and 255 above to assess the origin of internet users' searches (traffic share) run on comparison shopping services, including Google's comparison service (counted separately), and on retail platforms, two of the five adjustment methods it used, namely those used in the second study (the methods are mentioned in recital 637(d) and (e) of the contested decision), were wrong because they covered only the share of traffic from Google received by the other websites and not the total traffic they received. The other methods are also flawed. In particular, the five methods incorrectly miscalculated the share held by Google's comparison service because they added together the clicks on Google's general results page linking to the specialised Google Shopping search page as well as those linking directly to sellers' websites.
- 288 But even with the adjustment method that is most detrimental to Google, referred to in recital 637(a) of the contested decision, the market share of retail platforms is on average several times higher in the 13 countries concerned than Google Shopping's share, 9 years after the beginning of the conduct that the Commission found to be abusive. In essence, Google claims that given the size of the market share held by retail platforms, which are its closest competitors, it does not have sufficient market power to engage in conduct having anticompetitive effects. In response to the Commission's argument that the market share of Google's comparison shopping service increased while the market share of retail platforms remained broadly stable, Google states that, in terms of volume, they received more traffic and still hold an overwhelming market share.
- 289 In that respect, **the Commission** submits that retail platforms were not disregarded as a source of potential competition in the analysis set out in the contested decision, since the development of traffic to them, to Google's comparison shopping service and to competing comparison services was examined, based on the data in Annex I to the contested decision. It is apparent from that examination that traffic to Google's comparison service increased much more between 2011 and 2016 than traffic to retail platforms during the period coinciding with the conduct in issue. BDZV adds that the table accompanying paragraph 349 of the application, setting out the market shares between 2011 and 2016 held by retail platforms, by Google's comparison shopping service and by competing comparison shopping services, is inevitably flawed because Google counted only the number of visits to the specialised Google Shopping search page under its comparison shopping service when it should also have included clicks on links in Product Universals and Shopping Units.
- 290 The Commission also observes, in essence, that the conduct in issue meant that Google's general results page showed the links of competing comparison services only as poorly ranked general search results, without any enriched eye-catching content, while retail platforms were not subject to the same treatment, which left comparison shopping services in a much worse situation than retail platforms.

- 291 The Commission rejects the criticism levelled at its methodology to the effect that it counted too many clicks when calculating the market share of Google's comparison shopping service: once when a user reached the specialised page from a product ad and once when the ad directly linked the user to a retail website. The service of the comparison site is used in both situations.

5. *Third part of the fourth plea in law: the Commission did not demonstrate the existence of anticompetitive effects*

- 292 **Google** claims in the third part of this plea that, even if the Court does not uphold the first two parts, the Commission failed to demonstrate in the contested decision that the conduct complained of produced anticompetitive effects. CCIA submits, citing the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 139) and the Opinion of Advocate General Wahl in the case giving rise to that judgment, that the Commission was required to carry out an in-depth analysis in order to decide whether exclusionary effects existed.
- 293 First of all, in its analysis of the trends in internet users' use of comparison shopping services competing with Google's comparison service, the Commission took account only of the traffic they received from Google's general results pages. However, all sources of use of those competing comparison shopping services should have been considered. The Commission merely stated in the contested decision that traffic from Google's generic results affected by the practices complained of accounted for a large proportion of the traffic to competing comparison shopping services, for some of which half of their traffic. Google refers in that regard to recitals 539 and 540 and table 24 of the contested decision. CCIA states that the Commission had to prove that the traffic affected by the practices in issue represented a sufficiently significant share of the total traffic of competing comparison shopping services in order to have a foreclosure effect and that it could not simply note that that traffic was significant for some of those comparison shopping services. The Commission therefore erred in law. Google adds that the positioning and display of Product Universals and Shopping Units could not, in any event, have affected all traffic from Google's generic results and that it is inconsistent to state at the same time that those generic results accounted for such a large proportion of the use of competing comparison shopping services and that Google diverted traffic to their detriment. Referring to the arguments set out in its third plea, based on information from table 23 of the contested decision, Google observes that, in actual fact, the maximum impact on the total traffic of comparison shopping services competing with its own comparison service attributable to the positioning and display of Product Universals and Shopping Units was less than [0% – 10%, the exact figure is confidential], which is far too low to generate exclusionary effects.
- 294 Next, in the contested decision, the Commission did not establish the existence of barriers to entry, in particular those created by Google, that would prevent comparison shopping services from benefiting from traffic sources other than general search engines, such as paid traffic, direct traffic and traffic from mobile

applications or third-party referrals. The fact that retail platforms make extensive use of such sources confirms the absence of barriers to entry. The statement of one of Google's competitors to the effect that 'it is not possible to develop a price comparison service without traffic from a general search engine' because 'consumers will always start their search on a general search engine', mentioned in recital 575 of the contested decision, was not verified and is contradicted by studies showing that most consumers begin their product searches on retail platforms, not on Google's search engine. The study submitted in support of the defence (Annex B18) states only that search engines are the most important source of information for enquiring about comparison shopping services; it does not show that they are an indispensable source of traffic for such services.

- 295 The Commission wrongly treats the situation in this case in the same way as the situation in which a dominant undertaking possesses something that is indispensable for the business of other undertakings. But although it is an attractive tool, Google's search engine is not indispensable for competing comparison shopping services. In that regard, Google refers to the situation that gave rise to the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraph 43). The view that Google's management of its search engine may foreclose competition from those comparison services is therefore unfounded. The onus is on those competitors to attract internet users by different means by making the appropriate investments, which, nevertheless, are not an automatic guarantee of success in a competitive market. A number of online services, including comparison services specialising in other fields, such as insurance or energy, have been successful in their investments. In particular, the UK's Competition and Markets Authority (CMA) reported, in a March 2017 study (Annex C18), that comparison services successfully invest in advertising and developing brands and engage in extensive broadcast and online advertising. Google did not object in any way to the development of those other means. The Commission's assertions that advertising in the form of text ads on Google's general results pages is too expensive and that traffic from mobile applications and direct traffic to competing comparison shopping services is low do not demonstrate that Google erected barriers preventing those means from being used. Retail platforms and other online comparison services thus receive a lot of traffic independently of Google. Contrary to what the contested decision states in footnote 715, the situation is therefore not similar to that giving rise to the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289). In that case, which concerned tying, Microsoft had created barriers to entry involving third-party channels through which its competitors could compete with Windows Media Player, by taking action with regard to PC manufacturers. In its observations on BDZV's statement in intervention, Google identifies five further differences between this case and the case giving rise to that judgment: (i) the absence of coercion on the part of Google; (ii) the absence of technical barriers capable of rendering competitors' services less efficient; (iii) the existence of technical justifications for the conduct examined by the Commission; (iv) the Commission's failure to prove actual anticompetitive effects; and (v)

Google's obligation to give its competitors access to its services (Product Universals and Shopping Units) if it wishes to maintain those services.

- 296 Google, like CCIA, submits that the Commission also failed to prove that competing comparison shopping services that had experienced difficulties were as efficient as Google or that they exerted significant competitive pressure on prices or innovation. Such proof was necessary, even though the alleged abuse was not price related. That was the approach taken in the case giving rise to the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289). The disappearance of less efficient or non-competitive competitors is a normal market situation, as the Court held, in particular, in its judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 134). Article 102 TFEU is not designed to protect inefficient undertakings. In the *Microsoft* case mentioned above, the competitors that had been foreclosed by the anticompetitive conduct were leaders in terms of quality and innovation and had attracted a large number of users before being affected by the practices in issue. By contrast, as evidenced by statements and a study submitted during the administrative procedure, but overlooked by the Commission, competing comparison shopping services were, as Google also stated in the third plea, not particularly innovative and did not take appropriate measures to generate traffic from sources other than Google. CCIA states that, in recital 557 of the contested decision, the Commission accepted that this was the case as regards four of the five competing comparison shopping services whose spending in order to appear in Google's text ads is depicted in graph 76. Google criticises its competitors' lack of determination despite them receiving billions of queries from it over the last decade or so that should have enabled them to retain users satisfied with their experience. Thus, according to the data in table 24 of the contested decision, they attract only around 15% of their traffic directly. By comparison, retail platforms receive most of their traffic directly, according to the data in the file relating to the administrative procedure (Annex A147), and most visits to the specialised Google Shopping search page come from direct navigation links, not links in search results. Moreover, the discussions that took place with comparison shopping services in order to implement the contested decision show that those services are not particularly attractive. Google also puts forward various arguments to show that comparison shopping services competing with its own comparison service are inefficient, which is reflected in particular by the fact that its Panda algorithm gives them a low ranking in the generic results. In the defence, the Commission can reasonably point to just two improvements in the search engine of only one of the five comparison services to which it refers. The explanation given by three of them that they were unable to innovate because of Google's conduct is untruthful.
- 297 Google also argues that, contrary to what the Commission maintains in recital 603 of the contested decision, the conduct it is alleged to have engaged in has no effect on the use by internet users of comparison shopping services competing with its own comparison service. Thus, Google submits that the removal of Shopping Units would not provide those comparison services with any meaningful traffic from its search engine, as already explained in the third plea.

- 298 The Commission was also wrong to find, in recitals 641 to 643 of the contested decision, that the conduct in issue produces anticompetitive effects on the national markets for general search services. There is nothing in those recitals to suggest that competing comparison shopping services could extend their reach to cover general search services.
- 299 CCIA adds that the Commission did not take account of the two-sided nature of the markets concerned and the associated business model. Within that model, it is normal to treat paid ads and free generic results differently. Paid ads finance Google's general search service, as the Commission itself stated in recital 642 of the contested decision. The Commission thus ignored the real conditions and structure of the markets, contrary to what was required of it by the line of authority devolving, in particular, from the judgment of 11 September 2014, *CB v Commission* (C-67/13 P, EU:C:2014:2204, paragraph 78). In addition, the Commission did not take account of Google's innovation efforts, which are not disputed as such and provide evidence of competition on the merits, which raises serious concerns for innovative industries. It also failed to take account of the absence of any anticompetitive strategy on the part of Google, which distinguishes this case from the cases giving rise to the Commission's decision of 1 December 1988 (IV/30.979 and 31.394, Decca Navigator System) (OJ 1989 L 43, p. 27) and the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289).
- 300 In response to those arguments, **the Commission** contends, first of all, that it took account of all the sources of traffic of competing comparison shopping services, as is apparent from the analyses starting at recitals 482 and 539 of the contested decision. Traffic from Google's generic results nevertheless accounts for a significant proportion — around 50% — of the total traffic received by those comparison services. In that connection, BDZV submits that recital 454 et seq. of the contested decision show that the appearance of a website in the top generic results generates significant traffic to that website from those results. According to the Commission, as explained in recitals 462 to 481 of the contested decision, that proportion decreased on a lasting basis for most of those comparison services between January 2004 and December 2016 in the 13 countries in which it had identified abuse. Consequently, even taking all sources of traffic into account, the conduct in issue was capable of foreclosing competition or at least distorting it significantly. Kelkoo maintains that recital 571 of the contested decision states that direct traffic accounted for less than 20% of the total traffic of comparison shopping services between 2011 and 2016. The Commission nevertheless argues that it does not need to show that the harm to competition exceeds an appreciability threshold in order to make a finding of abuse of a dominant position. In refers in that regard, in particular, to the judgment of 6 October 2015, *Post Danmark* (C-23/14, EU:C:2015:651, paragraph 73).
- 301 Next, the Commission showed in recital 546 of the contested decision that the value some internet users placed on Google's generic search results was an example of a barrier to the use of other sources of traffic. A study mentioned in

footnote 168 also states that general search engines are by far the tool most commonly used by internet users to learn about comparison shopping services. Furthermore, recitals 545 to 567 of the contested decision show that, for comparison shopping services competing with Google's comparison service, attempts to secure traffic through paid advertising in the form of text ads on Google's results pages is neither effective nor economically viable (as it is insufficient to make up for the lost traffic from Google's generic results). In that regard, Kelkoo states that although it was able to increase traffic from sources other than Google's generic results by 29% between 2011 and 2014, its revenue continued to fall. So far as the Commission is concerned, the study carried out by the UK's Competition and Markets Authority (CMA), which Google put forward to show that comparison services successfully invest in advertising and brand development, is inadmissible because it was submitted only at the stage of the reply, even though Google knew about it and had even referred to it during the administrative procedure. In any event, like other evidence adduced by Google, that study is not concerned with comparison shopping services operating on the markets concerned by the contested decision and does not allow a definitive conclusion to be drawn about the influence of advertisements on the number of visits users made to the five specialised comparison services considered by the study, which operate in a very different financial context to that of comparison shopping services, receiving much higher commissions for the transactions carried out. Recitals 568 to 579 of the contested decision demonstrate that mobile applications are a negligible source of traffic, in particular because, even on mobile devices, internet users generally use a search engine rather than a specialised application for comparison shopping searches. The study (Annex C19) that Google puts forward to prove the opposite is inadmissible because it was submitted only at the stage of the reply and, on the substance, proves nothing since it exclusively concerns sellers with a mobile shopping application and the figure of 44% (the proportion of transactions carried out by means of such an application) cited by Google relates to the United States, the figure for Europe being only 27%. One of the studies put forward by Google to show that, in general terms, internet users directly seek out retail platforms is also irrelevant with regard to the use, on mobile devices, of specialised applications for comparison shopping searches, because it relates only to the use of computers. Recital 581 of the contested decision also states that, even for Google Shopping, direct traffic is negligible.

- 302 Furthermore, the Commission did not have to demonstrate that Google's conduct resulted in the establishment of barriers to market entry. Abuse of a dominant position or, more generally, anticompetitive conduct may take the form of restrictions other than those establishing such barriers to entry. The Commission, as Google does, refers to the cases giving rise to the judgments of 6 October 1982, *Coditel and Others* (262/81, EU:C:1982:334) and of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:8S3). Nevertheless, Google's conduct limiting the traffic source comprising its general results pages for competing comparison shopping services affects the attractiveness of those comparison

services and their competitiveness, thus creating barriers to entry and to competition.

- 303 As regards Google's argument that it did not refuse access to something indispensable for the business of other undertakings, the Commission contends that, in the contested decision, it did not analyse the conduct in issue as a refusal to deliver or a refusal to grant access to an 'essential facility', which it describes as passive conduct. The conduct in issue is active conduct. Moreover, contrary to what might have been the situation in the case giving rise to the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), the remedy for that conduct is not necessarily to give competing comparison shopping services access to the general search results pages or Shopping Units, since Google is free to choose a different course of action, and the conduct in issue affected both the markets subject to the dominant position and other markets. The Commission was therefore not required to show that conditions similar to those in *Bronner* were met in this case. However, as BDZV also argues, Google's conduct and Microsoft's conduct in the case giving rise to the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289), bear similarities in so far as both undertakings sought to foreclose competition in a market other than the market on which they held a dominant position and neither of them prevented the victims of their conduct from using alternatives to the more attractive option they blocked. The Commission was not required to demonstrate that Google also obstructed competing comparison shopping services' alternative sources of traffic.
- 304 In response to the argument that it was wrong not to prove, in the contested decision, that competing comparison shopping services that had experienced difficulties were as efficient as Google, the Commission, supported by Kelkoo and BDZV, submits that the efficiency of foreclosed competitors is relevant only when analysing possible price abuse. By way of counterargument, it cites examples in which that question was not addressed when a finding of abuse of a dominant position was confirmed by the EU Courts. It also cites the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, paragraphs 55 to 58), from which it can be inferred that in order to establish the existence of one type of abuse, it is not necessary to demonstrate that the requirements for another type of abuse are met.
- 305 The competitive weakness of comparison shopping services competing with Google is in any event due to Google's conduct, which includes its use of algorithms demoting those comparison services in the generic results. In its statement in intervention, Kelkoo submits that between 2006 and 2017, its advertising revenue and revenue from clicks linking to retail websites decreased by 67%, while revenue generated by traffic from Google's generic results decreased by 94%. That prevented it from investing and innovating to the detriment of the quality of its services, which led to its different websites laying off 65% of the workforce. The Commission observes that, in the contested decision, contrary to CCIA's assertions, it did not find that competing comparison shopping services made no effort to diversify their sources of traffic. Rather, it

found that they were unable to recover lost traffic from Google's generic results through increased spending on text ads and that, in any event, this would not be a cost-effective solution for them. Moreover, Kelkoo states that it changed aspects of its websites on several occasions to improve the services it offered to customers and counterbalance the negative effects of Google's conduct, changes that were ultimately insufficient. The Commission also submits that the fact that most visits to the specialised Google Shopping search page come from direct navigation links does not mean that Google's comparison service is more efficient than its competitors, but simply that those links are obviously present on the general search page, Google Search. Furthermore, it recalls that it disputes Google's assertion that the removal of Shopping Units would not provide those competing comparison services with any meaningful traffic from its search engine, as already explained in its response to the third plea. According to the Commission, if the conduct in issue had not occurred, those comparison services would have continued to be serious competitors of Google, as is apparent from several documents in the file relating to the administrative procedure, produced by Google, in which they are described as such. In response to the arguments put forward by Google and CCIA seeking to distinguish this case from the case giving rise to the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289), BDZV maintains that Google's comparison shopping service was not efficient while its competitors were, just like the victims of Microsoft's conduct. BDZV relies in that respect on tests carried out by a number of German magazines between 2001 and 2017 that rated the comparison site Idealo favourably compared to Google Shopping. Google disputes the admissibility of those test results, which were not produced during the administrative procedure even though they predate the contested decision, and criticises both their representativeness and objectivity. BDZV expresses surprise that, during the administrative procedure, Google did not provide any data on Google Shopping's direct traffic. The banner link on Google's general page, which Google cites as a source of direct traffic for Google Shopping, does not generate direct traffic, but traffic from the general results pages. Websites, even efficient ones, all depend heavily on their visibility on the general results pages, which are the gateway to the internet, even for well-known websites and brands.

- 306 In response, specifically, to CCIA's arguments mentioned in paragraph 299 above, the Commission states that it did not overlook the two-sided nature of the markets concerned (that argument is moreover inadmissible because it was first put forward by an intervener), but that it criticised Google for not treating two similar things in a similar way, namely the results of its comparison shopping service and those of competing comparison shopping services, and that the problem was not a difference in treatment between free generic results and paid ads. The Commission also submits that, as is apparent from recital 662 of the contested decision, in its view, Google did not improve its services for the benefit of consumers by showing in an improved format only the results of its own comparison shopping service on its general results pages. Finally, the Commission observes that it did not need to demonstrate the existence of an anticompetitive strategy on Google's part in order to classify its practices as abusive.

Nevertheless, Google was aware of the consequences of those practices as identified in the contested decision and, given its dominant position, it must have known that the fact that other undertakings engaged in such practices did not permit it to engage in them too.

D. Fifth plea in law: the Commission wrongly classified qualitative improvements within the scope of competition on the merits as abusive practices and failed to demonstrate that the necessary conditions were met requiring Google to grant competing comparison shopping services access to its improved services

1. First part of the fifth plea in law: the practices in issue are qualitative improvements within the scope of competition on the merits and cannot be classified as abusive

307 In the first part of its fifth plea, **Google** claims that the practices in issue constitute qualitative improvements made to specialised product searches and to the relevant advertisements in the context of its general search service. Those improvements come within the scope of competition on the merits and cannot be regarded as abusive.

308 Google refers in particular to the judgments of 13 February 1979, *Hoffmann-La Roche v Commission* (85/76, EU:C:1979:36, paragraph 91), of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286, paragraph 70), and of 14 October 2010, *Deutsche Telekom v Commission* (C-280/08 P, EU:C:2010:603, paragraph 177), to explain that, so far as dominant undertakings are concerned, the Court distinguishes between anticompetitive abusive practices and pro-competitive conduct within the scope of ‘normal’ competition or competition ‘on the merits’. Thus, it was entitled ‘to compete better’ by improving the quality of its technologies and its specialised product search and product ad services accessible from its general search page. It maintains that it competed on the merits in the national markets for general search services.

309 Therefore, the common theme running through these cases is that undertakings are entitled to use all normal means to compete and to win business. This includes Google’s right ‘to compete better’ by improving the quality of its technologies and its specialised product search and product ad services accessible from its general search page.

310 The reasoning set out in the contested decision does not identify anything to distinguish Google’s practices from competition on the merits. The claim that Google engaged in favouritism and the presumption of potential effects in respect of that practice do not change the fact that its grouped product results and product ads improved the quality of its general search service. By showing those concepts on its general results pages and developing the innovative technologies that supported them, Google competed on the merits in the market for general search services.

- 311 The Commission attempted to address this matter by asserting, in recital 334 of the contested decision, that the ‘conduct of an undertaking with a dominant position in a given market’ can be abusive if it ‘tends to extend that position to a neighbouring but separate market’. It states, in recital 652 of the contested decision, that applying that principle to improvements in products and services is in line with existing case-law. Thus, according to Google, the Commission merely considered that its conduct was intended, by ‘leveraging’, to extend its dominant position to markets adjacent to those in which it held that position, without taking account of the fact that the conduct consisted in improving its services in order to compete on the merits.
- 312 It is apparent from the case-law that not all exclusionary effects are necessarily detrimental to competition, since competition may lead to the disappearance or marginalisation of less efficient competitors. Google refers in that regard to the judgments of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 22), and of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraph 134). That applies not only when such effects occur in the market on which the dominant position is held, but also when they occur in a different market. It is true that an improvement in services does not ‘immunise’ an undertaking against a finding of abuse of a dominant position, but, in the present case, without having identified any additional anticompetitive feature of Google’s conduct, the Commission was not entitled to classify it as abusive.
- 313 Google, supported by CCIA in that regard, adds that the term ‘leveraging abuse’ is an ‘umbrella’ term covering different types of abuse. For each type of ‘leveraging abuse’, the case-law identifies specific features that distinguish the conduct in issue from competition on the merits and render it abusive, such as a deterioration in quality, margin squeezing, or a refusal to supply an indispensable input. For example, a dominant undertaking’s practice of setting low prices cannot, on its own, be considered abusive. It would only be abusive if an additional feature departing from competition on the merits were identified that could be classified as predatory pricing.
- 314 Such an anticompetitive feature was identified in the cases referred to in recitals 334 and 652 of the contested decision, whether it be a refusal to supply something that is indispensable for competition (judgment of 3 October 1985, *CBEM*, 311/84, EU:C:1985:394, paragraphs 2 to 5 and 26), tying or predatory pricing. The case giving rise to the judgment of 14 November 1996, *Tetra Pak v Commission* (C-333/94 P, EU:C:1996:436), was concerned with tying and, moreover, involved separate products belonging to separate markets, whereas, in the present case, the Commission did not claim in the contested decision that Product Universals and Shopping Units displayed on Google’s general results pages constituted a comparison shopping service separate from the general search service. Google refers in that regard to recitals 408, 412 and 423. The judgment of 7 October 1999, *Irish Sugar v Commission* (T-228/97, EU:T:1999:246, paragraphs 71 and 167), concerned practices implemented by an undertaking with a dominant position on the two markets in question. In the judgment of

17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, paragraph 88), the Court identified an anticompetitive intention in order to make a finding of margin squeezing in the form of predatory pricing.

- 315 In the case giving rise to the judgment of 17 September 2007, *Microsoft v Commission* (T-201/04, EU:T:2007:289), the addition, through tying, of Windows Media Player to the Windows operating system diminished the latter's quality, unlike the addition of Product Universals and Shopping Units in the instant case, which improved the quality of Google's general search service.
- 316 **CCIA** argues, in support of Google, that the contested decision undermines legal certainty in the sector in so far as the infringement in question is not based on any coherent legal standard corresponding to a recognised category of abuse. The lack of a coherent legal standard in the contested decision is problematic for the sector as a whole. The contested decision is based on a vague claim of 'more favourable positioning and display' that has no apparent limiting factors. The Commission merely stated that Google engaged in abuse by positioning and displaying its own comparison shopping service more favourably on its general results pages. The lack of a theoretical basis for the abuse of favouritism identified by the Commission makes it impossible to ascertain the additional factors or legal principles that render such favouritism, which is perfectly natural, an infringement of Article 102 TFEU. This is compounded by the fact that the Commission refers to the concept of 'competition on the merits' without explaining how Google's conduct departs from that concept. Legal certainty is particularly important in an area such as competition law, which is characterised by high fines and is of a quasi-criminal nature, as follows from recital 38 of Regulation No 1/2003 and the case-law. CCIA states that some categories of abuse, such as margin squeezing and tying, are not anticompetitive as such unless certain conditions are met under which competitive harm may be presumed. The same is true of discrimination, as the Court made clear in its judgment of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172, paragraph 30). As yet, there is no precedent penalising discrimination in favour of an undertaking's own products on account of its very existence (first degree discrimination).
- 317 Furthermore, CCIA submits that the development and improvement of website content is part of the competitive process. Those changes cater to the expectations of both consumers and advertisers. The quality of a website is a key parameter of competition in online markets. However, if improving the quality of a service or changing the way it is displayed were to become abusive inasmuch as it might place competitors in related markets at a disadvantage, innovation would be stifled and the competitive process distorted. CCIA also contends that, in today's economy, vertical integration is ubiquitous. And yet, if the decision is upheld, vertically integrated undertakings — instead of focusing on improving their services — will need to consider how to grant their competitors equal access to those improvements, even if such access is not indispensable to enable them to compete in the market. Vertical integration and product improvements are

generally positive steps from an economic perspective and should not be considered abusive unless there are exceptional circumstances.

- 318 **The Commission** refers to recitals 344 and 512 of the contested decision to support its argument that the conduct in issue does not consist solely in the display of Product Universals and Shopping Units. It states, in the rejoinder, that the fact that it does not limit the conduct in issue to the display of Product Universals and Shopping Units does not mean that it takes a positive view of the changes made to specialised product searches and to the relevant advertising, considered in isolation. Furthermore, it contends that the conduct in issue may have had effects both on non-dominated national markets for comparison shopping services and on dominated national markets for general search services. The Commission refers in that regard to recitals 591 to 607 and 641 to 643 of the contested decision, respectively.
- 319 The Commission, supported by **the German Government**, also asserts that the improvement in a service does not prevent that improvement constituting abuse of a dominant position, particularly if it results in the dominant undertaking favouring its own service by recourse to methods other than competition on the merits and is liable to produce anticompetitive effects. In support of that argument, it relies on the cases mentioned in paragraphs 314 and 315 above to show that there are a wide range of circumstances in which a finding of abuse of a dominant position may be made.
- 320 The Commission, again supported by the German Government, states that it also disputes that there was any improvement in Google's general search service. The Commission argues that 'Google did not ... invent comparison shopping' and that, as is apparent from an internal email, the development of such comparison services requires 'relatively little technical sophistication'. In addition, it maintains that while it may indeed be possible for Google to improve its general search service by showing 'some' grouped results on its general results pages, it was not able to improve its general search service by showing 'only' grouped results from its own comparison shopping service on its general search results pages. Moreover, the Commission recalls that, in its view, Google's conduct cannot be justified by any objective reason related to the improvement in the quality of its general search service.
- 321 Finally, the Commission denies that it sought to impose an obligation on Google requiring it to grant competitors access to qualitative improvements in its services. It only found that the combination of the following three factors led to an abuse of a dominant position: (i) prominently displaying the results of the comparison shopping service Google Shopping in Product Universals and Shopping Units; (ii) limiting competing comparison shopping services to generic results only, without any enriched display features; and (iii) the possible demotion of those comparison services in the generic results by the algorithms used by Google for general searches.

322 In response to CCIA's arguments, the Commission submits that the contested decision is indeed based on a coherent legal framework corresponding to a recognised category of abuse. The contested decision reflects settled case-law dating back to 1974 (judgment of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation*, 7/73, ECLI:EU:C:1974:18) on abuse of a dominant position. The Commission states that the contested decision correctly explains what 'factors' enable the preferential positioning and display of Google's comparison shopping service to be classified as abusive. The practice is abusive because it concerns two separate but related markets (the market for general search services and the market for comparison shopping services) and is capable of having anticompetitive effects on those two markets. Contrary to CCIA's submissions, the decision clearly identifies 'what is actually unlawful in the specific case at hand', namely that Google's comparison shopping service comprises both the standalone Product Search / Google Shopping website and Product Universals / Shopping Units and that the prominent display of Product Universals and Shopping Units was one of the ways by which Google favoured its own comparison shopping service. The Commission also claims that CCIA's argument that the contested decision infringes the principle of legal certainty is inadmissible under the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 142(3) of the Rules of Procedure of the General Court, since it does not support the arguments raised by Google in the application. Furthermore, the Commission maintains that the contested decision explains why the practice constitutes a form of leveraging abuse on the national markets for comparison shopping services. Thus, its pleadings before the Court do not limit themselves to 'merely labelling ex post' the conduct as 'leveraging abuse'. In particular, the Commission recalls that the conduct in issue is capable of having anticompetitive effects on both markets concerned and that it constitutes a well-known form of abuse consisting, in the instant case, in the use of Google's dominant position on the general search markets to extend that position to adjacent markets for comparison shopping services. The contested decision therefore sets out 'in detail' why the practice departs from competition on the merits, as demonstrated by recitals 341 and 342 of the contested decision.

323 **The German Government** submits that Google's conduct is not the result of competition on the merits since it prevents competition based on the quality of the algorithm used to carry out specialised shopping searches. The quality of the specialised search algorithm is the constant against which the undertakings concerned compete. By means of the conduct in issue, Google encourages users to click not on the most relevant results, but on the most visible results, namely its own, regardless of their actual relevance to the user. The abuse therefore lies in the fact that Google, from its dominant position on the market for general search services, artificially diverts the attention of users on a related market to its own specialised search results by prominently displaying those results, thereby preventing competition based on the quality of the search results and, in particular, their relevance.

- 324 The German Government states that, by prominently displaying its own comparison shopping service, Google is suggesting to users that its own results are more relevant than the results of competing comparison shopping services, even though that might not be the case. Users click on Google's results not because they are more relevant, but because they are displayed in a way that suggests they are. In other words, the balance is tipped even before competition between the different comparison shopping services begins, since users believe, in view of the favourable way in which the results of Google's comparison shopping service are displayed, that those results are more relevant than the results of competing comparison shopping services.
- 325 **VDZ** asserts that, as is apparent from recital 662 of the contested decision, the Commission does not consider that Google's claimed improvements are actually anticompetitive. It is only the more favourable positioning and display by Google of the results of its own comparison shopping service compared with the results of competing comparison shopping services that infringes Article 102 TFEU. Whether Google improved its service is irrelevant. The only relevant issue is whether Google used the new features of its services (Product Universals, Shopping Units, adjustment algorithms) as a vehicle to promote its own comparison shopping service at the expense of competing comparison shopping services. The improvements in Google's comparison shopping service can, at most, be assessed from the perspective of efficiency gains. However, Google does not adduce any evidence of such efficiency gains as required by the case-law. In particular, Google failed to prove that it could not have achieved the same efficiency gains if it had brought the abuse to an end.
- 326 **VDZ** also states that the instant case is a typical example of leveraging abuse. In essence, the practice departs from competition on the merits because, as in the case giving rise to the judgment of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, paragraph 88), Google's conduct on the primary market has no economic rationale other than to foreclose competition on the secondary market. Google's conduct favouring its own comparison shopping service at the expense of competing comparison services leads to the exclusion of more relevant specialised search results from competitors, which makes no economic sense. **VDZ** observes that, in a non-dominated competitive market, the implementation by Google of its new specialised search model would have been counterproductive as users would have turned away from Google, which, in the light of that new model, would no longer have been in a position to offer them the most relevant results. Search engines compete with each other based on the relevance of their search results, since that is what attracts users and advertisers. **VDZ** refers in that regard to recitals 288, 535, 593 et seq. of the contested decision. It maintains that Google could have used its general search algorithm to select the most relevant results from competing comparison shopping services and include them in 'boxes' with an enriched format, if such a format was a genuine improvement.

327 VDZ argues that the shift from equal treatment between comparison shopping services to preferential treatment for its own service allowed Google to increase its profits by increasing auction prices on the advertising market, despite the lower relevance of the proposed results and the lack of technical justifications for the change. Equally efficient competitors in the secondary market for specialised search services were unable to counter that behaviour in the primary market for general search services because they did not receive enough traffic.

328 Google puts forward the following submissions.

- In response to the German Government’s argument, it claims that describing the abuse as leveraging abuse does not explain why such conduct is abusive in the absence of the conditions for a duty to supply being satisfied. Whether leveraging is abusive depends on the nature of the leveraging mechanism and whether that mechanism involves anticompetitive conduct. The consequence of the German Government’s argument is that conduct on one market may be regarded as anticompetitive simply because it produces effects on another market. Google states, moreover, that the German Government’s reasoning implies that Google should have given competing comparison shopping services access to its infrastructure with their own algorithms. However, that reasoning does not appear in the contested decision, which requires Google to show the results of competing comparison shopping services in Product Universals and Shopping Units with its own algorithms. The contested decision simply seeks to require Google to assist its rivals by giving them access to its infrastructure based on its own algorithms for Shopping Units without demonstrating that the conditions for a duty to supply are satisfied. The decision is not, therefore, concerned with competition between different algorithms or technologies.
- In response to VDZ’s assessment that Google diminished the quality of its search results and did away with relevance-based rankings when it introduced Universal Search in 2008, Google states that, on the contrary, Universal Search made it possible to gauge relevance much more accurately based on a direct, real-time comparison of the relevance of product results and generic results. Google reiterates that it could not have included the results of competing comparison shopping services in Product Universals without affecting the quality of its service. At a later stage, it was able to arrange for the appearance of those comparison services in Shopping Units, which operate differently. The adjustment algorithms that lower the ranking of the least relevant sites were decisive in upholding the quality of Google’s results, which the contested decision does not dispute. Google adds that the display of product ads is in no way indicative of a foreclosure strategy. Displaying ads that generate revenue is a normal part of Google’s ad-based model. In this case, Google displays product ads because they are better than text ads and attract users to its general search service. That higher quality is borne out by studies conducted by Google. Moreover, contrary to what VDZ

suggests, product ads provide retailers with a better conversion rate at a lower price than text ads.

2. *Second part of the fifth plea in law: the Commission requires Google to provide competing comparison shopping services with access to its improved services, without satisfying the legal requirements for that purpose*

329 The second part of the fifth plea for annulment seeks a finding from the Court that the Commission was not entitled to require Google to give competing comparison shopping services access to services resulting from the improvements it had made in respect of comparison shopping. **Google** claims, first of all, that that is indeed the scope of the contested decision, which imposes a duty to supply on it, even though the conduct in issue is described only as favouritism, in the sense that Google favoured its search results over those of its competitors.

330 Google relies, in particular, on recitals 538 and 662 of the contested decision, the latter of which states: ‘The abuse established by this Decision concerns simply the fact that Google does not position and display in the same way results from Google’s comparison shopping service and from competing comparison shopping services.’ Google observes that, as is apparent from the Opinion of Advocate General Jacobs in *Bronner* (C-7/97, EU:C:1998:264), ‘it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business’.

331 Therefore, Google states that the contested decision does not demonstrate that access to its services was indispensable for competing comparison shopping services and that, without such access, effective competition could be foreclosed, which is necessary for a duty to supply to be imposed on a dominant undertaking. In the instant case, recital 575 of the contested decision refers to the assertion of a complainant that ‘it is not possible to develop a price comparison service without traffic from a general search engine’. But that assertion was not proven at all. The Commission simply stated, in recitals 444 and 542 of the contested decision, that Google’s search traffic is important for the ability of a comparison shopping service to compete and that other sources of traffic are less efficient. The risk of foreclosing competition was not proven either. The Commission merely noted, in recital 583 of the contested decision, that developing those other sources requires financial investment without any guarantee of success. More generally, **CCIA** submits that the contested decision is based on the misconception that Google’s search engine is a gateway to the internet. Today, more than ever, there are numerous ways to compete online and no one site is a gateway to the internet.

332 Google refers to various judgments establishing the conditions mentioned at the beginning of paragraph 331 above, particularly the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). In the contested decision, the Commission put forward two erroneous grounds for departing from that case-law. First of all, in recital 650 of the contested decision, it stated that Google’s conduct

did not consist simply in a passive refusal to grant access to its general results pages, but in active behaviour favouring its own comparison shopping service by favourable positioning and display on those pages. However, according to Google, in the case giving rise to the judgment of 3 October 1985, *CBEM* (311/84, EU:C:1985:394, paragraph 5), to cite one example, although the conduct in issue was also active, the Court drew attention to the indispensability of the service that had been refused and the risk of eliminating all competition in a market adjacent to that on which the dominant position was held in order to find that the conduct was abusive. The Commission did not do that here.

- 333 The fact of the matter is that, as is apparent from recitals 538 and 662 of the contested decision, the Commission objects to passive, not active, conduct on Google's part. It is true that Google actively displayed specialised search results and ads, but the Commission took issue with it for passively refraining from including competing comparison shopping services in specialised search results and ads.
- 334 Secondly, in recital 651 of the contested decision, the Commission stated that it was not requiring Google to provide access to services. However, even though it was open to Google to cease using the services for its benefit, instead of giving access to them, that same choice is also available to undertakings subject to a duty to supply in order to bring an end to an abuse of a dominant position.
- 335 In short, in the contested decision, the Commission objects to the improvements in search results and product ads and the technologies supporting them because Google did not give competing comparison shopping services access to them. To make a finding of abuse based on that reasoning, the Commission should have shown that such access was indispensable and that lack of access risked eliminating all competition. In its observations on the statement in intervention of the Federal Republic of Germany, Google states that it also follows from the case-law of the Bundesgerichtshof that a dominant undertaking is under no general obligation to treat its competitors as it treats itself.
- 336 In response to the argument put forward by the German Government and VDZ that Google already gives competing comparison shopping services access to its general results pages and that the case does not involve a problem of access to a service, but a problem of discrimination in the provision of that service, Google argues that the service to which the Commission required it to give access are Product Universals and Shopping Units and not, more broadly, the general results pages. Product Universals and Shopping Units are infrastructures that are independent of the other components of general results pages. The argument summarised in paragraph 335 above is therefore relevant.
- 337 **CCIA** also submits that the Commission circumvented the standards established by the case-law by imposing a duty to supply without proving that the conditions for doing so, particularly those laid down in *Bronner* (C-7/97, EU:C:1998:264), were met. The classification ex post of the practices in issue as 'leveraging' in the

defence does not justify the legality of the contested decision. That is a very general term and is not sufficient in itself to establish an abuse of a dominant position, as is apparent from the judgment of 25 October 2002, *Tetra Laval v Commission* (T-5/02, EU:T:2002:264, paragraphs 217 and 218). Advocate General Wahl drew attention to the need for consistency in the application of Article 102 TFEU in his Opinion in *Intel Corporation v Commission* (C-413/14 P, EU:C:2016:788, point 103).

- 338 **The Commission**, supported by **the German Government, VDZ, Twenga and Kelkoo**, contends that the criteria set out in *Bronner* (C-7/97, EU:C:1998:264) are not applicable here. It restates the arguments set out in the contested decision, referred to in paragraph 332 above, and maintains that it left it to Google to decide how to ensure equal treatment between its comparison shopping service and competing comparison shopping services, which covered both the possibility of continuing to show Shopping Units on its general results page by incorporating, by contract, competing comparison shopping services' results, and the possibility of no longer showing Shopping Units on that page.
- 339 The Commission disputes Google's argument that abuse of a dominant position may be established only if the conditions relating to a refusal to provide access to an 'essential facility' are met, while other conduct with the effect of extending or strengthening a dominant position on a market is able to exist. As long as the Commission shows that competition may be restricted by the conduct of a dominant undertaking, it does not have to demonstrate that that undertaking refused to provide a product or service that is indispensable for its competitors. The Commission cites the example of the case giving rise to the judgment of 23 October 2003, *Van den Bergh Foods v Commission* (T-65/98, EU:T:2003:281, paragraphs 159 and 161), in which a clause providing for the exclusive use of food freezer cabinets for the benefit of the ice cream brand that supplied those cabinets, in a dominant position on the market for ice cream sales, was found to be abusive without those cabinets being regarded as an 'essential facility'.
- 340 The Commission also maintains, in its observations on CCIA's statement in intervention, that the contested decision does not impose any duty to supply. The Commission's complaint is not only that competing comparison shopping services 'can appear only as generic results' and 'do not have access to Product Universals and Shopping Units'. The Commission regards as abusive not only the fact that Google prominently displayed Product Universals and Shopping Units while competing comparison shopping services could appear only in the generic search results, but also the fact that competing comparison shopping services (i) could not be displayed in an enriched format, and (ii) were prone to being demoted by Google's adjustment algorithms.
- 341 The German Government argues, in support of the Commission, that unlike the case at issue in *Bronner* (C-7/97, EU:C:1998:264), the present case is not concerned with access to an 'essential facility'. It claims that Google already 'supplies' its competitors by giving them access to its general search service. As

in the situation giving rise to that judgment, there is no exclusion of competitors. On the contrary, the Commission takes issue with Google for displaying competitors' services less favourably than its own service, since competitors' results are shown in a way that suggests they are less relevant than Google's. Thus, turning to the context of *Bronner* (C-7/97, EU:C:1998:264), the situation would be akin to one whereby the newspaper distribution network in question had agreed to deliver competing newspapers but did so later than its own newspapers.

342 **VDZ** also contends that the present case differs from a 'duty to supply' case. It states that Google's competitors did not request such access. It notes, in particular, that competing comparison shopping services have always had access to Google's general search service through generic results and text ads and that there is no evidence of a competing comparison shopping service having ever demanded any type of access, including to Product Universals and Shopping Units. Moreover, according to **VDZ**, from a commercial perspective, competing comparison shopping services are not interested in accessing Product Universals or Shopping Units and would prefer Google to stop displaying those 'boxes' on its general results pages instead. **VDZ** adds that the contested decision does not require any access to be given but leaves it to Google to decide how to correct the abuse.

343 **VDZ** asserts that the conduct in issue is a typical example of leveraging abuse comparable to practices that have already been found to be unlawful, such as bundling and tying, margin squeezing and some specific types of refusal to supply, and that the conduct was treated as such. It states that a finding that those strategies are unlawful under the competition rules is based on the principle that market power in a primary market must not be extended to a secondary market by means that depart from competition on the merits. Finally, **VDZ** submits, after recalling the case-law criteria on leveraging abuse, particularly as regards tying, bundling and margin squeezing, that a distinction should be drawn between two types of refusal to supply by a dominant undertaking on a market. The first type involves decisions to discontinue the supply of a product in the dominant undertaking's possession that is necessary for production in another market, in circumstances where it is not impossible for that input to be obtained by other means. Those refusals have been considered to be abusive, without it being necessary, therefore, for the unique nature of the source of the input to be proven. **VDZ** refers in that regard to the cases giving rise to the judgments of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* (6/73 and 7/73, EU:C:1974:18), and of 3 October 1985, *CBEM* (311/84, EU:C:1985:394). The second type involves cases where the dominant undertaking's refusal to supply concerns a product that has never been supplied to a third party before. Such a refusal can be considered abusive only if the product is necessary for the product requester to compete and it cannot be sourced from anyone other than the dominant undertaking. **VDZ** refers in that regard to the cases giving rise to the judgments of 6 April 1995, *RTE and ITP v Commission* (C-241/91 P and C-242/91 P, EU:C:1995:98), and of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). In order to find that a refusal to supply is abusive, the unique nature of the source of the product necessary for competition need only be

proven where that product has never been supplied to a third party before. As stated in paragraph 342 above, comparison shopping services competing with Google's comparison service have always had access to Google's general results pages. Google's conduct therefore meets all the criteria for a finding of leveraging abuse and the question of the indispensability of access to Google's services is irrelevant.

E. Sixth plea in law: the Commission was wrong to impose a financial penalty on Google

344 According to **Google**, which states that this plea is put forward in the alternative, the Commission should not have imposed any penalty on it for three reasons: (i) this is the first time it has classified conduct aimed at improving quality as abusive; (ii) it undertook to deal with the case by means of a commitments procedure; and (iii) during the administrative procedure, it dismissed the possibility of imposing the corrective measures it now requires in the contested decision. **CCIA** argues that a financial penalty as 'stratospheric' as that imposed on Google — which, *prima facie*, did not infringe the competition rules in the light of precedents and the case-law — is problematic for industry as a whole and has negative consequences for companies' incentives to innovate.

345 In particular, Google observes that the fine it received was the highest ever imposed by the Commission for anticompetitive practices and notes, together with **CCIA**, that the Commission can impose a fine on an undertaking only if it has intentionally or negligently infringed Articles 101 or 102 TFEU. Therefore, the Commission was entitled to impose a fine only if Google could not have been unaware that its conduct had as its object the restriction of competition. It refers in that regard, in particular, to the judgment of 11 July 1989, *Belasco and Others v Commission* (246/86, EU:C:1989:301, paragraph 41). However, the contested decision does not point to anything that could have enabled Google to ascertain that the improvements it was making to its services were unlawful and should therefore be rolled back or made available to competitors, especially since the Commission stated in a press release accompanying the contested decision that it was 'a precedent which establishes the framework for the assessment of the legality of this type of conduct'. Thus, Google cannot even be blamed for being negligent. **CCIA** refers in particular to the Commission's decision of 22 January 2019 AT.40049 concerning MasterCard, acknowledging that MasterCard could reasonably have been unaware of the anticompetitive nature of its conduct before the Commission accepted commitments from the other interbank card payment system, Visa, concerning similar conduct. According to Google, the Commission took the view in previous cases that penalties were not appropriate when a novel 'theory of harm' was identified or in the event of diverging national case-law on the conduct in issue. Google refers to several decisions of national administrative authorities and national courts finding that its conduct was lawful. The fact that the Commission considered Google's alleged conduct to be abuse of a dominant position on one market directed at another market, falling within the concept of

leveraging abuse, does not mean that the contested decision is not novel, because that concept can cover very different situations

- 346 The Commission's initial undertaking to deal with the case by means of a commitments procedure implies that a fine was not appropriate in the circumstances, as is apparent from recital 13 of Regulation No 1/2003, a Commission statement explaining what such a procedure involves and the Manual of Procedures of the Commission's Directorate-General for Competition, accessible on its website. The possibility for the Commission to revert to a traditional procedure if the commitments procedure has no prospect of success should not be confused with whether the conduct in issue merits a penalty. In the reply, Google adds that the Commission should at least have provided some explanation in that respect. CCIA submits that the statement of reasons for the contested decision is defective.
- 347 Finally, the Commission initially informed the participants in the administrative procedure that it was not possible, under EU competition law, to require Google to do what the contested decision ultimately required it to do, namely to use the same processes and methods for displaying on its general results pages both its own comparison shopping results and those of competing services. In essence, this also shows that Google could not have known that it was infringing EU competition rules since the Commission had been stating for some time that it was not.
- 348 First of all, **the Commission** contends, together with the German Government, that there is nothing novel in the legal analysis on which the contested decision is based. Findings of abuse of a dominant position on one market in order to extend that position to neighbouring markets date back well into the past and Google confuses the establishment of new principles with the application of established principles to new practices. The Commission refers in particular to the case giving rise to the judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission* (322/81, EU:C:1983:313), and the German Government cites the judgment of 7 October 1999, *Irish Sugar v Commission* (T-228/97, EU:T:1999:246). Most of the cases involving this kind of abuse arose in a complex context, as here, but that did not prevent the EU Courts from confirming the heavy financial penalties imposed in those cases. Unlike the situation in some of the cases relied on by CCIA, there was no uncertainty in the instant case surrounding the legal standard applicable to the assessment of Google's conduct prior to the adoption of the contested decision. In any event, the infringing undertaking's own knowledge of the abusive nature of its conduct is not a prerequisite for the imposition of a penalty on it, as the Court held in its judgment of 10 April 2008, *Deutsche Telekom v Commission* (T-271/03, EU:T:2008:101, paragraph 327).
- 349 Secondly, since the Commission has discretion in choosing whether to deal with a case by means of a commitments procedure, without a penalty, or by means of a traditional procedure, and since it had several reasons to revert to the latter after initiating the former, as explained in recital 123 et seq. of the contested decision, it

recovered its power to impose a financial penalty. Moreover, contrary to Google's assertions, the information it provided during the discussions on the possible acceptance of commitments did not assist the Commission in any way in classifying the infringement, which could otherwise have influenced the penalty. Indeed, Google expressly denied any infringement.

- 350 Finally, the Commission submits, in essence, that what it stated by way of preliminary conclusion at a particular stage of the administrative procedure as not being possible to impose on Google (to rank all comparison shopping services' results, including Google's, in the same way in its generic search results) and what it subsequently considered to be abusive (favouring its own comparison shopping service over other such services in its general search results pages) are not the same. Even if the views of the former Commissioner responsible for competition matters, produced by Google, could be interpreted differently, those views are personal and do not bind the Commission.
- 351 Next, **Google** argues that, assuming that the Commission was entitled to impose a fine on it, the calculation of that fine was in any event incorrect. Referring to the Guidelines, Google states that the Commission applied the wrong value of sales, an excessively long infringement period, an unreasonable gravity multiplier, an unjustified additional amount normally used to deter anticompetitive agreements, an additional deterrence multiplier that was also unjustified, and the wrong exchange rate. It also failed to take into account mitigating circumstances.
- 352 To recap, the Commission states in the Guidelines that, when calculating the fine for an infringement of EU competition rules, it takes account of a proportion of the value of sales of the goods or services to which the infringement relates and the duration of the infringement. A gravity multiplier of up to 30% (multiplier of 0.3) is applied to the value of sales directly or indirectly related to the infringement over one year. The resulting figure is then multiplied by the duration of the infringement expressed in years, and then, if applicable, increased, for deterrence purposes, by an additional amount of between 15% and 25% of the annual value of sales to give the 'basic amount of the fine'. The Commission states that, in principle, when determining the value of sales, it takes account of the last full business year of participation in the infringement (paragraphs 5 to 25 of the Guidelines). It also points out that aggravating or mitigating circumstances may result in it altering the basic amount of the fine and that it may ultimately further increase that fine for deterrence purposes, provided that it does not exceed the penalty ceiling of 10% of worldwide turnover in the business year preceding the decision (paragraphs 27 to 33 of the Guidelines).
- 353 As explained in more detail in paragraphs 77 to 79 above, the Commission applied in this case a gravity multiplier of [5% – 20%, the exact figure is confidential] to the revenue generated in 2016, in the 13 countries in which it had identified the conduct in issue, by product ads appearing in Shopping Units and on the specialised Google Shopping page and by text ads also appearing on that page. It multiplied that amount by the number of years of the infringement, deemed to

begin with the launch of Product Universals or, failing which, Shopping Units. To ensure the deterrent effect of the penalty, it added a further amount corresponding to a specific percentage of the revenue mentioned above. Without taking into account aggravating or mitigating circumstances, it increased the resulting figure by applying a multiplier factor of 1.3.

- 354 First of all, Google challenges the choice of 2016 as the reference year. It claims that the average revenue for the period during which the conduct in issue took place should have been used, which would have been more representative of economic reality and the situation of Google itself. Indeed, the Commission announced that it was going to take that approach in the statement of objections and did so in several other cases.
- 355 Secondly, for each country concerned, the Commission applied an excessively long infringement period. No competitive analysis was carried out for the period prior to 2011, only an analysis of search traffic in France, Germany and the United Kingdom. Moreover, in several countries, Google Shopping — which the contested decision describes as Google’s comparison shopping service — was not launched until September 2016, although Shopping Units were already in place there. The period during which the Commission and Google were negotiating the latter’s possible commitments, between May 2012 and March 2015, should not have been taken into account either, contrary to what actually occurred without any explanation being given.
- 356 The gravity multiplier used is too high. This is the highest multiplier (on a par with a case in which the anticompetitive conduct was much more serious) applied for an infringement of Article 102 TFEU. Even in the worst cartel cases in breach of Article 101 TFEU, the gravity multiplier rarely exceeds 20%. The reasons given, namely a link to Google’s high market shares and the economic importance of the markets concerned, do not justify such a high multiplier. Those factors relate to the market situation, not the seriousness of the conduct in respect of which the fine was imposed. In Case AT 37990, Intel, involving a similar market situation, a multiplier of 5% was applied, even though the conduct in issue was, as the Commission itself stated in the decision in that case, by its very nature abusive, complex and covert, and the exclusion strategy was worldwide in scope.
- 357 The Commission has never previously applied an additional amount of a specific percentage of annual revenue for an infringement of Article 102 TFEU, whereas the Guidelines state that this type of increase is designed to deter cartels falling under Article 101 TFEU. The Commission puts forward no reasons to explain why that increase was applied. The objective of deterring other undertakings, invoked in the defence, does not justify imposing a disproportionate penalty for conduct also engaged in by Google’s competitors, which are unlikely to hold a dominant position in view of the market analysis set out in the contested decision.
- 358 Similarly, the multiplier of 1.3 that was ultimately applied, resulting in an increase of several hundred million euros, is unjustified. In that respect, the general

justification given in the contested decision concerning the need for deterrence and Alphabet's worldwide turnover is insufficient. Such an increase was applied only once for an infringement of Article 102 TFEU, involving a refusal to supply an indispensable input and margin squeezing, and without an additional amount such as that mentioned above being applied at the same time. Furthermore, Google cooperated constructively with the Commission and did not conceal the practice at issue, which rules out the need for a specific deterrence component in the fine, which is already quite sufficient in that regard.

- 359 In addition, in order to convert the value of sales of the goods or services to which the infringement relates, based on the information provided by Google, from United States dollars (USD) to euros (EUR), the Commission wrongly used an incorrect average exchange rate for 2016, when it should have used that included in the Statistics Bulletin of the European Central Bank (ECB).
- 360 Finally, the Commission ought to have taken the following into account as mitigating circumstances: (i) Google's good faith efforts to negotiate commitments; (ii) the novelty of the theory underpinning the existence of an infringement, meaning that any infringement was not committed intentionally; (iii) the benefits to consumers and retailers arising from the practices in issue; and (iv) the fact that those practices were not concealed.
- 361 It follows from the above, particularly if a gravity multiplier of 2.5% is applied (half that in AT 37990, Intel), that the financial penalty should be much lower than the penalty imposed, even without taking account of mitigating circumstances. Google therefore asks the Court, should it decide to maintain the financial penalty, to take all the foregoing into consideration in the exercise of its unlimited jurisdiction.
- 362 As regards the choice of 2016 as the reference year for calculating the value of sales of the goods or services to which the infringement relates, the **Commission** states that that choice is in line with paragraph 13 of the Guidelines and that the last full year prior to the finding of an infringement reflects economic reality, especially the scale of the infringement and, in essence, its effect on the markets concerned, namely the development of Google's comparison shopping service at the expense of competing services. Google does not put forward any evidence to suggest otherwise. In particular, special circumstances — which were not present here — explain why, in some cases invoked by Google, in the light of the principle of equal treatment, the Commission refers to averages over several years.
- 363 As regards the duration of the infringement, the Commission states that it established, based on specific evidence, that the conduct in issue existed prior to 2011 in France, Germany and the United Kingdom, a period in respect of which it made a finding of infringement in those three countries alone. The examination of search traffic from Google's general results page to comparison shopping services was relevant in that regard. Concerning the other countries in which the

infringement began on a later date, the Commission submits that Google's comparison shopping service comprised not only the specialised page, but also product ads and specialised product search results appearing on the general search results pages before that specialised page was available in some countries. In particular, recital 412 of the contested decision, referred to by Google, says nothing more. Thus, the appearance of Shopping Units (ads) in different countries could be taken to be the start of the conduct designed to favour Google's comparison shopping service. Finally, the Commission maintains that there was no reason to exclude the period of discussions on possible commitments, as the practice at issue had not ceased during that time.

- 364 The Commission contends that the gravity multiplier is well below the ceiling of 30% mentioned in the Guidelines. It reflects the importance of the markets affected by the conduct in issue and the nature and geographical scope of that conduct. The Court has never called into question such a multiplier in a case involving the application of Article 102 TFEU. In addition, Google did not demonstrate that the circumstances of the other cases it relies on, in particular AT 37990, Intel, are comparable to those of the present case. The Commission points to the differences between them in terms of products and markets, the undertakings involved and the periods during which the conduct was identified.
- 365 The application of an additional amount of a specific percentage of annual revenue was also justified. Paragraph 25 of the Guidelines does not state that such amounts are to be applied only in cartel cases. They are designed to deter other undertakings from engaging in unlawful conduct comparable to the conduct in respect of which the fine was imposed, including in other product markets. Moreover, Google did not demonstrate that the cases in which the Commission did not include such an amount in the penalty are comparable to the present case. Accordingly, it was not necessary to provide specific reasons for applying that amount.
- 366 The multiplier of 1.3 that was ultimately applied is intended, as indicated in paragraph 30 of the Guidelines, to take into account the extent of Google's activities beyond the markets affected by the conduct in issue (the Commission mentions a turnover many tens of times higher). It enabled a penalty to be set for such an undertaking that was sufficiently high as to ensure its deterrent effect. Google's behaviour during the procedure, in seeking to settle the case by means of commitments, is not a relevant factor in that regard.
- 367 The average USD/EUR exchange rate for 2016 that was used in the contested decision, listed in the interactive statistics webpage relating to the exchange rates of the ECB website to be 1 USD to 0.9039 EUR, is not incorrect.
- 368 Finally, according to the Commission, it was right not to take account of any mitigating circumstances. Moreover, no such circumstances were claimed by Google during the procedure leading to the contested decision, which explains why the Commission did not state why they were not taken into account. On the

substance, the Commission puts forward the following arguments: (i) the fact that Google offered commitments did not mitigate its conduct, since the commitments proposed did not, in particular, assist in establishing the infringement; (ii) even assuming that the penalty for conduct such as Google's was unprecedented, that would not be a mitigating circumstance, either, in the same way that the novelty of a finding of infringement for a specific type of conduct would not prevent it being punished; (iii) the contested decision establishes that Google did not act out of mere negligence, but that it acted intentionally; (iv) although consumers and retailers may have valued the display of the results of Google's comparison shopping service, that is also not a mitigating circumstance, because they were unable to benefit from the display of competing comparison services' results; (v) while concealment of the unlawful conduct is an aggravating circumstance, the fact that it was known about is not a mitigating circumstance.

V. Measure of organisation of procedure

369 The Court put the following questions to the main parties, requesting them to reply in writing before the hearing:

'Questions for Google

1. Google is requested to indicate whether, in paragraph 79 of the reply, it contests, in themselves, the Commission's calculations in paragraph 92 of the defence, concerning the triggering rate of Product Universals, as might be apparent from the use of the term "wrongly", or whether it simply wishes to draw the attention of the Court to the fact that these calculations show, on the contrary, that in a large number of cases where a comparison shopping service has been classified in the first three generic results, no Product Universal has been displayed.

2. Google states, in paragraph 136 of the application, with regard to Product Universals, that it could not "*compare the relevance of its own results and results generated by third parties' algorithms in the same way as Universal Search allowed it to do for its different result categories*". It also states, in paragraph 196 of the application, with regard to Shopping Units, that for the same reasons it was not able to "*compare the relevance of ads that are generated by different services and scored by different methods*".

Can Google return to that point and explain why it could not compare the specialised results of different comparison shopping services, including its own, when the latter is itself able to compare offers from different merchants on the Internet.

3. Google is requested to indicate what is referred to under the term "stores" in the email of 27 February 2009 referred to in recital 443(b) of the contested decision. That email states "*the point is that we win not because we are so much better than*

an Amazon or NexTag as a store, but that in many cases there just aren't stores on the page if not for product universal".

4. Google is requested to briefly explain the differences, particularly at the technical level, between the ads in the Shopping Units and the ads on the Google Shopping site.

Questions for the Commission and for Google

5. In order to quantify the traffic from Google's general results pages to Google Product Search and Google Shopping, respectively, the Commission took into account different kinds of "clicks" made from these general results pages, in particular by comparing the evolution of the number of such clicks with that of the trigger rate of Product Universals and Shopping Units (recital 494 of the contested decision), and then with that of clicks referring to certain competing comparison shopping services (recitals 495 to 501 of the contested decision). Footnotes 603, 604 and 606 of the contested decision explain the "clicks" that have been adopted, but the General Court seeks further clarification in that regard.

The Commission is requested to specify exactly which areas of Google's general results pages have been used to count the relevant clicks (Product Universal, Shopping Unit, menu tab at the top of the page). Can the Commission confirm that clicks on product results or product ads otherwise appearing on the specialised Google Product Search or Google Shopping results page itself have never been taken into account?

It appears from the above footnotes that the traffic volumes used are based on data provided by Google during the administrative procedure at the Commission's request. However, Google is asked to state whether it has itself presented in the same way as in the contested decision this or that type of click as participating in the traffic from Google's general results pages to Google Product Search and Google Shopping respectively, whether it presented things differently, or whether it did not take a position in this respect during the administrative procedure.

6. The main parties are invited to indicate in a concise manner how the latest commitments proposed by Google to the Commission in January/February 2014 differ from the measures implemented by Google to comply with Article 3 of the contested decision. The Commission is asked to indicate whether at this stage it has approved those measures. Google is also asked to specify whether the competing comparison shopping services can still appear in Google's "boxes" today only if they have included a "buy" button or if they act as intermediaries. The Court refers to paragraphs 34 and 35 of Google's observations on Visual Meta's statement in intervention.

370 The Court put the following questions to the main parties, requesting them to reply at the hearing:

'I. On the functioning of the comparison shopping services market

1. The main parties are requested to comment on the role of attention in the markets for general Internet search and comparison shopping services, in the light of recitals 16, 358(d), 436(b), 436(f), 437 and 455 of the contested decision.
2. The main parties are requested to comment, in the light, inter alia, of recitals 160, 194 and 195 of the contested decision, on the role of the relevance of search results in the competition between comparison shopping services, both from the supply and demand point of view.
3. Google is requested to indicate whether there is competition between the different comparison shopping services regarding the quality of the specialised search algorithm and, in particular, on the ability of that algorithm to select the best offers, sort them and compare them according to criteria relevant to the user. If so, Google is asked to indicate whether the manner in which the selection criteria for specialised search (e.g. price, merchant's reputation, product popularity, stock) are weighted plays a role in that competition.

II. On the constitutive elements of the practice

4. The Commission is requested to clarify how Google's positioning and presentation, in its general results pages, of its comparison shopping service and competing comparison shopping services, differ from the competition on the merits from operators offering general search services.
5. In this respect, the Commission is requested to indicate whether it considers that, in view of Google's dominant position on the general search market, the power of its brand, and its role as gatekeeper for Internet searches, Google could be required, on the basis of the contested decision, to a duty of neutrality in the presentation and positioning of its own specialised results as compared to competing specialised results.
6. The Commission is requested to clarify recital 440 of the contested decision. In particular, the Commission is invited to clarify to what extent the assessments in recital 440, in response to an argument by Google, are in line with the general scheme of the contested decision and the reasoning behind it.

The Commission is requested to explain how the lack of importance of the fact that the results of the different comparison shopping services are subject to the same standards of relevance can be reconciled with the finding in recitals 535 and 598 of the contested decision, that Google's alleged behaviour would result in Google not always presenting the most relevant results (*"as ranked by its generic search algorithms"*) to users.

The Commission is also requested to indicate whether, with regard to the standards referred to at the end of recital 440, to which Google's comparison shopping service would not be subject, the Commission addresses the differences in the positioning and presentation of the results of competing comparison

shopping services compared to the Product Universals, as described in section 7.2.1 of the contested decision.

7. The Commission is requested to indicate whether, as part of the constitutive elements of the infringement, it has taken into account an anti-competitive strategy of Google or whether it has relied on objective elements for the purposes of characterising the practice.

8. The main parties are requested to indicate whether, during the administrative procedure, it was pointed out that comparison shopping services competing with Google which had not already included a “buy” button on their own results pages would have asked Google to allow their results to appear in product results or product ads and that they would have been refused. If the answer is yes, the main parties are requested to provide further details in this respect.

III. On the fine

9. In recital 743 of the contested decision, the Commission justified adopting a certain proportion of the value of sales (gravity multiplier) by stating that the relevant national markets for specialised comparison shopping service search and general search were of significant economic importance, which meant that any anti-competitive behaviour in those markets could have a considerable impact and that, during the infringement period, Google not only held a dominant position in the 13 national markets for general search concerned, but also had much higher market shares than its competitors. The Commission is requested to indicate which element(s) it has taken into account to justify the gravity multiplier used in relation to the criterion relating to the “nature of the infringement” mentioned in paragraph 22 of the Guidelines on fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2).

10. The Commission is requested to clarify paragraph 384 of the defence. Does the Commission interpret paragraphs 25 and 30 of the Guidelines as meaning that, first, the additional amount would pursue an objective of deterrence in respect of undertakings other than those complained of, as indicated in paragraph 384 of the defence, according to which the additional amount “*is intended to deter other undertakings from committing the same or similar infringement to that of the [a]pplicants*” and, second, the multiplier coefficient would be intended as a specific deterrent objective for the undertakings concerned, since it would be intended, as also indicated in paragraph 384 of the defence, to “*ensure that fines are sufficiently deterrent for infringing undertakings whose turnover, beyond the sales of goods or services to which the infringement relates, is particularly large*”. In addition, the Commission is requested to indicate whether it considers, in the light of paragraphs 25 and 30 of the Guidelines, that the purpose of the additional amount is to apply to certain infringements whereas the purpose of the multiplying coefficient is to apply to certain undertakings.’

L. Madise
Judge-Rapporteur

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