

# An Overview of Google Shopping Case in Brazil and Europe Union

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**Abstract.** The challenge to competition authorities presented by digital markets is the combination of some characteristics present in this specific market. The article explores how the characteristics of digital market present a challenge to the antitrust enforcement. Among the decision made by competition authorities worldwide, the Google Shopping Case demonstrated to be present in more than one jurisdiction, due to it, the present work intends to analyze the influence to the antitrust of the Google Shopping case in Brazil - that was judge by Administrative Council for Economic Defense - and Google Shopping case in Europe. Furthermore, a comparative between the two decision is development to prove the importance of Google Shopping case in each jurisdiction and how the competition authorities had different position towards Google alleged conducts.

**Keywords.** Digital Platforms, Google Shopping, Brazil, Europe, Antitrust.

## 1. Introduction

The presence and importance of digital platforms have acquired in our daily routines over the last few years are undeniable. Since almost all, if not all, aspects of human life have taken place in the virtual environment: social interactions, study, work, entertainment and the market, which is the purchase and sale of goods and the contracting of services.

The digital environment allowed the emergence of new markets, make companies to reinvent their way of operating, even made possible the performance of a company in several different market. Google is a great example of this, initially launched as a mere search engine in 1988, nowadays, the company currently serves the sectors of books, travel, maps, telecommunications and price comparison services, and its profit is due to advertising sold in all these areas.

Some digital platforms are serving various market sectors and the most diverse demands of consumers. Specially the Big Techs - a group of companies: Microsoft, Apple, Google, Meta, Amazon, Alibaba and Tencent - have acquired a great market power, that demands special attention in the antitrust enforcement by the competition agencies. Nowadays, antitrust has a challenge to face in the enforcement of digital markets, since the legal standards of antitrust investigation were conceived and developed for traditional business models.

The present work intends to analyze the case of

Google Search (Shopping), whose notoriety was not exhausted in the thematic scope of digital platforms - specially in price comparison platforms - but rather the application of competition law in the digital market as a whole. To enable the achievement of this objective, a comparative study will be carried out between the decisions of Administrative Council for Economic Defense ("CADE") - Brazilian competition authority - and of the European Commission, within the framework of the European Union.

## 2. Digital Platforms

### 2.1 Overview of digital platforms main characteristics

Digital markets have several characteristics, especially two (or multiple) side, network effects and economies of scale and scope with low marginal cost. Briefly, two-sided market happens when a platform is mediating relationship between two sides. This operation model requires that the platform to be able to combine the renumbering model on both sides. Therefore, the network effect means that the platform value increases as the number of users grows.

Economy of scale is a traditional concept of economics, having an economy of scale means that the produce cost is lower when the service/product is offered to a large group of users. Consequently, the cost of producing a given product becomes lower due to the number of users using it. Meanwhile, economy of scope is when a company produces a certain

quantity of product while having a lower produce cost, usually this happens because the products inputs are similar and can be reused during production.

Low marginal cost is a characteristic present in digital markets and is related to the economy of scope. Therefore, this happens because when platform is developed, the "developments" can be used for more than one product or service. It is important to highlight that economy of scale can be a barrier to entry in a market for a player, since an economic agent established in the market can choose to difficult the development of the new player. The entry of a new economic agent into digital markets is even more difficult, since the new player will face intrinsic characteristics of this market.

## 2.2 Competition in digital markets

In the digital economy it is very difficult to perform a successful entry without innovation, which becomes important for a new player have the user's preference. In this case, innovation does not necessarily seek the replacement of a service and/or product, because the consumer can choose to use two similar products at the same time.

Due to it, potential competition is important in digital markets, as companies that do not offer the same product or service compete with each other. The potential competition ends up generating the creation of ecosystems, in which players who work in specific segments add new tools to their platform. In the Brazilian market, Magazine Luiza is a good example of this, since entering the payment market through acquisitions.<sup>1</sup>

Data has been very important in digital markets, increasingly characterized as an input. Data is used several times by different companies because it is non-rival and non-exclusive goods, therefore, many companies can use the same data at the same time without losing value of the data. In addition, data is replicable and can be used simultaneously.

The aforementioned characteristics of digital markets do not have any of the are new and/or new competitive concepts, all have already been developed. The challenge to competition authorities presented by digital markets is the combination of these aforementioned characteristics in the antitrust enforcement.

## 3. Google Shopping Case in Brazil

In the Administrative Proceeding No. 08700.009082/2013-03, CADE investigated an

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<sup>1</sup> See: Merger Control No. 08700.00378012021-05. Claimants: Magazine Luiza S.A. and Kabum Comércio Eletrônico S.A. Cleared without conditions; Merger Control No. 08700.00324712021-35. Claimants: Magalu Pagamentos Ltda. and Banco BS2 S.A. Cleared without conditions on July 5, 2021; Merger Control No 08700.000059/2021-55. Claimants:

alleged anti-competitive conduct and a supposed economic abuse that would have been practiced by Google Inc. and by Google Brasil Internet Ltda. through alleged manipulation of the algorithm from their internet search engine.

The investigation was initiated on October 10, 2013, and was based on a legal representation made by the E-Commerce Media Group Information and Technology ("E-Commerce"). The E-Commerce made a legal representation informing CADE that Google - a company that would be responsible for 95% of the relevant Brazilian market for search engines - would have practiced discriminatory conduct that such as artificially leverage its participation in the price comparison market, that Google had recently entered through Google Shopping website.

In summary, Google would have favored Google Shopping in the results of organic searches, through: (i) providing differentiated privileged information architecture (with benefits such as the exposure of images and instant review after the search); and (ii) high frequency in Google's first page results and among unsponsored links. After the submission of the Parties' allegations, both the General Superintendence of CADE ("SG") and the CADE's Specialized Federal Attorney's Office suggested that the case should be closed, due to the lack of robust enough elements to support Google's conviction.

The Brazilian case presented the opinion of companies in the sector through Officials Letters and third parties who claimed been affected by Google's conduct. Respecting Brazilian law, Google had several opportunities to defend itself and present evidence to support its arguments, including holding several meetings with CADE's Attorneys.

The SG in the Technical Note suggested that the case should be dismissed. Also, the SG document recognized the complexity of analyzing unilateral conducts in markets with high innovation, as they are markets that are constantly changing over time, consequently it becomes more complex to differentiate a pro-innovation advantage of an anti-competitive innovation. Furthermore, SG analyzed the history of the internet search market and explained the performance of results frequently accessed at the beginning of result page. It was concluded that this was an appropriate innovation due the dynamics of the market, since they were able to display the most relevant to the user.

The Attorney Mauricio Oscar Bandeira Maia pointed out that it would not have been possible to verify the manipulation of the search algorithms in the Brazilian market alleged by the E-Commerce, since the changes in the market (including here the

Magalu Pagamentos Ltda. and Hub Prepaid Participações S.A. Cleared without conditions on April 14, 2021; Merger Control No. 08700.003703/2020-66. Claimants: Magazine Luiza S.A. and in loco Information Technology S.A. (InLoco). Cleared without conditions on August 27, 2020.

decrease in the market of price comparators) would be more the result of market behavior (such as the growth in the number of marketplaces) than the consequences of Google's alleged anti-competitive conduct.

Furthermore, the change from the search model to the Product Listing Ads (PLA) marketing model, that online advertisements are placed at the top of search pages with images, title and price would represent an advance for the market, as it would result in greater number of purchases and a "decrease in the latency of the user's relationship with their purchase process". In this sense, the Attorney claimed that the "negative repercussions of the decision to impose remedies on Google" would be reason to disengage from the European decisions, analyzed below.

On July 26, 2019, the CADE's Tribunal decision was to dismissed the case by the Administrative Court of CADE closed the case. This decision is important because held debates that were important to Brazilian antitrust.

## **4. Google Shopping Case in Europe (AT.39740): Abuse of Dominant Position**

On October 30, 2010, the European Commission decided to open an antitrust investigation into allegations against Google Inc. and Alphabet Inc. (Google's parent company) to investigate alleged practices of abuse of a dominant position in the online search market in violation of European Union rules. The opening of the formal investigative process was a consequence of complaints filed by companies of search service providers that compete with Google. The companies alleged favorable treatment of unpaid and sponsored search results in the Google Search tool, in order to favor an alleged preferential placement of Google Shopping.

The investigation sought to determine whether Google abused a dominant position in the online search market by reducing the ranking of unpaid search results from competing services. Google is specialized in providing users with specific content in the virtual environment (i.e., comparisons of prices) by granting preferential placement to Google Shopping results, seeking to exclude competing services. Furthermore, competing companies claimed that their products were harmed in organic search results and in the sponsored links that appear on the right side of the results page or at the top of it.

The Commission also investigated allegations that Google lowered the 'Quality Score' for sponsored links comparing competitive prices. Quality Score is one of the important factors in determining the price paid to Google by advertisers. In view of the above-mentioned alleged conducts, a preliminary investigation against Google.

In 2013, the European Commission preliminarily

concluded that Google practiced differential treatment in favor of its products within search results, which constituted a violation of the competition rules of the European Union.

In the case of Google Shopping, the preliminary conclusion was that the company systematically offered a favorable treatment to the price comparison service on the results pages, so Google Shopping logo was located in a position of greater visibility to the user. Thus, Google could artificially direct the flow of traffic to its services - as it diverted it from the services of competing price comparators - preventing competitors from competing in the market. Finally, the European Commission concluded that the company's behavior harmed innovation in the market and consumers, as the Google's results did not necessarily show the most relevant results for the search.

A series of attempts were made to reach agreements between the European Commission and Google to stop the investigated conduct, however, the company and the competition authority did not reach an agreement. On 14 July 2016, the European Commission decided to initiate proceedings against the company. The AT.39740 case was initiated by seeking to determine how Google favored its own price comparison service in general search results.

The European Commission announced its decision to convicted Alphabet Inc. and Google Inc. due to the abuse of a dominant position by favoring the positioning and display of its own price comparison service over competing price comparison services on Google Search. The relevant market affected was general research services and the anti-competitive conduct occurred in 13 countries: Austria, Belgium, Czech Republic, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Spain, Sweden, and the United Kingdom.

The Commission decided that Google's behavior would be abusive because diverts traffic from competing price comparison services to Google's own price comparison service. Therefore, this had an anticompetitive effect in the national markets for price comparison services and general research services.

Briefly, certain specific algorithms were responsible for positioning competing price comparison services in a lower position on Google's general search results pages, thus affecting the competitors' visibility on Google's general search results pages. Furthermore, through the algorithms, Google Shopping service is positioned in a better way compared to the services of competing companies, since the specific algorithm responsible for the decrease in the position of competing comparison services was not applied to the service of the same Google. Thus, Google Shopping was presented with more visibility, at or near the top of the first general search page, "while such features are not available to its rivals".

The European Commission found that the

positioning and visualization of generic results influence users of search services, as users tend to click more on links that are more visible on the general search results page. The evolution of traffic on price comparison services was also presented - including paid traffic - and the impacts of positions on the pages of the services.

Google has not provided any verifiable efficiencies justification and/or evidence demonstrating that the likely efficiencies resulting from its behavior outweigh the likely negative effects on competition and consumer welfare in the affected markets.

The Google conduct resulted in the imposition of a fine in the amount of 2.42 billion euros, historic at the time of the facts; in application of a corrective measure that effectively ended the abuse; and Google's commitment to refrain from any act or behavior that has an identical or similar object or effect, among other remedies.

## 5. Investigations Conclusions

It is observed that both Brazilian and European competition authorities conducted similar investigative processes, referring to the investigation of any practice offensive to competition in the sector of online price comparators. However, it is noteworthy that the two judgments developed essentially different legal reasoning, as will be discussed in this section.

In the scope of Administrative Proceeding 08012.010483/2011-94, CADE chose to verify a theory of abuse of economic power by Google. In terms of the Attorney Mauricio Oscar Bandeira Maia, CADE investigated the alleged conducts with "the traditional steps of an investigation for unilateral conducts, considering that this approach is more protective of the economic order".

The Attorney's conclusion was although the recognition of Google privileged position of its own product, it was unconfirmed the conducts of blocking access to an essential structure, tie-in sale and lack of transparency on the publicity placement. Also, CADE judgment did not consider any of the E-Commerce's allegations proven, as following: lower visibility of competitors, reduction of organic traffic, increase in CPC value and limitation of the number of products advertised by retailers/marketplaces. Furthermore, CADE did not see a causal link between the actions taken by Google and the reduction in the number of price comparison sites. As a result, the lawsuit was dismissed and Google did not receive any sanctions in light of the Representative's allegations. Thus, the damage theory presented by the E-commerce was not proven.

Under AT.39740, the European Commission - a competition authority with more expertise with digital markets - concluded that there were several potential anti-competitive effects in the conduct

practiced by Google. In the European judgment, the potential for excluding competing price comparison services was verified. Finally, the Google conducts could generate higher charges for traders and higher prices for consumers, therefore reducing the innovative potential of the market.

In the European jurisdiction, the conduct practiced by Google was considered likely to reduce consumers' ability to access the most appropriate price comparison services. Also, it was also observed that the company's behavior would demonstrate potential anti-competitive effects, even though the other price comparison platforms did not constitute a distinct relevant product market, but a segment of a possible broader market for the relevant product, that included both price comparison services and sales platforms.

Thus, the European Commission developed its legal reasoning in order to established an understanding to consolidate a jurisprudence to be taken into account for all cases of competition in digital markets. At the end of the process, the Commission fined Google €2.42 billion for abusing its domain position in the search engine, giving the price comparison service an illegal advantage.

The conduct of a tech giant resulted in the imposition of a €2.42 billion fine and behavioral and structural remedies such as the application of corrective measures that effectively ended the abuse; and Google's commitment to refrain from any act or behavior that has the same or similar object or effect.

## 6. Conclusion

The decisions reflect the particularities of digital markets and the challenges imposed on the application of antitrust policies in different contexts. Since it was observed that both investigations had a long duration, but still obtained different results.

Because Google Inc. hold a dominant position in both jurisdictions, their conduct has affected the search market even of the investigations results in Brazil and Europe are different, the investigation process has resulted in better expertise for both competition authorities.

The precedent created in European Union was extremely important for antitrust, which proved to be essential to establish a new paradigm of investigation in digital markets. The Brazilian investigation itself was fundamentally influenced by the European decision. It is noteworthy that the European decision influenced the initiation of several lawsuits against Google for the conduct practiced, including in Brazil.

Both jurisdictions were able to judge challenging disputes involving the dynamics of digital platforms. The competitive analysis carried out by the Brazilian and European authorities is strongly linked to the definition of the relevant market. This point is strongly criticized in the European Union decision,

since the relevant market is broadly defined in its geographic dimension.

The European Commission's decision is strongly linked to consumer behavior, without considering that in digital markets there are other competitors that meet their expectations. This aspect is highly mentioned in the Brazilian precedent, as CADE analyzed European and US investigations. In this way, the Brazilian authority during its investigation was able to accurately delimit the relevant market. Currently, both precedents have become relevant in their respective jurisdictions, as both the European Commission and CADE file other lawsuits in which Google is the defendant.

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