Rules, Discretion, and Reasoning According to Law

Lindeboom, Justin

Published in:
Journal of European Competition Law & Practice

DOI:
10.1093/jeclap/lpac008

Article

Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on *Google Shopping*

Justin Lindeboom*

Key Points

- The key question in *Google Shopping* is not whether Google's conduct fell under an existing substantive legal test, but whether the Commission's merits-based reasoning violated any existing norm of EU competition law.
- *Google Shopping* leaves unclear whether the General Court's reasoning as regards the abusive nature of Google's conduct is based on a new, general rule against self-favouring by dominant undertakings.
- In *Google Shopping*, both the Commission and the General Court had substantial law-making discretion as a result of limited constraints by existing law, which in general may raise substantive legitimacy concerns.

I. Introduction

This article comments on the General Court's (GC) judgment in *Google Shopping*[1] from the perspective of the relationship between rules and individual cases, and between pre-existing law and administrative and judicial discretion. Legal philosophers and theorists have long debated the question of how rules relate to the facts of individual cases to which they ought to be applied, what should be done when an individual case cannot be readily subsumed under an existing rule, and how the content of pre-existing law relates to the discretion of legal authorities in applying the law. Competition law scholarship, in turn, has developed numerous normative theories about how courts ought to apply rules from competition law doctrine to new and complex factual situations.

A wide range of antitrust scholars with various legal and economic views could agree on the claim that competition law enforcement should be based on sufficiently clear legal rules that pre-exist the factual circumstances of the case, even though they would not agree on the content of those rules.[2] Thus, even scholars sceptical about 'form-based' substantive legal tests typically do not propose to substitute form-based enforcement with administrative or judicial discretion, but rather argue for stricter rules on evidence of consumer harm or actual anticompetitive effects.[3] In the context of the *Google Shopping* case, numerous scholars have attempted to subsume the facts of the case under existing substantive legal tests.[4]

The *Google Shopping* case is legally challenging in this regard because there was no pre-existing legal rule prohibiting self-favouring by dominant undertakings,[5] nor a legal rule that prohibits self-favouring in the specific

* Fulbright Scholar, Harvard Law School; Assistant Professor of European Law, University of Groningen. In accordance with ASCOLA's Declaration of Ethics, I confirm that I have no conflicts of interest.

1 Case T-612/17, *Google LLC, Formerly Google Inc. and Alphabet, Inc. v Commission*, EU:T:2021:763.

2 E.g., on the importance of the formal rule of law in Chicago School scholarship, see Ryan Stones, 'The Chicago School and the Formal Rule of Law' (2018) 14 Journal of Competition Law & Economics 527. In EU competition law, substantial attention has been devoted to *ad hoc*, case-by-case enforcement associated with the 'more economic approach' to EU competition law. For a critical analyses, see e.g. Bruce Wardhaugh, *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Hart Publishing, Oxford 2020); Ryan Stones, 'Why Should Competition Lawyers Care about the Formal Rule of Law?' (2021) 84 Modern Law Review 608. *Scholarly* arguments for a more 'effects-based' approach, however, typically involve the substitution of existing legal categories by alternative, (allegedly) more economically informed legal categories, not abolishing categorisation as such. See e.g. Ioannis Lianos, 'Categorical Thinking in Competition Law and the "Effects-based" Approach in Article 82 EC', in Ariel Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing, Oxford 2009).

3 See generally, Justin Lindeboom, 'Formalism in Competition Law' (2022) 18 Journal of Competition Law & Economics (forthcoming), with further references.

4 See e.g. Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Search Quality in the Search Engine Market' (2013) 9 Journal of Competition Law & Economics 422; Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' (2013) 11 Northwestern Journal of Technology and Intellectual Property 275; Benjamin Edelman, 'Does Google Leverage Market Power through Tying and Bundling?' (2015) 11 Journal of Competition Law & Economics 365; Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal—Two Sides of the Same Coin?' (2015) 1 Competition Law and Policy Debate 4.

5 As Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 World Competition 417 notes, self-favouring or self-preferencing practices can be linked both to rational

factual circumstances of the *Google Shopping* case.[6] Furthermore, although recent case law seems to take a more 'realist' approach to Articles 101 and 102 TFEU,[7] the current state of EU competition law does not go as far as to require evidence of actual anticompetitive effects in Article 102 cases.[8] As a result, the Commission still maintains a significant degree of discretion in determining what counts as an anticompetitive abuse of dominance. At the same time, a tentative countertrend can be identified in which heightened evidential standards appear to limit the discretion that has been created by the increased relevance of the individual facts of each case.[9] These trends raise important questions about the role of rules, and their relationship to discretion, in the administrative and judicial enforcement of EU competition law.

The central claim of this article is that the substantive reasons for qualifying Google's conduct in *Google Shopping* as abusive should not be understood as reasoning *about* (already existing) competition law, but as merits-based reasoning according to competition law. In doing so, it aims to provide a better understanding of the relationship between rules and discretion in *Google Shopping* from a dynamic-positivist perspective on legal reasoning. This article focuses on the two key aspects of the GC's qualification of Google's conduct as abuse of a dominant position, namely the inapplicability of the *Bronner* criteria and the abusive nature of Google's conduct.

Section II introduces the distinction between 'reasoning about the law' and 'reasoning according to law' on the basis of a dynamic-positivist theory of law. Section III applies this framework to the GC's reasoning regarding the scope of the *Bronner* criteria and the abusive nature of Google's conduct.[10] Section IV addresses the legitimacy of reasoning according to law by administrative and judicial authorities, and proposes a shift in attention from a narrow focus on the predictability of substantive law towards increased attention for institutional legitimacy, procedural due process, and the 'rulifiability' of legal decision-making. Section V concludes.

II. A dynamic-positivist perspective on legal decision-making

The separation of legislative and judicial authority has long been theorised and justified by reference to their respective spheres of legitimate decision-making. The task of courts, on the conventional view, is first to identify the relevant law, and second, to interpret and apply it.[11] This conventional view tends to rely on a specific type of legal theory, which legal philosopher David Dyzenhaus calls 'static theories of law'.[12] According to static theories of law, 'the law' can be described as a collection of currently valid individual legal norms. Consequently, it is at least theoretically possible to make a snapshot of all the currently valid legal norms of a legal order.[13] If there is no law regulating the facts of the case or existing law is indeterminate, there is a 'gap' in the law, and courts should exercise discretion. How this discretion ought to be exercised is a question to which the law itself has little to contribute, and effectively courts will act as quasi-legislatures.[14]

In contrast, 'dynamic theories of law', which Dyzenhaus traces back in particular to Hans Kelsen, emphasise the process of legal decision-making and law-making by both legislatures, administrative authorities and judicial authorities.[15] Legal decision-making involves a dynamic process of 'creative judgment which requires attention to both the formal norms—those that authorize and condition the interpretive process—and the material norms—those that have a content that must be taken into account in the process'.[16] Those formal and substantive norms constrain the discretion of administrative and judicial decision-makers to shape and develop the law in their

behaviour by undertakings, and to a range of abusive practices including tying and refusal to deal.

6 See e.g. Magali Eben, 'Fining Google: A Missed Opportunity for Legal Certainty?' (2018) 14 European Competition Journal 129; Pinar Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment Under EU Competition Law' [2017] Journal of Law, Technology and Policy 301.

7 Damjan Kukovec, 'The Realist Trend of the Court of Justice of the European Union' (2011) *EUI Working Papers* LAW 2021/11.

8 For a comparative US–EU analysis, see e.g. Nicolas Petit, 'A Theory of Antitrust Limits' (2021) 28 George Mason Law Review 1399.

9 See e.g. Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265, para. 74–75; Case C-413/14P, *Intel Corp. v European Commission*, EU:C:2017:632, para. 138–139; Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission*, EU:C:2020:217, para. 172–175, 245–249.

10 The GC's judgment first discusses the abusive nature of Google's conduct (para. 139–198), and the scope of the *Bronner* criteria only afterwards (para. 199–240). I prefer to discuss these aspects in reverse order, although the exact order does not affect the substance of the analysis.

11 See, in the context of EU law, e.g. Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, Oxford 2013) 13.

12 David Dyzenhaus, 'Kelsen's Contribution to Contemporary Philosophy of International Law' (4 May 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571343; accessed 21 February 2022. David Dyzenhaus, 'The Janus-Faced Constitution', in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press, Cambridge 2020).

13 Dyzenhaus, 'Kelsen's Contribution' (n 12) 17, 19–20.

14 In competition law discourse, however, it is often inferred from such a static view that 'enforcers are pure technocrats' who should 'refrain from making any value choices', as Stavros Makris notes in 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228, 235–236 (referring to the archetype of 'autonomous law').

15 Dyzenhaus, 'Kelsen's Contribution' (n 12) 19–20.

16 Ibid.

decisions. For Kelsen, gaps in the law do not exist because 'a legal order provides seamlessly for an authorised official to solve by a legal procedure any problem raised within the legal order'.[17]

In competition law, substantive legal tests—and related rules on evidential standards—have an important discretion-constraining function. From a static perspective, it is possible to describe all available substantive legal tests as a 'snapshot' of currently legally valid substantive competition law. From a dynamic perspective, this snapshot tells at most half of the story. The absence of a specific substantive legal test does not mean that there is no law, but indicates that the law delegates the competence to apply Article 102 TFEU to the relevant legal decision-makers.[18] The discretion of competition authorities and courts to solve problems is defined by what is left open by existing law.[19]

To flesh out this point a bit more, a helpful distinction between 'reasoning about the law' and 'reasoning according to law' has been made by Joseph Raz and John Gardner.[20] Reasoning about the law is involved in applying pre-existing rules to individual cases. To the extent that a case can be readily subsumed under a pre-existing rule, applying the rule involves reasoning about the content of the law.

Reasoning according to law is moral, i.e. merits-based, reasoning to solve a case.[21] In competition law, it is mostly relevant when there is no clear-cut rule that can be syllogistically applied to the facts at hand. In such a case, the relevant legal authorities have to decide the case on the basis of merits-based reasoning, within the procedural and substantive constraints provided by law. Substantive constraints include, for instance, higher-order principles with which the legal solution to be reached should be consistent, such as the special responsibility for dominant undertakings,[22] and the overall objectives of Article 102 TFEU.[23]

The distinction between reasoning about the law and reasoning according to law relies on a positivist conception of law, meaning that the content of law can be determined by reference to its sources alone, without merits-based reasoning.[24] Accordingly, reasoning according to law is different from reasoning about the law because existing substantive law has run out. Although existing law is never irrelevant to the case at hand, it is inconclusive.[25] In other words, the case cannot be solved solely based on 'autonomous' legal reasoning.[26]

Although decision-making according to law is not entirely determined by rules and principles pre-existing the decision, Gardner elsewhere argued that courts should decide cases 'on the footing that the ruling is an application of a legal rule, and that the rule in the case, even if it has just been created to resolve the case, could in principle be reapplied in future'.[27] This is what distinguishes courts from arbitrators.[28]

In light of the vagueness of the standard provided by Article 102 TFEU—and other competition law provisions—this imperative is of crucial importance for competition law. This 'rullifiability' constraint ensures that the discretion exercised by those actors is not 'arbitrary' in the sense of being limited to the facts of the specific case. The decision-maker has to explain not only why *this* conduct is anticompetitive or abusive, but on the basis of what general criteria *this and similar conduct* are anticompetitive or abusive. It also ensures that the merits-based reasons for deciding the case are not merely

17 Dyzenhaus, 'The Janus-Faced Constitution' (n 12) 41, referring to Hans Kelsen, *Pure Theory of Law* (Max Knight tr, Harvard University Press, Cambridge, MA 1945) 245–50.
18 See doctrinally, Articles 1(3) and 7(1) Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
19 See e.g. *Google Shopping* (n 1) para. 197, strongly emphasising the consistency of the Commission's decision with previous case law, rather than the question of whether the decision could be deduced from that case law.
20 Joseph Raz, 'On the Autonomy of Legal Reasoning' (1993) 6 Ratio Juris 1; John Gardner, 'Legal Positivism: 5½ Myths' in *Law as a Leap of Faith* (Oxford University Press, Oxford 2012). Admittedly, I am not entirely confident how Raz and Gardner's work should be qualified in terms of 'static' versus 'dynamic' theories of law. However, their distinction between 'reasoning about the law' and 'reasoning according to law', in my view, complements and fits Kelsen's emphasis on the dynamic perspective to law.
21 The term 'moral' is quite loaded, especially in an allegedly technocratic discipline like competition law. Raz seems to understand 'moral reasoning' in this context as reasoning about what ought to be done or decided (Raz (n 20) 3). Gardner uses 'moral' and 'merits-based' reasoning interchangeably. In the remainder of this article, I mainly refer to 'merits-based reasoning'.
22 *Google Shopping* (n 1) para. 150.
23 *Google Shopping* (n 1) para. 156–157.
24 On this so-called 'sources thesis', see Gardner, 'Legal Positivism' (n 20) 19.
25 Gardner, 'Legal Positivism' (n 20) 40.
26 On the fiction of 'autonomous competition law', see Stavros Makris, 'Openness and Integrity in Antitrust' (2021) 17 Journal of Competition Law & Economics 1, and Makris (n 14). The distinction between 'reasoning about the law' and 'reasoning according to law' overlaps partly with Makris' distinction between legal reasoning within an 'autonomous law' model and constructive teleological interpretation within a 'responsive law model'. Makris' account of 'autonomous law', however, includes several normative obligations, for example that adjudicators should 'merely "uphold the rule of law" by elaborating or discovering the content of the legal norms, but not make the rules' (Makris (n 14) 236). In contrast, although a dynamic-positivist perspective would conform to Makris' picture of 'autonomous law' in that the exercise of discretion by decision-makers operates partly outside the current content of substantive law, the practice of 'reasoning according to law' is much more like what Makris describes as 'constructive teleological interpretation' within a 'responsive model' of competition law.
27 John Gardner, 'The Twilight of Legality' (2018) University of Oxford Legal Research Paper Series 4/2018, 18.
28 John Gardner, 'Legal Justice and Ludic Fairness' (2020) 11 Jurisprudence 468, 468–469.

compliant with existing law, but also contribute to the gradual increase of the sophistication of competition law doctrine. As I discuss in the remainder of this article, it may be doubted whether the GC's judgment meets this bar.

III. *Google Shopping* as merits-based reasoning according to law

The abovementioned theoretical overview is, of course, highly abstract. This section aims to show how the GC's judgment in *Google Shopping* is largely based on a dynamic-positivist understanding of the Commission's discretion in applying Article 102 TFEU. It is positivist in the sense that the merits-based reasoning in *Google Shopping* moves beyond the existing content of Article 102 TFEU, and it is dynamic in the sense that it emphasises both the Commission's and the GC's discretion in developing the content of Article 102 TFEU.

In *Google Shopping*, the main driver of the Commission's discretion seems to be the *absence* of any applicable substantive legal test. From a static-positivist viewpoint, there is a gap in the law. From a dynamic-positivist viewpoint, there is a power-conferring rule allowing the Commission to develop the law by merits-based reasoning in accordance with the existing legal materials. Obviously, important legal constraints are provided by general standards of judicial review. In *Google Shopping*, the GC affirmed that Commission decisions applying Article 102 TFEU are subject to 'in-depth review',[29] and that while the Commission has a 'margin of discretion with regard to economic matters', the EU courts will nonetheless 'establish whether the evidence put forward is factually accurate, reliable and consistent [and] determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[30] The Commission bears the burden of proving the infringement and must 'adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement'.[31] It should be noted, however, that these well-known observations do not require that any particular substantive rules—other than the vague standard of Article 102 TFEU itself—must be violated in order to establish an infringement of Article 102 TFEU. No reference is made to the necessity of a pre-existing substantive legal test. Accordingly, these observations hardly cast doubt on the Commission's competence to formulate a substantive legal test that is a plausible proxy for the existence of an infringement of Article 102 TFEU. Thus, the remainder of this section first discusses the way in which the GC reviewed the Commission's decision in light of the scope of the *Bronner* criteria, and, subsequently, the qualification of Google's conduct as abusive and outside the scope of 'competition on the merits'.

A. The scope and applicability of the *Bronner* criteria

As to the applicability of the *Bronner* criteria, Google claimed that its conduct ought to have been qualified as a 'refusal to deal', and that the Commission had failed to satisfy the *Bronner* criteria including in particular the criteria that (non-discriminatory) access to Google's traffic was 'indispensable' for competition and that lack of access risked eliminating all competition.[32] The GC agreed with Google that the case is about (equal) access by Google's comparison shopping service and competing comparison shopping services to Google's general results pages.[33] It also observed that Google's general results page 'has characteristics akin to those of an essential facility'.[34] Finally, the GC recalled several of the Commission's observations that allude to the *Bronner* criteria.[35]

However, the GC then made a sharp turn by distinguishing the facts of this case from the facts of *Bronner* and similar cases. According to the key paragraph 232, applying the *Bronner* criteria is warranted if and only if (i) 'there is a "request" or in any event a wish to be granted access and a consequential "refusal"', and (ii) the exclusionary effect is principally caused by the refusal as such, and not by 'an extrinsic practice' such as a leveraging abuse.[36] Contrary to the Commission's claim, the GC denied that the *Bronner* criteria necessarily apply whenever a dominant undertaking is required, in order to end an abuse, to transfer assets, enter into agreements or give access to its service under non-discriminatory conditions.[37] The *Bronner* criteria generally do not apply to 'implicit' refusals to supply[38] and 'active' exclusionary practices.[39]

29 *Google Shopping* (n 1) para. 130.
30 Ibid., at para. 131.
31 Ibid., at para. 132.

32 Ibid., at para. 199–203.
33 Ibid., at para. 222.
34 Ibid., at para. 224.
35 Ibid., at para. 225–227 (alluding to indispensability of traffic generated by Google's general search pages) and 228 (alluding to the elimination of all competition).
36 Ibid., at para. 232.
37 Ibid., at para. 244.
38 Ibid., at para. 234.
39 Ibid., at para. 241.

The two criteria in paragraph 232 are accompanied by large number of case law references, ostensibly suggesting the GC was only recalling existing case law. However, most references refer to a combination of the facts of those cases and their holdings.[40] None of these holdings mentioned these two specific criteria as necessary conditions for the applicability of the indispensability test.[41] The GC appeared to have inferred the criteria as normative explanations as to why the *Bronner* criteria were warranted in those cases, but not in *Google Shopping*. There simply appears to be no basis in the text of EU competition (case) law for the claim that these specific criteria distinguish *Google Shopping* from *Bronner*.[42]

Moreover, although the formulation of specific substantive legal tests is not infrequently motivated by specific factual situations, from a positivist perspective the resulting legal landscape is nonetheless confined to the text of those substantive legal tests. If the content of the law were to include the facts of the cases that gave rise to it, it would be impossible to identify *any* judicially crafted rule as conclusively determining the law on a specific issue, since all judicially crafted rules originate from a specific and unique set of facts.

The GC also held that the *Bronner* criteria could not be applicable to any conduct that could be constructed as an 'implicit' refusal to supply, since this would cover a wide range of forms of abuse to which the EU courts have not applied the *Bronner* criteria, which would '[disregard] the spirit and the letter of Article 102 TFEU'.[43] This argument can be understood as a 'systematic-teleological' interpretation of the *Bronner* criteria. The extent to which a purposive interpretation of the law is still 'about' the law is somewhat controversial, especially among legal positivists.[44] In any case, the GC's introduction of the two criteria that *do* distinguish *Bronner* cases from other abuse cases does not follow from that case law.

Accordingly, the GC's reasons for distinguishing the normative framework applicable to *Google Shopping* from the *Bronner* criteria should be evaluated as a merits-based argument going beyond the present content of Article 102 TFEU. The merits of this reasoning should thus be evaluated based on (i) its consistency with existing law and (ii) its extra-legal merits, which include economic soundness, predictability and fairness. In reality, the two are interlinked. Whether paragraph 232 is consistent with the initial formulation of the *Bronner* criteria depends on how literally these latter criteria are interpreted, and consequently whether these additional two criteria violate, or should be conceived as an enriched version of, the *Bronner* judgment. However, this question cannot be answered without merits-based reasoning, particularly involving the perceived risk of types 1 and 2 errors. EU competition law itself has very little to say about this policy question.

Finally, following Gardner, reasoning according to law by courts and administrative authorities should always be evaluated based on the question of whether the reasons for deciding the case can be construed as a rule to which the court is bound. The GC's observations on the *Bronner* criteria are certainly of this kind: they create a fairly precise rule that delineates the applicability of the *Bronner* criteria from other types of abuse, including leveraging abuses. As we will see in the next sub-section, this is more complex with regard to the GC's reasons for concluding that Google's self-favouring lies outside the scope of 'competition on the merits', which are not easily construed as a general rule. However, in the context of distinguishing *Google Shopping* from the *Bronner* case

40 Case 6/73, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, EU:C:1974:18, para. 24 observes, as a matter of fact, that 'when Zoja sought to obtain further supplies of aminobutanol, it received a negative reply [from Commercial Solvents]', without stating that a negative reply is a necessary condition for the applicability of the (nascent) refusal to deal doctrine. Case 311/84, *CBEM*, EU:C:1985:394 concludes that an abuse is committed if 'an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking' (para. 27), which seems compatible with the facts of *Google Shopping*. Joined Cases C-241/91P and C-242/91P, *RTE and ITP* v *Commission*, EU:C:1995:98, observes as matter of fact that Magill 'was prevented from [publishing a comprehensive weekly television guide]' (para. 10) and concludes that '[t]he applicants' refusal to provide basic information' [. . .] prevented the appearance of a new product [. . .] for which there was a potential consumer demand (para. 54). Case C-7/97, *Bronner*, EU:C:1998:569, states as a matter of fact that 'Oscar Bronner seeks an order requiring [to include] Der Standard in its home-delivery service against payment of reasonable remuneration' and that, Oscar Bronner further argues that Mediaprint has discriminated against it [. . .]' (para. 8), and holds that 'the refusal [. . .] to have access to that [home-delivery scheme] for appropriate remuneration' does not constitute abuse of a dominant position (para. 47). Case T-504/93, *Tiercé Ladbroke* v *Commission*, EU:T:1997:84, para. 5, 7, 110, 131 and 132 state as a matter of fact that 'Ladbroke asked DSV to grant it the right to retransmit the French sound and pictures in Belgium' and 'DSV refused that request' (para. 5, and similarly in para. 7), and discuss the criteria of indispensability and the emergence of a new product (para. 131–132). Case T-201/04, *Microsoft* v *Commission*, EU:T:2007:289 quotes Sun Microsystems' explicit request for access to the information required for interoperability (para. 2) and states that Sun's complaint relates to 'Microsoft's refusal to give it the information' (para. 7).

41 Ibid.

42 Although Case C-165/19P, *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, para. 50 offers some general support for a limited applicability of the *Bronner* criteria, that judgment also does not provide the two criteria proposed by the GC.

43 *Google Shopping* (n 1) para. 234. See also para. 235–239.

44 See e.g. the Hart–Fuller debate: H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593; Lon Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 Harvard Law Review 630. In essence, the problem is that regard to purpose easily leads to merits-based reasoning, which threatens the 'sources thesis' in legal positivism.

law, the GC's reasoning clearly is based on a rule to which the GC was bound, even if that rule did not exist in the case law pre-existing the judgment, and the judgment only relied on the rule by applying it first.

B. The abusive nature of Google's conduct

Based on the newly formulated rule limiting the scope of the *Bronner* criteria, the remaining question is whether Google's conduct was abusive and outside the scope of 'competition on the merits'. In addition to there being no pre-existing rule within the Article 102 TFEU framework concerning Google's conduct, it should be noted that the notion of 'competition on the merits' has never been comprehensively defined in either the case law or the literature.[45]

The Commission's decision had been based on the premise that 'abusive leveraging constituted a well-established, independent form of abuse falling outside the scope of competition on the merits'.[46] According to the GC's understanding of the Commission's decision, the Commission applied a two-step approach. First, Google's conduct is outside the scope of competition on the merits because Google relied on its dominant position on the market for general search services in order to favour its own comparison shopping service on the market for specialised comparison shopping search services.[47] Second, based on three specific factors, this leveraging is liable to lead to a weakening of competition on the market.[48]

In respect of both steps, the existing law on Article 102 TFEU left considerable discretion to the Commission. As regards the second step specifically, the case law on Article 102 TFEU is ambiguous about the required degree of probability, with 'capability' and 'likelihood' both having been presented as relevant standards in specific situations.[49] It seems, therefore, that also in this regard the law does not provide a clear, *ex ante* available standard for the required degree of probability. In its judgment, the GC confirms this broad discretion by requiring the Commission to merely demonstrate 'potential exclusionary or restrictive effects on competition',[50] in light of Google's arguments 'to contest the notion that its conduct had been capable of restricting competition'.[51]

The key question surrounding the nature and effectiveness of in-depth judicial review by the GC is how it can be applied to decisions involving merits-based reasoning according to law. If there is no pre-existing substantive legal test applicable to Google's conduct, how can the GC conduct an in-depth review as to whether the Commission has demonstrated 'to the requisite legal standard the existence of the circumstances constituting an infringement'?[52]

The GC's review consists of a combination of (i) some non-redundant but non-dispositive legal constraints; and (ii) merits-based reasons regarding the specific factual situation of the case. After scrutinising the structure of the GC's reasoning in more detail, this section briefly discusses the question of whether these reasons can be construed as a general rule applicable beyond the specific facts of this case.

The GC relied primarily on nine reasons to conclude that the Commission's decision was 'according to law':[53]

(1) The general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified;[54]
(2) Leveraging practices by a dominant undertaking are not, as such, prohibited by Article 102 TFEU;[55]
(3) Dominant undertakings have a special responsibility not to further weaken competition;[56]
(4) Google leveraged its dominant position to favour its own comparison shopping service by prominently

45 On various proposals, see OECD, *What Is Competition on the Merits?* (June 2006), available at https://www.oecd.org/competition/mergers/37082099.pdf. Categorising conduct as either 'abusive' or 'competition on the merits' is typically based on economic knowledge and experience as regards the types of conduct that lead—by and large—to anticompetitive or rather pro competitive outcomes, or to the attainment or some other purpose such as allocative efficiency. This knowledge is usually translated into fact-specific legal tests or principles that aim to 'represent' conceptions of competition on the merits. On this point, see Lindeboom (n 3).

46 *Google Shopping* (n 1) para. 212; referring to European Commission, Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, Case AT.39740, *Google Search (Shopping)*, C(2017) 4444 final, rec. 649.

47 *Google Shopping* (n 1) para. 167.

48 Ibid., at para. 169.

49 According to Pablo Ibáñez Colomo, 'The Future of Article 102 TFEU after *Intel*' (2018) 9 Journal of European Competition Law & Practice 293, the 'capability' threshold applies to 'by object' infringements of Art. 102 TFEU, whereas the 'likelihood' threshold applies to 'by effect' infringements. However, since there was no pre-existing substantive legal test in respect of Google's conduct, existing competition law also did not settle the question of whether this conduct is a 'by object' or a 'by effect' infringement.

50 *Google Shopping* (n 1) para. 518, 541.

51 Ibid., at para. 518.

52 Ibid., at para. 132.

53 This description does not exhaustively enumerate all observations by the GC, but they are the principal reasons for it to conclude that Google's conduct was outside the scope of competition on the merits. As to Google's argument that its conduct amounted to a 'product quality improvement', the GC rejected this argument (Ibid., para. 187), but noted additionally that even if Google's conduct was a product quality improvement, it could still be qualified as abusive (Ibid., para. 188). For that reason, I am excluding this point.

54 Ibid., at para. 155.

55 Ibid., at para. 164.

56 Ibid., at para. 165.

displaying its own comparison shopping service while letting competing comparison shopping services only appear as simple blue links;[57]

(5) The three specific circumstances identified by the Commission cause such self-favouring to be liable to weaken competition;[58]

(6) Google's self-favouring is an 'economic abnormality' in view of the 'universal vocation of Google's general search engine';[59]

(7) The principle of non-discrimination is also a relevant principle in the law regulating internet access providers and equality of opportunity is generally important to ensure effective competition;[60]

(8) Google 'change[d] its conduct on the market for general search services',[61] in a manner that is 'not consistent with the intended purpose of a general search service',[62] and therefore 'cannot, as such, constitute competition on the merits';[63]

(9) The Commission's decision was not inconsistent with the existing case law, including the case law on (different types of) leveraging practices.[64]

These points are partly legal and partly factual. Point (9) can be conceived as an overarching reason for sanctioning the Commission's reasoning as 'reasoning according to law' in that the lack of inconsistency with existing law equals a legal exercise of discretion.[65] (1), (2), (3), and (7) are propositions of law, whereas (4), (5), (6) are statements of fact, and (8) appears a combination of both.

Among the propositions of law, the relevance of (7) is most controversial. Regulation (EU) 2015/2120 does not apply to general search engines, making it legally dubious that a legislative prohibition of discrimination for internet access providers 'cannot be disregarded when analysing the practices of an operator like Google on the downstream market'.[66] As the GC emphasises that this observation is merely 'for the sake of completeness', it is difficult to avoid the impression that the GC is simply invoking additional principles to add weight to its reasoning.

The claim that 'a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators' appears to do considerable work in the GC's analysis, especially in conjunction with its considerations on self-favouring. This makes it somewhat odd that the GC only mentions this at the very end of a paragraph that was only included 'for the sake of completeness'. It is also unfortunate in the sense that equality of opportunity could play an important role in 'rullifying' the GC's holding in *Google Shopping*, a point to which I return below.

Similarly, (1) seems to impose the general principle of equal treatment on dominant undertakings in general. Interestingly, the case law mentioned by the GC relied specifically on Article 102(c) TFEU,[67] while the GC's judgment itself refrains from qualifying Google's conduct as a violation of Article 102(c) TFEU. The most plausible explanation of this oddity may be that the CJEU's judgment in *MEO*—a judgment far more recent than any of the judgments cited by the GC—applied a higher standard for infringement of Article 102(c) TFEU,[68] which requires taking into account all the circumstances that may be helpful in identifying a competitive disadvantage, while also alluding to the relevance of an as-efficient-competitor test.[69] Had the GC applied the 'all the circumstances' standard from *MEO*, it is unclear whether the Commission's decision would still have been in accordance with the law.

The general applicability of the principle of equal treatment is furthermore obscured by the fact that the GC refers to a judgment on the legality of an EU legislative act.[70] That the principle of equality is binding on the EU institutions and, in certain situations, on private parties,[71] hardly proves anything in the specific context of Article 102 TFEU.

Legal propositions (2) and (3) are, by contrast, hardly controversial, but direct neither the Commission nor the GC to any particular conclusion as regards Google's conduct. They are non-redundant but non-dispositive.

57 Ibid., at para. 167–168.
58 Ibid., at para. 169–173.
59 Ibid., at para. 176–179.
60 Ibid., at para. 180.
61 Ibid., at para. 181.
62 Ibid., at para. 184.
63 Ibid., at para. 185.
64 Ibid., at para. 194–197.
65 For a criticism of this approach in light of legal certainty, see Yasmine L. Bouzoraa, 'Between Substance and Autonomy: Finding Legal Certainty in *Google Shopping*' (2022) 13 Journal of European Competition Law & Practice (in this special issue).
66 *Google Shopping* (n 1) para. 180.
67 Case C-242/95 *GT-Link*, EU:C:1997:376, para. 41; Case C-82/01P *Aéroports de Paris v Commission*, EU:C:2002:617, para. 114; Case T-228/97 *Irish Sugar v Commission*, EU:T:1999:246, para. 140.
68 Case C-525/16 *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:270, para. 26.
69 Ibid., at para. 31. Although *MEO* does not *require* the application of an as-efficient-competitor test, the CJEU confirms that a strategy aiming to exclude a trade partners which is at least as efficient as its competitors' is relevant as part of an 'all the circumstances' test. By contrast, in *Google Shopping* the relevance as-efficient-competitor test was dismissed as irrelevant to (non-price) leveraging practices (*Google Shopping* (n 1) para. 538–541.
70 Case C-127/07, *Arcelor Atlantique et Lorraine and Others*, EU:C:2008:728.
71 See e.g. Case C-441/14, *Dansk Industri*, EU:C:2016:278 (in the context of Article 21 EU Charter of Fundamental Rights).

At most, the special responsibility in proposition (3), together with the principle of non-discrimination in proposition (7), exercises normative weight, without limiting the GC's discretion in a meaningful way.

Point (4) ostensibly functions as a statement of fact regarding Google's actual conduct. However, the result of the GC's judgment may well be that self-favouring by a dominant undertaking on an adjacent market is *prima facie* abusive, especially if point (4) is read in conjunction with point (1) on the principle of equal treatment. In that case, the judgment could be read as introducing a presumption of illegality for leveraging through self-favouring in an adjacent market insofar as the conduct is 'liable to lead to a weakening of competition on the market'.[72] This is where the three remaining reasons (5), (6), and (8) in the GC's judgment enter.

Both (5) and (6) are heavily fact-specific. For example, the 'abnormality' identified by the GC is explicitly based on the 'universal vocation' of Google's general search engine.[73] The three factors mentioned by the Commission are also specific to this particular case and the particular economic context of Google's general search engine having 'characteristics akin to those of an essential facility'.[74] Similarly, (8) seems specifically tied to this particular case, as it seems unlikely that dominant undertakings in general have to refrain from changing their conduct. To the extent that Google's specific change of conduct is relevant at a rule-level, it is difficult to distinguish this point from the special responsibility for dominant undertakings.[75]

None of these nine reasons offered by the GC's reasoning, nor any combination of them, seems dispositive for the conclusion that Google's conduct was abusive, or makes this conclusion compelling as reasoning *about* existing law.

The flipside of this point is that there seemed to have been no clear legal rule—neither substantive, nor evidential—that prevented the Commission from reaching its conclusions.

From a dynamic-positivist perspective, absence of pre-existing legal rules equals discretion to develop the law by merits-based reasoning according to other formal and substantive legal constraints. At least after having discredited the applicability of the *Bronner* criteria, the GC simply had very little legal ammunition to annul the substantive dimensions of the Commission's decision, even if it had wanted to do so. Arguably the *only* pre-existing legal constraint weighing in favour of annulling the Commission's qualification of Google's conduct is the principle of legal certainty, but it is doubtful whether the principle of legal certainty, as such, could exercise sufficient normative weight to deny the Commission the discretion conferred to it by law.[76]

This is not to say that one cannot substantially disagree with the overall merits of the Commission's qualification of Google's conduct. In the absence of clear pre-existing rules, each application of Article 102 TFEU reflects, albeit often implicitly, a conception of its underlying purpose(s).[77] In this regard, most applications of the EU competition law provisions are indeed examples of 'constructive teleological interpretation',[78] which means that substantive discussion on the merits of *Google Shopping* is likely to mirror discussion about the goals of EU competition law. However, the CJEU's case law commits to a pluralistic—and therefore indeterminate—conception of these goals.[79] Accordingly, the content of EU competition law has surprisingly little to say about whether the Commission's *Google Shopping* decision was correct or incorrect, beyond the general obligation to rely on factually accurate, reliable, and consistent evidence, which allows the GC to exercise its judicial review.[80]

A final question is whether the GC's observations about the abusive nature of Google's conduct can be construed as a rule. Compared to the GC's conclusions about the scope of the *Bronner* criteria, *Google Shopping* is ambiguous on this point. As mentioned previously, points (5) and (6) seem very specifically linked to the facts of the case. Read together, (1) and (6) are certainly *capable* of entailing a general non-discrimination requirement for dominant undertakings, especially if their conduct is deemed 'economically abnormal'. However, it is by no means clear that the GC intended to introduce a general rule covering *all* discriminatory practices by dominant

72 *Google Shopping* (n 1) para. 169.

73 Ibid., at para. 176.

74 Ibid., at para. 224.

75 Ibid., at para. 183: 'Google subsequently entered the market for specialised comparison shopping search services. [. . .] [I]n view of its "superdominant" position, its role as a gateway to the internet and the very high barriers to entry on the market for general search services, it was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison shopping search services'.

76 See section 4 below. This is not to say that the current state of the law and the scope of the Commission's discretion is normatively satisfactory: Bouzoraa (n 65). See also Eben (n 6).

77 For a conception of rule-based decision-making that conceives of rules as constraints to all-things-considered decision-making, see Frederick Schauer, 'Formalism' (1988) 97 Yale Law Journal 509; and as applied to competition law, Lindeboom (n 3).

78 Makris (n 26)

79 Konstantinos Stylianou and Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation* (December 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795 accessed 21 February 2022.

80 *Google Shopping* (n 1) para. 130–132.

undertakings, and it remains to be seen how future case law conceives of the holding of *Google Shopping*: a non-discrimination requirement in respect of all non-price practices? All leveraging practices? All leveraging practices involving self-favouring and 'economically abnormal' conduct? All leveraging leveraging practices by 'super-dominant' undertakings having characteristics akin to an essential facility? The levels of generality at which the GC's reasoning could be interpreted are multitude.

Accordingly, it is simply unclear whether the GC's reasons for dismissing Google's appeal are based on a rule. Perhaps *Google Shopping* should be interpreted as a non-generalizable judgment that considered the Commission's decision to have remained within the latter's discretion to apply Article 102 TFEU. This interpretation would both significantly limit the practical relevance of the *Google Shopping* judgment for the Article 102 TFEU case law, while augmenting the Commission's discretion to apply Article 102 TFEU. Alternatively, *Google Shopping* could turn out to be a deliberate act of judicial minimalism, deferring the task of fleshing out the content of the rule that has been applied to future judgments.[81] The EU courts are indeed well known for developing the content of EU law using a step-by-step approach.[82]

IV. The legitimacy of reasoning according to law

As noted above, the distinction between law-making and law-application is deeply engrained in many jurisdictions, including that of the European Union. Koen Lenearts, for instance, emphasised the importance of the judiciary's 'external legitimacy', which depends on the separation of law and politics.[83] More generally, the EU courts' case law tends to use a magisterial, self-referential style of adjudication, often disguising judicial law-making as quasi-deductive reasoning about the law as it already existed, ready to be applied by courts.[84] Dynamic theories of law and the distinction between reasoning about the law and reasoning according to law resist the distinction between law-making and law-application. Courts as well as other non-legislative actors frequently make new law by applying existing rules. This raises the question of judicial legitimacy, and more specifically the questions of (i) how judicial decision-making is different from legislative decision-making, and (ii) how administrative and judicial discretion can and should be limited.

As to the first question, both legislatures and courts engage in law-making, but judicial (and administrative) law-making operates within the boundaries of existing substantive law. In contrast, although legislatures are constrained by *formal* and *procedural* rules that ought to be followed, legislative law-making is ordinarily far less constrained by *substantive* law (of a non-constitutional status). The legislature is free to substitute a statute with a completely different one. Law-making by courts and administrative authorities, however, must always be *according to law*, which means it must be consistent with pre-existing law. This substantive constraint provided by pre-existing law distinguishes administrative and judicial law-makers from legislative law-makers.

A. Law-making by discretion in EU competition law

Nevertheless, active law-making by courts is likely to be controversial. This brings us to the second question of how administrative and judicial discretion can and should be limited. Although substantive competition law doctrine offers few reasons to resist the Commission's exercise of discretion in *Google Shopping*, one may criticise the administrative and judicial law-making involved for normative reasons.

Some commentators may go as far as to argue that it is illegitimate in general for competition authorities or courts to rely on merits-based reasoning, instead of merely applying pre-existing rules. Merits-based reasoning by administrative decision-makers would be normatively problematic in light of the separation of powers and the Commission's 'technocratic' task as an administrative body,[85] especially in light of the numerous political and policy trade-offs that competition law invariably entails.[86] However, this critique shoots the messenger.

81 It may seem odd to suggest that future case law should figure out the content of the rule that has been applied in an earlier case. However, courts not only frequently rely on rules that did not pre-exist the case to which they are first applied, they may also rely on rules of whose content they are not entirely aware. See e.g. Arthur Ripstein, *Private Wrongs* (Harvard University Press, Cambridge, MA 2016), which aims to elucidate the underlying moral principles of the—seemingly fragmented, contradictory and confusing—tort case law.

82 Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302; Daniel Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice', in Monica Claes et al (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia, Cambridge 2012).

83 Lenaerts (n 11).

84 Mitchel Lasser, *Judicial Deliberations* (Oxford University Press, Oxford 2009), chs 4 and 7.

85 For a representation of this argument by reference to the idea of 'autonomous law', see Makris (n 14).

86 For a seminal contribution, see Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051. For a recent empirical analysis, see Or Brook, *Non-Competition Interests in EU*

Merits-based reasoning by discretion is the inevitable by-product of the lack of stricter pre-existing rules that would otherwise constrain this discretion. As long as there is no legislation on the scope and meaning of Article 102 TFEU, and the Court's case law is limited mostly to specific types of conduct and accompanying specific substantive legal tests in respect of those types of conduct, the Commission can hardly be criticised legally for taking the discretion that is implicitly conferred to it, and exercising it based on the merits-based principles it deems appropriate.

The dynamic-positivist perspective on competition law abstracts from substantive concerns about legality, which are especially salient in a quasi-criminal law context. Strictly speaking, the exercise of discretion is not problematic under Article 6 of the European Convention of Human Rights and Article 47 of the EU Charter of Fundamental Rights, as Commission decisions remain fully subject to judicial review.[87] It is somewhat ironic, however, that the GC's reasoning qualifies equally as merits-based reasoning according to law. Possible concerns about the legality of punishment of a criminal law nature are simply reproduced at the judicial stage.

From a substantive rather than a strictly legalistic perspective, the classical liberal viewpoint would be that only clearly defined and pre-existing laws are compatible with liberty.[88] Pragmatically, this point of view would translate into an obligation for the GC to conclude that Google did not violate any specific rule pre-existing its conduct.

However, this viewpoint is unrealistic in an EU competition law context, in which the legitimacy of reasoning according to law is implied by the normative structure of EU competition law. Broad and abstract standards such as Article 102 TFEU essentially delegate the task of fleshing out their meaning to competition authorities and courts.[89] A system of 'autonomous competition law', even if it is considered desirable,[90] is only realistic to the extent that a comprehensive system of specific substantive legal tests is already in place.[91] However, as business models and economic structures are in constant development, such a comprehensive system is not plausible for mainstream competition law, which depends on judicially crafted rules that are only created incrementally.

B. Legal certainty in merits-based reasoning according to law

The dynamic-positivist perspective on competition law that I have outlined in this article by no means aims to marginalise concerns about legal certainty and the Rule of Law in the context of *Google Shopping*. Although this dynamic-positivist perspective can be used to explain the logic of the *Google Shopping* judgment specifically and the functioning of EU competition law more generally, it is not a normative endorsement of this explanation.

Legal certainty is obviously a legally binding, general principle of EU law.[92] However, outside the 'hard core' of criminal law, legal certainty, like many principles, operates mainly by having normative weight, rather than in an all-or-nothing fashion.[93] Since Article 102 TFEU offers merely a broad standard, to be specified precisely through discretion, it will generally be difficult to argue *legally* that a particular theory of harm advanced by the Commission—if it complies with requirements regarding evidence, consistency and coherence[94]—violates the principle of legal certainty. What certainty could the party advancing this argument derive from the vague language of Article 102 TFEU? Vagueness generally *legitimises* discretion and purposive interpretation instead of limiting it.[95] A critical assessment of the manner in which Article 102 TFEU is liable to entail legal uncertainty should therefore mainly take place from an external perspective, rather than from an internal perspective within law as such.

Proposals to give more normative weight to legal certainty in the *Google Shopping* case, for example by limiting administrative decisions to a behavioural remedy and not fining the dominant undertaking concerned,[96] or by integrating national administrative and judicial decisions into the normative picture,[97] should be seriously considered

Antitrust Law: An Empirical Study of Article 101 TFEU (Cambridge University Press, Cambridge 2022).

87 ECtHR, *A. Menarini Diagnostics S.R.L. v Italy*, App. No. 43509/08 (27 September 2011); C-272/09P, *KME Germany and Others v Commission*, EU:C:2011:810; C-386/10P, *Chalkor v Commission*, EU:C:2011:815.

88 See generally Friedrich A. Hayek, *The Constitution of Liberty* (University of Chicago Press, Chicago, IL 1960).

89 See Article 1(3) (self-executing nature of Article 102 TFEU), 5 (enforcement powers of national competition authorities), 6 (direct effect of Articles 101 and 102 TFEU) and 7 (enforcement powers of the Commission) Regulation 1/2003.

90 For several conceptual and practical arguments against an 'autonomous law' model of competition law, see Makris (n 26).

91 The proposed Digital Markets Act is particularly interesting in this regard, as it not only aims to foster legal certainty and administrability, but in doing so also departs from a discretion-based model of enforcing substantive law. Nonetheless, the DMA is entirely without prejudice to individualised enforcement of Articles 101 and 102 TFEU: Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, COM/2020/842 final, rec. 9.

92 Takis Tridimas, *General Principles of EU Law* (3rd edn, Oxford University Press, Oxford 2022), ch. 5.

93 Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 25–27. Using Dworkin's language, legal certainty does not 'purport to set out conditions that make its application necessary' (ibid., at 26).

94 *Google Shopping* (n 1) para. 130–132.

95 For analysis, see Schauer (n 77) 540–4; and as applied to competition law, Lindeboom (n 3) section 7.

96 Eben (n 6).

97 Bouzoraa (n 65).

as a matter of policy. The normative structure of Article 102 TFEU, however, makes such proposals difficult to enforce legally. Assuming that the dynamic-positivist perspective is an accurate reflection of the current state of EU competition law enforcement, the following rules and principles may be considered as important norms that can help to ensure legal certainty within this framework, particularly in the context of Article 102 TFEU. These norms are expressly not meant as *legal requirements*, but rather as a merits-based analysis of how legal certainty should be evaluated and could be enhanced.

1. *Systemic coherence*: in evaluating the degree of legal certainty, the entirety of substantive rules, principles, objectives and policy relevant to the case to be decided (or the case that the Commission may wish to pursue) should be taken into account.
2. *Anticompetitive intent*: although intent is neither a necessary nor a sufficient condition to find an abuse of dominance,[98] intent can be taken into account in evaluating the legitimacy and predictability of the application of Article 102 TFEU, especially in cases involving novel theories of harm.
3. *Procedural legitimacy and due process*: predictability and legitimacy are not merely functions of the content of substantive competition law, but also of the procedural system in which Commission decisions are embedded. This procedural system comprises formal procedural safeguards but also soft norms such as administrative reliability, expertise, and good faith.
4. *'Rullifiability' of reasons underlying the decision*: both the Commission but in particular the EU courts should, as much as possible, base their decisions on reasons that can be understood as a (existing or new) rule at the level of a specific substantive legal test.

This list is by no means exhaustive, but may assist in developing a more holistic framework to assess the predictability and overall legitimacy of reasoning according to law, especially by administrative authorities such as the Commission. As regards the first point, predictability should not be merely assessed on the basis of (possibly) applicable substantive legal tests, but also by reference to the role of the special responsibility, possible analogues to the conduct at stake, and the overall philosophy underlying the way in which Article 102 TFEU has been interpreted and applied in previous cases. Predictability could be enhanced by the formulation of up-to-date enforcement policy guidelines along the lines of the Commission's Article 102 TFEU enforcement priorities.[99]

The relevance of intent will necessarily be controversial, especially as 'anticompetitive intent' seems hard to distinguish at a principled level from an intent to compete fiercely. In this regard, the GC's claim that Google's 'infringement was therefore committed intentionally' seems perhaps somewhat assertive,[100] especially as it also concluded that 'the mere intention to compete on the merits, even if it were established, cannot prove the absence of abuse'.[101] Nonetheless, intent may play a role in the evaluation of reasoning according to law, especially in conjunction with the procedural history of the case. Insofar as (internal) statements reveal a clear intention to foreclose competition, legal certainty concerns are less convincing in subsequent enforcement procedures.

As regards procedure more specifically, some scholars have argued for a proceduralisation of the principle of legal certainty. This would entail that legal certainty does not give a right to or the expectation of a specific outcome, but rather the expectation that the outcome is the result of a 'discursive elucidation of the legal and factual issues that arise'.[102] Such a procedural understanding of legal certainty, and the corresponding legitimacy of decisions according to law, goes hand in hand with a high degree of trust in the decision-making process. Institutional legitimacy and reliability would then play a greater role in ensuring predictability, both in the context of commitment negotiations, and more generally in regard to the obligation to state reasons and respond substantially to the argument put forward by the dominant undertaking.[103]

The 'rullifiability' of reasoning according to law does not enhance the predictability of the current decision itself, but does contribute to the overall legitimacy and predictability of competition law enforcement. It emphasises the underlying premise that competition law should apply equally to similarly situated situations, and constrains future decision-making. In this regard, the principal objection to the GC's reasoning in *Google Shopping* may not be that the Commission's decision was not predictable, but that the GC's judgment leaves on the table

98 Case C-307/18, *Generics (UK) and Others*, EU:C:2020:52, para. 162; C-549/10P, *Tomra Systems and Others* v *Commission*, EU:C:2012:221, para. 22.

99 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7. These Enforcement Priorities may however be considered a poor example as the extent to which the Commission has itself used them for guidance, their current status, and their compatibility with the case law of the EU courts have always remained rather obscure.

100 *Google Shopping* (n 1) para. 616.

101 Ibid., at para. 263.

102 Lianos (n 2) 36.

103 See for recent trends to this effect in the case law, Kukovec (n 7).

considerable (future) guesswork about the scope of the rule against self-favouring by dominant undertakings.

V. Conclusion

Existing scholarship about the Commission's case against Google's conduct on the general search and comparison shopping search markets has mostly focused on the question of whether this conduct can be subsumed under any pre-existing substantive legal test. The *Google Shopping* judgment is likely to invite criticism along similar lines.

However, this article argued that this is the wrong question. There is no obligation for either the Commission or the GC to link (allegedly) abusive conduct to a specific substantive legal test pre-existing the case. The normative structure of Article 102 TFEU rather entails that the Commission and the EU courts, within their respective spheres of competence, have broad discretion to interpret and apply Article 102 TFEU to wholly novel types of—what they consider—abuse of a dominant position.

This article aimed to flesh out this logic by reference to a dynamic-positivist perspective on competition law. This perspective emphasises the lack of genuine gaps in competition law, as administrative and judicial actors are given the power to solve any case based on merits-based reasoning in accordance with existing law. Merits-based reasoning creates new law by combining relevant but non-dispositive existing legal norms with newly created rules and principles. Thus, *Google Shopping* has created new law by refining and amending the scope of the *Bronner* criteria and by subsuming Google's conduct under Article 102 TFEU on the basis of a range of legal and factual arguments, all of which support, but neither of which determines, the conclusions drawn by the Commission and the GC.

The legitimacy of merits-based reasoning according to law—and that of the *Google Shopping* judgment specifically—is controversial. This article suggested that a number of norms—systemic coherence, the relevance of anti-competitive intent, procedural legitimacy and due process, and the 'rullifiability' of the reasons underlying the decision—are capable of evaluating and enhancing the legitimacy of competition law enforcement, in the face of the central role of administrative and judicial discretion in EU competition law.

https://doi.org/10.1093/jeclap/lpac008
Advance Access Publication 3 March 2022