СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
SOUDNÍ DVŮR EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN UNION
EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH
SUD EUROPSKE UNIJE
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

CVRIA
LUXEMBOURG

EIROPAS SAVIENĪBAS TIESA
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS
AZ EURÓPAI UNIÓ BÍRÓSÁGA
IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA
HOF VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Grand Chamber)

10 September 2024 *

- 1302871 -

(Appeal – Competition – Abuse of dominant position – Markets for online general search services and specialised product search services – Decision finding an infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA) – Leveraging abuse – Competition on the merits or anticompetitive practice – Dominant undertaking favouring the display of results from its own specialised search service – Potential anticompetitive effects – Causal link between abuse and effects – Burden of proof – Counterfactual scenario – Capability of foreclosing – 'As-efficient competitor' test)

In Case C-48/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 January 2022,

Google LLC, established in Mountain View (United States),

Alphabet Inc., established in Mountain View,

represented by A. Bray, avocate, T. Graf, Rechtsanwalt, D. Gregory, H. Mostyn, Barristers, M. Pickford KC, R. Snelders, advocaat, and C. Thomas, avocat,

appellants,

supported by:

Computer & Communications Industry Association, established in Washington (United States), represented by J. Killick, advocaat, A. Komninos, dikigoros, and A. Lamadrid de Pablo, abogado,

intervener at first instance,

* Language of the case: English.

EN

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre, A. Dawes, N. Khan, H. Leupold and C. Urraca Caviedes, acting as Agents,

defendant at first instance,

supported by:

PriceRunner International AB, established in Stockholm (Sweden), represented initially by M. Jonson, K. Ljungström, F. Norburg, P. Scherp and H. Selander, advokater, and subsequently by K. Ljungström, F. Norburg, P. Scherp and H. Selander, advokater,

intervener in the appeal,

Federal Republic of Germany,

EFTA Surveillance Authority, represented initially by C. Simpson, M. Sánchez Rydelski and M.-M. Joséphidès, and subsequently by C. Simpson, M. Sánchez Rydelski, I.O. Vilhjálmsdóttir and M.-M. Joséphidès, acting as Agents,

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

Infederation Ltd, established in Crowthorne (United Kingdom), represented initially by S. Gartagani, K. Gwilliam, L. Hannah, Solicitors, and A. Howard KC, and subsequently by S. Gartagani, K. Gwilliam, L. Hannah, Solicitors, A. Howard KC and T. Vinje, advocaat,

Kelkoo SAS, established in Paris (France), represented by W. Leslie, Solicitor, and B. Meyring, Rechtsanwalt,

Verband Deutscher Zeitschriftenverleger eV, established in Berlin (Germany),

Ladenzeile GmbH, formerly Visual Meta GmbH, established in Berlin,

BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV, formerly Bundesverband Deutscher Zeitungsverleger eV, established in Berlin,

represented by T. Höppner and P. Westerhoff, Rechtsanwälte,

Twenga SA, established in Paris, represented by L. Godfroid, M. Gouraud and S. Hautbourg, avocats,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, E. Regan, F. Biltgen and O. Spineanu-Matei (Rapporteur), Presidents of Chambers, P.G. Xuereb, L.S. Rossi, I. Jarukaitis, N. Jääskinen, N. Wahl, I. Ziemele and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2023,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2024,

gives the following

Judgment

1 By their appeal, Google LLC and Alphabet Inc. ask the Court of Justice to set aside the judgment of the General Court of the European Union of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)* (T-612/17, EU:T:2021:763) ('the judgment under appeal'), by which the General Court annulled Article 1 of Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)) ('the decision at issue'), in so far only as the European Commission found an infringement of those provisions by Google and Alphabet in 13 national markets for general search services within the European Economic Area (EEA) on the basis of the existence of anticompetitive effects in those markets and dismissed their action as to the remainder.

I. Background to the dispute

2 The background to the dispute, as described in paragraphs 1 to 78 of the judgment under appeal, may be summarised as follows.

A. Context

3 Google is a United States company specialising in internet-related products and services. It is principally known for its search engine, which allows internet users (also referred to as 'users' or 'consumers', depending on the context) to locate and access websites that match their requirements by means of the browser they are using and hyperlinks. Since 2 October 2015, Google has been a wholly owned subsidiary of Alphabet.

4 Google's search engine enables search results to be obtained and displayed on pages appearing on internet users' screens. Those results are either selected by that search engine according to general criteria and without the websites to which they link paying Google in order to appear ('general search results') or selected in accordance with a specialised logic for the particular type of search carried out ('specialised search results'). Specialised search results may appear without any specific intervention on the part of the internet user alongside general search results on the same page ('general results page(s)'), or they may appear alone in response to a query entered by the internet user on one of the specialised pages of Google's search engine or after links appearing in certain areas of Google's general results pages have been activated. Google has developed various specialised search services, for example for news, local business information and offers, flights or shopping. It is the last category that is at issue in this case.

5 Specialised search services for shopping ('comparison shopping services') do not sell products themselves, but compare and select the offers of online sellers offering the product sought. Like general search results, specialised search results may be what are sometimes referred to as 'natural' results, which are not paid for by the websites to which they link, even if they are merchant websites. The order in which those natural results are displayed in the results pages is also independent of payment.

6 Google's general results pages, like those of other search engines, additionally contain results, commonly called 'ads', which, on the other hand, are paid for by the websites to which they link. Those results are also related to the internet user's search and are distinguished from the natural results of a general or specialised search, for example by the word 'Ad' or 'Sponsored'.

7 Google's general results pages can include or have included all types of result referred to in paragraphs 4 to 6 of the present judgment.

8 Search engines other than Google's own offer or have offered general search services and specialised search services. There are also specific search engines for comparison shopping.

9 Google began providing internet users with a comparison shopping service from the end of 2002 in the United States, then approximately two years later, gradually in certain countries in Europe. The comparison shopping results ('product results') were first provided through a specialised search page, called Froogle, which was separate from the search engine's general search page, then, as from 2003 in the United States and 2005 in certain countries in Europe, they were also available from the search engine's general search page. In the latter case, product results were grouped together on the general results pages in what was called the Product OneBox ('Product OneBox'), either below or parallel to the advertisements appearing at the top or at the side of the page and above the general search results.

10 Google stated that, as from 2007, it had changed the way in which it developed product results. The changes made included Google's abandoning the name Froogle in favour of Product Search for its specialised comparison shopping search and results pages.

11 As regards the product results displayed on the general results pages, first, Google enriched the content of the Product OneBox, subsequently renamed Product Universal ('Product Universal'), by adding images. Google also diversified the possible outcomes of the action of clicking on a result link shown: depending on the circumstances, internet users were taken directly to the appropriate page of the website of the seller of the product sought or they were taken to the specialised Product Search results page to view more offers of the same product. Second, Google established a mechanism called Universal Search which, if a shopping search was identified, made it possible to rank, on the general results page, products covered by the Product Onebox, subsequently the Product Universal, against general search results.

12 As regards paid product results 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. 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, together with images and prices ('product ads'), and which appeared either on the right-hand side or at the top of the results page.

13 In 2013, Google discontinued Product Universals and text ad extensions on its general results pages in Europe. As a result, only groups of product ads, renamed 'Shopping Commercial Units' or 'Shopping Units' ('Shopping Units'), text ads and general search results were subsequently shown on those pages. Accordingly, 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 and results 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 menu ('Shopping' menu link). At the same time as Google removed Product Universals from its general results pages, it also stopped displaying natural product results on its specialised Product Search results page, which had become a page containing ads only, called Google Shopping.

B. The administrative procedure

14 On 30 November 2010, the Commission initiated proceedings against Google pursuant to 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).

15 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 the Commission's concerns.

16 On 4 September 2014, the Commission informed Google that it was not in a position to adopt a decision accepting commitments in accordance with Article 9 of Regulation No 1/2003.

17 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 practices at issue constituted an abuse of a dominant position and, therefore, infringed Article 102 TFEU.

18 On 14 July 2016, the Commission initiated proceedings against Alphabet pursuant to Article 2(1) of Regulation No 773/2004 and adopted a supplementary statement of objections addressed to Google and Alphabet.

C. The decision at issue

19 On 27 June 2017, the Commission adopted the decision at issue.

20 In the first place, the Commission concluded that, when investigating the possible dominant position of Google, the relevant markets, which were national in scope, were the market for online general search services and the market for online comparison shopping services.

21 In the second place, the Commission found that, since 2008, Google had held a dominant position on the market for general search services in every EEA country except the Czech Republic, where it had held such a position only since 2011. In reaching that conclusion, it relied inter alia on Google's very high and stable market shares by volume, as observed in various studies. Moreover, it pointed to the low market shares of Google's competitors, the existence of barriers to entry to that market and the fact that few internet users used more than one general search engine. It noted that Google had a strong reputation and that internet users, being independent of one another, did not exert any countervailing buyer power.

22 In the third place, the Commission found that Google had, at different times dating back as far as January 2008, abused the dominant position it held in 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 comparison shopping service, which was capable of having, or was likely to have had, anticompetitive effects on the 13 corresponding national markets for specialised comparison shopping search services and on those 13 national markets for general search services. The countries concerned were

Belgium, the Czech Republic, Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the United Kingdom and Norway.

23 In that regard, first, in Section 7.2 of the decision at issue, 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.

24 More specifically, the conduct identified by the Commission as the source of the abuse was, in essence, the fact that Google displayed its comparison shopping service on its general results pages in a prominent and eye-catching manner in dedicated 'boxes', without that comparison service being subject to its adjustment algorithms used for general searches, including the algorithm called 'Panda', whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results (blue links), never in rich format, which were prone to being demoted within the ranking of generic results by those 'adjustment' algorithms. The Commission pointed out 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 were not applied both to Google's own and to competing comparison shopping services. Similarly, the Commission stated that it did not object, as such, to the promotion of specialised comparison shopping results that Google considered to be relevant, but to the fact that the same promotion effort was not made in respect of both Google's own comparison shopping service and competing comparison shopping services.

25 Second, in Section 7.2.2 of the decision at issue, the Commission examined the value of traffic volume for comparison shopping services. It noted, in that regard, that the volume of traffic was important in many respects for the ability of a comparison shopping service to compete.

26 Third, in Section 7.2.3 of the decision at issue, the Commission stated that the practices at issue 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, on the basis of an analysis of internet users' behaviour, the Commission noted that generic results generated significant traffic to a website when they were ranked within the first three to five results on the first general results page ('above the fold'), internet users paying little or no attention to subsequent results, which often did not appear directly on the screen. Next, the Commission stated that the practices 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 those practices had been implemented. Lastly, the Commission found that those practices had led to an increase in Google's traffic to its own comparison shopping service.

27 Fourth, in Section 7.2.4 of the decision at issue, the Commission claimed that the traffic diverted by the practices at issue accounted for a large proportion of traffic to competing comparison shopping services and that it could not be effectively replaced by other sources of traffic currently available to competing comparison shopping services, namely, inter alia, mobile applications, direct traffic, referrals from other partner websites, social networks and other general search engines.

28 Fifth, in Section 7.3 of the decision at issue, the Commission stated that the practices at issue had potential anticompetitive effects on the 13 national markets for specialised comparison shopping search services and on the 13 national markets for general search services, referred to in paragraph 22 of the present judgment. With regard to the markets for specialised comparison shopping search services, it sought to demonstrate that the practices at issue could cause competing comparison shopping services to cease trading, have a negative impact on innovation and therefore reduce the ability of consumers to access the most relevant services. The competitive structure of those markets would thus be affected. As regards the markets for general search services, according to the Commission, the anticompetitive effects of the practices at issue arise from the fact that the additional resources generated by Google's comparison shopping service from its general results pages enabled it to strengthen its general search service.

29 In Section 7.4 of the decision at issue, the Commission contested the arguments put forward by the appellants in challenging that analysis, to the effect that the legal criteria used were wrong. In Section 7.5 of that decision, it also rejected the reasons put forward by the appellants to demonstrate that the practices at issue were not abusive, whereby they claimed that they were objectively necessary or that any resulting restrictions of competition were offset by efficiency gains benefiting consumers.

30 Accordingly, in Article 1 of the decision at issue, the Commission declared that Google and Alphabet, since its takeover of Google, had infringed Article 102 TFEU and Article 54 of the EEA Agreement in the 13 countries referred to in paragraph 22 of the present judgment, from various dates corresponding to the introduction of specialised product results or product ads on Google's general results page.

31 The Commission ordered Google inter alia to cease the practices at issue. It made clear that although Google could comply with that order in different ways, certain 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 shopping services. Lastly, by Article 2 of the decision at issue, the Commission imposed on Google a pecuniary penalty of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet.

II. The action before the General Court and the judgment under appeal

32 By application lodged at the Registry of the General Court on 11 September 2017, Google brought an action seeking the annulment of the decision at issue and, in the alternative, the annulment or the reduction of the fine which had been imposed on it.

33 By order of the President of the Ninth Chamber of the General Court of 17 December 2018, Computer & Communications Industry Association ('CCIA') was granted leave to intervene in support of the form of order sought by the appellants. By orders of the same day, the Federal Republic of Germany, the EFTA Surveillance Authority, the Bureau européen des unions de consommateurs (BEUC), Infederation Ltd ('Foundem'), Kelkoo SAS, Verband Deutscher Zeitschriftenverleger eV ('VDZ'), Ladenzeile GmbH, formerly Visual Meta GmbH, BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV, formerly Bundesverband Deutscher Zeitungsverleger eV ('BDZV'), and Twenga SA were granted leave to intervene in support of the form of order sought by the Commission.

34 By order of the President of the Ninth Chamber of the General Court of 11 April 2019, confidential treatment was granted inter alia to Annex A.1 to the application.

35 By decision of 10 July 2019, the General Court referred the case to a Chamber sitting in extended composition.

36 In support of its action, Google raised six pleas in law, which it presented as follows:

'The First and Second pleas show that [the decision at issue] 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 at issue] 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 at issue]'s speculation about anticompetitive effects is unfounded. The Fifth plea shows that [the decision at issue] errs in law by treating quality improvements that constitute competition on the merits as abusive. The Sixth plea sets out why [the decision at issue] errs in imposing a fine.'

37 By the judgment under appeal, the General Court largely dismissed the action and confirmed the Commission's analysis of the market for specialised comparison shopping search services.

38 The General Court emphasised at the outset that Google did not dispute the fact that it held a dominant position on the 13 national markets for general search services corresponding to the countries in which the Commission had found that Google had abused that position. It stated that that fact was a premiss on which all the analyses that followed were based.

39 In the first place, the General Court examined the fifth plea in law and the first part of the first plea in law, alleging that the practices at issue were consistent with competition on the merits. First, it rejected the appellants' arguments that those practices were quality improvements that constituted competition on the merits and could not be treated as abusive. Second, it rejected the appellants' arguments to the effect that the Commission required Google to provide competing comparison shopping services with access to its improved services without satisfying the conditions identified in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). Third, it rejected the appellants' arguments to the effect that the facts presented by the Commission were misstated, since Google had introduced grouped product results to improve the quality of its service, not to drive traffic to its own comparison shopping service.

40 In the second place, the General Court examined the second part of the first plea and the first, second and, in part, third parts of the second plea, alleging that the practices at issue were not discriminatory. In that regard, it rejected the appellants' complaints that the Commission had erred in finding that Google had favoured its own comparison shopping service by showing Product Universals and Shopping Units, and the complaints that the competing comparison shopping services had already been included in the Shopping Units, with the result that there could not have been any favouring.

41 In the third place, the General Court examined the third and fourth pleas in law, alleging that the practices at issue did not have any anticompetitive effects. First, it rejected the appellants' arguments that the Commission had not proved that the practices at issue had led, on the one hand, to a decrease in traffic from Google's general results pages to competing comparison shopping services and, on the other hand, to an increase in traffic from Google's general results pages to its own comparison shopping service. Second, it considered that the appellants' arguments that the Commission had speculated about the anticompetitive effects of the practices at issue should be rejected so far as the markets for comparison shopping services are concerned and should be upheld with regard to the national markets for general search services. Third, it rejected the appellants' arguments that the role of merchant platforms had not been taken into account in the analysis of the effects of the practices at issue. Fourth, it rejected the appellants' arguments that the Commission failed to show anticompetitive effects attributable to the practices at issue in the national markets for comparison shopping services.

42 In the fourth place, the General Court rejected the third part of the first plea in law and, in part, the third part of the second plea in law, alleging that there were objective justifications for showing Product Universals and Shopping Units.

43 By contrast, as regards the national markets for general search services, the General Court considered that the Commission had relied on considerations too imprecise to show that there were anticompetitive effects, even potential effects, with the result that the first part of the appellants' fourth plea, alleging that the

analysis of the anticompetitive effects of the practices at issue was purely speculative, was upheld in so far as concerns those markets.

44 Thus, the General Court annulled the decision at issue in so far only as the Commission found an infringement by Google and Alphabet of Article 102 TFEU and Article 54 of the EEA Agreement on 13 national markets for general search services within the EEA on the basis of the existence of anticompetitive effects on those markets and dismissed the action as to the remainder. In the exercise of its unlimited jurisdiction, it maintained in full the fine imposed on the appellants by the Commission.

III. Procedure before the Court of Justice

45 By order of the President of the Court of Justice of 22 March 2022, *Google and Alphabet* v *Commission* (C-48/22 P, EU:C:2022:207), Annex 2 to the appeal, lodged at the Registry of the Court of Justice by the appellants on 2 February 2022, was to be treated as confidential, vis-à-vis CCIA, the Federal Republic of Germany, the EFTA Surveillance Authority, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga, interveners at first instance, and only the non-confidential version of that annex was required to be served on those interveners.

46 By order of the President of the Court of 1 September 2022, *Google and Alphabet* v *Commission* (C-48/22 P, EU:C:2022:667), PriceRunner International AB ('PriceRunner') was granted leave to intervene in support of the form of order sought by the Commission. In that order, Annex 2 to the appeal was also to be treated as confidential, vis-à-vis PriceRunner.

47 By order of the President of the Court of 1 September 2022, *Google and Alphabet* v *Commission* (C-48/22 P, EU:C:2022:668), FairSearch AISBL's application for leave to intervene in support of the form of order sought by the Commission was dismissed.

IV. Forms of order sought by the parties to the appeal

48 By their appeal, the appellants claims that the Court should:

- set aside the judgment under appeal;
- annul the decision at issue or in the alternative refer the case back to the General Court;
- order the Commission to pay the costs incurred in the proceedings at first instance and on appeal; and
- order PriceRunner to pay the costs relating to its intervention.

49 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

50 PriceRunner claims that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs incurred by it.

51 CCIA contends that the Court should:

– set aside the judgment under appeal, in so far as it upholds the decision at issue;

– annul the decision at issue in its entirety or in the alternative refer the case back to the General Court; and

– order the Commission to pay the costs incurred by it.

52 The EFTA Surveillance Authority claims that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

53 BEUC claims that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs incurred by it in the appeal.

54 Foundem claims that the Court should:

– dismiss the appeal as manifestly inadmissible or as unfounded in its entirety; and

– order the appellants to pay the costs incurred by it.

55 Kelkoo claims that the Court should:

– dismiss the appeal as inadmissible in so far as it is directed against findings of fact made by the General Court and as unfounded as to the remainder; and

– order the appellants to pay the costs incurred by it.

56 VDZ, Ladenzeile and BDZV claim that the Court should:

– dismiss the appeal as a whole; and

– order the appellants to pay the costs, including the costs incurred by them.

57 Twenga claims that the Court should:

– dismiss the grounds of appeal put forward by the appellants;

– uphold the judgment under appeal;

– uphold the decision at issue; and

– order the appellants to pay the costs.

58 At the hearing on 19 September 2023, in response to a question put by the Court of Justice, the appellants stated that they were seeking to have the judgment under appeal set aside only in so far as the General Court had dismissed their action at first instance, formal note of which was taken in the minutes of the hearing. Thus, the appellants withdrew the appeal in so far as it was directed against the part of the judgment under appeal in which the General Court had upheld their claims.

V. The appeal

59 The appellants raise four grounds in support of their appeal. The first ground of appeal alleges that the General Court erred in law in upholding the decision at issue despite the fact that it failed to meet the legal test for a duty to supply access to comparison shopping services. The second ground of appeal alleges that the General Court erred in law in upholding the decision at issue despite the fact that it failed to identify conduct that deviated from competition on the merits. The third ground of appeal alleges that the General Court erred in its review of the causal link between the alleged abuse and likely effects. The fourth ground of appeal alleges that the General Court erred in holding that the Commission did not have to examine whether the conduct was capable of foreclosing as-efficient competitors.

A. Admissibility

60 Foundem submits that the appeal should be dismissed as manifestly inadmissible. It maintains, in essence, that the appellants, without openly challenging the facts established in the judgment under appeal, seek to substitute them with their own version of those facts, which is contrary to the findings of the General Court. That misrepresentation and distortion of the facts affects each of the four grounds of appeal, since the legal arguments put forward in support of those grounds are based on factual inaccuracies.

61 In that regard, it is sufficient to recall that, in accordance with Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute a point of law which

is subject, as such, to review by the Court of Justice on appeal (judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraph 60 and the case-law cited).

62 Accordingly, first, the fact that the appellants base the legal arguments put forward in their appeal on a misrepresentation of the facts established in the judgment under appeal must be assessed in the context of the examination of the merits of that judgment. Second, a criticism alleging a misleading presentation of the facts established in the judgment under appeal, which does not challenge the accuracy of those facts, even if it is well founded, is not such as to entail the inadmissibility of the appeal.

63 Furthermore, in the present case, the appeal identifies with sufficient precision, in each of its grounds of appeal, the contested paragraphs of the judgment under appeal and sets out the grounds on which those paragraphs are, according to the appellants, vitiated by errors of law, thus enabling the Court of Justice to carry out its review of legality.

64 It is apparent from the foregoing considerations that the present appeal is admissible.

B. Substance

1. The first ground of appeal

(a) Arguments of the parties

65 By the first ground of appeal, which consists of two parts, the appellants, supported by CCIA, complain that the General Court endorsed the decision at issue even though the Commission had not demonstrated that the conditions required to establish a duty to supply, established by the case-law and recalled in paragraphs 213, 215 and 216 of the judgment under appeal, had been met.

66 In that regard, the appellants submit that Google was criticised, in essence, for having failed to provide competing comparison shopping services with access to prominent, dedicated boxes on its results pages, which had rich display features, and which were not prone to demotion by algorithms such as Panda.

67 By the first part of the first ground of appeal, the appellants complain that, in paragraphs 224 to 228 of the judgment under appeal, the General Court unlawfully substituted for the Commission's assessment in the decision at issue its own assessment that the conditions required to establish a duty to supply had been met. According to the appellant, the General Court stated that Google's general results page had characteristics akin to those of an essential facility (paragraph 224); that the Commission had considered Google's traffic indispensable for competing comparison shopping services (paragraph 227); and that the Commission found a risk of elimination of all competition

(paragraph 228). The decision at issue does not include such findings, as indeed the General Court itself confirmed in paragraph 223 of the judgment under appeal, when it stated that the Commission had not referred to the criteria for duty to supply.

68 By the second part of the first ground of appeal, the appellants submit that the General Court erred in law, in paragraphs 229 to 249 of the judgment under appeal, in so far as it held that the Commission was not required, in order to determine the existence of the alleged abuse, to apply the test established in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

69 In that regard, the appellants claim that, in paragraphs 220, 229 and 287 of the judgment under appeal, the General Court identified the alleged abuse as being, in essence, a breach by Google of its duty to supply access. However, in paragraph 229 of that judgment, the General Court held that the practices at issue could be distinguished in their constituent elements from the refusal to supply at issue in the case giving rise to the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

70 By the first complaint, the appellants criticise the General Court for having held, in paragraphs 237 to 240 of the judgment under appeal, that the present case had to be distinguished from a case relating to a refusal to supply, because it involved a 'difference in treatment'. A case relating to a refusal to supply is only one particular type of case concerning a difference in treatment, since it involves the undertaking concerned retaining an asset for its own benefit, while refusing to supply it to its competitors.

71 According to the appellants, the problem identified in the present case was the existence of a facility, consisting of boxes, to which competing comparison shopping services did not have access and the fact that that facility was more attractive, in terms of placement, features and a lack of demotions, than the facility to which those comparison shopping services were actually offered 'access', in the words used by the General Court in paragraphs 219 and 243 of the judgment under appeal, namely the presentation of generic results. Describing the alleged abuse as a combination of several practices, namely the display of results from Google's comparison shopping service in prominent boxes and a display of results from competing comparison shopping services in generic results that may be demoted, is merely another way of expressing the fact that Google treated results from its comparison shopping service differently from those of competing comparison shopping services on the ground that it did not provide the latter with access to boxes. Therefore, contrary to what the General Court stated in paragraph 232 of the judgment under appeal, the difference in treatment at issue is not an 'extrinsic practice' distinct from access.

72 By the second complaint, the appellants claim that, in paragraphs 177, 219 and 243 of the judgment under appeal, the General Court, unlawfully and incorrectly,

described the decision at issue as relating to the conditions of the supply by Google of its general search service by means of access to the general results pages, rather than as relating to a duty to supply access to a distinct facility.

73 First, the appellants submit that the General Court 'rewrote' the decision at issue, finding in paragraph 219 of the judgment under appeal that, 'contrary to the Commission's contention', what is at issue in the present case are the conditions of Google's supply of its general search service by means of access to the general search results pages', whereas such a finding does not appear in that decision.

74 Second, according to the appellants, the General Court erred in its legal characterisation of the present case in describing it as concerning conditions of supply. This case does not concern the conditions of supply, that is to say, the commercial terms under which a company, having chosen to supply another, then makes its products or services available. Nor is the infrastructure at issue the entirety of Google's result page. On the contrary, it follows from the decision at issue that boxes constitute a distinct facility with their own technical infrastructure and that Google is criticised for not having given competing comparison shopping services access to those boxes. The fact that Google provided competing comparison shopping services with access to its generic results does not change this. Therefore, as in all cases involving duty to supply, the issue in the present case concerns an undertaking's right to choose who has access to a given facility. In those circumstances, the reference, in paragraphs 234 to 236 and 239 of the judgment under appeal, to the case-law on margin squeeze practices is irrelevant.

75 By the third complaint, the appellants assert that, in paragraphs 232 and 233 of the judgment under appeal, the General Court wrongly rejected the duty to supply test on the ground that there was no express request for access from the competitor and no express refusal by the dominant undertaking. First, the General Court erred in law since the case-law does not require the existence of an express request and refusal of access. Second, the General Court's formalistic approach is contrary to the legal and economic rationale of the duty to supply. It is necessary to determine whether the present case meets the requisite legal thresholds for imposing such a duty, which constitutes interference with fundamental freedoms and an exception to competition in a market-based economy. By contrast, the existence or otherwise of an express request is irrelevant. Third, the General Court's reasoning departs from the decision at issue, which found that there was a request for access and a refusal of access to Shopping Units.

76 By the fourth complaint, the appellants criticise the General Court for having, in paragraph 240 of the judgment under appeal, rejected the duty to supply test on the ground that it classified the conduct at issue as 'active', namely Google's different treatment of results from its own comparison shopping service as compared with results from competing comparison shopping services. The decision at issue objects to the 'passive' failure to supply other comparison shopping services with the same access as provided to Google's comparison shopping service. According to the appellants, characterising conduct as 'active'

or 'passive' is not a pertinent point of distinction between this case and refusal to supply cases generally.

77 By the fifth complaint, the appellants dispute the findings of the General Court, in paragraph 246 of the judgment under appeal, by which it held that the remedies in the decision at issue were irrelevant for the purpose of assessing the nature of the alleged abuse. The Commission identified only two measures to put an end to the abuse, since Google could either enter into agreements with competing comparison shopping services to give them the same access to its boxes as its comparison shopping service or remove the display of boxes. The decision at issue was thus clearly aimed at addressing a concern that Google was refusing to supply access to infrastructure that it was in law required to give.

78 The Commission, PriceRunner, the EFTA Surveillance Authority, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga dispute the appellants' arguments and contend that the first ground of appeal should be rejected as inadmissible, ineffective or unfounded. In particular, according to the appellants, that ground of appeal is based on the incorrect premiss that, in the decision at issue, as upheld by the judgment under appeal, the impugned conduct consisted solely in Google prominently displaying results from its comparison shopping service and refusing to give competing comparison shopping services access to a separate facility, allegedly made up of boxes, namely the Products Universals and subsequently the Shopping Units.

(b) Findings of the Court of Justice

(1) The second part of the first ground of appeal

79 By the second part of the first ground of appeal, which must be examined in the first place, the appellants criticise paragraphs 229 to 249 of the judgment under appeal, on the ground that, by refusing to apply the conditions established in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), to the present case, the General Court applied an incorrect legal test in order to assess whether there was an abuse of a dominant position.

80 In that regard, the General Court held, in paragraph 229 of the judgment under appeal, that while the practices at issue were not unrelated to the issue of access, they could nevertheless be distinguished in their constituent elements from the refusal to supply at issue in the case giving rise to the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), which vindicated the Commission's decision to consider them from the aspect of conditions other than those referred to in that judgment.

81 In paragraphs 230 and 231 of the judgment under appeal, the General Court stated that not every issue of, or partly of, access, like that in the present case, necessarily means that the conditions set out in that judgment must be applied, in particular, as the Commission stated in the decision at issue, where the practice in

question consists in independent conduct which, while it may have the same exclusionary effects, can be distinguished, in its constituent elements, from a refusal to supply.

82 In paragraphs 232 and 233 of the judgment under appeal, the General Court explained, in essence, that a refusal to supply justifying the application of the conditions set out in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), implies, first, that it is express, that is to say, that there is a request or, in any event, a wish to be granted access and a consequential refusal, and, second, that the impugned conduct lies principally in the refusal as such, and not in an extrinsic practice such as, in particular, another form of leveraging abuse. According to the General Court, the lack of such an express refusal precludes practices from being described as a refusal to supply where, notwithstanding that those practices might ultimately result in an implicit refusal of access, they constitute, in view of their constituent elements which deviate, by their very nature, from competition on the merits, an independent infringement of Article 102 TFEU.

83 In paragraph 234 of the judgment under appeal, the General Court added that, although all or at the very least most 'exclusionary practices' are liable to constitute implicit refusals to supply, since they tend to make access to a market more difficult, the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), cannot be applied to all of those practices without disregarding the spirit and the letter of Article 102 TFEU, the scope of which is not limited to abusive practices relating to 'indispensable' goods and services within the meaning of that judgment.

84 In paragraph 235 of the judgment under appeal, the General Court observed that, in a number of cases which raised issues of access to a service, such as margin squeeze practices, it was not necessary to demonstrate that the condition as to indispensability was satisfied. In that regard, it considered, in paragraph 236 of the judgment under appeal, that it cannot be inferred from the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), that the conditions required in order to establish the existence of an abusive refusal to supply must necessarily apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser, since such conduct may, in itself, constitute an independent form of abuse distinct from the refusal to supply.

85 In paragraphs 237 to 241 of the judgment under appeal, the General Court considered, in essence, that the present case was not concerned merely with a unilateral refusal by Google to supply a service to competing undertakings that was necessary in order to compete on a neighbouring market, but with a difference in treatment that is contrary to Article 102 TFEU. It observed that the practices at issue were 'active' by nature, in the form of positive acts of discrimination between Google's comparison shopping service and competing comparison shopping services and that those practices constituted an independent form of

leveraging abuse from a dominated market, characterised by high barriers to entry, namely the market for general search services. According to the General Court, the Commission was therefore not required to establish that the conditions set out in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), were satisfied in order to find that there was an abuse of a dominant position.

86 In paragraphs 242 to 247 of the judgment under appeal, the General Court rejected, inter alia, Google's argument that the decision at issue required it, in essence, to transfer a valuable asset, namely the space allocated to search results. It explained that the obligation for an undertaking which is abusively exploiting a dominant position to transfer assets, enter into agreements or give access to its service under non-discriminatory conditions does not necessarily involve the application of the conditions set out in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). There could, after all, be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied. The General Court added that the fact that one of the ways of ending the abusive conduct was to allow competitors to appear in the boxes displayed at the top of the Google results page did not mean that the abusive practices should be limited to the display of those boxes and the conditions for identifying the abuse should be defined having regard to that aspect alone.

87 In order to assess whether, as the appellants claim, those considerations are vitiated by an error of law, it is important to recall that Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. The purpose of that provision is to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 124 and the case-law cited).

88 Such conduct covers any practice which, on a market where the degree of competition is already weakened precisely because of the presence of one or more undertakings in a dominant position, through recourse to means different from those governing normal competition between undertakings, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 125 and the case-law cited).

89 As regards practices consisting in a refusal to grant access to infrastructure developed by a dominant undertaking for the purposes of its own business and owned by it, it is apparent from the case-law of the Court of Justice that such a

refusal may constitute an abuse of a dominant position provided not only that that refusal is likely to eliminate all competition in the market in question on the part of the entity applying for access and that such a refusal is incapable of being objectively justified, but also that the infrastructure, in itself, is indispensable to carrying on that undertaking's business, inasmuch as there is no actual or potential substitute in existence for that infrastructure (see, to that effect, judgments of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 41, and of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraph 79 and the case-law cited).

90 The imposition of those conditions, in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), was justified by the specific circumstances of that case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct (judgments of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 45, and of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraph 80).

91 A finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor. Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, since an undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs (judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 46).

92 In the present case, the appellants claim that, despite the fact that they had identified, in paragraphs 220, 229 and 287 of the judgment under appeal, the alleged abuse in terms that demonstrate that it ultimately concerns whether Google is under an obligation to supply competing comparison shopping services with access to such an infrastructure, the General Court, in paragraphs 229 and 240 of that judgment, wrongly concluded that Google's practices can be distinguished in their constituent elements from a refusal of access such as that at issue in the case that gave rise to the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569) and that, therefore, the conditions laid down in that judgment do not apply to those practices.

93 By their first two complaints, the appellants criticise the General Court, in particular, for having considered that the present case concerned a 'difference in treatment' as regards Google's conditions of supply of its general search service by means of access to the general results pages, rather than an obligation to supply access to a separate facility, consisting of dedicated boxes positioned prominently on its results pages, which had rich display features, and which were not prone to demotion by algorithms such as Panda.

94 In that regard, it should be noted, in the first place, that the appellants have misread paragraphs 220, 229 and 287 of the judgment under appeal.

95 It is true that the General Court noted, in paragraph 220 of the judgment under appeal, that 'Google is accused of failing to make a similar type of positioning and display available to competing comparison shopping services as is available to its own comparison service'. In paragraph 229 of that judgment, it noted that 'the practices at issue, as Google maintains, are not unrelated to the issue of access'. In paragraph 287 of that judgment, it found that, 'even if the results from competing comparison shopping services would be particularly relevant for the internet user, they can never receive the same treatment as results from Google's comparison shopping service, whether in terms of their positioning, since, owing to their inherent characteristics, they are prone to being demoted by the adjustment algorithms and the boxes are reserved for results from Google's comparison shopping service, or in terms of their display, since rich characters and images are also reserved to Google's comparison shopping service'.

96 However, contrary to what the appellants claim, the General Court, in paragraphs 220, 229 and 287 of the judgment under appeal, in no way identified the alleged abuse in terms which demonstrate that it was ultimately a question of ascertaining whether Google was under an obligation to supply access to boxes, namely the Products Universals and subsequently the Shopping Units.

97 It is apparent from the very wording of those paragraphs and from a reading of those paragraphs in their context, and in particular from paragraphs 219 to 229 and 288 of the judgment under appeal, that Google was accused of failing to allow comparison shopping services competing with its comparison shopping service to benefit, on its general results pages, from similar visibility to that enjoyed by the latter and, therefore, of failing to ensure equal treatment between its own comparison shopping service and competing comparison shopping services. More specifically, Google's alleged conduct consisted, as the General Court also recalled in paragraphs 187 and 261 of that judgment, in the combination of two practices: (i) the more favourable positioning and display of Google's own specialised results within its general results pages than the positioning and display of results from competing comparison shopping services; and (ii) the simultaneous demotion of results from competing comparison shopping services by the application of adjustment algorithms.

98 Furthermore, since the appellants also rely on the relevance of the remedies provided for in the decision at issue, it is sufficient to note that those measures did not require Google to give access to the boxes. It follows from paragraphs 71 and 221 of the judgment under appeal that the Commission ordered Google to put an end to the impugned conduct, emphasising that although Google could comply with that order in different ways, any measure of implementation had to ensure that Google did not treat competing comparison shopping services 'less favourably' than its own comparison shopping service within its general results pages and that any such measure should subject Google's own comparison

shopping service to the 'same [...] processes and methods' for positioning and display as those used for competing comparison shopping services.

99 The description of the conduct at issue in the judgment under appeal thus makes it clear that that conduct concerned the discriminatory positioning and display on the general results pages of Google's general search service and not access to the boxes.

100 Thus, in paragraph 177 of the judgment under appeal, the General Court stated, inter alia, that the infrastructure at issue was Google's general results pages which generated traffic to other websites, including those of competing comparison shopping services, and that that infrastructure was, in principle, open.

101 In addition, in paragraphs 219 and 243 of the judgment under appeal, the General Court pointed out that what was at issue was the conditions of the supply by Google of its general search service through access by competing comparison shopping services to the general results pages.

102 Lastly, after summarising, in paragraphs 220 and 221 of the judgment under appeal, the content of recitals 662 and 699 and recital 700(c) of the decision at issue, the General Court found, in paragraph 222 of that judgment, that that decision concerned equal access of Google's comparison shopping service and competing comparison shopping services to Google's general results pages, irrespective of the types of results concerned (generic results, Product Universals or Shopping Units) and therefore did indeed seek to grant competing comparison shopping services access to Google's general results pages with positioning and display that is as visible as those of Google's comparison shopping service.

103 It is thus common ground that, when it noted, in paragraph 229 of the judgment under appeal, that the practices at issue 'are not unrelated to the issue of access', the General Court referred not to the access of competing comparison shopping services to boxes, but to their access to Google's general results pages under non-discriminatory conditions.

104 In the second place, the General Court cannot be criticised for having substituted, in paragraph 219 of the judgment under appeal, its own assessment for that set out in the decision at issue. The description of the conduct at issue, as set out by the General Court, is merely a way of describing the fact that Google was criticised for the more favourable positioning and display, in Google's general search results pages, of its own comparison shopping service compared with competing comparison shopping services, which is stated several times in the decision at issue and in the judgment under appeal, with slight variations in the wording used.

105 In the third place, it is not possible to uphold the appellants' argument that boxes constitute a separate facility from Google's general results pages, with the result that the General Court should have considered that the issue in the present case was whether it was justified to require Google to give competing comparison shopping services access to that facility. As the Advocate General observed, in

essence, in points 114 and 115 of her Opinion, even if they are highlighted on Google's general results page, boxes do not constitute an infrastructure that is separate from that page in the sense of an independent results page.

106 Furthermore, it is common ground that comparison shopping services competing with Google's own comparison shopping service had access to its general search service and to the general results pages. Google is therefore in no way criticised for refusing that access.

107 Accordingly, the disadvantage which results for comparison shopping services competing with Google from the combination of the two practices at issue – namely, first, the more favourable positioning and display of its own specialised results in its general results pages than those of the results of competing comparison shopping services and, second, the simultaneous demotion, by adjustment algorithms, of results from competing comparison shopping services – concerns the conditions of access to Google's general results page, and not access to an allegedly separate infrastructure, consisting of boxes.

108 In the fourth place, as the General Court noted, in essence, in paragraphs 223, 237 and 240 of the judgment under appeal, the Commission found in the decision at issue that, by the combination of those two practices and therefore by the discrimination between its own comparison shopping service and competing comparison shopping services on its general search pages, Google was leveraging its dominant position on the market for general search services, which was characterised by high barriers to entry, in order to favour its own comparison shopping service on the market for comparison shopping services, and that that conduct led to the potential or actual foreclosure of competition on that downstream market.

109 In the light of that fact, the General Court found, in paragraphs 229 and 240 of the judgment under appeal, that the Commission was not required to establish that the conditions laid down in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), recalled in paragraph 89 of the present judgment, were satisfied, in order to make a finding of infringement on the basis of the practices found, since those practices can be distinguished in their constituent elements from the refusal of access at issue in the case that gave rise to that judgment in *Bronner* and constitute an independent form of leveraging abuse.

110 As recalled in paragraph 90 of the present judgment, it is apparent from the case-law arising from the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), that the imposition of the conditions referred to in paragraph 41 of that judgment was justified by the particular circumstances of the case which gave rise to that judgment, which consisted in a refusal by a dominant undertaking to give a competitor access to an infrastructure that it had developed for the purposes of its own business, to the exclusion of any other conduct.

111 By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), do not apply. It is true that where access to such an infrastructure – or service or input – is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anticompetitive effects and will constitute abuse within the meaning of Article 102 TFEU. However, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purposes of examining potentially abusive conduct on the part of a dominant undertaking (judgments of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 50, and of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraph 50 and the case-law cited).

112 While such practices can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned, they cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted. The measures that would be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business (judgments of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 51, and of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraph 51).

113 Since, as has been stated in paragraphs 105 to 107 of the present judgment, Google gives competing comparison shopping services access to its general search service and to the general results pages, but makes that access subject to discriminatory conditions, the conditions established in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), do not apply to the conduct at issue.

114 Consequently, the General Court was right to find, in paragraphs 229 and 240 of the judgment under appeal, that the Commission had not erred in law by failing to assess whether the conduct at issue satisfied those conditions.

115 It follows from the foregoing that the first and second complaints must be rejected.

116 Consequently, the third to fifth complaints, concerning paragraphs 232, 233, 240 and 246 of the judgment under appeal, are ineffective.

117 By those complaints, the appellants submit that the General Court was wrong to reject the applicability of those conditions, in paragraphs 232 and 233 of the judgment under appeal, on the ground that there was no request for access or an express refusal, and, in paragraph 240 of that judgment, on the ground that the conduct at issue, namely Google's different treatment of results from its comparison shopping service as compared with results from competing comparison shopping services, was 'active' rather than 'passive' conduct. They claim that, in paragraph 246 of the judgment under appeal, the General Court erred in finding that remedies of the decision at issue were irrelevant for assessing the nature of the alleged abuse.

118 Even if those findings of the General Court were vitiated by errors of law, they do not need to be analysed, since it did not err in law in finding that the conduct at issue did not constitute a refusal of access subject to the conditions laid down in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

119 Consequently, the second part of the first ground of appeal must be rejected.

(2) The first part of the first ground of appeal

120 By the first part of the first ground of appeal, the appellants criticise the General Court for having unlawfully substituted, in paragraphs 224 to 228 of the judgment under appeal, its own assessment for that of the Commission in the decision at issue to the effect that the conditions laid down in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), were satisfied, whereas no such finding was made in the decision at issue.

121 However, given that, as stated in paragraph 118 of the present judgment, the General Court did not err in law in finding that Google's impugned conduct did not have to be assessed in accordance with those conditions, the first part of the first ground of appeal must be rejected as ineffective.

122 In the light of the foregoing, the first ground of appeal must be rejected in its entirety.

2. The second ground of appeal

(a) Arguments of the parties

123 By the second ground of appeal, which consists of three parts, the appellants, supported by CCIA, claim that, if the alleged abuse was not a refusal to supply access, the decision at issue should, in order to establish an infringement of Article 102 TFEU, have identified another 'extrinsic practice' and established that that practice deviated from competition on the merits. In that regard, as the General Court observed in particular in paragraphs 162 to 164 of the judgment under appeal, it is insufficient merely to identify extension by leveraging of a

dominant position from one market into a neighbouring market, even if that extension leads to the disappearance or marginalisation of competitors.

124 By the first part of the second ground of appeal, the appellants submit that the General Court erred in law in that, in paragraphs 175 and 197 of the judgment under appeal, it found that circumstances relating to the likely effect of Google's conduct, summarised in paragraphs 169 to 174 of that judgment, were capable of determining whether Google competed on the merits.

125 More specifically, the appellants assert that, in paragraphs 195 and 196 of the judgment under appeal, the General Court acknowledged that recital 341 of the decision at issue was not sufficient to assess the merits of the conduct at issue, since it related 'solely to the exclusionary effects' of Google's conduct, but stated that that recital had to be read in conjunction with recital 342 of that decision, which set out three circumstances. In paragraphs 169, 175, 196, 197, 219 and 283 of that judgment, those circumstances were considered by the General Court to be relevant for the purpose of characterising the difference in treatment between Google and its competitors as a deviation from competition on the merits.

126 According to the appellants, those three circumstances do not relate to the nature of Google's conduct, but to the importance and sources of search traffic and concern the alleged likely effects of that conduct. They do not therefore provide a valid basis for deciding whether Google deviated from competition on the merits by treating itself differently from competitors.

127 In their reply, the appellants maintain that, although the factors taken into account in order to establish a deviation from competition on the merits must not only relate to the nature of the conduct at issue, they must nevertheless make it possible to characterise that nature. Thus, contrary to what the Commission maintains, mere factors surrounding that conduct cannot suffice.

128 By the second part of the second ground of appeal, the appellants submit that the General Court erred in law in that it unlawfully 'rewrote' the decision at issue. It set out three additional grounds, which did not appear in that decision, in order to fill a gap in the reasoning of that decision and to explain how the conduct at issue had supposedly deviated from competition on the merits. Those three additional grounds are, first, a stricter legal test for 'superdominant' undertakings (paragraphs 180, 182 and 183 of the judgment under appeal); second, the fact that it is abnormal for Google to limit 'the scope of results to its own' because Google is open to showing results for all content (paragraphs 176 to 184); and, third, the description of the conduct complained of as discriminatory treatment (paragraphs 124, 237, 240, 279 and 284 to 289).

129 In their reply, in the first place, the appellants dispute the Commission's observation that the General Court put forward only two of those grounds for the sake of completeness, namely that relating to the abnormality of Google's conduct (paragraphs 176 to 179 of the judgment under appeal), and that relating to the

application of a stricter legal test on account of Google's 'superdominance' (paragraph 180). In the second place, the appellants refute the idea that the General Court's statement that Google changed its conduct (paragraphs 181 to 184) merely constitutes, as the Commission also suggested, 'an additional explanation'.

130 By the third part of the second ground of appeal, the appellants claim that the additional grounds relied on by the General Court, as set out in the second part of the second ground of appeal, to explain why Google did not compete on the merits are, in any event, legally invalid.

131 By their first complaint, the appellants maintain that, in paragraphs 180, 182 and 183 of the judgment under appeal, the General Court applied an erroneous legal test by relying on a concept of 'superdominant' position in order to assess the merits of Google's conduct. First, the degree of dominance has no bearing on whether abuse of a dominant position exists, as such, within the meaning of Article 102 TFEU. Second, according to the appellants, the General Court was wrong to find that, because of Google's 'superdominant' position, the equal treatment rule for internet access providers under Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks and services within the Union (OJ 2015 L 310, p. 1), had to be taken into account in assessing Google's conduct under Article 102 TFEU. Characterising Google as 'superdominant' or as a 'gateway to the Internet' cannot expand the application of the equal treatment rule in such a way as to introduce more expansive obligations under Article 102 TFEU.

132 By the second complaint, the appellants assert that, in paragraphs 176 to 179 of the judgment under appeal, the General Court erred in law in finding that it was abnormal for a search service to show only its own results. They also dispute the General Court's statements, in paragraphs 181 to 184 of that judgment, because there was no change in Google's conduct that rendered a deviation from competition on the merits all the more obvious.

133 By the third complaint, the appellants argue that, in paragraphs 71, 124, 237, 240, 279 and 284 to 288 of the judgment under appeal, the General Court erred in characterising Google's conduct as discriminatory.

134 First, the appellants maintain that the General Court failed to adopt a consistent approach in defining the two elements which were treated in a discriminatory manner. According to the appellants, in paragraph 285 of the judgment under appeal, in its analysis of the alleged discrimination, the General Court objected to Google's different treatment of results depending on whether they came from its own comparison shopping service or from competing comparison shopping services. By contrast, in paragraph 575 of the judgment under appeal, in its

analysis of objective justification, it found that the Commission's concern in the decision at issue was to ensure equal treatment between two types of Google results, namely generic results and specialised results.

135 Second, according to the appellants, the General Court erred in failing to establish that Google had engaged in an arbitrary difference in treatment, as merely engaging in different treatment is not sufficient to find discrimination. They maintain that it is not arbitrary for a search service to act solely as a producer of its own results, based on its data and algorithms. Furthermore, Google's inability to present specialised results from third parties of the same reliability and quality as its own results is a relevant objective difference. For the same reasons, the General Court's criticism, expressed in paragraphs 287, 291 and 292 of the judgment under appeal, to the effect that specialised product results from third parties did not receive the same treatment as Google's own, even if they were particularly relevant, is unfounded. As a producer of search results, Google shows the best results that it can produce. Furthermore, the appellants submit that, although they are criticised for treating two types of Google results differently, as is apparent from paragraph 575 of the judgment under appeal, that difference was also based on objective and reasonable considerations.

136 In their reply, the appellants assert that a dominant undertaking deviates from competition on the merits if it impairs the quality of its service and acts against its interest.

137 The Commission, PriceRunner, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga dispute the appellants' arguments and contend that the second ground of appeal must be rejected as being, in part, inadmissible and ineffective and, in any event, unfounded.

(b) Findings of the Court of Justice

138 By the second ground of appeal, the appellants allege that the General Court committed an error of law in finding that the Commission had established that the conduct at issue fell outside the scope of competition on the merits.

139 In that regard, the General Court considered, in paragraphs 166 and 167 of the judgment under appeal, that, in order to conclude that there had been an infringement of Article 102 TFEU, the Commission had not relied solely on leveraging practices, but had considered that, by means of such an effect, Google had 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, by promoting the positioning and display of that comparison shopping service and of its results on its general results pages, as compared to competing comparison shopping services.

140 In paragraph 168 of the judgment under appeal, the General Court stated that, in recital 344 of the decision at issue, the Commission had observed that while

results from competing comparison shopping services could appear only as generic results, that is to say, simple blue links that were also prone to being demoted in Google's general results pages by adjustment algorithms, results from Google's own comparison shopping service were prominently positioned at the top of those general results pages, displayed in rich format and incapable of being demoted by those algorithms. The General Court added that, according to the Commission, those practices resulted in a difference in treatment in the form of Google's favouring of its own comparison shopping service.

141 In paragraphs 169 to 173 of the judgment under appeal, the General Court noted that, in Sections 7.2.2. to 7.2.4. of the decision at issue, the Commission had explained in particular that, on account of three specific circumstances, that favouring was liable to lead to a weakening of competition on the market. It set out the Commission's analysis of those three circumstances, also referred to in paragraph 196 of that judgment, which were (i) the importance of traffic generated by Google's general search engine for comparison shopping services, (ii) the behaviour of users when searching online and (iii) the fact that diverted traffic from Google's general results pages accounted for a large proportion of traffic to competing comparison shopping services and could not be effectively replaced by other sources.

142 In paragraph 174 of the judgment under appeal, the General Court concluded that the Commission, without committing any error of law, had considered that the importance of Google's traffic from its general search pages and the nature of that traffic as being not effectively replaceable constituted, in view of the background recalled in paragraphs 168 to 173 of that judgment, relevant circumstances capable of characterising the existence of practices falling outside the scope of competition on the merits.

143 In paragraph 175 of the judgment under appeal, the General Court found that the Commission did not merely identify leveraging but classified Google's accompanying practices in law on the basis of relevant criteria. It thus held that, if the favouring and its effects, identified in the light of the specific circumstances of the relevant markets, were validly demonstrated by the Commission, which was verified subsequently by the General Court, the Commission was fully entitled to take the view that that favouring was a departure from competition on the merits.

144 In paragraph 189 of the judgment under appeal, the General Court added that that conclusion was not undermined by CCIA's arguments that the lack of a clear legal test in the decision at issue infringed the principle of legal certainty. In that regard, it noted, in paragraph 195 of that judgment, that it is true that recital 341 of that decision set out the reasons why the practices at issue departed from competition on the merits, stating, in essence, that, first, those practices had diverted traffic and, second, they were capable of having anticompetitive effects. Accordingly, by that recital, read in isolation, the Commission seemed to have inferred from the existence of exclusionary effects arising from those practices that they deviate from competition on the merits.

145 In paragraph 196 of the judgment under appeal, the General Court considered, however, that recital 341 of the decision at issue should be read in conjunction with recital 342 thereof, in which the Commission had stated, 'to demonstrate why the conduct is abusive and falls outside the scope of competition on the merits', that the practices at issue consisted in Google favouring its own comparison shopping service at the expense of competing comparison shopping services and that that favouring occurred within a particular context. That recital listed the numerous aspects which the Commission took into account in order to demonstrate why the practice at issue deviated from competition on the merits and, in particular, the three specific circumstances set out in Sections 7.2.2. to 7.2.4. of the decision at issue and referred to in paragraphs 170 to 173 of that judgment.

146 In paragraph 197 of the judgment under appeal, the General Court thus held that the Commission's analysis resulting in a finding of leveraging abuse made it possible to conclude that there was an infringement on the basis, first, of suspect elements in the light of competition law which were absent in the case of a refusal of access, in particular an unjustified difference in treatment, and, second, of specific circumstances, relating to the nature of the infrastructure from which that difference in treatment arose, in this instance, the importance of Google's traffic from its general search pages and the fact that it is not effectively replaceable.

(1) The first part of the second ground of appeal

147 By the first part of the second ground of appeal, the appellants complain, in essence, that the General Court erred in law, in paragraphs 175 and 197 of the judgment under appeal, in finding that the three specific circumstances referred to in paragraphs 169 to 174 and 196 of that judgment were relevant for the purpose of determining whether the conduct at issue fell within the scope of competition on the merits.

(i) Admissibility

148 The Commission contends that the first part of the second ground of appeal is inadmissible. The appellants cannot claim for the first time before the Court of Justice that those three circumstances, set out in Section 7.2 of the decision at issue, related to the capability of the conduct at issue to restrict competition rather than to the fact that that conduct fell outside the scope of competition on the merits.

149 In order to rule on the plea of inadmissibility thus raised by the Commission, it should be noted that, by that first part of the second ground of appeal, the appellants challenge part of the General Court's response to the fifth plea of the action at first instance, set out in paragraphs 169 to 175 and 197 of the judgment under appeal.

150 According to the summary in paragraph 136 of that judgment, by the first part of the fifth plea in law, the appellants asserted that the decision at issue failed to identify anything in Google's conduct, which consisted in making quality improvements in its online search service, that would represent a departure from competition on the merits.

151 By the first part of the second ground of appeal, the appellants dispute the General Court's interpretation and application of EU law, which led it to find, in paragraphs 175 and 197 of the judgment under appeal, that the Commission had not relied solely on the existence of exclusionary effects resulting from the practices at issue in order to conclude that those practices deviated from competition on the merits.

152 In that regard, it must be noted that, according to the case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice a plea in law which it did not raise before the General Court would in effect allow that party to bring before the Court of Justice a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it. However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 9 December 2020, *Groupe Canal +* v *Commission*, C-132/19 P, EU:C:2020:1007, paragraph 28 and the case-law cited).

153 In addition, a ground of appeal must seek not the annulment of the decision challenged at first instance but rather to have the judgment under appeal set aside by advancing a line of argument specifically identifying the error of law allegedly vitiating that judgment, failing which it is inadmissible. Accordingly, an appellant is entitled to lodge an appeal relying on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 77 and the case-law cited).

154 In the present case, contrary to what the Commission maintains, the arguments put forward by the appellants in the context of the first part of the second ground of appeal are closely linked to the fifth plea set out in the application at first instance, which called into question the findings set out in recital 341 of the decision at issue, according to which the practices at issue fall outside the area of competition on the merits, and, in so far as they seek to demonstrate that the General Court was wrong to find, in paragraphs 175 and 197 of the judgment under appeal, that the Commission had classified in law the practices at issue accompanying leveraging, on the basis of relevant criteria, they are an amplification of that plea, not a new plea raised for the first time in the appeal.

155 Moreover, the appellants do not merely reproduce the arguments relied on at first instance, but claim that the General Court, in responding to those arguments,

vitiated the judgment under appeal by an error of law. Consequently, although, as the Commission asserts, part of the appellants' line of argument is put forward for the first time before the Court of Justice, the fact remains that it arose from the judgment under appeal itself.

156 The first part of the second ground of appeal is therefore admissible.

(ii) Substance

157 After observing, in paragraphs 164 and 165 of the judgment under appeal, that leveraging practices of a dominant undertaking are not prohibited as such by Article 102 TFEU and that the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened, the General Court held, in paragraphs 166 to 175 of the judgment under appeal, that the Commission, in the decision at issue, had not merely identified leveraging but classified Google's accompanying practices in law on the basis of relevant criteria, with the result that it had not erred in law in finding that the conduct at issue, consisting of Google's favouring its own comparison shopping service, did not fall within the scope of competition on the merits.

158 Similarly, in paragraphs 195 to 197 of the judgment under appeal, the General Court held that the Commission had not inferred the leveraging abuse from the existence of exclusionary effects arising from those practices, but had justified its analysis on the basis, first, of suspect elements in the light of competition law, in particular an unjustified difference in treatment, and, second, of specific relevant circumstances relating to the nature of the infrastructure giving rise to that difference in treatment, which had in fact enabled it to conclude that there had been an infringement of Article 102 TFEU.

159 As regards the specific circumstances found by the Commission in the decision at issue, set out in paragraphs 169 to 173 of the judgment under appeal, the first of those circumstances concerned the importance of traffic generated by Google's general search engine for comparison shopping services. The General Court noted, in particular, that the Commission had explained that that traffic produced positive network effects, in that the more a comparison shopping service was visited by internet users, the greater the relevance and usefulness of its services and the more merchants were inclined to use them. It added that the loss of that traffic could lead to a vicious circle and, eventually, to market exit.

160 The second circumstance was the behaviour of users when searching online. The General Court noted, inter alia, that the Commission had stated that those users typically concentrated on the first three to five search results and paid little or no attention to the remaining results, particularly those below the part of the screen that was immediately visible, and that they tended to assume that the most visible results were the most relevant, irrespective of their actual relevance.

161 The third circumstance was the impact of diverted traffic. According to the General Court, the Commission emphasised that that traffic represented a large proportion of traffic to competing comparison shopping services and that it could not be effectively replaced by other sources, including by text ads, mobile applications, direct traffic, referrals to partner websites, social networks or other search engines.

162 As is apparent from paragraphs 174 and 197 of the judgment under appeal, the General Court concluded that the Commission, without committing any error of law, had considered that the importance of Google's traffic from its general search pages and the nature of that traffic as being not effectively replaceable constituted, in view of the background recalled in paragraphs 168 to 173 of that judgment, relevant circumstances capable of characterising the existence of practices falling outside the scope of competition on the merits.

163 In order to assess whether the findings of the General Court thus set out are vitiated by an error of law, as the appellants claim, it must be borne in mind that, whilst a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market, Article 102 TFEU does not sanction the existence per se of a dominant position, but only the abusive exploitation thereof (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 128 and the case-law cited).

164 It is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. On the contrary, competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 126 and 127 and the case-law cited).

165 In order to find, in a given case, that conduct must be categorised as 'abuse of a dominant position' within the meaning of Article 102 TFEU, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned, or by hindering their growth on those markets, although the latter may be either the dominated markets or related or neighbouring markets, where that conduct is liable to produce its actual or potential effects (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 129 and the case-law cited).

166 That demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130 and the case-law cited).

167 In addition, conduct may be categorised as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market or markets concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131 and the case-law cited).

168 It follows from that case-law that the relevant factual circumstances include not only those that concern the conduct itself, but also those that concern the market or markets in question or the functioning of competition on that or those market(s). Thus, circumstances relating to the context in which the conduct of the undertaking in a dominant position is implemented, such as the characteristics of the sector concerned, must be regarded as relevant.

169 It must be stated that the specific circumstances set out in paragraphs 169 to 173 of the judgment under appeal constituted elements of the context in which Google's general search engine and comparison shopping services functioned, and in the context of which the conduct in question was implemented.

170 In particular, contrary to what the appellants claim, those circumstances do not relate solely to the effects of the practices at issue or to the elements merely surrounding those practices, but are, as the General Court pointed out in paragraph 174 of the judgment under appeal, capable of characterising the existence of practices falling outside the scope of competition on the merits.

171 Those circumstances were relevant for the purpose of classifying the practices at issue in law – namely, first, the more favourable positioning and display of Google's own specialised results in its general results pages than those of results from competing comparison shopping services and, second, the simultaneous demotion, by adjustment algorithms, of results from competing comparison shopping services – since they enabled those practices to be placed in the context

of the two relevant markets and the functioning of competition on those markets and were thus capable of demonstrating that potential exclusionary effects on the downstream market, namely, that of specialised comparison shopping search services, and the success of Google's comparison shopping service on that market since the implementation of those practices, referred to in the decision at issue, were due not to the merits of that service but to those practices combined with the specific circumstances identified.

172 Thus, the General Court in no way confused the analysis of the conduct at issue in order to determine whether it departed from competition on the merits and the analysis of the effects of that conduct. On the contrary, as the Advocate General noted, in essence, in point 143 of her Opinion, it is apparent from what is stated in paragraphs 168 to 175 of the judgment under appeal that the General Court carefully examined whether, in the decision at issue, the Commission had been entitled to find, without committing any error, that the practices at issue, and not only their effects, could be classified in law as practices deviating from competition on the merits.

173 It follows from the foregoing that paragraphs 175 and 197 of the judgment under appeal are not vitiated by any error of law.

174 Consequently, the first part of the second ground of appeal must be rejected.

(2) The second and third parts of the second ground of appeal

175 By the second part of the second ground of appeal, the appellants allege that the General Court relied on reasons concerning deviation from the means of competition on the merits that were not contained in the decision at issue and that it substituted its own reasoning for that of the Commission, thereby committing an error of law. Those additional reasons concern, first, a stricter legal test for assessing 'superdominant' companies (paragraphs 180, 182 and 183 of the judgment under appeal), second, the assessment that, in the light of the, in principle, open infrastructure of Google's search engine, the fact that some of its own specialised search results are promoted over competing search results involves 'abnormality' (paragraphs 176 to 184) and, third, the assessment that the conduct at issue was discriminatory (paragraphs 71, 124, 237, 240, 279 and 284 to 289).

176 By the third part of the second ground of appeal, the appellants submit that, in any event, those additional grounds are wrong in law.

177 It is appropriate to examine, in the first place, the appellants' arguments by which they argue, in the second part of the second ground of appeal, that the classification of the conduct complained of as discriminatory does not appear in the decision at issue and, in the third part, that, in any event, that classification is incorrect.

178 First, contrary to the appellants' arguments, which refer to paragraphs 71, 124, 237, 240, 279, 284 to 289 and 316 of the judgment under appeal, it is not apparent from those paragraphs that the General Court added a classification of the conduct at issue to that adopted by the Commission.

179 First, in paragraphs 71 and 124 of the judgment under appeal, the General Court did not classify that conduct. In the first of those paragraphs, it merely summarised the order to cease and desist formulated in Article 3 of the operative part of the decision at issue. In the second paragraph, it announced the way in which it would examine the appellants' arguments, stating that it would carry out an examination of whether there was in fact a difference in treatment underpinning that classification of favouritism by the Commission, namely whether or not Google discriminated in favour of its own specialised search service.

180 Second, it is apparent from paragraphs 237, 240, 279 and 284 to 289 of the judgment under appeal that the General Court examined the Commission's classification of the conduct at issue. Thus, in paragraphs 237 and 240, the General Court, in essence, relying on the decision at issue, upheld the Commission's assessment that the practices at issue, in the form of positive acts of discrimination in the treatment of results from Google's comparison shopping service, were an independent form of leveraging abuse from a dominated market, characterised by high barriers to entry, namely the market for general search services. Furthermore, in paragraphs 279 and 284 to 289, the General Court examined the difference in treatment found by the Commission as regards, inter alia, the positioning and display of Product Universals, in order to ascertain whether the Commission was right in finding discrimination. Paragraph 316 of the judgment under appeal belongs to the part of that judgment devoted to that examination concerning Shopping Units.

181 It is thus clear from those paragraphs, referred to by the appellants, which cite them in isolation from the other paragraphs of the General Court's reasoning to which they refer, that the General Court based its reasoning on the decision at issue and upheld the Commission's classification, without adding any new classification which was not supported by that decision.

182 Second, it is necessary to examine whether, as the appellants submit, the General Court erred in law in finding that there was discrimination without establishing that Google had engaged in arbitrary different treatment.

183 As is apparent, in essence, from paragraphs 168 to 174, 237, 240, 279 and 284 to 289 of the judgment under appeal, the General Court, first of all, noted that, according to the Commission, the conduct at issue consisted in treating results from comparison shopping services differently depending on whether they originated from Google's comparison shopping service or from competing comparison shopping services, in terms of display and positioning on the general

results pages, and led to a difference in treatment in the form of Google's favouring its own comparison shopping service.

184 Next, the General Court pointed out that, on account of the three specific circumstances to which it had referred, the Commission had considered that that favouring was liable to lead to a weakening of competition on the market and that it could be classified in law as a matter of conduct which did not fall within the scope of competition on the merits.

185 Lastly, the General Court held that the conduct at issue was implemented through leveraging, consisting in Google's exploiting its dominant position on the upstream market for online general search services, characterised by high barriers to entry, in order to gain competitive advantages on the downstream market for specialised product search services, on which it did not hold such a position, and by favouring its own comparison shopping service.

186 It is important to add that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case.

187 However, in the present case, the General Court, in upholding the Commission's analysis, did not merely note the existence of such more favourable treatment by Google of its own comparison shopping service, but established that, having regard to the characteristics of the upstream market and the specific circumstances identified, the conduct at issue, with its two components, namely the highlighted presentation of its own results and the demotion of those of competing operators, was discriminatory and did not fall within the scope of competition on the merits.

188 As regards the appellants' line of argument by which they rely, in essence, on Google's inability to display specialised results from third parties of the same reliability and quality as its own results, that line of argument must be rejected in accordance with the case-law referred to in paragraph 61 of the present judgment, since, by that line of argument, the appellants call into question the General Court's assessment of the facts, without alleging distortion.

189 It is also necessary to reject the appellants' argument by which they claim, with reference to paragraphs 285 and 575 of the judgment under appeal, that the General Court did not adopt a consistent approach in defining the two elements, which were treated in a discriminatory manner.

190 The General Court noted, in particular in paragraph 285 of the judgment under appeal, that the differentiated treatment applied by Google was based on the origin of the results, that is, whether they came from competing comparison shopping services or from its own comparison shopping service, with Google favouring the latter compared to the former, rather than one type of result over another depending on its content.

191 In paragraph 575 of the judgment under appeal, in its analysis of the objective justification, the General Court did indeed consider that the Commission had sought only equal treatment, in terms of positioning and display, of two types of Google results. However, it is apparent from the part of the General Court's reasoning in which that paragraph appears, in particular from paragraphs 574 and 576 of that judgment, that the Commission criticised Google for not having treated results from competing comparison shopping services in the same way as results from its own comparison shopping service. The reference to 'two types of Google results' referred to in paragraph 575 of that judgment therefore constitutes a clerical error, the General Court having moreover repeatedly stated that Google's conduct consisted of treating results differently according to their origin and not according to their content.

192 Consequently, the definition of the subject of the discrimination in the judgment under appeal is not inconsistent and the General Court cannot be criticised for having erred in law in finding that the conduct at issue could be classified as discriminatory and that it did not fall within the scope of competition on the merits.

193 In those circumstances, it is necessary to reject the appellants' arguments by which they assert, in the second part of the second ground of appeal, that the classification of the conduct complained of as discriminatory was not contained in the decision at issue and, in the third part of the second ground of appeal, that that classification was, in any event, incorrect.

194 In the second place, the appellants claim, in the second part of the second ground of appeal, that, in paragraphs 176 to 184 of the judgment under appeal, the General Court put forward two other additional considerations which did not appear in the decision at issue, namely, first, a stricter legal criterion for assessing 'superdominant' undertakings and, second, in the light of the fundamentally open infrastructure of Google's search engine, the fact that some of its own specialised search results were promoted over competing search results was an abnormality. In the third part of the second ground of appeal, the appellants submit that, in any event, those considerations are unfounded.

195 In that regard, it is true that, in paragraphs 176 to 184 of the judgment under appeal, the General Court put forward considerations which did not derive from the reasoning of the decision at issue. The same is true of those considerations relating to the abnormality of Google's conduct and its superdominance on the market for general search services and of those relating to the obligation of non-discrimination arising from the provisions of Regulation 2015/2120.

196 However, although the only considerations which the General Court expressly indicated as being for the sake of completeness are those set out in paragraph 180 of the judgment under appeal, the considerations set out in paragraphs 176 to 179 and 181 to 184 of the judgment under appeal were also set out for the sake of completeness.

197 In paragraphs 175 and 185 of the judgment under appeal, the General Court held, in essence, that, even if the favouritism and its effects, identified in the light of the specific circumstances of the relevant markets, had been validly demonstrated by the Commission, the Commission was fully entitled to take the view that that favouring was a departure from competition on the merits. That conclusion at the end of paragraph 185 of that judgment merely refers to the considerations set out in paragraphs 170 to 173 of that judgment, without referring to the additional considerations set out by the General Court in paragraphs 176 to 184 of that judgment, criticised by the appellants.

198 Furthermore, as is apparent from paragraph 192 of the present judgment, those considerations were not necessary to confirm the assessment that the conduct at issue could be regarded in law as falling outside the scope of competition on the merits.

199 Consequently, the appellants' complaints raised in the second and third parts of the second ground of appeal, by which they criticise paragraphs 176 to 184 of the judgment under appeal, must be rejected as ineffective and, therefore, those two parts must be rejected in their entirety.

200 In the light of all of the foregoing, the second ground of appeal must be rejected in its entirety.

3. The third ground of appeal

201 By the third ground of appeal, which consists of three parts, the appellants claim that the General Court erred in law in the analysis of the causal link between the alleged abuse and its likely effects.

202 By the first part of the third ground of appeal, the appellants claim that, in the present case, the General Court erred in law when it held, in paragraphs 377 to 379 of the judgment under appeal, that the burden of conducting a counterfactual analysis lay with Google, rather than the Commission. By the second part of the third ground of appeal, they submit that the General Court erred in law in holding, in paragraphs 374, 376 and 525 of that judgment, that a counterfactual scenario for an abuse that consists in the combination of two lawful practices required the removal of both practices. By the third part of the third ground of appeal, they maintain that the General Court's incorrect approach to what constitutes a correct counterfactual scenario invalidated its assessment, in paragraph 572 of the judgment under appeal, of the objective justifications and effects of the conduct concerned.

(a) Admissibility

203 BEUC, VDZ, Ladenzeile and BDZV submit that the third ground of appeal is inadmissible. They maintain that, by that ground of appeal, the appellants seek to call into question the General Court's assessment of the evidence, in particular the

two counterfactual scenarios which the appellants had submitted during the administrative procedure, or merely reiterate arguments already put forward before the General Court. For its part, without formally raising an objection of inadmissibility, the Commission submits that the General Court's assessment of those counterfactual scenarios is definitively established in paragraphs 369 to 376 of the judgment under appeal, in the absence of any allegation of distortion by the appellants.

204 In their reply, the appellants assert that the third ground of appeal is admissible. They state that the criticisms that they make in the context of that ground of appeal relate to the General Court's incorrect assessment of the legal concept of the counterfactual analysis in the specific context of conduct including several practices whose combined effect adversely affects competition on the merits, which constitutes an error of law.

205 It must be observed, in the first place, that, as has been recalled in paragraph 61 of the present judgment, the jurisdiction of the Court of Justice in an appeal against a decision of the General Court is limited to points of law, since the assessment of the facts and evidence does not, save where the facts or evidence are distorted, constitute a point subject to review by the Court of Justice.

206 The questions whether, first, the Commission is under a systematic obligation to carry out a counterfactual analysis in cases under Article 102 TFEU and, second, which criteria must be addressed by a counterfactual scenario in order that it may reflect what would have happened in the absence of the alleged abuse in the particular case of conduct consisting of several practices the combined effect of which constitutes an adverse effect on competition on the merits are points of law, amenable to review by the Court of Justice on appeal.

207 In the second place, as is apparent from the settled case-law of the Court of Justice, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his or her appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (see, to that effect, judgment of 19 October 2023, *Aquino* v *Parliament*, C-534/22 P, EU:C:2023:802, paragraphs 69 and 70 and the case-law cited).

208 In the present case, the appellants do not merely reproduce the arguments relied on at first instance, but claim that the General Court, in responding to those arguments, vitiated the judgment under appeal by an error of law.

209 It follows that the third ground of appeal is admissible.

(b) Substance

(1) The first part of the third ground of appeal

(i) Arguments of the parties

210 By the first part of the third ground of appeal, the appellants claim that the General Court erred in law, in paragraphs 377 to 379 of the judgment under appeal, in finding that the burden of conducting a counterfactual analysis lay with Google, since the Commission had found potential and not actual anticompetitive effects. In the absence of a counterfactual analysis carried out by the Commission, its claims relating to the anticompetitive effects of the allegedly abusive conduct remain abstract, because there is no reference point against which to assess those effects.

211 By the first complaint, the appellants assert that the General Court unlawfully departed from the decision at issue in finding that that decision had identified potential anticompetitive effects and not actual effects. In recital 462 of that decision, the Commission stated that the alleged abuse had had actual and not only potential effects, because the conduct at issue had led to a decrease in traffic from Google's generic search pages to competing comparison shopping services. Moreover, the General Court itself also relied on that actual effect on traffic when it concluded, in paragraph 519 of the judgment under appeal, that the conduct at issue had been capable of restricting competition. Therefore, given such actual anticompetitive effects, the Commission should have conducted a counterfactual analysis.

212 By the second complaint, the appellants claim that, irrespective of whether the effects of the conduct at issue were actual or potential, any assessment of those effects would have required the Commission to conduct a counterfactual analysis, since such an analysis is inherent in the concept of causation.

213 In that regard, the appellants submit, in the first place, that the EU Courts have repeatedly confirmed the need for the Commission to conduct a counterfactual analysis in the context of Article 101 TFEU, with the result that there is no reasonable basis for a different approach in the context of Article 102 TFEU.

214 In the second place, the appellants claim that paragraph 21 of the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7) confirms that the alleged abusive conduct should usually be assessed on the basis of an appropriate counterfactual scenario.

215 In the third place, the appellants maintain that, contrary to what is stated in paragraph 377 of the judgment under appeal, counterfactual scenarios based on real contexts, namely developments in similar markets in Member States in which the Commission did not identify instances of abuse, existed in the present case. In

addition, according to the appellants, even in the absence of such scenarios, the Commission cannot be exempted from carrying out a counterfactual analysis in order to explain, in a reasoned manner, what the likely situation would be without the alleged abuse. Thus, in the present case, the absence of an 'objective analysis' of a counterfactual scenario should have constituted a sufficient ground for annulling the decision at issue.

216 In their reply, the appellants deny that their complaints are ineffective, as the Commission contends. In response to the Commission's line of argument, concerning, first, the undisputed increase in traffic to Google's comparison shopping service, on which the finding of anticompetitive effects of the conduct at issue is also based, second, the superfluous nature of paragraphs 377 and 378 of the judgment under appeal and, third, the undisputed nature of the impact of the algorithms ranking Google's generic results on traffic, found by the General Court in paragraph 393 of that judgment, the appellants submit, first of all, that, in so far as it was found that the conduct at issue caused both decreases and increases in traffic, the disputed decrease is sufficient to invalidate the finding of an increase. Next, the appellants dispute that the reasons set out by the General Court in paragraphs 377 to 379 of that judgment were set out for the sake of completeness and assert that those reasons entail necessary elements of its reasoning. Lastly, the appellants claim that paragraph 393 of the judgment under appeal is precisely part of the error identified by the appeal, since it shows that the General Court attributed the decrease in traffic to competing comparison shopping services not to the conduct at issue as a combination of the two practices but only to one of those practices, namely the use of the algorithms ranking generic results.

217 The Commission, PriceRunner, the EFTA Surveillance Authority, BEUC, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga dispute the appellants' arguments and contend that the first part of the third ground of appeal is ineffective or, in any event, unfounded.

(ii) Findings of the Court of Justice

218 Paragraphs 377 to 379 of the judgment under appeal, which are challenged in the first part of the third ground of appeal, concern the General Court's analysis of the causal link between the conduct at issue and the decrease in traffic from Google's general results pages to competing comparison shopping services.

219 As regards the first complaint, it must be observed that recital 426 of the decision at issue is set out in Section 7.2 of that decision relating to the conduct at issue and concerns the analysis of the impact of that conduct on traffic generated by Google's general results pages to competing comparison shopping services, carried out by the Commission in Section 7.2.3.2 of that decision. The Commission found there that there was a decrease in that traffic in each of the 13 EEA countries in which those practices had been implemented.

220 By contrast, it was in Section 7.3 of the decision at issue that the Commission analysed the effects of the conduct at issue, which it classified as potential anticompetitive effects capable of affecting the competitive structure of the relevant markets. Those potential effects consisted, as noted in paragraph 451 of the judgment under appeal, in a risk that competing comparison shopping services might cease trading and in a negative impact on innovation and on the ability of consumers to access the most relevant services.

221 The evidence concerning the variation in traffic from Google's general results pages to competing comparison shopping services and to its own comparison shopping service did not therefore constitute actual anticompetitive effects relied on by the Commission, but tangible evidence on which the finding of the potential anticompetitive effects of the conduct at issue was based. As is also apparent from paragraphs 445 to 450 and 454 of the judgment under appeal, the General Court considered that the Commission, after carrying out an analysis covering several periods and following a reasoned argument, inferred that there were potential anticompetitive effects in the markets for comparison shopping services by relying on specific information concerning the evolution of traffic from Google's general results pages to competing comparison shopping services and to its own comparison shopping service, as well as the share which that traffic represented as a proportion of competing comparison shopping services' overall traffic. In so doing, the General Court did not deviate from the decision at issue, since the anticompetitive effects found by that decision remained potential while being inferred from specific information derived from the evolution of traffic.

222 Consequently, the first complaint must be rejected as unfounded.

223 By the second complaint, the appellants seek to demonstrate, in essence, that the General Court reversed the burden of proof by upholding the decision at issue without the Commission's having conducted a counterfactual analysis in order to establish the causal link between the conduct at issue and its effects.

224 In that regard, it must be observed, at the outset, that that causal link is one of the essential constituent elements of an infringement of competition law which it is for the Commission to prove, in accordance with the general rules on the taking of evidence, referred to in particular in paragraphs 132 to 134 of the judgment under appeal. Thus, it is for the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. By contrast, it is for the undertaking raising a defence against the finding of such an infringement to prove that that defence must be upheld.

225 Paragraph 382 of the judgment under appeal, which is not disputed by the appellants, supplements the General Court's reasoning in that regard and sets out the criteria which must guide the examination of the causal relationship. It is thus stated therein that, in order to establish the actual or potential effects of practices examined, the Commission may rely on information obtained by observation of

the actual evolution of the market or markets concerned by those practices. If a correlation is observed between those practices and the modification of competition on those markets, additional information, which may include inter alia the assessments of market participants, their suppliers, their customers or professional or consumer associations, may be capable of demonstrating the causal link between the conduct concerned and the evolution of the market.

226 It is on those analytical criteria that the General Court relied in paragraphs 383 to 393 of that judgment in order to carry out a specific examination of the causal relationship between the conduct at issue and the decrease in traffic from Google's general results pages to the majority of competing comparison shopping services, an examination at the end of which the General Court found, in paragraph 394 of that judgment, that the Commission had demonstrated that the practices concerned had led to a decrease in generic search traffic to almost all of the competing comparison shopping services.

227 In that context, the General Court held, in paragraph 379 of the judgment under appeal, that, in the context of the allocation of the burden of proof, an undertaking may put forward a counterfactual analysis in order to challenge the Commission's assessment of the potential or actual effects of the conduct concerned.

228 In so doing, the General Court neither reversed the burden of proof borne by the Commission as regards the obligation to demonstrate the causal link between the conduct at issue and its effects, nor ruled out the usefulness of a counterfactual analysis. It merely found that it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool to prove the existence of such a causal link.

229 That approach is, moreover, consistent with the case-law of the Court of Justice cited in paragraphs 165 to 167 of the present judgment.

230 Consequently, in so far as it concerns the General Court's reasoning concerning the allocation of the burden of proof and the usefulness of the counterfactual analysis in the context of the relevant evidence in the light of Article 102 TFEU, the second complaint must be rejected as unfounded.

231 In so far as that complaint concerns paragraphs 377 and 378 of the judgment under appeal, it should be noted that the General Court held therein that identifying a credible counterfactual scenario in order to analyse the effects on a market of what are assumed to be anticompetitive practices may, in a situation such as that in the present case, be an arbitrary or even impossible exercise, and that, in order to demonstrate an infringement of Article 102 TFEU, in particular as regards the effects of practices on competition, the Commission cannot be required systematically to establish such a counterfactual scenario.

232 Those paragraphs of the judgment under appeal are, as the Advocate General observed in point 171 of her Opinion, for the sake of completeness, as opposed to,

inter alia, paragraphs 372 to 376 of the judgment under appeal, with the result that the appellants' criticism in that regard must be rejected as ineffective.

233 Lastly, as regards the appellants' criticism of paragraph 393 of the judgment under appeal, it is sufficient to note that the General Court merely found that there was a causal link between the visibility of a website within Google's generic results, depending on the algorithms ranking those results, and the importance of traffic from those results to that website. Such a finding does not contradict its assessment of what could constitute an appropriate counterfactual scenario in the present case.

234 Consequently, the first part of the third ground of appeal must be rejected as in part unfounded and in part ineffective.

(2) The second and third parts of the third ground of appeal

(i) Arguments of the parties

235 By the second part of the third ground of appeal, the appellants dispute the legal characterisation, made in paragraphs 374, 376 and 525 of the judgment under appeal, of what constitutes, for the General Court, a correct counterfactual scenario where an abuse involves a 'combination' of two practices. According to the appellants, by holding that, in such a situation, a counterfactual scenario must take into account the effects of the two practices at issue, namely both the effects of the promotion of Google's comparison shopping service through boxes and the effects of the application of adjustment algorithms and of the demotion of competing comparison shopping services in the generic results, the General Court erred in law.

236 By the first complaint, the appellants claim that, in so far as each of those two practices is, as acknowledged by the General Court in paragraph 373 of the judgment under appeal, in itself lawful, a counterfactual scenario which removes one of those practices, in particular the display of boxes, constitutes an appropriate scenario, since it creates a situation without the combination of the two practices and, consequently, without the alleged abuse. By contrast, the removal of the two practices when constructing the counterfactual scenario, favoured by the General Court in paragraph 376 of that judgment, goes beyond what is necessary to create a situation without the allegedly abusive combination and confuses the effects of lawful and unlawful conduct.

237 By the second complaint, the appellants criticise the General Court for envisaging a counterfactual scenario which is not 'realistic', 'plausible' and 'likely' within the meaning of the case-law of the Court of Justice (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 166 to 169 and 173). That scenario is not limited to removing boxes, which would put an end to the abuse, as the Commission confirmed in its defence before the General Court, but even requires the removal of demotion algorithms

intended to improve the quality of the search service. The studies submitted by the appellants during the administrative procedure, namely 'differences-in-differences' analysis and an 'ablation' experiment, showed that traffic to competing comparison shopping services did not materially change if the boxes were removed, which demonstrates that the decrease in traffic had been wrongly attributed to the conduct at issue.

238 By the third part of the third ground of appeal, the appellants claim, first, that the General Court's erroneous approach to the counterfactual scenario invalidated its assessment of the effects of the conduct concerned, since by that approach it attributed effects to the alleged abuse that were attributable to lawful practices. Second, they assert that that approach also invalidated the General Court's assessment of the objective justification put forward by Google that it could not have improved its search service if results from competing comparison shopping services were included in the boxes. According to the appellants, by rejecting that explanation, in paragraph 572 of the judgment under appeal, on the ground that the improvements did not outweigh the anticompetitive effects of the conduct at issue, the General Court vitiated that judgment by an error of law.

239 The Commission, PriceRunner, the EFTA Surveillance Authority, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga dispute the appellants' arguments as ineffective or, in any event, unfounded.

(ii) Findings of the Court of Justice

240 Paragraphs 374, 376 and 525 of the judgment under appeal, which are challenged in the context of the second part of the third ground of appeal, concern the General Court's assessment of what constitutes a counterfactual analysis capable of addressing the effects of conduct consisting in the combination of two practices, each of which is lawful in itself.

241 In paragraphs 370 to 373 of the judgment under appeal, the General Court noted that none of the practices at issue, taken separately, had given rise to any competition objections as far as the Commission is concerned but that it called into question the combined practices which, on the one hand, promoted Google's comparison shopping service and, on the other hand, demoted competing comparison shopping services in Google's general results pages. The General Court concluded that the effects of those combined practices could not be analysed by isolating the effects of one practice from those of the other.

242 It was on the basis of those findings that, in paragraphs 374 and 376 of the judgment under appeal, the General Court held that the analysis of the effects of the conduct at issue on competing comparison shopping services could not be limited to the impact which the appearance of results from Google's comparison shopping service in Product Universals and Shopping Units might have had on them, but that that analysis also had to take account of the impact of the adjustment algorithms on generic results, with the result that the only

counterfactual scenario that Google could properly have put forward was that in which no element of that conduct was implemented, as otherwise the combined effects of that conduct would be only partially understood. That finding was, in essence, reiterated in paragraph 525 of that judgment, which was also challenged by the appellants in the second part of the third ground of appeal.

243 That reasoning of the General Court is not vitiated by any error of law.

244 As the Advocate General observed in points 179 and 180 of her Opinion, it was only by being combined that the two practices at issue influenced user behaviour in such a way that traffic from Google's general results pages was redirected, to the extent found by the Commission, in favour of Google's own comparison shopping service and to the detriment of competing comparison shopping services. Thus, that redirection of traffic was based both on the preferential positioning and display of search results from Google's comparison shopping service in boxes and on the parallel demotion carried out by the adjustment algorithms and on the less attractive display of search results from competing comparison shopping services, which meant that those comparison shopping services would escape the attention of users.

245 Accordingly, in so far as the increase in traffic in favour of search results from Google's comparison shopping service and the decrease in traffic from its general results pages to competing comparison shopping services, on which the potential anticompetitive effects of the conduct at issue are based, resulted from a joint application of the two practices at issue, an appropriate counterfactual scenario should also have made it possible to examine the likely development of the market in the absence of both of those practices and not only in the absence of one of them.

246 In those circumstances, the appellants' argument that the General Court accepted, in paragraph 373 of the judgment under appeal, that, taken separately, none of those practices had given rise to any competition objections cannot invalidate the General Court's reasoning in paragraphs 374, 376 and 525 of the judgment under appeal, which are challenged in the second part of the third ground of appeal.

247 The General Court therefore did not err in law in holding, in paragraphs 374 to 376 and 525 of the judgment under appeal, that the analysis of the effects of the conduct at issue had to take into account both the effects of the adjustment algorithms for generic results and the promotion of Google's comparison shopping service by means of Product Universals and Shopping Units, and that the studies which Google put forward, which related only to the impact on traffic of that promotion were, in themselves, insufficient to measure the impact of the conduct at issue on competing comparison shopping services.

248 The second part of the third ground of appeal must therefore be rejected as unfounded.

249 The third part of the third ground of appeal is based on the premiss that the General Court's approach to what constitutes a correct counterfactual scenario where an abuse involves a combination of two practices is incorrect. As is apparent from the examination of the second part of the third ground of appeal, the General Court's reasoning in that regard is not vitiated by any error of law.

250 The criticisms put forward by the appellants in support of that part of the ground of appeal must therefore be rejected as ineffective.

251 Consequently, the third ground of appeal must be rejected in its entirety.

4. The fourth ground of appeal

(a) Arguments of the parties

252 By the fourth ground of appeal, the appellants claim that the General Court erred in law, in paragraphs 538 to 541 of the judgment under appeal, in finding that the Commission did not have to examine whether the conduct at issue was capable of foreclosing as-efficient competitors. According to the appellants, although the decision at issue sought to demonstrate that that conduct had been capable of restricting competition, by referring to the difficulty faced by competing comparison shopping services in attracting traffic from sources other than Google, that decision did not, however, examine whether those difficulties were attributable more to the relative efficiency of those comparison shopping services or to users' preferences for other comparison shopping sites, such as merchant platforms.

253 In support of that ground of appeal, the appellants submit, in the first place, that the General Court was wrong to hold, in paragraph 538 of the judgment under appeal, that the application of the as-efficient competitor test is not warranted in cases that do not concern pricing practices. In so doing, the General Court confused the formal as-efficient competitor price-cost test, the application of which is not always necessary, with the general principle established in the case-law of the Court of Justice, in particular paragraph 21 of the judgment of 27 March 2012, *Post Danmark* (C-209/10, EU:C:2012:172), and paragraphs 133 and 134 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), according to which the objective of Article 102 TFEU is not to protect less-efficient undertakings. The applicability of that principle is independent of whether or not the alleged abuse concerns pricing, so that it is always necessary to examine whether the conduct concerned is capable of foreclosing as-efficient competitors, particularly where that conduct leads to product innovation and leads to an improvement in the choices and quality of the offer to consumers.

254 In the second place, the appellants criticise paragraph 539 of the judgment under appeal and criticise the General Court for having considered that it was not relevant to examine whether Google's actual competitors were as efficient as

Google, since, in the case-law referred to in the preceding paragraph of the present judgment, the Court of Justice referred to a hypothetical competitor. However, according to the appellants, the Commission did not attempt to assess the effectiveness of competing comparison shopping services, whether hypothetical or actual, and confined itself to referring to the effects of the conduct at issue on actual competitors, without examining their efficiency. The flaws in the General Court's reasoning are even more evident on reading the ground set out in paragraph 391 of the judgment under appeal, according to which the higher quality of merchant platforms is a 'possible explanation' for the decline of those comparison shopping services.

255 In the third place, the appellants criticise paragraphs 540 and 541 of the judgment under appeal and the findings of the General Court set out therein, according to which, first, the assessment of the efficiency of competing comparison shopping services would be objective only if 'the conditions of competition were not in fact distorted by anticompetitive behaviour and, second, the Commission could confine itself to demonstrating potential exclusionary effects, irrespective of whether Google was more efficient than competing comparison shopping services.

256 In that regard, first, the appellants claim that, while it is possible that the distorting effect of the conduct concerned is such that its impact on actual equally efficient competitors cannot be assessed, such an assumption cannot be presumed. However, the Commission did not envisage that hypothesis and the General Court substituted its own reasoning for the assessment of the decision at issue. Second, the appellants claim that, even in such a situation, the Commission cannot be exempted from the obligation to demonstrate the likely impact of the conduct at issue on those competitors. In that case, if the analysis necessarily remains hypothetical, it should draw on actual evidence.

257 In their reply, the appellants add that paragraphs 45 and 73 of the judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379), support their argument concerning the Commission's obligation to assess, under Article 102 TFEU, whether the conduct in question was capable of excluding from the market competitors that were at least as efficient.

258 The appellants also claim that, in the present case, the Commission should have applied the same filter as for instances of price abuse, since, in the same way as a low price cannot in itself be regarded as distorting the competitive process, the combination of two lawful practices cannot undermine that process, especially because each of those practices improved the quality of the services offered to consumers and Google was not pursuing an anticompetitive strategy. Thus, like price reductions, quality improvements and innovation are part of a properly functioning competitive process.

259 The Commission, PriceRunner, the EFTA Surveillance Authority, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga dispute the appellants'

arguments and contend that the fourth ground of appeal is inadmissible or unfounded.

(b) Findings of the Court of Justice

260 By the fourth ground of appeal, the appellants challenge paragraphs 538 to 541 of the judgment under appeal and assert, in essence, that the General Court wrongly held that the Commission was not required to analyse the effectiveness of Google's actual or hypothetical competitors when assessing the capability of the conduct at issue to foreclose competition on the relevant markets.

261 In that regard, it must be observed at the outset that paragraphs 538 to 541 of the judgment under appeal form part of the analysis of the anticompetitive effects of the conduct at issue, following which the General Court concluded, in paragraph 543 of that judgment, that the Commission had demonstrated the existence of potential effects on the national markets for comparison shopping services.

262 The appellants' arguments in support of the fourth ground of appeal seek, in particular, to demonstrate that the grounds of the judgment under appeal relating to the absence of an obligation on the part of the Commission to examine the effectiveness of competing comparison shopping services are vitiated by an error of law. First, the Commission was required to examine the effectiveness of those comparison shopping services, whether actual or hypothetical, since that obligation reflects a general principle according to which the objective of that article is not to protect less-efficient undertakings. Second, the as-efficient competitor test, which is characteristic of situations of price abuse, should also have been applied in the present case, since the conduct at issue consisted in a combination of lawful practices and led to an improvement in innovation.

263 As regards the question whether Article 102 TFEU imposes a systematic obligation on the Commission to examine the efficiency of actual or hypothetical competitors of the dominant undertaking, it follows from the case-law of the Court of Justice cited in paragraphs 163 to 167 of the present judgment that, admittedly, the objective of that article is not to ensure that competitors less efficient than the dominant undertaking remain on the market.

264 Nonetheless, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor.

265 The assessment of the capability of the conduct at issue to foreclose an as-efficient competitor, referred to by Google as the principle underlying the application of Article 102 TFEU, appears, in particular, to be relevant, where the dominant undertaking submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. In such a case, the

Commission is not only required to analyse the extent of the undertaking's dominant position on the relevant market, but it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138 and 139).

266 Furthermore, since the Commission is required to demonstrate the infringement of Article 102 TFEU, it must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, inter alia, the as-efficient competitor test, where that test is relevant, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judicature.

267 In the present case, it must be observed that, as is apparent, in particular, from paragraphs 54 to 63 of the judgment under appeal, the abuse identified by the Commission consisted in the more favourable positioning and display which Google reserved, in the pages of its general search engine, for its own comparison shopping service as opposed to competing comparison shopping services. Thus, the Commission found, given that a comparison shopping service's ability to compete depended on traffic, that this discriminatory conduct on Google's part had had a significant impact on competition in that it had enabled Google to redirect, in favour of its own comparison shopping service, a large proportion of traffic previously existing between Google's general results pages and comparison shopping services belonging to its competitors, without the latter being able to compensate for that loss of traffic by using other sources of traffic, since increased investment in alternative sources was not an 'economically viable' solution.

268 The General Court was therefore right, in paragraph 540 of the judgment under appeal, to state, without that finding being invalidated by the appellants, which merely make allegations in principle, that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google's competitors in the light of the specific conditions of the market in question.

269 It follows that the General Court did not err in law in holding, first, that such a test was not mandatory in the context of the application of Article 102 TFEU and, second, that, in the circumstances of the present case, that test was not relevant.

270 It follows that the fourth ground of appeal must be rejected as unfounded, without its being necessary to rule on the plea of inadmissibility raised by BEUC.

271 Since none of the grounds of appeal raised in support of the present appeal has been successful, the appeal must be dismissed in its entirety.

VI. Costs

272 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

273 Under Article 140(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority are to bear their own costs if they have intervened in the proceedings.

274 Under Article 140(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Court may order an intervener to bear his or her own costs.

275 In accordance with Article 184(4) of those rules, where the appeal has not been brought by an intervener at first instance, he or she may not be ordered to pay costs in the appeal proceedings unless he or she participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court of Justice may decide that he or she is to bear his or her own costs.

276 In the present case, since the Commission has applied for costs and the appellants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, with the exception of the costs incurred by the Commission as a result of the intervention of CCIA, which must be borne by CCIA.

277 PriceRunner, CCIA, the EFTA Surveillance Authority, BEUC, Foundem, Kelkoo, VDZ, Ladenzeile, BDZV and Twenga must each bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Google LLC and Alphabet Inc. to bear their own costs and to pay the costs incurred by the European Commission, with the exception of those incurred by the Commission as a result of the intervention of Computer & Communications Industry Association;**

3. **Orders Computer & Communications Industry Association to bear its own costs and to pay the costs incurred by the Commission as a result of the intervention of Computer & Communications Industry Association;**

4. **Orders PriceRunner International AB, the EFTA Surveillance Authority, the Bureau européen des unions de consommateurs (BEUC), Infederation Ltd, Kelkoo SAS, Verband Deutscher Zeitschriftenverleger eV, Ladenzeile GmbH, BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV and Twenga SA to bear their own costs.**

Lenaerts Bay Larsen Arabadjiev

Regan Biltgen Spineanu-Matei

Xuereb Rossi Jarukaitis

Jääskinen Wahl Ziemele

Passer

Delivered in open court in Luxembourg on 10 September 2024.

A. Calot Escobar K. Lenaerts

Registrar President

Certified a true copy,

Luxembourg, 10. 09. 2024

For the Registrar

Mátja Longar
Administrator