MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

The transatlantic divergence in the Google Shopping Case: an attempt at innovation or exclusion?

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien 2020 / Vienna 2020

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	Dr. Marco Botta

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US Legislation

The Sherman Antitrust Act (1890)

Federal Trade Commission Act 15 U.S.C. § 45

LIST OF ABREVIATIONS

EC	**European Commission**
ECJ	**European Court of Justice**
FTC	**Federal Trade Commission**
SERP	**Search Engine Results Page**
WMP	**Windows Media Player**

INTRODUCTION

In June 2017, the European Commission ("EC") fined Google €2.42 billion for abusing its dominance in the general search services market by giving an unfair advantage to another Google product, its comparison-shopping service. This was the first of three antitrust decisions taken by the EC concerning Google's market behaviour. The EC's recent focus on Google has sparked debate about the reasoning behind the EC's findings of anti-competitive behaviour, especially concerning the Google Shopping decision, as the Federal Trade Commission ("FTC") closed their investigation in 2013 without finding the same behaviour anti-competitive.

Both American and European competition law have the same objective: to safeguard the welfare of the consumer through the effects of long-term effective competition in the market. The divergence in the findings of anti-competitive behaviour in the market is a question of whether Google's changes to its service amounted to an attempt to exclude its competitors, as perceived by the EC, or an innovative improvement of its customer service, as was accepted by the FTC.

The Google Shopping fine, the largest antitrust fine the EC had ever imposed before the Android decision in 2018, has been interpreted by some sceptics as a form of protectionism.[1] This suspicion, combined with the confusion as to how the same behaviour can be interpreted so differently by the European and American authorities may lead to less comparative shopping websites and online marketplaces innovating their services. This could lead to decreased vertical integration in online markets and a loss of potential gains in efficiency which could be to the detriment of the consumer. The success of global technology companies, such as Google and Amazon, has been a result of establishing a direct channel between consumers and suppliers, eliminating the traditional distributor intermediaries. Vertical integration of services would seem the next logical step in this successful methodology, however, this decision has created some uncertainty as to how to achieve this without committing anti-competitive conduct.

This uncertainty will have an impact on the rate of development in the EU's e-commerce sector. This will not only result in a decrease for the future vertical integration of services, but also disincentivise efforts to streamline the front-end web development of online

[1] Nicholas Hirst, 'EU's Vestager hits Google with €2.42 billion fine', *Politico* (27 June 2017) <www.politico.eu/article/vestager-hits-google-with-e2-42-billion-fine/> accessed 3 February 2019.

platforms. This is ultimately detrimental to the consumer, as front-end web development and the integration of services increase the accessibility of these online platforms.

The objective of this thesis is to assist in clarifying this uncertainty through an assessment of the reasoning of these divergent decisions by the US and EU competition authorities. An understanding of how the applied principles of EU competition law differ from the US antitrust perspective would also be beneficial for the development of e-commerce and comparison-shopping services in both jurisdictions, ensuring that they can continue to evolve and improve the accessibility of their services without being found to have unlawfully eliminated their competitors.

A secondary objective of this thesis is to challenge the EC's findings of anti-competitive behaviour. As previously stated, this decision could have negative effects for the future development of the general internet search market, comparison-shopping market, and even the e-commerce sector as a whole. Due to the growing importance of these sectors, a false positive finding of anti-competitive behaviour could seriously impede the accessibility of these services for consumers that are unfamiliar to these markets. Google, as a household name, could act as an introduction to these markets for many consumers, where upon becoming more familiar with the concept of these services, consumers could then switch to more specialised comparison shopping or e-commerce services. Therefore, it is vital for the EC's findings to be closely scrutinised, as a false positive finding could prevent European consumers benefiting from price comparison websites in general.

The divergence between the two systems presents an interesting insight and opportunity to reflect on the merits of both jurisdictions' policy. It is significant because it offers other jurisdictions differing perspectives on how they might adapt to emerging digital markets. Convergence between the two jurisdictional systems has long been encouraged due to the benefits of encouraging cross-border business transactions, which enhance economic growth and reduce the enforcement costs of controlling competitive conduct.[2] *Microsoft III*[3] is widely recognised as having influenced the EC's own enforcement action against

[2] William E. Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (Bates White Fifth Annual Antitrust Conference, Washington D.C., 2 June 2008) <www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf> accessed 23 January 2019.
[3] *United States v. Microsoft Corp*, 253 F.3d 34 (D.C. Cir. 2001).

Microsoft.[4] The European Court of Justice ("ECJ") relied on the evidence of the results of the Microsoft settlement to rebut Microsoft's arguments against the dissemination of interoperability information.[5] This demonstrates the potential for direct savings by the competition authorities in terms of relying on the findings of their counterpart during an action for enforcement, which would be particularly useful in highly technical markets that demand large resources during investigations.

Convergence on the policy relating to these markets can ensure that these products fulfil their pro-competitive potential and deliver the promised boon to consumer welfare, as opposed to differing regulatory standards that might stifle innovation or fail to prevent the exploitative abuse of consumers by digital monopolists.

This thesis will focus solely on the abuse characterised in the EC's Google Shopping decision and will not address the claims alleging the more blatantly anti-competitive action of 'scraping' competitors' data and results.[6] The abuse identified by the EC is more controversial, ambiguous, and affords more opportunity to reflect on the overall competition policy of both the EU and US in digital markets.

Chapter I of this thesis will introduce Google and its business model. To fully evaluate the behaviour of Google, it is necessary to become familiar with how it operates as an economic entity. This chapter will introduce the concepts of algorithmic content aggregation and how it relates to the operation of internet search engines. It will explain the concept of search engine optimisation, where websites deliberately design their content to improve their listing in internet search engines. It will also propose the theory that Google became successful due to the accessible and minimalist design of its front-end web development. Network effects allowed Google to benefit from the increased users it gained as a result of its service's accessibility and utilise the data from these users to improve its algorithm.

Chapter II will provide an outline of the Google Shopping case, presenting the proposed theory of discrimination carried out by Google toward their competitors. It will discuss how their preferential treatment toward their own service has a potentially distortive impact on

[4] Keith N. Hylton, 'Microsoft after Fifteen Years' (2016) 11(1) Competition Policy International <www.competitionpolicyinternational.com/microsoft-after-fifteen-years/>.
[5] Case T-201/04 *Microsoft Corp v European Commission* [2007] ECR II-03601 [10]; Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/17 (Hereinafter "**Google Shopping Decision**") [663].
[6] Federal Trade Commission, 'Google Investigatory report' (2012) (Hereinafter "**FTC Google Report**") excerpt page 40 <http://graphics.wsj.com/google-ftc-report/>.

competition in the market. It will then present the FTC's findings in 2013 and contrast them with the EC's findings in 2017.

Chapter III will assess the possible reasons for the diverging findings of the competition authorities. It will explore how Article 102 and the Sherman Act[7] differ in their prohibition of discriminatory behaviour. It will then present the reasons for why Google's conduct could be perceived as pro-competitive, as an innovation to increase user accessibility, as well as anti-competitive, as an attempt to exclude its competitors by optimally place its own service above its rivals. The chapter will conclude by comparing these reasons with the previous cases of anti-competitive discriminatory behaviour under American and European jurisprudence to determine how both jurisdictions react to the pro-competitive and anti-competitive arguments for Google's conduct.

Chapter IV will assess what the EC's findings mean for the future of the relevant markets. It will present the commitments that Google have made to address the EC's findings, and address the recent complaints by Google's competitors that these commitments have failed to remedy the anti-competitive effects. It will then assess the likely consequence of the EC's decision for digital markets, specifically looking at the potential of price comparison websites to improve competition in related markets. It will conclude by highlighting the key reasons for diverging perspectives on consumer welfare and their potential causes. Finally, it will make an evaluation on which perspective has the best potential capacity to benefit consumers in digital markets.

[7] The Sherman Act 1890, Section 2.

CHAPTER I: GOOGLE LLC

i) Monetisation Model

Google is a multinational technology company whose business model is based on providing online products and services to consumers on a free-to-use basis. Its revenue is generated primarily by its advertising services,[8] where it delivers advertised content to end-users alongside other content generated by its search services. Google's flagship product, Google Search, is a universal search engine and has allowed it to become synonymous with browsing the internet.

The universal search engine is an evolution of the general internet search engine, as it vertically integrates other Google owned specialist search engines, such as Google Image Search and Google Maps, into the general search engine. As a result, when an end-user searches for something in the general search engine, such as a specific item or location, the universal search will not just provide a list of relevant uniform resource locators, otherwise described as URL links, but it will also provide a number of relevant search listings from the integrated specialist search services.

The benefit of this integration is an increase in efficiency for the end-user. This means that Google's end-users spend less time and effort finding the content that they want.[9] Google's intention is to provide the end-user with 'the best result' for their individual search request in as short a time as possible, minimising the search costs for the consumer. This dedication to providing the fastest and most relevant search engine on the market has unquestionably been one of the most influential factors for Google's super dominant market share, however, it also is counter to the typical monetisation model of the free-to-use product. Logically, services that are monetised solely through providing advertisements to consumers tend to provide a slow and indirect delivery of content to their end-users, as they expose them to as many advertisements as possible, subsequently generating the maximum potential revenue from each end-user. Google Search differs completely, prioritising accessibility to attract the highest potential volume of end-users for their service, generating large amounts of advertisement revenue from its large volume of users.

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[8] Google Shopping Decision (n 5) [7].

[9] Search Metrics, 'What is Universal Search?' <www.searchmetrics.com/what-is-universal-search/> accessed 15 May 2019.

Google have made mission statements consisting of an objective 'to organize the world's information and make it universally accessible and useful'.[10] Google's focus on increasing accessibility is its primary business strategy. Google does not actually receive remuneration for the act of communicating advertisements to end-users, it is only paid by advertisers if the end-users access and interact with the advertised hyper-links.[11] Therefore, it is fundamental to Google's monetisation strategy that they can predict what advertisements will be accessed by end-users. Google has prioritised having as many users as possible, as it allows Google to collect search data from an enormous population of users, which it then uses to analyse and predict what advertisements will be most relevant to the individual search request or even the demographic of the end-user.[12] It logically follows that increasing the accessibility of Google's products and services is a key design strategy employed by Google's developers,[13] as a more accessible service attracts more potential users, which leads to more end-user data that Google can collect and use to refine their advertisement selection process. Google's success in increasing the accessibility of its services to attract new end-users to the market is clearly demonstrated in its impact upon the online maps market. As was stated in an English High Court hearing:

> The evidence of Mr Gale was that the market for online maps in the UK significantly and steadily increased over the period 2000–2010: he said that the increase overall would plot at a 45 degree gradient. In such a growing market, if the usage of Google Maps increased and that of competing products remained static, it follows that Google Maps was capturing a major share of that growth, including therefore new users of online maps. The main providers competing with Google Maps in 2007 were Streetmap and MultiMap. But the fact that Google Maps gained market share compared to Streetmap and MultiMap does not in itself indicate, let alone establish, that the new-style Maps OneBox was the cause, or even a contributory cause. Any relative success of Google Maps is equally explicable on the basis of features of Google Maps that attracted users: i.e., competition on the merits.[14]

Other than through vertical integration, Google's minimalist design of its graphical interface has been a unique product dimension that has significantly contributed to the accessibility of the service. Google's competitors in the general search engine market traditionally used

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[10] Google 'About' <https://about.google/intl/en_at/> accessed 15 May 2019.
[11] Google 'How We Make Money with Advertising' <https://howwemakemoney.withgoogle.com/> accessed 15 May 2019.
[12] Google 'Safety Centre: Ads and Data' <https://safety.google/privacy/ads-and-data/> accessed 15 May 2019.
[13] Sundar Pichai, 'At I/O '19: Building a more helpful Google for everyone' (*Google: The Keyword*, 2019) <https://blog.google/technology/developers/io19-helpful-google-everyone/> accessed 15 May 2019.
[14] Streetmap.Eu Limited v Google Inc., Google Ireland Limited, Google UK Limited [2016] EWHC 253 (Ch) [116].

approximately all of their available space on their front-end web development design for advertising purposes.[15] This was a logical market practice, as it exposed the end-users to the maximum amount of advertised content and available information. Google differed from this approach, maintaining a minimalist interface that did not expose the end-users to advertised content at the earliest opportunity. Google's minimalist design has proven to be successful with end-users, which is why it was able to earn a significant market share and an abundance of data to improve its service.

Therefore, it should be kept in mind when assessing Google's design decisions that its minimalist graphical interface and vertical integration have traditionally been key to increasing the accessibility of its products and services. Accessibility is at the core of Google's market monetisation strategy which is its dominant stream of revenue. By increasing the level of accessibility of Google's products and services, new and inexperienced consumers are introduced to the market, and the overall experience of end-users in the general internet service market has been improved. These pro-competitive effects need to be balanced against the alleged harm and distortion caused by Google's conduct in related markets.

ii) The Characteristics of the General Internet Search Market

If the internet is to be seen as a vast perpetually expanding library, search engines are the indexes, catalogues and librarians. However, this analogy is superficial at best because of the fact that unlike a traditional library, the expansion of the internet is so fast and uncoordinated that no individual search engine could ever hope to catalogue and identify every online directory or webpage.

A general search engine's purpose is to guide end-users to other websites based on their individual search request. They are distinct from content sites which host a search tool, such as Wikipedia,[16] as this search tool is primarily utilised for the purpose of searching from a catalogue hosted solely by the content site. The traditional search engine is also distinct from specialised search services, such as TinEye[17] and SkyScanner.[18] These specialised services are limited to search for specific content using tools that allow the end-user to sort content

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[15] Joshua Becker, 'Google, minimalism, and 150 billion dollars' (*Becoming Minimalist*) <www.becomingminimalist.com/google-minimalism-and-150-billion-dollars/> accessed 22 April 2019.
[16] Wikipedia.com.
[17] TinEye.com.
[18] SkyScanner.com.

by selecting certain parameters, such as maximum price or location. The opinion of the EC is that general search services cannot share a similar functionality to that of specialised services.[19] However, this opinion could be seen as rather static, not taking into consideration the vertical integration of specialised search services into general search services that has been undertaken by Google and its competitors, such as Bing. Akman would suggest that the integration of specialised services into the general search service is a pro-competitive innovation, and a too narrow interpretation of the general search service market is a misinterpretation of the market's products, leading to a potentially detrimental impact upon future innovation and development in this sector.[20]

The provision of general search services, otherwise termed 'horizontal search providers',[21] constitutes an economic activity, despite the fact that the end-user does not pay traditional remuneration in the terms of fees. Instead end-users agree to supply the search engine operator with data, relating to their individual search request. This allows the search engine operator to accurately provide the end-user with advertised hyperlinks that closely relate or are relevant to their search request.[22] Advertising through general search services receives the most investment from online merchants, as advertisers believe that it is the most effective advertising method due to the fact they learn valuable information from the end-user's query.[23]

Search engines function in three stages.[24] Firstly, they employ the use of software described as "spiders" or web crawlers that "crawl" or scan the internet looking for content. Secondly, search engines store and index the content discovered by the web crawlers. Once stored in the index, pages can now be listed among search results. Finally, search engines respond to individual users' requests by providing the most relevant pieces of content in their listings. Search engines rank the content using algorithms, such as PageRank, a core element of the Google general search engine's mechanisms. PageRank is designed as 'a method for rating Web pages objectively and mechanically, effectively measuring the human interest and

[19] Google Shopping Decision (n 5) [171]-[172].
[20] Pınar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2017) University of Illinois Journal of Law, Technology and Policy, page 30.
[21] FTC Google Report (n 6) excerpt page 66.
[22] Gintarė Surblytė, 'Competition Law at The Crossroads in the Digital Economy: Is It All About Google?' (2015) Max Planck Institute for Innovation and Competition Research Paper No. 15-13, pages 11-13.
[23] FTC Google Report (n 6) excerpt pages 70 and 72.
[24] Google, "Webmaster tools: How Google Search Works", http://support.google.com/webmasters/bin/answer.py?hl=en&answer=70897#content accessed 04 April 2020; Google Shopping Decision (n 5) [15].

attention devoted to them'.[25] It basically determines a content's relevancy, and thus its position in the ranking, by measuring the number and the quality of links to that specific piece of content.

These three stages are important from a competition perspective for two reasons: not all search engines function identically and content can be optimised to perform better in rankings. As a result, there are two types of agents capable of influencing the ranking content on a search engine results page, these being an internal manipulator and external manipulator. The internal manipulator is the search engine operator that controls how its service aggregates and ranks content. Search engine operators differ in their methods of ranking content for relevance to the end-user, which is one of the most significant parameters of competition in the market. The external manipulators are content creators that design their content in a manner that achieves the highest rankings in the search engine operators' listings rather than to provide the most utility to consumers. This practice is termed search engine optimisation and is undesirable for both consumers and the search engine operator, as these manipulated rankings do not deliver the most relevant result to the end-user's query and subsequently degrades the quality of the search engine itself. As Salinger and Levinson describe, '[t]he result is a constant cat-and-mouse game between Web sites and search engines as the former try to increase their visibility and profits by gaming the search provider's algorithms, and the latter adjust their algorithms to thwart such efforts'.[26]

Therefore, it is necessary to internally manipulate the ranking of "organic" search results to a certain degree to preserve and improve their quality. At least some element of internal manipulation is a natural aspect of competition on the merits in the general search services market and not just an attempt to arbitrarily influence the search results to the detriment of the ranked content or end-user.

Examples of how a search engine operator can make adjustments to their ranking is Google's use of RankBrain, a machine learning component of its algorithm which makes adjustments to the listings based on several factors. Among these factors, user engagement is a core influence in adjusting a page's ranking among the listings. RankBrain collects data on which

[25] Sergey Brin and Larry Page, "The PageRank Citation Ranking: Bringing Order to the Web", <http://ilpubs.stanford.edu:8090/422/1/1999-66.pdf> accessed 15 May 2019.
[26] Michael A. Salinger and Robert J. Levinson, 'The Role for Economic Analysis in the FTC's Google Investigation, June 2013' (2013) page 14, <www.crai.co.uk/publication/role-economic-analysis-ftc%E2%80%99s-google-investigation> accessed 12 June 2019.

listing is receiving the most attention from end-users and re-adjusts the ranking of the listings to accommodate its findings. For example, if listing #2 is receiving a much larger proportion of user traffic than listing #1, RankBrain will determine that listing #2 is in fact more relevant for the search request than listing #1 and RankBrain will subsequently replace listing #1 with listing #2. This was confirmed by Udi Manber, former Chief of Search Quality at Google, in his testimony during the FTC's investigation: '[t]he ranking itself is affected by the click data. If we discover that, for a particular query, 80% of people click on #2 and only 10% click on #1, after a while we figure out probably #2 is the one people want, so we'll switch it'.[27]

These adjustments made to the initial rankings of content by Google are incontestably an effort to improve their product's value in terms of providing the most relevant content to an end-user's search request. Google accepts no payment from third parties to improve their ranking in the listings. At no stage does Google charge any of the owners of the listed content for the act of being organically listed in the search results. Instead, Google subsidises its service with revenue from advertisements.

Moreover, content producers have at least partial knowledge of the ranking methodologies of search engine operators from public disclosures. There has been a large amount of public discussion on this point, such as one former engineer at Google stating that:

> [i]t's pretty clear that any reasonable search engine would use click data on their own results to feed back into ranking to improve the quality of search results. The actual mechanics of how click data is used is often proprietary, but Google makes it obvious that it uses click data with its patents on systems like rank-adjusted content items.[28]

Some degree of external manipulation or search engine optimisation is actively encouraged by Google and its competitors, because it strengthens their product and service by providing end-users the most relevant content to their search.[29] Through publishing codes of best practice, content becomes standardised and more accessible to not only the search services, but also the end-users. It also encourages competition for the highest listing position between content producers in a transparent and non-discriminatory manner, which increases the

[27] FTC Google Report (n 6) excerpt page 14.
[28] Edmond Lau, 'Did Bing intentionally copy Google's search results?' (*Quora*, 2 February 2011) <https://www.quora.com/Did-Bing-intentionally-copy-Googles-search-results/answer/Edmond-Lau#> accessed 19 August 2019.
[29] Google, 'Search Engine Optimization (SEO) Starter Guide' <https://support.google.com/webmasters/answer/7451184?hl=en> accessed 19 August 2019.

overall efficiency of the market. Such a practice is actively encouraged by recent European legislation which mandates transparency in how intermediary platforms aggregate content.[30]

Although there has been some debate over the definitive structure of the general search services market, it has been largely agreed that it is at least constituting a sort of *sui generis* two-sided market.[31] As stated in the previous section, other than providing consumers or end-users with the most relevant results to their search queries, search engine operators also provide advertised results to end-users. Search engine operators, such as Google, monetise their search engines by accurately predicting what advertisements would generate a response from an end-user. This ability to predict which advertised content would appeal to a consumer uses the same technology and processes that generate organic search results. Therefore, the search engine's success in meeting the consumer's demand with relevant search results will similarly meet the demand of advertisers, as their sponsored content is matched with consumers likely to make a purchase.

Consequentially, maintaining high quality search results is essential for undertakings to compete in the general search services market due to the substantial influence of network effects. As discussed in the earlier section, the ability of Google and other search engine operators to predict what results would be the most relevant to an end-user's search query is fuelled by the analysis of previous search data. Google is incentivised to deliver the most relevant content to the end-user.

> When Google displays a list of organic search results pointing to websites unaffiliated with Google, Google receives no consideration from the unaffiliated websites. As a result, Google's incentives in choosing what organic search results to more prominently display are to choose those most relevant to the user's query. This will maximize the user's satisfaction with this search experience, and will strengthen or maintain the strength of the user's expectation of the value she would receive by performing a subsequent search at Google.[32]

By utilising previous search data, search engine operators can improve the quality of their results. The high quality of the search results encourages end-users to make subsequent searches on the platform, which then provides the search engine operator with more data to

[30] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[31] Giacomo Luchetta, 'Is the Google Platform a Two-Sided Market?' (2013) 10 Journal of Competition Law & Economics 185– 207.

[32] James D. Ratliff, Daniel L. Rubinfeld, 'Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?' (2014) 0(0), 1–25, Journal of Competition Law & Economics, page 14.

improve the quality of their search results. The ability to deliver relevant search results also encourages advertisers to contract with the search engine operator to supply sponsored hyperlinks. Advertisers are attracted to the platforms which not only have the best chance of matching their sponsored content with consumers that are likely to demand it, but also the platform which has the largest volume of end-user traffic as a result of their ability to meet end-users' demands. The revenue that the search engine operators earn from their advertisers is then invested into improving their ability to deliver relevant search results to end-users. This improved ability attracts more end-users and advertisers to the search engine, which in turn generates more revenue to invest into the quality of results. This network effect combined with the low cost of the service for end-users contributes to the market tipping toward a dominant firm.[33]

As a result, generating and maintaining end-user traffic is essential for effectively competing in this market. Without substantial volumes of end-user traffic, a search engine operator would struggle to attract advertisers and to generate sufficient user data to improve the quality of their results. The strength of the network effects has led to a highly concentrated market, with Google possessing a super dominant market share of above 90% in the majority of EEA member states, (excluding only three where it was still the market leader with a >78% market share).[34] However, competitors are not denied end-user traffic simply because they use Google Search. There exists a substantial number of end-users switching between services within the general search services market due to the little to no switching costs involved.[35] As described by White and Dumais:

> [t]he reasons for switching are varied and include: perceived poor quality of results on original engine, desire for verification or additional coverage, and user preferences. Approximately half of all users in our log sample and around two-thirds of survey respondents engage in within-session switching. It is clear that the utilization of multiple search engines is an important aspect of users' Web search behavior. Since switching is mainly associated with dissatisfaction with the search results on the origin engine, that engine could tailor the search experience for queries with a high observed switching rate.[36]

[33] Stigler Committee on Digital Platforms, Final Report, September 2019, (Hereinafter "**Stigler Report**") https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report, page 11.
[34] Google Shopping Decision (n 5) [280].
[35] Aaron S. Edlin, Robert G. Harris, 'The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google' (2013) 15 YALE J.L. & TECH. 169, page 206.
[36] Ryen W. White & Susan T. Dumais, 'Characterizing and Predicting Search Engine Switching Behavior' (2009) MICROSOFT RES. 1, 3, at page 9, <http://ryenwhite.com/papers/WhiteCIKM2009.pdf>.

White and Dumais also found that ‘40.4% of subjects reported having defected from one search engine to another and never or very rarely returning to the pre-switch (origin) engine’.[37] The main cited reason for defecting was experiencing search results that were of dissatisfactory quality. This outlines the importance of maintaining high quality search results, as ‘the better the results, the less likely users are to switch away. But conversely, if search results are degraded—for whatever reasons—users are more likely to switch to an alternative. In extreme cases, users defect: they switch search engines and do not switch back’.[38]

Nevertheless, the quality of search results is not the only parameter of competition within the market. ‘A user’s decision to select one search engine over another can be based on factors including reputation, familiarity, effectiveness, and interface usability.’[39] As a result, the conduct complained of in the Google Shopping decision – the design of the user interface – is an actual parameter of competition within the market. As described below, improving the user interface is a potential response to increased competition from rivals improving the quality of their results. Another parameter that is relevant is user privacy, where certain competitors will differ in how much of the user’s data they will record and process. Some competitors market this as a chief reason to use its service over that of competitors.[40]

Edmond Lau’s comments highlight the importance of different parameters of competition in the general search services market:

> [t]he main downside for Google, and the reason that they feel that they have to publicly complain, is not so much that what Bing is doing is wrong but that Google has much less to gain relative to Bing through toolbar data. Their organic search results are superior in quality, and they have more market share and data for ranking anyways. What Google should focus more on instead is their results UI so that even if Bing has the same result, Google makes the results page more useful by surfacing more relevant snippets or metadata about the result.[41]

These comments were made in the context of Google’s public complaint against Microsoft’s use of Google’s search results to coordinate its own aggregation of results.[42] By doing so,

[37] ibid at page 4; Edlin and Harris (n 35) pages 200-201.
[38] ibid page 203.
[39] White and Dumais (n 36) page 1.
[40] Jack Schofield, ‘Can DuckDuckGo replace Google search while offering better privacy?’, *The Guardian*, (12 December 2019) <www.theguardian.com/technology/askjack/2019/dec/12/duckduckgo-google-search-engine-privacy>.
[41] Lau (n 28).
[42] Matt Rosoff, ‘Yes Bing Has Been Copying Google Search Results For Years’, *Business Insider*, (1 February 2011) <www.businessinsider.com/bing-is-cribbing-from-google-search-results-2011-2?r=US&IR=T>.

Microsoft was able to produce search results of a similar quality to Google without needing to invest the same resources and time to develop the process. This incident demonstrates the significance of the other parameters of competition in the market. If the quality of results was the only influential factor in generating end-user traffic, then Microsoft's general search service would be a closer competitor to Google Search. Nevertheless, the consumer's preference and familiarity with Google's user interface was sufficient for them to return to Google for subsequent searches, maintaining Google's market share. Therefore, it is important to recognise the importance of certain parameters of competition in this market that are sometimes overlooked.

Moreover, there are some analysts that hold the view that the network effects present in the general search market do not impede new entrants. A case study analysis conducted by the United Kingdom's Department of Business comments that:

> [t]he network effects are indirect. This means that even a search engine with a commanding market share and resulting data network effects is vulnerable to competition from innovative competitors. […], this has happened in the search engine market in the past. Network effects did not prevent the displacement of Yahoo! and AltaVista by Google.[43]

This conclusion is based on the fact that the end-user is not locked-in to the general search service because of its social connections and, as emphasised earlier, is able to switch service easily due to the lack of switching costs.

Nevertheless, this conclusion does not factor in the advantages that arise with economies of scale relating to user data. Even if a new entrant can overcome the indirect network effects, they would still face a significant disadvantage in processing novel or uncommon search queries. This was demonstrated by the UK competition authority's market investigation into the digital advertising sector, where '[b]oth Google and Microsoft said that a substantial proportion of queries that they see are uncommon or new (around 15% of the daily queries on Google's search engine have never been seen before)'.[44]

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[43] Department for Business, Energy and Industrial Strategy, 'Dynamic Competition in Online Platforms: Evidence from Five Case Study Markets' (2017), page 35, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602816/Digital_Platforms_report_new_BEIS.pdf>.

[44] Competition and Markets Authority, 'Online platforms and Digital Advertising Market Study' (2019) Interim Report, page 12, <https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf>.

The advantages gained by possessing a substantial volume of previous user search data are significant when the algorithm processes novel queries, as it has more data to factor into its aggregation and is more likely to produce high quality results. Therefore, 'a lack of comparable scale in click-and-query data is likely to be a key factor that limits the ability of other search engines to compete with Google'.[45] When taking this into consideration, it is not surprising that no English language based search engines, other than Bing and Google Search, maintain their own at-scale index of webpages.[46] Instead, smaller search engines choose to buy organic search links and search advertisements through syndication agreements, '[f]or example, Yahoo Search (owned by Verizon Media), Ecosia, and DuckDuckGo access Bing's organic links and adverts through syndication deals'.[47]

In summary, the general internet search market consists of search services that direct end-users to the most relevant content for their search request. It is a free-to-use service for end-users, who instead of compensating search engine operators with monetary remuneration, supply their search data instead. This consists of, inter alia, the terms they used in their search request, their location and demographic characteristics, and the hyperlinks that they access through the service. This data assists search engine operators in selecting the most relevant advertisements for the end-user's search request and in making adjustments to their ranking of content to provide the end-user with the most relevant listing of hyperlinks to content.

As a result, end-user traffic is vital for undertakings to effectively compete in this market. A continuous volume of end-user traffic enables a search engine operator to improve their search results and attract more advertisers. As such, this market is susceptible to the influence of network effects and economies of scale, which have allowed Google to amass a super-dominant market share. Despite this, there are little to no switching costs, enabling end-users who suffered a dissatisfactory experience to easily switch services. Therefore, there is significant competitive pressure to maintain high quality search results and an accessible user interface. Moreover, developing a more accessible interface enables search engine operators to attract more end-users and collect more end-user data, further increasing their ability to compete in the market. In accordance with general search services becoming more

[45] ibid.
[46] ibid, pages 61-62.
[47] ibid.

accessible, their exact characteristics have been blurred with the possible inclusion of specialist search tools to better compete with specialist search services for end-user traffic.

iii) The Characteristics of the Comparative Shopping Market

Comparative shopping services are a form of specialised search service that allows end-users to browse and compare the prices and characteristics of a specific product offered by different online retailers. When using comparison shopping search services, end-users have the opportunity to sort through the offers from online retailers by certain characteristics, such as price or location. Comparison shopping services act as intermediaries between end-users and the relevant online retailers that most closely meet the end-users search request. End-users typically make use of a combination of general search services and comparison-shopping services when conducting a search for a product due to the lack of switching costs.[48]

Comparison shopping services are free-to-use for the end-user, acquiring remuneration through a cost-per-click model, where the retailer pays a fee every time an end-user visits their website through a comparison-shopping services' provided hyperlink. Therefore, the business strategy for comparison shopping sites is similar to that of the general search engine operators. Both strategies aim to attract as many end-users to the service as possible to increase the potential revenue that can be generated from the sponsored hyperlinks.

Where comparison shopping search services differ is how they gather the information which they communicate to the end-user. Unlike general search engines, comparison shopping search services do not provide hyperlinks to non-contracted partners. Comparison shopping services enter into agreements with online retailers, where they are supplied with the most up to date offers by the retailer themselves. This partnership has the benefit of efficiently supplying end-users with the most accurate and up to date information to enable them to enter into a transaction as quickly as possible.

Another difference is the value of the collected end-user data. As specialist search services offer more specific parameters to refine search queries, the data collected reflects this specificity. The value of this specific data is that search operators are better equipped to accurately match the end-user's query with an advertiser's content.[49] Therefore, comparative

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[48] Edlin and Harris (n 35) page 204.
[49] Andres V. Lerner, 'The Role of "Big Data" in Online Platform Competition' (2014), pages 25-26, <http://ssrn.com/abstract=2482780> accessed 28 August 2019.

shopping services and other specialised search services can potentially provide more value to the advertiser-side of the market than a general search engine. For example, Manne has commented on the increasing competition Google has faced from Amazon, the leading online retailer:

> [c]onsider, for example, Amazon's recent move into the targeted advertising market, competing with Google to place ads on websites across the Internet, but with the considerable advantage of being able to target ads based on searches, or purchases, a user has made on Amazon - the world's largest product search engine.[50]

Although comparison shopping services are not considered to be direct competitors of general search services as they serve different purposes, they are an indirect competitor for end-user traffic. While a mutually beneficial relationship exists in the early stages of the end-user's interaction with both types of services, where the end-user uses the general search service to navigate to the comparison shopping service, this is only temporary. When the end-users discover the comparison website relevant to their request, they are no longer incentivised to use the general search engine, as it is more efficient to simply access the comparison site directly for their future requests. As stated by Edlin and Harris:

> one of the primary benefits of generalized search engines is that, each time a [general search engine] takes a user to a [specialised search engine] that the user finds particularly well-suited to her preferences, the user can bookmark that site (and/or sign up for email alerts or RSS feeds), which makes it costless for the user to return directly to the site without using the [general search engine] as an intermediary.[51]

This maintains the revenue for the comparison service, however, the general search engine misses out on future traffic. Similarly, it is in the comparison service's interest to remove the relationship between the end-user and the general search engine, as the end-user may be attracted to a direct competitor instead. Therefore, it was a natural extension of the market strategy of general search engines to expand upon the versatility of its functions to possibly compete with specialised search services for future end-user traffic. This leads to more effective competition in the comparison shopping service market, as there is little to no cost in switching between services. Edlin and Harris point to the minimal switching costs as a main reason for fierce competition between services, where end-users often make use of multiple services.

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[50] Geoffrey Manne, 'FTC Ends Google Antitrust Investigation. Critics And Competitors: Move On', *Forbes,* January 3, 2013, <http://www.forbes.com/sites/beltway/2013/01/03/ftcs-google-antitrust-investigationwas-silly-critics-and-competitors-move-on/>.

[51] Edlin and Harris (n 35) page 206.

> One of the reasons [specialised search services] are competitive with [general search engines] is that switching costs are so low across vertical search engines and between vertical and generalized search. Unlike an operating system—where most users have one and only one - Internet users can easily have a 'stable' of vertical search engines (and other means of searching the Internet) with zero marginal costs.[52]

Therefore, there exists indirect competition between general search services and comparison shopping services for future initial contact with end-users. While both types of services gather relevant information for the end-user differently, their monetisation strategies are similar, consisting of increasing the potential opportunity to earn revenue through growing the number of potential end-users who might access commercial feeds from retailers.

The existence of indirect competition means that it is an inevitable and logical extension for the general search engine market to adapt its characteristics to become more substitutable for a specialised search service. A common method is the vertical integration of specialist search results into the general search results listings. Google Search, the market leader of the general search services market, has already adapted its general search service's result page to include the vertical integration of specialised search results. In doing so, Google hopes to compete more effectively with specialised search services which cater to a third of all online searches.[53] As was stated by Michael Griffin, Founder and Chief Technology Officer of Adlucent, which does search marketing for online retailers and who formerly managed Amazon's paid search, 'Google and Amazon both have the same end goal, to be the destination that people go to, to do their product searches, and Amazon's winning that battle'.[54]

By making the markets more substitutable, the specialist search service market is made to be more accessible to end-users, which correlates with the monetisation strategies of both general and specialist search service markets. It is therefore likely that there will be an effort from undertakings in the general search service market to increase the substitutability of their products to directly compete in the comparison service market.

In summary, the comparison shopping market is structured similarly to the general search service market. Where it differs is the increased focus on a narrower subject, where it allows

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[52] ibid pages 205-206.

[53] Data originally from "*Does Search Still Matter?, WHERE2GETIT (Oct. 4, 2011), http://blog.where2 getit.com/2011/10/does-search-still-matter/*" referenced in Edlin and Harris (n 35) page 205.

[54] Claire Cain Miller, 'Google Struggles to Unseat Amazon as the Web's Most Popular Mall', *N.Y. TIMES*, Sept. 9, 2012, <http://www.nytimes.com/2012/09/10/ technology/google-shopping-competition-amazon-charging-retailers.html>; Edlin and Harris (n 35) page 205.

end-users to search through products with more specific parameters than what is offered by a general search service. The increased focus also allows for the opportunity to collect data that is more specific, which allows comparative shopping services to better determine which consumer would be most likely to respond to the advertiser's content. As a result, there exists indirect competition between general search services and comparative shopping services for the advertiser side of their markets.

CHAPTER II: THE GOOGLE SHOPPING CASE

i) The Development of the Google Shopping Case

Google began offering a specialised search service, otherwise termed a 'vertical search service',[55] in the form of a comparison shopping service in the United States under the name Froogle in 2002. Froogle began as standalone website, which similar to Google Search, was monetised solely by advertisements and did not charge merchants for the act of being listed among the search results. Froogle was subsequently launched in the United Kingdom and Germany in 2004.[56]

In 2007, Froogle was rebranded as 'Google Product Search',[57] remaining a standalone website from Google Search. At this stage Google Product Search did not alter their monetisation model. Additionally, Google launched its 'universal search' tool in 2007, which began to vertically integrate or 'blend'[58] Google's specialised search services into its provision of general search services through Google Search. The universal search tool was specifically meant to correct 'tab blindness',[59] where the end-users would ignore the specialist search services offered by Google. Google's Vice-President of Search Products and User Experience, Marissa Mayer, remarked that 'you almost need a search engine for all our search engines',[60] referring to the large number of specialist search services offered by Google that end-users often ignored, as they either had no knowledge of their existence or of how to use them. Through introducing a universal tool that vertically integrates these services into a more accessible form, more end-users would be introduced to the existence and purpose of these specialised search services and hopefully utilise them more frequently in the future. However, it was this same promotion that raised concerns of anti-competitive effects.

The methodology employed by Google in listing results from universal search altered the original format of Google Search's results page. Instead of only including hyperlinks to content sites, the results page began to list hyperlinks to Google's specialised search services' platform pages. These links also displayed the highest ranked listed result from that vertically integrated specialist search service, listing them above the usual listed general

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[55] FTC Google Report (n 6) excerpt page 66.
[56] Google Shopping Decision (n 5) [27].
[57] <https://googleblog.blogspot.com/2007/04/back-to-basics.html> accessed 20 May 2019.
[58] <https://searchengineland.com/google-20-google-universal-search-11232> accessed on 20 May 2019.
[59] ibid.
[60] ibid.

search results.[61] Therefore, the new search results page displayed the advertised links at the top of the results page, followed by the vertically integrated specialist search results, and then the listing of general search results. These new specialised search results were not displayed according to the generic search results and would always be displayed above competitors, even if the algorithm deemed the competitors' results to be highly relevant.

> Although Google tracks user click-through rates relies on such click-through data to improve its web search results, Google has not relied on click-through data to rank its Universal Search results against other web search results. According to Marissa Mayer, Google did not use click-through rates to determine the position of the Universal Search properties because it would take too long to move up on the SERP on the basis of user click-through rate.
>
> Rather than comparing its content with that of competitors, Google used the occurrence of competing vertical websites in its natural search results to automatically boost the ranking of its own vertical properties above that of competitors. For example, where Google's algorithms deemed a comparison shopping website relevant to a user's query, Google automatically returned Google Product Search - above any rival comparison shopping websites. Similarly, when Google's algorithms deemed local websites, such as Yelp or CitySearch, relevant to a user's query, Google automatically returned Google Local at the top of the SERP.[62]

To accommodate this new layout, the number of general search results listed on the first page was reduced. This was a design choice by Google in regard to its front end-web design. Google could have left the same amount of general search results on the first page, but this would have impacted upon the loading speed of the web page for the end-user. The more content that is added to the web page, the larger the amount of data stored on the page, which means that the page takes longer to load for the user because more data needs to be transmitted.[63] The loading speed of a webpage is a very influential aspect in attracting end-user traffic, as end-users will always prefer to use a faster, more responsive webpage. In fact, a webpage's loading speed is a parameter that Google itself uses to rank content in its search listings. This was described in a relevant court hearing:

> [A] significant issue for Google is latency: i.e. delay in generating the SERP for users. Google's evidence emphasised the great importance of minimising delay and that even apparently slight increases in latency have a significant impact. A Google experiment reported in November 2006 revealed that a 0.5 second delay in generating the SERP caused a 20% drop in traffic, while a further experiment in 2009 found that

[61] Adam Raff and Shivaun Raff, 'How Google's Universal Search Mechanism Threatens Competition and Innovation on the Internet', (*Foundem*, 23 February 2010) page 2, <http://www.foundem.co.uk/Foundem_Preferencing_Data_and_Arguments.pdf> accessed 13 May 2019.

[62] FTC Google Report (n 6) excerpt page 26.

[63] Jay Kang, 'Webpage Size – Why is it important? And how do you optimize it?' (*SEOptimer)* <https://www.seoptimer.com/blog/webpage-size/> accessed 20 May 2019.

> slowing down the load time of the SERP by 0.1 to 0.4 seconds over 4–6 weeks reduced the number of searches per user by on average 0.2% to 0.6%, which is of consequence given the level of Google searches'.[64]

Thus, Google made the decision to reduce the number of general listings to maintain an acceptable loading speed, accommodating for the increased size of data that needed to be processed as a result of the displayed images alongside the hyperlinks. However, a more cynical interpretation was that the removal of general search listings furthered the aim of the introduction of the universal search tool, that of increasing the promotion of Google's specialised search products and services.[65] This interpretation prompted complaints from the undertakings operating comparative shopping services in the downstream market to the respective antitrust authorities of the United States and the European Union.

Following an investigation into Google's business practices, the FTC decided to exclude the allegations of Google's preferential treatment of its own comparative shopping service over its competitors in Google's general search engine results page ("SERP") from further investigation. In 2013, the FTC announced this in a public statement.[66]

Meanwhile, Google made some adjustments to its comparative shopping product. In 2012, Google Product search was rebranded as the 'Google Shopping Unit'.[67] Additionally, Google changed the methodology by which it collects offers from online retailers, moving to the model commonly used in the comparison service market where it would only communicate offers to end-users from contracted partners. As explained by Google, this was for the benefit of ensuring the end-user is presented with the most accurate product information. This model incentivises the contracted online retailers to provide regular updates to Google, as it increases the likelihood that they will receive an increased number of end-user traffic. This alteration could be interpreted as decreasing the supply side substitutability of Google's general search service and its comparative search service, as there is no reliance on their general search 'crawling' or indexing algorithms and increased costs in the form of time and money spent on negotiations to enter into contractual

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[64] *Streetmap* (n 14) [166].
[65] Raff and Raff (n 61).
[66] Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc. FTC File Number 111-0163 January 3, 2013 (Hereinafter "**FTC Google Statement**")<https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf> accessed 17 May 2019.
[67] Google Shopping Decision (n 5) [31].

agreements with online retailers. This alteration was also taken into account in the EC's investigation into Google's comparison shopping service.

In 2017, the EC concluded their investigation finding that Google had abused its dominant market position in the general search services market to artificially increase its market share in the comparison shopping market. Google was fined €2.42 billion as a result of its anticompetitive conduct.[68]

ii) The European Commission's Analysis

Through Google's reformatting of its general SERP, some of the comparison shopping services that were previously listed on the first page of the SERP are now listed on the second page of relevant results. The EC's analysis of end-user behaviour was that the first three to five hyperlinks listed on the first page of the SERP received nearly the entirety of the end-user traffic.[69] The analysis also demonstrates that approximately only 1% of end-users access hyperlinks ranked on the second page of the SERP.

Diminishing end-user traffic can have serious detrimental effects upon the ability of comparison shopping services to effectively compete in the market. Firstly, the level of end-user traffic directly affects the negotiating position of the comparison shopping service in relation to online retailers, where they cannot demand as much revenue from them due to a smaller chance of directing end-users to their offers for products and services.[70] Contrastingly, a large amount of end-user traffic lends credibility and brand recognition to the comparison shopping service, encouraging potential online retailers to partner with the undertaking. A lack of traffic subsequently diminishes this incentive, leading a narrow catalogue of offers that the comparison shopping service can communicate to the end-user. A narrower catalogue is detrimental to the comparison shopping service's ability to compete for end-user traffic, which creates a recessive cycle for the undertaking. The comparison shopping service is prevented from collecting as much end-user data as its competitors, preventing their ability to accurately predict relevant offers to the end-user's search request. This is particularly detrimental if the comparison shopping service is seeking to employ a popularity algorithm to rank retailer offers for relevancy, as a large amount of end-user

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[68] European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (2017) <http://europa.eu/rapid/press-release_IP-17-1784_en.htm> accessed 17 May 2019.

[69] Google Shopping Decision (n 5) [458].

[70] ibid [445].

traffic generally produces optimal results for a diverse demographic group. A diminished stream of revenue, combined with a diminished amount of collected end-user data, disadvantages the comparison shopping service in terms of resources to refine and improve its service toward end-users.

At the same time that the comparison shopping service is entering into a recessive cycle of declining popularity, its higher ranked competitors are making gains at their expense with increased network effects. The increased amount of end-user traffic that competitors receive affords them more resources to improve their service toward end-users, raising the level of competition in the market. This may further strengthen the decline of lower ranked comparison shopping services, likely leading to their elimination from the market.

As a result, Google's conduct has the potential to seriously diminish the amount of end-user traffic that comparison shopping services previously enjoyed from Google Search. As Google Search is the market leader in the general search services market, this will almost definitely have implications on the overall comparative shopping market. The placement of its own comparative shopping service's results above the listed competing comparison shopping services on the SERP provided Google a clear commercial advantage. Google is able to generate an increased amount of end-user traffic for their comparative shopping service, which enables it to enjoy the subsequent benefits of increased revenue and user data.

As stated previously, the monetisation strategy of the comparison shopping market depends on the amount of end-user traffic, where the more popular the comparison shopping service the greater the opportunity for earning revenue. Consequentially, comparison shopping services compete for the most end-user traffic by being the most convenient and effective operator. Google's super-dominant market share in the general search market enables it to act as a significant influencer in directing end-user traffic. By separating its own comparison shopping service from competitors that are subject to the algorithmic ranking system, Google Shopping receives a significant amount of end-user traffic regardless of the quality of its service, as nearly the entirety of end-users only select from services listed among the first page of the SERP. Therefore, end-users who are unfamiliar with the comparison shopping market will use Google Shopping because of its recognisable brand and location on the general SERP, not because of its quality when compared to competitors. Competitors will then have to invest more than Google in marketing to attract end-users.

The EC interpret this conduct as having potential anti-competitive effects that would foreclose all competition in the comparison shopping market. This could lead to higher fees for online retailers, which could result in them increasing the prices offered to end-users to compensate for the increased marketing cost. It would also decrease the incentive for Google to innovate its comparative shopping service, as they are already attracting the majority of end-user traffic. Therefore, despite the fact that the service remains free-to-use for end-users, Google's conduct could result in harm to consumers according to the published guidance on the enforcement of Article 102. As is stated in the EC's published guidance on enforcement in relation to Article 102:

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.[71]

The EC's theory of harm pre-supposes that without the internet traffic from Google Search, comparison shopping services would not be able to market themselves effectively to end-users or merchants, enabling them to remain competitive in the market. It also assumes that end-users, who are keen to browse and compare different prices among merchants, will not actively search for a specialised search service instead of a generic product. Finally, it also pre-supposes that there will not be a demand among end-users for a search engine focused on finding specialised search services, which subsequently would create an opportunity for a competitor to fulfil this unmet demand.

Nevertheless, the assumptions made by the EC are actually corroborated in the FTC's investigatory report. When discussing the inter-competition between general search services and specialised search services, the FTC relied on testimony from Google's former CEO on the impact of brand quality on an undertaking's performance in the market. Eric Schmidt testified that it was 'fundamental' to Google's marketing strategy to build brand equity with its end-users by consistently providing the most useful results regardless of the type of query:

> [s]o, if you for example, are an academic researcher and you use Google 30 times for your academics, then perhaps you'll want to buy a camera ... So long as the product is very, very, very, very good, people will keep coming back ... The general product

[71] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45 (Hereinafter "**Guidance Paper**") [19].

> then creates the brand, creates demand and so forth. Then occasionally, these ads get clicked on.[72]

Google's comprehensive scope creates a habit for end-users to primarily consider Google Search as the first search engine to use when attempting to find content on the internet, relegating the consideration of using specialised search services only when Google fails to achieve the desired result. This has had the effect that specialised search services now consider themselves dependant on general search services for the majority of the end-user traffic that they receive.[73]

Therefore, when the EC's summary findings are read in conjunction with the testimony found in the FTC's investigatory report, the assumptions made by the EC in its theory of harm appear to be corroborated. This evidence is in the form of the witness testimony from Google's former CEO and the executives of several specialised search services, and the fact that since the FTC report, there has been no development in the ways that specialised search services can market themselves effectively without the use of general search services, which would not result in a significant loss of end-user traffic.

iii) The Federal Trade Commission's Analysis

Although the FTC did not find Google's preferential design to have violated Section 2 of the Sherman Act, it was not a clear-cut decision. The FTC had similar findings to the EC on the effects of Google's conduct for vertical search services' ability to compete, however, the FTC was more accepting of the pro-competitive arguments put forth by Google in defence of its conduct. The FTC ultimately decided that to truly determine whether Google's conduct should be considered anti-competitive and condemned, it would be necessary to consider an extensive balancing of the pro-competitive and anti-competitive effects of the conduct, which the courts have previously been hesitant to perform. Therefore, an FTC finding that stated Google's preferential design was in violation of Section 2 of the Sherman Act would be unlikely to be upheld.[74]

Nevertheless, there were significant similarities in the theory of harm proposed by both competition authorities. The FTC similarly held that Google's conduct would place vertical search services at a significant commercial disadvantage, hampering their ability to innovate at the same pace as Google, leading to the consequence of new or existing vertical search

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[72] FTC Google Report (n 6) excerpt page 66.
[73] ibid.
[74] ibid excerpt page 86.

services ceasing to exist in the market. This would subsequently reduce the future level of innovation in the market and the available choice of services for the consumer.[75] The FTC's investigative report also corroborates the EC's findings that the loss of traffic would result in a loss of revenue and end-user data, which would provide less resources for innovation of a competitor's product and service. A similar point was also made that with the exiting of competitors of the market, there is little to constrain Google's ability to raise prices for advertisers. As is stated in the FTC's report:

> While reduced innovation is at the heart of this theory, the role of pricing cannot be ignored, in that (as with other theories described later in this memorandum), the broader availability of alternative search advertising platforms would operate as a constraint on Google's ability to raise prices to its advertisers.[76]

Whilst it is not explicitly stated, this increase in price would likely result in higher prices charged by the advertisers, ultimately passing on the increased price to the end-user. However, when considering this potential harm to competition in the market, the FTC was also very adherent to the consideration of the potential pro-competitive effects resulting from Google's product design. Google put forth arguments that the changes in product design were ultimately to the benefit of the consumer. By providing relevant links to web pages where end-users could purchase the product directly, they were improving their product to meet the expectations of end-users.[77] Therefore, from Google's perspective, this design change of their universal search product and service is an innovation to improve customer satisfaction. Google holds the belief that end-users would ultimately prefer to be directed to the least amount of pages required for the end-user to achieve their desired result, which would mean that it would be counter to the interest of the end-user if they were to be directed to another search service, which in turn would direct them to another merchant. This new product design can be stated to objectively consist of an increase in efficiency, where the end-user spends less time in being directed toward their desired web page.

Nevertheless, the FTC considered this to be an innovation of the universal product search service, not of the shopping comparison shopping service. As shown in the investigatory report, the FTC took into consideration that Google stood to significantly benefit from this product design change to its general search service in terms of substantially increasing the end-user traffic to its comparison shopping service, resulting in it becoming the most

[75] ibid excerpt page 80.
[76] ibid excerpt page 150.
[77] ibid excerpt page 84.

frequently accessed comparison shopping service through Google Search, despite there being no significant innovation of its design or features.[78] The FTC also noted that Google's internal documents demonstrated an awareness of the fact that this design change would result in a significantly decreased amount of end-user traffic to its competitor vertical search services. Therefore, it can also be objectively stated that Google made the informed decision to alter the product design of its super dominant product, fully aware that it would provide a substantial commercial advantage to its struggling product and cause detriment to its competitors.

Determining whether the product design change should be considered as an unfair method of competition under Section 5 of the Federal Trade Commission Act[79] required discerning Google's primary motivation. Was this change an attempt to mainly improve the efficiency of Google's flagship product or an effort to exclude its competitors from another market? When making this assessment, the FTC took into consideration internal evidence from Google on how it implemented this design change. From this evidence, the FTC concluded that the implementation of the design was carefully made to provide the optimal end-user experience:

> Google would typically test, monitor, and carefully consider the effect of introducing its vertical content on the quality of its general search results, and would demote its own content to a less prominent location when a higher ranking adversely affected the user experience. Analyses of 'click through' data showing how consumers reacted to the proprietary content displayed by Google also suggest that users benefited from these changes to Google's search results.[80]

Accordingly, the FTC concluded there existed sufficient pro-competitive justifications for the integration of Google's comparison-shopping service into the universal search service. Additionally, the FTC examined competing general search services and found similar design changes, which led it to conclude that Google's conduct was similarly motivated to improve quality as opposed to an exclusionary strategy.[81]

Presented with sufficient evidence of pro-competitive motivations, the FTC considered further scrutiny into Google's rationale or methodology would be tantamount to second-guessing Google's commercial strategy. This consideration is supported when examining the specific characteristics of both the general search service and specialised search service

[78] ibid excerpt page 30.
[79] Federal Trade Commission Act 15 U.S.C. § 45, Section 5.
[80] FTC Google Statement (n 66) page 2.
[81] ibid.

markets. As these markets consist of free-to-use products and services, the main distinguishing factor between competitors and their commercial success in these markets is the methodology of how they deliver results to end-users. To extensively scrutinise how Google has designed the delivery of its content to the end-user would be a direct interference with Google's performance in the market, and considering Google's near total market share, any judicial interference would change the dynamics of the overall market, possibly to the detriment of the consumer.

This conclusion could be further supported when comparing Google's traditional design philosophies and commercial strategies with the product design changes under investigation. As previously demonstrated,[82] Google has attributed its market success to a minimalist and accessible interface, where the end-user is delivered the most relevant content as efficiently as possible. As it can be objectively stated that the vertical integration of specialised search services into Google Search is an improvement in efficiency, the change in product design would fit naturally within Google's traditional overall commercial strategy, which was ultimately rewarded with its large market share because it fulfilled consumer's expectations better than its competitors.

iv) The Key Differences

Nevertheless, when interpreting the overall investigatory report and the subsequent public statement concerning the FTC's investigation, it is clear that there are some distinct differences in how the FTC and the EC assessed the relevant markets. The FTC did not distinguish between the general search service market and the comparison shopping service market to the same degree as the EC. From the FTC's perspective, general search services compete dynamically with vertical search services, even within the competence of their specialised subject matter. This is the logical interpretation of the end-user's thought process in engaging with the market, where they will use a combination of both general search and specialist search services.

When end-users are searching for a relevant product, many end-users will not take the different characteristics of these relevant markets into serious consideration, they will simply use either service to direct them to the desired merchant. Even if they are seeking to compare the prices of different merchants, many end-users will likely make use of at least a single

[82] See Page 13 for more discussion on the importance of Google's minimalist design.

general search service and specialised search service to browse through as many different offers from merchants as they can find. It is similar to the difference between the markets of independent bakeries and wholesale supermarkets, who could likely have a significant overlap of the same consumers that simply want to buy bread at a competitive price from a practical location. There will exist some consumers who do not seriously consider the differences between the types of undertakings as part of their decision to purchase the goods. From this perspective, what ultimately matters to the consumer is getting the product or service that they want, not who provides it to them. As such, when an end-user decides to use Google Search to find a product offer, they do not consciously decide to use Google's general search because it is not integrated with specialist search software, they are simply browsing for a desirable product offer.

Using the consumer's perspective as the focal viewpoint of the market also highlights another significant difference between the FTC's and EC's interpretation of harm. This difference is what can be deemed as a relevant result to the end-user's search query. The FTC do not interpret or make a judgement on what is relevant to the end-user, they instead rely on the 'click-through'[83] data provided to them by Google. "Click-through" data can be summarised as a statistic showing how many previous end-users accessed the hyperlink, which Google subsequently uses as a measurement of how relevant a result is to the end-user's search query. Therefore, if the new design changes receive more end-user traffic, they will be determined by Google to have been beneficial to the end-user's experience because they provided relevant results. The FTC accepted Google's interpretation in its investigation, perhaps with the consideration that this again falls within the remit of Google's commercial strategy, as providing relevant results is the primary factor of quality competition in the relevant market.[84]

On the other hand, the EC did not accept Google's interpretation. Instead, the EC claimed that it was not the relevancy of the results, determined by the click-through data, which was shaping the search results page ranking, but it was in fact the other way around. In its summary report, the EC provided evidence to demonstrate that the most significant factor in receiving end-user traffic is the positioning on the results page, where the same content

[83] FTC Google Report (n 6) excerpt page 82.

[84] Eric Bartelsman and others, 'Market Dominance and Search Quality in the Oligopolistic Search Engine Market' (2013), page 3. <https://pdfs.semanticscholar.org/98d5/62124c968a4219c93109a3eea78f86d3bbbd.pdf> accessed 14 September 2019.

would have significantly reduced traffic if it was moved from the first ranked result to alternative ranked positions.[85] Based on this data, the EC felt sufficiently confident to make the claim that end-users were not using the most relevant results to their queries. '[U]sers tend to consider that search results that are ranked highly in generic search results on Google's general search results pages are the most relevant for their queries and click on them irrespective of whether other results would be more relevant for their queries.'[86]

Therefore, the EC has taken a very different stance on assessing the potential harm to competition in this market. Not only does the EC second-guess Google's commercial strategy, but it also second-guesses the demand of the majority of consumers.[87] Google's product is free-to-use, where the only barrier for an end-user to achieve the most relevant search result is the time that they have available to find it. There is no cost barrier forcing the end-user to be satisfied with lower quality results. Therefore, the claim that the majority of end-users are not having their demands met satisfactorily is a bold one, considering Google's super dominant market share. It is also contradicted by the Slingshot SEO study. This study found that Bing's click through rate for the first result on a search result page was only half that of Google's (9.66% vs. 18.20%); Bing also had lower click-through rates on its top 10 search results.[88] Commentators have held that 'this marked difference in click-through rates between Google and Bing indicates that Google is returning search results that better meet users' needs and could explain the preference of Google users over Bing'.[89] This evidence alone raises significant doubt over the theory that end-users will click on results regardless of their relevance.

In its theory of harm, the EC does not consider the experience and perception of end-users to the same degree as the FTC. While the FTC might believe that the design changes are pro-competitive, as an innovation of the product to improve the end-user experience, the EC perceives the end-user experience to be static, in that the same amount of end-user traffic will be generated for the first ranked result regardless of the content. The EC places more importance on the fact that these changes are potentially causing competitors to exit the market, subsequently reducing the choice available to the consumer and the incentive for

[85] Google Shopping Decision (n 5) [458]-[461].
[86] ibid [535].
[87] ibid [534].
[88] Casey Szulc, 'A Tale of Two Studies: Google vs. Bing CTR', *(Slingshot SEO*, 26 October 2011), <https://www.slingshotseo.com/blog/a-tale-of-two-studies-google-vs-bing-ctr/> accessed 15 February 2020.
[89] Edlin and Harris (n 35) page 201.

undertakings to innovate and improve the quality of their product, which allows Google to raise their prices for merchants. On the other hand, the FTC perceives that end-users have chosen to use Google's product over its competitors because the new changes represent an improvement in quality, where the possibility of Google being able to charge higher prices from merchants is justified as a reward for improving the quality of its product.

CHAPTER III: AN ANALYSIS OF THE DIVERGENCE

i) Abuse of Dominance: The European Perspective

After identifying that both competition authorities came to a similar conclusion on the resulting effects of the conduct, it is necessary to examine the legal context of both jurisdictions to discover the reason for the different findings on the conduct's legality. As the key difference between the two proposed theories of harm was the balancing of anti-competitive effects against pro-competitive justifications, this thesis will explore how the abuse of a dominant market position has been previously assessed under European Community law and American antitrust law to discover the legal reasoning that determines how the balance should be struck.

Firstly, it is important to determine the statutory differences that influence how the EC and the FTC enforce antitrust law. Article 102 of the Treaty on the Functioning of the European Union is the primary source of law relating to an abuse of a dominant market position within the EU. It places upon dominant undertakings a 'special responsibility not to allow its conduct to impair undistorted competition on the [internal] market'.[90]Article 102 is designed to complement the preceding Article 101, where Article 102 prevents the distortion of competition by a unilateral act, Article 101 prohibits collective acts by more than one undertaking.[91] Article 102 is an inherent recognition that an undertaking which enjoys a special advantage cannot unfairly utilise this advantage against competitors in lieu of simply competing on the merits of their products or services. As a result, an undertaking that earned a significant market share through producing the best quality product on the market, cannot then use that market share in an unfair manner, such as by engaging in predatory pricing, in an effort to earn an even larger share of the market to the detriment of its competitors.

Nevertheless, the purpose of Article 102 is not to protect inferior competitors of a dominant undertaking. As was stated in *IMS Health*, 'the primary purpose of [Art 102] is to prevent distortion of competition — and in particular to safeguard the interests of consumers — rather than to protect the position of particular competitors'.[92] As a result, the chief aim of

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[90] Case 322/81 *Michelin v Commission* [1983] ECR 3461 [57].

[91] Case T-41/96 *Bayer v Commission* [2000] ECR II-3383 [175-176].

[92] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] I-7811, Opinion of AG Jacobs [58]; Case T-184/01 R *IMS Health Inc. v Commission* [2001] ECR II-3193 [145].

Article 102 is to prevent the consumer from being exploited by an undertaking that possesses a monopoly.

The EC protects the competitive process, because 'consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services'.[93] When competition has failed to achieve this, because new competitors are unable to enter the market and offer a lower price or improved goods, the competition authority needs to intervene to prevent the consumer from being exploited by excessively high prices or other exploitative conditions of service. However, despite having the competency to intervene in the case of an undertaking charging excessively high prices, the EC is often reluctant to do so.

To determine whether an undertaking is charging an excessively high price, it is necessary to calculate an appropriate benchmark price, that would not unfairly impact the welfare of consumers nor remove the ability for the undertaking to effectively remunerate its activity. Under European competition law, a price can only be deemed to be excessive if it bears 'no reasonable relation to the economic value of the product supplied'.[94] As Advocate General Wahl explains:

> the calculation of a benchmark price is a rather complex and uncertain exercise. Were a competition authority to intervene in respect of any difference — however small — between those two prices, the risk of having false positives would simply be too high. That is not only a problem because a large fine may be imposed on the undertaking responsible, but also because neutral — or possibly pro-competitive — conduct might be prohibited. In that regard, it has been correctly argued that type I errors in competition decisions concerning unilateral conduct involve a much larger cost for the society than type II errors.[95]

A false positive error is where a competition authority has intervened and prohibited behaviour that was not anti-competitive. This could result in undertakings not investing further or even halting their activity in a market, which is ultimately to the detriment of the consumer, as it deprives them of their desired product or service. It would be paradoxical for a law designed to promote competition to have had the opposite effect and diminished it.[96]A much more attractive method for competition authorities to pursue is the prevention of actions that exclude competitors from competing effectively. By safeguarding the

[93] Guidance Paper (n 71) [5].
[94] Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207 [250].
[95] Case C-177/16 *Biedrība Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome* (6 April 2017), Opinion of AG Wahl [105].
[96] Richard Whish, David Bailey, *Competition Law* (Oxford University Press 2015), page 203.

competitive process, consumers are naturally protected from exploitation by a potential monopolist, as the monopolist is restrained from abusing its position by the necessity to act competitively in the market. In this regard, the market self-regulates the parties involved, without the loss of either the offered product or service, nor the potential improved quality through further investment. As was referenced by Advocate General Wahl:

> [t]he economic system corrects monopolies more readily than it corrects judicial errors … A practice once condemned is likely to stay condemned, no matter its benefits. A monopolistic practice wrongly excused will eventually yield to competition though, as the monopolist's higher prices attract rivalry.[97]

Accordingly, the EC often prioritises pre-emptive intervention to protect competition in a market, especially where these exists significant barriers that would prevent new competitors entering the market. This pre-emptive intervention is justified for the same reason that mergers and acquisitions require the prior permission of a competition authority, as it is more difficult to remedy a substantial loss of competition in a market than it is to prevent it. Nevertheless, as is stated in the EC's guidance on the enforcement of Article 102:

> the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.[98]

As such, intervention will normally only occur when the conduct of the dominant undertaking is capable of hampering the ability of competitors as efficient as the dominant undertaking to compete. This is further supported by the jurisprudence of the ECJ, where it has been stated that 'Article [102] prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors'.[99] This, combined with similar statements within the judgements of *Telia Sonera*[100] and *Post Danmark,*[101] has led to the general conclusion that conduct can only constitute an abuse when it excludes or constrains equally efficient competitors.

Nevertheless, it is also possible for a dominant undertaking to have restricted competition legally if the conduct it has undertaken is objectively justified by a pro-competitive rationale.

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[97] Easterbrook, F.H., 'The limits of antitrust', (1984) *Texas Law Review*, page 15; *AG Wahl* (n 95) [103].
[98] Guidance Paper (n 71) [19].
[99] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-9555 [177].
[100] Case C-52/09 *Konkurrensverkt v TeliaSonera Sverige AB* [2011] ECR I-527 [31]-[33], [39]-[40], [43], [63]-[64], [67], [70], [73].
[101] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (ECJ 27 March 2012.) [21]-[22], [25],[38].

This pro-competitive justification must demonstrate that the increased efficiency as a result of the dominant undertaking's conduct counteract the exclusionary effects on competitors in the market. This increased efficiency must:

i) have an overall beneficial effect on consumer welfare that outweighs the loss of competition,

ii) be necessary for the achievement of this positive effect,

iii) and not disproportionately foreclose competition on the market.[102]

Therefore, although it has been stated that European competition law 'aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such',[103] the structure of the market is a lesser priority to the overall standard of consumer welfare.

In summary, Article 102 is designed primarily to protect the welfare of consumers from being exploited by undertakings that hold a dominant position and who are not restrained by competition in a market. In this manner, it allows competition authorities to intervene when a dominant undertaking imposes unfair conditions upon consumers, such as excessive pricing. However, it is often difficult to determine what constitutes exploitive conduct, as there is often no ideal benchmark in the form of an alternate offering by a competitor. Therefore, to minimise the occurrence of false-positive findings of anti-competitive behaviour, European competition authorities seek to pre-emptively protect the competitive process by preventing the exclusion of competitors who are at least as efficient as the dominant undertaking. In doing so, the competitive process constrains the exploitive conduct that a dominant undertaking could potentially engage in.

ii) Abuse of Dominance: The American Perspective

There is no exact equivalent for Article 102 in American competition law. Section 2 of The Sherman Act 1890 prohibits an act or attempted act of monopolisation. Monopoly has been defined in American jurisprudence as 'the power to control market prices or exclude competition'.[104] The appropriate legal test applied to determine monopolisation has two limbs: (i) there must be monopoly power, and (ii) the wilful acquisition or maintenance of

[102] ibid [41-42].
[103] Joined Cases C-501, 513, 515, 519/06 P GlaxoSmithKline et al. v Commission [2009] ECR I-9291 [63].
[104] *United States v Grinnell Corp*, 384 U.S. 563, 571 (1966).

that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[105]

The first element, the possession of monopoly power, is determined by several factors. An undertaking's market share is definitely a relevant factor in both the competition authorities and courts' assessments of monopoly power, however, it is not sufficient to be the sole determinative factor.[106] Even if an undertaking possessed a market share that represented over half of the relevant market, it might not be considered to be in the possession of a monopoly, as was stated by the US Court of Appeals '[t]hat percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not'.[107]

Instead, market share is considered alongside additional factors, such as how much profit the undertaking is earning, the structure of the market, and the barriers that face new competitors when entering the market.[108] The necessity to consider factors other than just the market share is similar to the European perspective, as unless there are factors preventing the entry of competitors who could provide a similar quality good or service, any attempt to use that monopoly power to exploit consumers could be constrained by a new entrant to the market.

The second element, the intent to acquire or maintain monopoly power without offering a better experience for the consumer, was discussed in the US Supreme Court *Trinko* judgement:

> [t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[109]

This reference to anti-competitive conduct is alluding to what would be called an 'exclusionary abuse' from the European perspective. For example, it is considered an

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[105] ibid.

[106] Vijay Kumar Singh, 'Competition Law: Dominant Position and its Abuse: Abuse of Dominant Position in US and EU' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973772> accessed 19 March 2020.

[107] *United States v Aluminum Co of America*, 148 F.2d 424 (2d Cir. 1945).

[108] Singh (n 106); Jonathan IGleklen (ed.), ABA Section of Antitrust Law, Antitrust Law Developments, American Bar Association (7th ed. 2012) at page 236.

[109] *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 U.S. 398, 407 (2004).

infringement of Section 2 if an undertaking foregoes a profitable supplier relationship with a competitor in an effort to potentially eliminate it from the market, as was the case in the *Aspen Skiing* judgement.[110] Nevertheless, there is a significant divergence between what European and American competition law considers 'anticompetitive conduct', especially when it concerns an undertaking refusing to deal with a competitor. This is particularly relevant to the Google Shopping case, as it is often compared to ECJ's judgement in *Microsoft*,[111] where Microsoft was found to have engaged in exclusionary conduct in not supplying interoperability information. Google's counsel would also go on to argue before the General Court that the EC had misapplied the traditional 'refusal to deal' analysis in its Google Shopping decision.[112]

The American attitude towards judicial intervention on the basis of Section 2 is rather conservative when compared to the European attitude to intervening on the basis of Article 102.[113] The American evaluation of the false positive dilemma is that false positives are more costly to the competitive process than the proposed benefit of judicial intervention. This is clearly evidenced within the *Trinko* judgement:

> [a]gainst the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of §2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad'. Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect'. The cost of false positives counsels against an undue expansion of §2 liability.[114]

A key concern of the American Supreme Court was that if the market is highly technical or complex, a sectoral regulator would be better qualified to enact sector specific regulation which accounted for the market's technical nature, as opposed to simply applying general competition law principles. As referenced by Justice Scalia:

> No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law

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[110] *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 U.S. 585 (1985).
[111] John Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39, no. 1: 5-28, *World Competition* 39, page 10; *Microsoft v Commission* (n 5).
[112] Lewis Crofts, 'Google's duty to carry rival services draws EU judges' questions', *Mlex*, (12 February 2020).
[113] Eleanor M. Fox, 'A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal' (2004) 28(4) Fordham International Law Journal, Article 4.
[114] *Trinko* (n 109), IV.

> when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.[115]

Therefore, the Court was hesitant to potentially expand the scope of liability under Section 2, which could lead to more opportunities for a generalist court to unjustifiably intervene and disturb pro-competitive conduct. Nevertheless, a too strict interpretation of Section 2 would leave potentially anti-competitive conduct without any potential remedy.

Section 5 of the Federal Trade Commission Act 'was designed to supplement and bolster the Sherman Act and the Clayton Act - to stop in their incipiency acts and practices which, when full blown, would violate those Acts'.[116] This has allowed the FTC to pursue unilateral conduct not previously covered under the remit of the Sherman Act, such as invitations to collude.[117] Section 5 of the FTC Act[118] was seen as a preferred method of regulating business conduct, because of its light-handed approach compared to the remedies available under the Sherman Act. As a trade-off for broader applicability, Section 5 of the FTC Act would only allow equitable relief.[119] Section 5 also has the benefit of allowing judicial intervention against businesses without the need to consider exposing these businesses to excessive liability arising from private litigation.[120] Nevertheless, Section 5 has rarely been relied on exclusively by the FTC. The FTC when seeking to apply Section 5 has been cautious in acting within areas that are not prescribed by other antitrust statutes.

The caution and hesitancy demonstrated in the FTC's deliberation over intervention on the basis of antitrust law can almost certainly be attributed to the US Courts' deference to economic evidence. Unlike the standards applied by the European judiciary, the American judiciary are not as accepting of per se illegality. The courts will normally require a demonstration that conduct carries demonstratable anti-competitive effects, only applying a per se rule 'after courts have had considerable experience with the type of restraint at issue, (…) and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason'.[121] The US Supreme Court has also demonstrated that it is more willing to engage with economic literature that its European

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[115] ibid.
[116] *FTC v Motion Picture Advertising Service Company, Inc*, 344 U.S. 392, 394-95 (1953).
[117] *Quality Trailer Products*, 115 F.T.C. 922 (1992) <http://www.appliedantitrust.com/06_conspiracy/d_invitations/quality_trailer/quality_trailer_ftc1992.pdf>.
[118] Federal Trade Commission Act 15 U.S.C. § 45, Section 5.
[119] William Kovacic and Marc Winerman, 'Competition Policy and the application of Section 5 of the Federal Trade Commission Act' (2010) No. 3, 76 *Antitrust Law Journal*, page 932.
[120] ibid page 939.
[121] *Leegin Creative Leather Prods, Inc v. PSKS, Inc*, 551 U.S. 877, 886-87 (2007).

counterpart. As a consequence, the FTC finds it much more onerous than the EC to prove certain practices are contrary to antitrust law, such as predatory pricing, retail price maintenance, and artificially reducing competitors' margins.

Manne states that the two jurisdictions' different approaches to predatory pricing illustrate the key differences between their approaches to overall enforcement.[122] European competition law does not require proof that it is possible for the suspected undertaking to be able to recoup its losses before finding abusive conduct.[123] This is not the same standard in the US, where it must be demonstrated that there is proof of below cost pricing, recoupment of losses, and the lack of any reasonable business justifications for the conduct.[124] The US approach is guided by the belief that '[w]ithout recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced'.[125] Whereas the European approach is more concerned with preventing the distortion of competition by maintaining the structure of the competitive process. 'It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated… The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors'.[126]

In summary, Section 2 of the Sherman Act is similar to Article 102 of the TFEU, as it is intended to protect consumer welfare from undertakings abusing monopoly power. However, the manner in which Section 2 of the Sherman Act and Section 5 of the FTC Act are applied is substantially different to their European counterpart. There is a bigger focus on the context of individual cases rather than general principles, examining the economic evidence for anti-competitive effects in each scenario, ensuring that consumer welfare is ultimately improved by the decision. In this regard, the American authorities are highly considerate of the potential detriment to innovation that a false positive finding could cause, ultimately shackling the future quality of goods and services on offer to consumers. There is less of a focus on protecting the competitive process, as judging by the Court's statements

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[122] Geoffrey A. Manne, 'Why US Antitrust Law Should Not Emulate European Competition Policy: A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU' (Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, December 19, 2018).
[123] Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369 [110].
[124] *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 U.S. 209, 222-27 (1993).
[125] ibid.
[126] Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-05951 [44].

in *Trinko*,[127] the competitive process in some markets can be highly technical and complex, requiring a level of understanding that a generalist court would not likely possess.

iii) EU Legal Precedent

It is difficult to determine which body of case law in either jurisdiction would suit the harm identified in the Google Shopping case. It is perhaps for this reason that the EC's action against Google has been categorised as a novel abuse, outside of the previously defined categories of abuse recognised in European jurisprudence. Nevertheless, this newfound abuse, that of providing favourable treatment to certain products or services, is not substantially different from previous case law. The harm that traditionally results from a refusal to supply a competitor, that of preventing competitors from competing in the market as a result of the incumbent's control of necessary resources, has the same result as the identified harm caused by Google's conduct. By refusing to supply a competitor, the dominant undertaking favours its own products and services by preventing competing products access to essential resources leading to their elimination from the market. The key difference between traditional refusal to supply cases and Google shopping is that competitors are not denied access to an essential facility or resource, they are simply disadvantaged by the introduction of a new barrier to interoperability.

A dominant undertaking is considered to have committed an abuse in the form of a refusal to supply when they have denied a competitor access to a resource that is indispensable to competing effectively in the market. Examples have included a dominant undertaking reserving raw materials for its own subsidiaries and preventing competitors from manufacturing competing products in the market[128] or a dominant undertaking imposing a competitive disadvantage through its control of necessary infrastructure on an equally efficient competitor.[129] In certain scenarios, European competition law recognises infrastructure as an 'essential facility' that competitors need access to in order to enable effective competition in the market.[130] The controller of the essential facility is mandated to provide access to downstream competitors at a non-discriminatory market rate. For

[127]*Trinko* (n 109), IV.
[128] Cases 6 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 [25].
[129] Case C-280/08 *P Deutsche Telecom* [2010] ECR I-9555 [234].
[130] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-07791 [24].

infrastructure to be determined an essential facility, it must not be economically viable for a competitor to replicate it because of economic, legal or technical obstacles.[131]

When assessing Google's conduct and its anti-competitive effects, the EC did not find Google's general search service to fall within the essential facility doctrine. As a result, there was no need to meet the requirements of proving that Google Search would be necessary to compete in the comparison shopping services market. Instead Google Search was characterised as possessing a huge influence upon the comparison shopping market, 'Google's general search results pages accounts for a large proportion of traffic for competing comparison shopping services and cannot be effectively replaced by other sources of traffic currently available to competing comparison shopping services'.[132] In essence, the EC holds the position that Google's general search services plays an essential role in the comparison shopping market to enable undertakings to compete effectively, but it is not sufficiently essential to qualify as an essential facility. The reasoning for such a finding is undoubtedly due to the fact that its consideration as an essential facility would be immaterial to the finding of abuse, since Google has not refused any competitor access to its general search service, nor has it restricted or degraded their access to the service. Therefore, Google's conduct cannot be considered to be a refusal to supply in the traditional sense.

The two cases that are most similar to the EC's arguments against Google are that of the EC's decision against Decca Navigation Systems,[133] and the subsequent case of *Microsoft v Commission*.[134] Similarly to Google in the Google Shopping case, Decca were accused of making modifications to their product to decrease the interoperability with products from competitors. Microsoft, on the other hand, were sanctioned for refusing to supply information to third parties who wished to create software interoperable with the Windows platform.

In the *Decca*[135] case, the EC held that Decca's modification of their transmission signals constituted unlawful conduct, as they had the effect of rendering competitor's products unusable. However, a key difference between this case and that of Google Shopping is that there were no pro-competitive justifications for the modifications. In fact, Decca had

[131] ibid, [44]-[45].
[132] Google Shopping Decision (n 5) [342].
[133] Decca Navigation System (Case IV/30.979 and 31.394) Commission Decision 89/113/EEC [1989] O. J. No - L - 43/27 (Hereinafter referred to as "**Decca Decision**").
[134] *Microsoft v Commission* (n 5).
[135] Decca Decision (n 133).

admitted in the proceedings that the motivation for the conduct was purely to exclude competitors' unlicensed products from the market.[136] Therefore, considering that the pro-competitive justifications were the point at which the two competition authorities diverged in their analysis, there is a significant distinction between the *Decca* decision and the case against Google.

The *Microsoft*[137] judgement presents a more analogous situation in both the actual scenario and the theoretical arguments offered in defence of the sanctioned conduct. Microsoft was accused and eventually found guilty of refusing to supply information that would allow third party software, developed by its competitors, to communicate with the directory software of Microsoft's flagship operating system, the Windows platform. The Court found that failing to supply this interoperable data would severely affect the functionality of third-party software on the Windows platform, and as a consequence, foreclose all competition in the downstream market. Microsoft justified its decision to not supply this information by stating that it was Microsoft's exclusive right to refuse to license its intellectual property. As such, Microsoft argued that an order by the EC to disclose this information would disincentivise any future innovation and the whole purpose of intellectual property, as competitors would be free to utilise the fruits of Microsoft's labour. Microsoft feared that by disclosing this interoperable information, competitors would be enabled to 'clone' Microsoft products and maintain a similar level of functionality and interoperability to that of Microsoft's products, whilst spending a significantly smaller amount of resources in developing the competing product.[138]

The Court stated that in assessing the relevance of objective justification for conduct that infringes Article 102, the burden of proof falls upon the defendant to provide adequate arguments and evidence to support their proposed justification. Following this, if the EC is not satisfied by the stated justification, then it must demonstrate that the arguments and evidence provided by the defendant cannot prevail.[139] The EC's rebuttal of the justification presented by Microsoft was upheld by the Court. The Court found that the arguments presented by Microsoft were too vague and theoretical, failing to specify the products or technologies whose future innovation would be disincentivised.[140] Furthermore, the remedy

[136] ibid [52].
[137] *Microsoft v Commission* (n 5).
[138] ibid [121].
[139] ibid [688].
[140] ibid [698].

proposed by the EC would not have likely led to competitors 'cloning' Microsoft's products, as it did not order Microsoft to disclose its source code, merely the information that would allow the competitor's software to communicate with the Windows platform.[141] The Court concluded on the basis of the results of the American proceedings against Microsoft for the same conduct, that the disclosure of this interoperable information would not be likely to cause the cloning of Microsoft's products, nor reduce the incentive for Microsoft to innovate.[142] As was explained by the Court:

> [t]he aim pursued by the Commission is to remove the obstacle for Microsoft's competitors represented by the insufficient degree of interoperability with the Windows domain architecture, in order to enable competitors to offer work group server operating systems which differ from Microsoft's on important parameters such as, in particular, security, reliability, processing speed or the innovative nature of certain functionalities.[143]

There is a clear goal pursued by the EC to enable a market where there are multiple suppliers that will promote competition in multiple parameters, including the speed of the product or service and the innovation of new functions or features. In pursuing this goal, European competition law cannot allow dominant undertakings to create 'artificial advantages'[144] by restricting access to markets through control of the infrastructure. Nevertheless, the underlying justification for intervention by authorities is that by increasing the interoperability of competitors' software with Microsoft's infrastructure, more diverse products will emerge that offer different parameters that hold value to consumers.[145] This focus on protecting competition based on non-price parameters coincides perfectly with the EC's focus in Google's activity in the comparative shopping market. Google's comparison shopping service saw a dramatic growth in market share without altering or improving the functionality of their comparison shopping service. In the EC's view, Google's newfound market success was not based on the merits of new features or improved quality but a result of deliberate manipulation of its general search infrastructure.

Nevertheless, the Google Shopping case should be distinguished from the past jurisprudence relating to artificially imposed barriers through interoperability. The EC's action against Google cannot be justifiably framed as a product modification to exclude competitors.

[141] ibid [40].
[142] ibid [703].
[143] ibid.
[144] ibid [653].
[145] ibid [656].

Unlike in the case against Decca, there have been no admissions to an intent to engage an exclusionary strategy, instead Google has provided credible pro-competitive justifications that satisfied the FTC. Unlike in the case of Microsoft, there is no underlying concept that judicial interference would produce products or services that would be distinguished by differing parameters of competition, since Google's integrated general search service provides end-users with a direct link to the desired product or service that is most relevant to their query. Its methodology consists of searching amongst the commercial feeds from merchants that are supplied to their specialised search service, Google Shopping, and placing a hyper-link to the webpage where the end-user can enter into a transaction. In doing so, the end-user avoids being directed to the merchant's site, and is directed to their target of interest, making their online search for their desired product or service more efficient.

Should Google provide the same interoperability between competitors' specialised search service and Google Search? If so, how would the competitor's services be distinguished? As previously discussed in the description of the specialised search service market, the main parameters of competition that distinguish specialised search services in the eyes of end-users are the speed in which they are directed to the product, the number of merchants that can be found through the service, and the degree of accessibility the interface presents to end-users.

If Google Search was to direct end-users to the target webpages using an integrated competitor's specialised search service, as it does for its own specialised search service, the differences in speed and accessibility of its competitors' services would be negated. Google Search would be the only interface that end-users encounter in their search process, and the speed with which Google Search accesses the feeds of competing comparative shopping services would be identical, due to the legal requirement to not discriminate between the competitors.[146] Not only would this allow specialised search services to benefit from the fruits of Google Search without contributing to its development in any way, but it would also be unsustainable. It would remove the incentive for merchants to supply feeds to multiple comparative shopping services, as Google Search would need only one specialised service to provide products to the end-user. This would remove the incentive for Google to operate its own comparison specialised search service, because it can offer no significant

[146] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Article 102 (c).

difference between its own service and its competitors. Therefore, the only probable effect of this intervention is a requirement that there is no integration between Google Search and any specialised search services, and thus no requirement for increased interoperability between Google and its competitors. As such, despite the superficial similarities between the Microsoft and the Google Shopping cases, the established law sanctioning modifying a product design to decrease interoperability with competitors does not apply to the case against Google.

This leaves the obvious comparison that the restriction placed upon integrating Google's products is similar to previous European jurisprudence concerning the abuse of tying a dominant undertaking's products or services in tandem. A dominant undertaking can be considered to have abused its market position when it leverages its strong and successful product by tying it with another product or service to extend their influence into a new market.[147] The theory of harm arising from this conduct is that the dominant undertaking is not competing in the new market based on the merits of its new product, but through denying consumers access to their other dominant product without also purchasing or obtaining the new product.

The harm that is suffered by the consumer is varied, where they will either pay a higher price for the tied products than if they only wanted to purchase one individually, or being disincentivised to search for, purchase, or use a competitor's product that is comparatively better than one of the products that are tied together. Consumers are disincentivised by the additional cost of using the competitor's product in terms of either spending the money or time needed to acquire it compared to simply using the product that they have already received via the tied offering. If a significant number of consumers are sufficiently disincentivised to acquire the product of a competitor it would most likely lead to them exiting the market and the foreclosure of all effective competition, despite the fact that the quality of competitors' product might be superior. Nevertheless, similar to the abuse of refusing to supply necessary interoperable information, tying can be justified by objective rational reasons, such as a significant increase in efficiency or an improvement in quality.

[147] Whish and Bailey (n 96) page 730.

There are several forms in which products may be tied together, however, the most synonymous and relevant to Google's conduct is 'technical tying',[148] a form which was explored in the ECJ's *Microsoft* judgement in addition to Microsoft's refusal to supply.

In this case, Microsoft had tied its dominant operating system for personal computers with its Windows Media Player ("WMP"), where it freely included the latter as part of a bundle. A key point of contention in the case was whether WMP should be considered as a separate product to the Windows OS, as opposed to a 'natural evolution' or an improvement in terms of the features offered in the overall Windows OS product.[149] To settle this point, the ECJ looked at several determinative factors to assess whether there existed separate consumer demand for the individual products, which would subsequently result in the identification of two separate product markets and potential liability of an abuse of tying the two products together.

1. The ECJ first assessed the core functionalities of the two products, identifying that 'the Windows client PC operating system is system software while Windows Media Player is application software'.[150] Considering the fact that application software fulfils a specific consumer need, such as word processing, and that system software controls the hardware and sends instructions to the applications software to allow it to complete its task, the Court found that there was a distinct difference between the products in terms of functionalities.

2. The ECJ also considered the existence of competitors that offered streaming media players independent of a computer operating system as evidence to the existence of two individual product markets.

3. In addition to this, Microsoft's direct offer to consumers of a version of WMP that was capable of operating on different OS further supported this conclusion.

4. The existence of a method for acquiring and maintaining WMP that was independent of Windows OS was considered further evidence of the individuality of the products.

5. The existence of promotional material that focused exclusively on WMP also accentuated the separate demand for the product.

[148] Akman (n 20) page 60.
[149] *Microsoft v Commission* (n 5) [911].
[150] *Microsoft v Commission* (n 5) [926].

6. The existence of differing licence agreements which varied depending on whether they related to WMP or Windows OS also demonstrated the different nature of the products.
7. Finally, the fact that despite the bundling of the two functionalities by Microsoft, a not insignificant number of customers continued to acquire media players from Microsoft's competitors separately from their client PC operating system, showing that they regard the two products as separate.[151]

All of these factors taken into simultaneous consideration led the ECJ to confirm the EC's finding that there existed two separate product markets. This in turn influenced the Court to find that the integration of the two products was likely to lead to the foreclosure of competition. The ECJ considered the effect of the tying on the choice of PC manufacturers when preparing their product for consumers. The forced inclusion of WMP led to reduced disk space on the PC unit, and increased quality and assurance tests for the manufacturers to carry out if they intended to determine whether an alternative streaming media player would conflict with the pre-installed WMP. Additionally, the possibility for consumers to download competitors' products did not offset the effect of pre-installing WMP, as at the time of the conduct, the technological limitations resulted in 50% of all download attempts failing,[152] which evidenced the clear advantage that pre-installation had in effectively distributing the product.

A key concern of the EC was that without early intervention, the current state of the market would encourage producers of products that compliment steaming media players to optimise their product exclusively for WMP. This would lead to an additional barrier to entry for competitor streaming media players, who would have to offer additional incentives to consumers to compensate for inferior interoperability with complimentary products. If competitors were unable to overcome the future interoperability barrier, it could potentially lead to the elimination of all competitors in the market.

This is also representative of the EC's concern in the Google Shopping case. As was discussed earlier in Chapter 1 Part II, the comparison shopping service market is highly susceptible to the impact of network effects. Therefore, Google's tying or integration of its comparison shopping service meant that it would be utilised by any user of their general

[151] *Microsoft v Commission* (n 5) [926]-[932].
[152] ibid [1050].

search service looking to find an item online or a competing comparison shopping service. Since Google's general search service is so ubiquitously popular, this incentivises merchants to contract with Google to ensure that their products have the highest likelihood of being discovered by end-users. This in turn disincentivises merchants from contracting with competing comparison shopping service providers, because they have already spent funds on contracting with Google, who can likely demand a high premium due to their tied product. This would likely lead to a significant reduction of competition in the market, leading to the harm discussed earlier in Chapter II, namely increased prices and less choice for consumers.

Nevertheless, there are substantial differences between the facts of the Google Shopping investigation and the facts relating to Microsoft's tying of WMP and Windows OS. Firstly, the characterisation of two distinct product markets in the Microsoft judgement is supported by seven key points, which cannot be compared to the limited justifications underpinning the Google Shopping case's separate market definitions. As previously discussed, there was a difference in the interpretation of the two markets by the FTC and EC. Akman also contests the strength of the conclusion that there exist two distinct markets. Additionally, from the consumer perspective, a general search service and specialised search service can be substituted to a significant degree in terms of functionality. As Akman rightly indicates, the EC's theory of harm to competition in the comparison shopping market actively assumes that an integrated general search service, in the form of Google Search, can be substituted for a specialised search service.[153] With new and emerging technologies, the ECJ has previously stated that it will take a flexible approach to the definition of product markets:

> [t]he Court notes, by way of preliminary observation, that the IT and communications industry is an industry in constant and rapid evolution, so that what initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules.[154]

Moreover, Akman contests that, unlike other tying cases, end-users can access Google's general search service without the integrated specialist service functionality. Not only are the end-users free to choose to not access the linked search results generated by the specialist search functionality, there are search queries that will not generate specialist search results.[155]

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[153] Akman (n 20) page 55.
[154] *Microsoft v Commission* (n 5) [913].
[155] Akman (n 20) page 59.

Finally, the integration of the specialist search functionality into Google Search could be strongly argued by Google to be an improvement in the quality of its products, which was accepted by the FTC. The EC argue that there has been no improvement in quality, as the listed results receive traffic based on their prominence within the rankings, not based on the linked content. However, unlike the Microsoft judgement, where the lack of awareness of competitor products led to significant consumer inertia, Google Search still listed competitor specialised search services within the organic results listing on the SERP. Moreover, the listing of competitor products is not motivated solely by competition law concerns, but also by the commercial motivation to fulfil the demands of the consumer.

Therefore, if Google's specialised search service cannot present the consumer with a merchant feed that would be most relevant to its query, it would be beneficial for Google to list a competitor, as the consumer would be likely to return to Google Search for their next search query if they are satisfied. Google would have little motivation to list competitor's products in a less prominent manner if they were more relevant to the consumer's search query, as it would conflict with their primary commercial strategy. If consumers were unable to find relevant products through Google Search, there would be a potential risk that they would switch to a competitor service. This would be highly likely in this market due to the low switching costs of using multiple competing search services, and the benefit to the consumer of searching for the best deal across multiple platforms. The strong incentive for Google to not degrade the quality of its own service, due to the lack of switching costs, has been recognised by several commentators alongside Google itself, evidenced by the statement that 'the competition is just a click away'.[156]

Overall, it is clear that Google's conduct cannot be easily classified as a form of tying, nor as a refusal to supply. It possesses superficial similarities to the Microsoft case, but also diverges substantially to the effect that the applied legal principles cannot be followed comfortably to the Google case. Therefore, it is not unsurprising that the EC classified the abuse as novel, because it is not representative of established European competition legal reasoning. This is most clearly demonstrated in the English High Court case, *Streetmap.EU Ltd v Google Inc*.[157] In what may be a forerunner to the appeal case against the EC's Google

[156] *Ratliff and Rubinfeld* (n 32) pages 14-17; *Luchetta* (n 31) pages 27-28; *Edlin and Harris* (n 35) page 203; Adam Kovacevich, 'Google's approach to competition', (*Google Public Policy Blog*, 8 May 2009) https://publicpolicy.googleblog.com/2009/05/googles-approach-to-competition.html accessed 13 March 2020.
[157] *Streetmap* (n 14).

Shopping decision, the English court saw a case concerning the near identical conduct of Google integrating its online map into the general search service, but with a different conclusion. Not only were the Court sceptical that the integration had an appreciable effect on competition, they also held that the conduct was objectively justified.

The Court ultimately held that the integration of Google's online map service into its general search service was not conclusively the reason for the decline in end-user traffic to the plaintiff. Google Map's dramatic increase in end-user traffic was demonstrated to be a result of a growing number of new end-users in the market, not necessarily end-users switching from Streetmap to Google.[158] Moreover, it was not conclusive that the decline of Streetmap was a direct result of the integration of Google Maps into Google Search, as other factors were also significant, such as being featured on businesses' websites.[159] The comparability of this case with Google Shopping is limited to the objective justification element, as the effect on competition is too distinct due to differing characteristics of the market. For example, Streetmap did not receive less traffic immediately following the integration of Google Image Search, unlike the competing comparison shopping services in the Google Shopping case.

The Court considered Google's conduct to be pro-competitive and proportionate. The Court had found that there was no challenge by Streetmap against the argument that the integration had led to improved technical quality for the product. 'Cast in the language of objective justification, the presentation of a thumbnail map on the SERP in response to a geographic query was a technical 'efficiency.'[160] Nevertheless, the Court went on to consider whether there existed a more proportionate method for achieving the legitimate aim pursued by the dominant undertaking, without being too restrictive of the competitor's ability to compete.

The Court considered two potential alternatives that would have preserved the technical improvement, but not unfairly favoured Google's own product to the exclusion of Streetmap and other competitors.

The Court considered the possibility of presenting alternative shortcut links to Streetmap directly below Google's integrated map thumbnail. This would have had the effect of remedying the links to Streetmap being pushed down the page and becoming less prominent,

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[158] ibid [166].
[159] ibid [138].
[160] ibid [147].

similar to the harm supposedly suffered by competitors in Google Shopping's scenario. Nevertheless, the Court found that end-user traffic was responding to the prominent visual design of the integrated map, not just the position of the link.[161] Additionally, the Court found that placing a burden on Google to effectively link a competitor's result for every search query was disproportionate. As there were certain search queries that Streetmap could not respond to effectively due to its technical limitations, Google would have to find the best available competitor for each individual search query to avoid any possibility of delivering to the end-user a broken link.[162] This would be even more complex should Google be required to search for the best available competitors per each Member State's geographical location. [163]

The Court also considered the option of displaying multiple visual representations of maps from competitors alongside Google's own integrated map. This is similar to what would effectively be the remedy to the EC's finding of harm in Google Shopping. However, the English High Court also dismissed this possibility as a more proportionate means, finding that including these extra visual thumbnail displays of competing maps would substantially affect the speed of Google's SERP, effectively degrading the overall user experience.[164]

Finally, the Court considered a possible solution that would not risk the degradation of Google's product in terms of the reliability of search results and the potential latency in their delivery. This proposed solution centred on the use of web-crawlers to generate static images of all potential online map tiles, store them in the Google index of search results, and present them the same way Google produces results for Google Images. However, the Court found that this solution was the most complex and expensive for Google to implement, which would cause them to bear a significantly increased burden and cost for performing the same service.[165] Therefore, the Court found that such a solution was disproportionate. It is also worth mentioning that this is the process in which Google's comparative shopping service used to operate, by using web-crawlers instead of live feeds from merchants, which was ultimately replaced by a more efficient and reliable system of generating results. As such,

[161] ibid [157].
[162] ibid [158].
[163] ibid [159].
[164] ibid [166].
[165] ibid [173].

the search results generated from this proposed solution would also potentially be a degradation of the end-user experience.

The fact that Google's parallel integration of its online map service was not found to have sufficiently affected competition and would have been objectively justified even if it had, demonstrates the uncertainty of the legal basis for the EC's Google Shopping decision. The English court highlighted two aspects of European competition law that are contrasting in the cases involving Google.

Under European competition law, it is not necessary to demonstrate that consumers have suffered harm to find an infringement.[166] However, for the dominant undertaking to demonstrate that their conduct is objectively justified, it must prove that its conduct had a beneficial effect upon consumer welfare that outweighed the harm that resulted from a weakened competitive process. If the EC does not need to accurately establish the harm caused by Google's conduct, how can it accurately assess the pro-competitive and anti-competitive effects of Google's conduct. An unintended consequence of not requiring competition authorities to firmly establish consumer harm before the competitive process is irrevocably damaged has led to the creation of uncertainty as to what can be described as objectively justified conduct. Nevertheless, what the English High Court's decision makes abundantly clear is that there is a wide scope for debate and interpretation over the application of European competition law to Google's integration of its specialised search services.

iv) US Legal Precedent

Unsurprisingly, placing Google's conduct within an established category of monopolisation or unfair trading methods in established American jurisprudence is even more difficult than within EU jurisprudence. As previously discussed, *Aspen Skiing* and *Trinko* demonstrate that it is difficult to prove a firm refusing to supply or deal with a competitor amounts to an attempt at monopolisation. For a firm to be found guilty of monopolisation by refusing to deal with a competitor, there must be 'suggested a willingness to forsake short-term profits to achieve an anti-competitive end'.[167] In *Aspen Skiing*, the monopolising firm had previously contracted with its competitor in a profitable relationship, which led to the only

[166] ibid [64]; Case C-8/*08 T-Mobile Netherlands et al. v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 [38]-[39]; *Microsoft v Commission* (n 5) [1089].
[167]*Trinko* (n 109), IV.

plausible justification for the termination of its arrangement being that they sought to eliminate the competitor from the market. If there had been a justification offered for the conduct on the basis that it increased efficiency, then the Court would not have found the existence of a specific intent to exclude the competitor.

Google had no contractual relationships with competing comparison search services that appeared in their non sponsored search results list. Additionally, these comparison shopping services are still displayed in Google's SERP, even if the way they are displayed has substantially changed. Google also put forth justifications for its design changes in the form of improving the efficiency of providing end-users with relevant results. All of these factors are unlikely to persuade an American court that anti-competitive conduct has taken place in the form of a refusal to deal with competitors.

Moreover, as was discussed in *Trinko,* the US courts would likely be conscious of the highly complex and technical nature of the markets in question. This would give them pause to intervene in a market where sectoral regulatory expertise would be better placed to judge the competitive conditions than a general competition perspective.

Therefore, it is necessary to compare the potential anti-competitive effects of Google's conduct with other established categories of harm. Due to the sophisticated technological nature of the products in question, it is again unsurprising that the most applicable case to Google's conduct is that of the US Supreme Court's proceedings concerning Microsoft. In the US Court of Appeal's case, Microsoft's integration and tying of its internet browser product, Internet Explorer, was accused of breaching both Section 1 and Section 2 of the Sherman Act.

Tying of products in US law falls within the prohibitive scope of Section 1 of the Sherman Act and Section 3 of the Clayton Act.[168] Tying agreements can be held to be per se violations, such as in *International Salt* where there was no need to prove the intention of the act, as the conduct is obviously anti-competitive and cannot be justified by pro-competitive justifications. On the other hand, in the *Microsoft* judgement the Court opted to carve out an exception, where tying arrangements involving software platform products should be considered under the rule of reason standard.[169] Under the rule of reason standard, the conduct is found to be anti-competitive if it places an unreasonable restraint on trade, taking

[168] *International Salt Co, Inc v United States,* 332 U.S. 392 (1947).
[169] *United States v Microsoft Corp* (n 3) at 84.

into consideration any procompetitive justifications. In practice, as previously discussed, US courts should only apply the per se standard if they are so familiar with the products and markets in question, that they would be certain that the conduct would be considered to be anti-competitive in nearly all circumstances under the rule of reason standard.[170]

Google's conduct would equally be evaluated under the rule of reason standard, where Google would need to have been demonstrated to have unreasonable restrained competition by providing their general search service only along with the specialised search service. Nevertheless, Google's conduct would be unlikely to be considered as tying under US competition law, as the FTC did not find there to exist a sufficient distinction between Google Search and Google Shopping. 'The requirement that a practice involve two separate products before being condemned as an illegal tie stalled as a purely linguistic requirement: unless products are separate, one cannot be 'tied' to the other'.[171]

Google's bundling of its specialised search service would be better compared with the integration of Internet Explorer into the Windows OS platform. The Department of Justice had considered that Microsoft's technical integration of Internet Explorer, which made it impossible to remove from Windows OS, led to a reduced incentive for PC manufacturers or users to download competing browsers. This was due to the same costs that were identified by the EC in their action against Microsoft for its abuse of tying WMP with its OS, these being increased compliance testing and reduced disk space. Specifically, Microsoft was accused of making three alterations to its product design that were capable of violating Section 2 of the Sherman Act.

Under established US competition law, 'courts are properly very sceptical about claims that competition has been harmed by a dominant firm's product design changes'.[172] US courts have previously held that a business has a right 'to redesign its products to make them more attractive to buyers - whether by reason of lower manufacturing cost and price or improved performance'.[173] Equally, it was held that antitrust law did not place a restriction on the freedom of a business to innovate its product by requiring that competitors supplying complimentary or competing products 'survived' any design change of the product.[174]

[170] *Leegin Creative Leather Prods, Inc v PSKS,* Inc, 551 U.S. 877, 886-87 (2007).
[171] *USA v Microsoft Corp* (n 3) at 128.
[172] ibid.
[173] *California Computer Products v IBM Corp,* 613 F.2d 727 (9th Cir. 1979), at 744.
[174] *Foremost Pro Color, Inc v Eastman Kodak Co*, 703 F.2d 534, 544-45 (9th Cir. 1983).

Nevertheless, that did not mean that any product design change can be considered to be per se lawful.[175]

To have violated Section 2 of the Sherman Act, ‘a plaintiff must allege (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success’.[176]

However, if a defendant offers a pro-competitive justification, demonstrating that the design change of the product was in fact a form of competition on the merits, then the plaintiff must further disprove the claim by demonstrating its unreasonable restraint of competition.[177] Microsoft could not justify the co-mingling of Internet Explorer’s source code with the code of Windows OS, nor the inability to remove Internet Explorer from Windows OS with pro-competitive justifications, meaning that they were held to be anti-competitive actions. Nevertheless, Microsoft offered a justification that preventing a user from replacing Internet Explorer as the default browser for Windows OS was based on improved functionality. Only Internet Explorer was capable of interoperating with Windows OS to provide certain functions, meaning that the consumer could potentially be denied these functions inadvertently if they changed the default browser launch option. The Department of Justice failed to offer a rebuttal, resulting in the Court finding that this specific conduct did not amount to a Section 2 violation.

To remedy the violations of Section 2, Microsoft had to allow manufactures to disable the Internet Explorer icon on the desktop. Doing so would prevent novice end-users from accessing the internet browser, increasing the incentive for manufacturers to provide competing browsers. Additionally, Microsoft was forced to mandatorily disclose interoperability information to allow competing browsers to optimally function with Windows OS. The US Supreme Court rejected arguments from some States that the remedy did not go far enough, who desired that Microsoft remove the co-mingled source code of Internet explorer and Windows OS.[178] This meant that Internet Explorer was still essentially irrevocably integrated into Windows OS. Nevertheless, the Court held that the act of co-mingling was not inherently violative of Section 2, it was the resultant exclusionary effects.

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[175] ibid.
[176] ibid.
[177] *USA v Microsoft Corp* (n 3).
[178] *Massachusetts v Microsoft Corp*, 373 F.3d 1199 (D.C. Cir. 2004).

As such, it was sufficient for the Court to increase the incentive for manufacturers to consider competing browsers to remedy the anti-competitive effect. The Court was clear 'that it is not a proper task for the Court to undertake to redesign products'.[179]

Applying this perspective to Google's own integrated product, it is not surprising that the FTC was satisfied with Google's justifications. Google could evidence improved quality and efficiency through end-user data and the FTC could also witness competing general search engines making similar integrations. Moreover, Google also provided links to its competitors pages on its general search service results. There was no exclusionary effect to the same degree as Microsoft, as end-users could easily access competing search services who were only a few clicks away. Moreover, it was less clear that Google's general search service and specialised search service were differing products at the time of the FTC's investigation in 2012. Unlike during the EC's investigation in 2015, Google's specialised search service still operated a revenue stream directly from its search results as opposed to commercial premium feeds from merchants. Although the FTC was aware of the anticipated change,[180] it still believed Google would use General Search methodologies to aggregate its comparison shopping results. This presented more difficulty for the FTC when considering whether Google's conduct consisted of an actual integration or tying of two distinct products.

Therefore, the FTC's decision when assessing Google's conduct was perfectly aligned with the general principles of American competition law. As has been discussed regarding the EC's decision against Google, requiring Google to practically redesign its product in a way that degrades the consumer experience for the benefit of competitors would be wildly outside the traditional position a court would take. However, it is also worth considering the question of whether the traditional interpretation of American competition law is unfit for the digital age? The fact that the FTC's analysis of Google's conduct was completely justified by previous jurisprudence does not necessarily mean that it was the best outcome for consumer welfare. As much as European competition law's focus on preserving the structure of the competitive process is criticised for producing more false positive findings than a stricter adherence to the consumer welfare standard, it can be equally stated that the American

[179] ibid at 1250.
[180] FTC Google Report (n 6) excerpt page 40.

approach leads to potentially more false negative findings and fails to prevent certain anti-competitive conduct.[181]

Whilst a false positive has often been considered to be more damaging to competition than a failure to act, this may not be the case in digital markets. Digital markets are highly susceptible to tipping, where an undertaking rapidly builds a dominant position which can potentially be almost impossible to reverse due to the strong influence of network effects.[182] Therefore, if an undertaking is securing a dominant position in a market through unfair methods or anti-competitive conduct, competition authorities have a limited window of opportunity to intervene and affect the market in a meaningful way. This has already been a recognised factor in European competition law, where the ECJ has stated 'the Commission has all the more reason to apply [Article 102] before the elimination of competition has become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse'.[183] The American hesitancy to act in markets with strong network effects has been subject to criticism that even when punishing anti-competitive conduct, the delay in doing so has meant that the lessening of competition was irreversible. This has especially been the case where technological markets are involved:

> Even though Microsoft has endured the longevity of the antitrust lawsuit and was given restrictions to abide by, it still remains dominant and to our way of thinking a monopolistic force in the operating system and software industries. We believe that the settlement in the case did not end its domination in the marketplace. The company has used its monopoly power for too long and the effects of may well be irreversible. Even after the trial and settlement with restrictions imposed on the company, Microsoft's dominance in technology has created a market where competitors and the potential for innovative technology continue to be stifled in this post US v. Microsoft world.[184]

Therefore, although it could be simply stated that the EC erred by acting against Google because of a lack of precedent, whereas the FTC acted correctly by keeping within established precedent, such a conclusion would drastically fail to take into consideration the complexity that digital markets present. 'The platforms create new competitive environments; they provide opportunities for new types of anticompetitive conduct; and they

[181] Fox (n 113) Article 4.
[182] Stigler Report (n 33) pages 34-35.
[183] *Microsoft v Commission* (n 5) [10]; Google Shopping Decision (n 5) [285]-[305].
[184] Gregory Jenkins, Robert Bing, 'Microsoft's Monopoly: Anti-Competitive Behavior, Predatory Tactics, And the Failure Of Governmental Will' (2007) 5(1) Journal of Business & Economic Research, page 15.

create new economic and conceptual challenges for antitrust enforcement'.[185] To protect the competitive process in digital markets it may be necessary to break from tradition, especially when addressing new types of exclusionary conduct that are unidentifiable under traditional antitrust analysis. Therefore, the conclusion should seek to question whether antitrust intervention has led to increased consumer welfare.

185 Stigler Report (n 33) page 85.

CHAPTER IV: THE EFFECTS FOR CONSUMERS

i) Google's Remedy

The aftermath of the EC's decision did not result in what Google's competitors had hoped for. Google's remedy to the identified harm was to completely separate the comparison shopping business unit and allow competing comparison sites to bid for the integrated portals displayed on the SERP.[186] Through an auction based model, there would be no preference shown to Google's own comparison shopping service which must now bid against competitors to be selected for the advertised portal slot on Google Search. This also compromised between the concerns that were raised during the English High Court case involving Google Maps, where competing services must meet the same data requirements as the merchants who supply offers to Google's shopping service, meaning there is no risk of degrading the consumer's experience through any increased latency or unreliability of results.

The EC was widely reported to had initially expressed a positive view regarding Google's proposed remedy,[187] but this was not shared by competing comparison shopping services. Several competing comparison shopping services stated their objections to Google's auction based remedy in an open letter addressed to Commissioner Margaret Vestager.[188] Competing comparison shopping services claim that the remedy has failed to prevent the continued distortion of the market.

A specific concern in respect of the auction based approach is that comparison shopping services claim that they are being denied the profits to invest in innovating their services, as these funds are now paid to Google for placement in their prominent display locations. On the other hand, Google Shopping's bids are seen to be superficial, claimed to be simple internal accounting where there is no need to reserve funds for further innovation to remain

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[186] Ginny Marvin, 'CSEs will compete head-on with Google Shopping in EU search results', (*Search Engine Land*, 27 September 2017) https://searchengineland.com/google-shopping-comparison-shopping-results-changes-283436 accessed 20 December 2019.

[187] As reported by MLex on 27 March 2019, the Commission stated at the ABA conference that the "remedy is working" and the Commissioner in the press conference when announcing the Commission's decision in the AdSense case on 20 March said that the Commission "has seen positive developments" in the implementation of the remedy (referenced in Open Letter to Commissioner Vestager from Bureau Européen des Unions de Consommateurs (5 April 2019) <https://www.beuc.eu/publications/beuc-x-2019-020_google_non-compliant_remedy_in_antitrust_shopping_case.pdf>).

[188] Open Letter to Commissioner Vestager from 14 European CSSs (22 November 2018) <www.searchneutrality.org/google/comparison-shopping-services-open-letter-to-commissioner-vestager>.

competitive in the market, as the parent group ultimately benefits from the competition to appear prominently on Google Search.

Google's commitment to retain a 20% profit margin is criticised as an inconsequential limitation on Google Shopping's otherwise unlimited liability to outbid its rivals. Comparison shopping services claim to be unable to benefit from the limitation, as although it presents them with some opportunities to outbid Google Shopping to feature on Google Search, any gains made do not equate to the funds needed for future innovation and growth.

Ironically, Google Shopping's competitors also complain about a fact that severely weakens the EC's arguments against Google's conduct. They allege that Google has 'recreated Google Shopping' by allowing merchants to bid directly for the advertised slots that were intended for comparison shopping services.[189] This claim, made by Foundem, one of the chief complainants of Google's original conduct, heavily suggests support for the substitutable nature of the specialised search services and general search services markets, implying that these markets are not as distinctive as the EC had put forth in their report. As a result, this would strengthen the argument that the integration of these services was a product innovation and not a form of technical tying or 'self-favouring' of a product in a distinct market.

Nevertheless, despite the claims of non-compliance alleged at Google's remedy, the remedy itself is within the requirements set by the EC's decision. The EC's decision stated that '[w]here there is more than one way of bringing an infringement effectively to an end in conformity with the Treaty, it is for the addressee of a decision to choose between those various ways'.[190] Accordingly, Google was given a certain amount of discretion in implementing changes to their conduct to end the infringement. What was paramount about any change was that Google treated competing vertical search services on an equivalent basis as its own. For this purpose, the EC set out some guiding principles, so that any remedy must:

a) apply to all devices, irrespective of the type of device on which the search is performed;
b) apply to all Google users in the 13 relevant Member States, irrespective of the Google domain that they use;

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[189] Adam Raff and Shivaun Raff, 'Game Over? What Google's Latest Behind-the-Scenes Manoeuvres Reveal About its Brazenly Non-Compliant "Remedy" in the Google Search (Comparison Shopping) Case' (*Foundem*, 2018) <http://www.foundem.co.uk/The_Google_SpendMatch_Debacle.pdf >.
[190] Google Shopping Decision (n 5) [696].

c) subject Google Shopping to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services (noting that such processes and methods should include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's general search results pages)(…); and
d) not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by this Decision.[191]

It is difficult to argue that the remedy does not comply with the principle of equal treatment. Google's comparison shopping service and rival competitors compete on equal terms for the potential prominent placement on Google's SERP. There is no advantage afforded to Google's comparison shopping service from the auction, it operates as an individual commercial unit with the requirement to remain profitable, eliminating the potential for a squeeze of the competitor's margins. Revenue generated via the auctioned slots are earned by Google Search, not Google Shopping, leaving no possibility for Google to subsidise its commercial shopping unit. Therefore, the remedy enables equally efficient competitors to compete.[192] Requiring Google to charge less than market price would simply subsidise inefficient competitors and undermine competition on the merits. Therefore, it should be the case that 'the principle of equal treatment may lead to unequal outcomes'.[193]

However, the EC seems to have changed its perspective on Google's remedy based on the Competition Commissioner's comments at a Web Summit conference. Vestager remarked, '[w]e may see a show of rivals in the shopping box. We may see a pickup when it comes to clicks for merchants. But we still do not see much traffic for viable competitors when it comes to shopping comparison',[194] potentially suggesting that the EC will not be satisfied until the market structure reflects the period prior to Google's conduct, regardless of whether the principle of equal treatment is currently respected.

[191] Google Shopping Decision (n 5) [700].
[192] Bo Vesterdorf, Kyriakos Fountoukakos, 'An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law' (2018) 9(1) Journal of European Competition Law & Practice, pages 3–18.
[193] ibid.
[194] Foo Yun Chee, Victoria Waldersee, 'EU's Vestager says Google's antitrust proposal not helping shopping rivals', (*Thomson Reuters*, 7 November 2019) <https://www.reuters.com/article/us-eu-alphabet-antitrust/eus-vestager-says-googles-antitrust-proposal-not-helping-shopping-rivals-idUSKBN1XH2I8>.

ii) Potential Consequences for Market Development

The effects of the Google Shopping decision will persist regardless of the appeal that was heard by the General Court in February 2020. The theory of self-preference or self-favouring has been entrenched within European competition law with the Digital Platforms Regulations 2019.[195] These new regulations focus on making the way that online intermediaries operate more transparent. By requiring digital services to disclose how their platforms rank and position merchant offers, the EU institutions hope to level the playing field through allowing merchants access to the information that determines their visibility to consumers.

This should ensure fair trading conditions between merchants and online intermediaries, where merchants now can scrutinise how each provider's ranking system works and compare it against competitors. It also assists merchants in designing the presentation of their offers for optimal positioning within the intermediaries' result pages.[196] By increasing the transparency, the new regulations prevent the providers of online intermediaries benefitting from a "home advantage", where their knowledge of how their own platform aggregates content won't allow them an inherent advantage in optimising the design and prevalence of a subsidiary. Therefore, the ability for undertakings to engage in self-favouring is constrained by the other competitors now understanding how to optimise their offers to the same degree as the provider. This should, theoretically, allow for the best offers, determined by consumer preference,[197] to rise to the most prominent positions on these platforms, enabling true competition on the merits.

The similarities between the new digital platform regulations and the theory of harm behind the Google Shopping decision are obvious. However, the implications of the Google Shopping decision go further than mandating the disclosure of internal workings. The theory of self-favouring present within the EC's decision includes the manner in which the intermediary designs their website, so that a dominant intermediary cannot reduce the number of search results present on their page, nor re-arrange the way that these search results are presented to the end-user. Taking either of these actions would carry the potential

[195] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Recital 24.
[196] ibid [24].
[197] See the earlier discussion of the importance of consumer preference in the search engine market's parameters for competition on pages 11-12.

risk of demoting the prevalence of a competitor's results. This would likely be found abusive in the case that the intermediary's own service would remain within the top results, due to the inherent advantage of the experience of designing optimal results for their own platform.

Even in the case of consumers finding the new design more useful in presenting the most relevant search result, the conduct would still amount to an abuse of a dominant position. In such a case, if an online intermediary has a subsidiary that performs well on the intermediary platform's ranking, it prevents them from redesigning the platform further, effectively constraining their ability to compete in their original market. The practical conclusion for online intermediaries is that they can choose to compete aggressively in their search service market or their subsidiary's market, but not both. This will inevitably disincentivise any future investment or innovation by successful digital companies in related markets. Something that is further compounded by the EC's current discussions on implementing a special duty of care for tech firms, where the burden of proving conduct capable of having a restrictive or distortive effect on competition will be reversed, meaning the tech firms will need to prove their innocence before the EC has proven any anti-competitive effect.[198]

The EC's behaviour is reflective of its great concern toward the impact that digital services can have on the structure of the market. As discussed earlier, digital markets are prone to tipping, where significant shares of the market will be quickly earned by a single undertaking, leading to a super-dominant position. However, in fearing the speed of change and lack of ex-ante control competition authorities have in directing digital market behaviour, have the EU institutions lost sight of the vast potential for enhanced consumer welfare that these digital entrants offer?

Streetmaps v Google demonstrated the positive impact that Google's market entrance had upon the online mapping market, where the number of consumers participating and engaging in this market grew dramatically. By embedding these specialist search services into its flagship general search service, Google significantly increased the accessibility of not only its own specialist search service, but the market as a whole. Consumers who had previously had no knowledge of the online maps market were introduced to it through a familiar format, allowing a significant number of general search service consumers to benefit from a previously unknown specialist search service. It is very likely that Google's identical product

[198] European Commission, 'Competition policy for the digital era' (2019) Final Report, page 4 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

design in the comparison shopping integration would have had similar effects, leading to an overall improvement in consumer welfare.

The failure to fulfil the potential of the comparison shopping services is already being demonstrated. On the 28th September 2018, the UK competition authority received a super-complaint from a consumer rights group, detailing that they had failed to act in regard to the detriment of a significant number of consumers overpaying for their services.[199] The complaint focused on certain consumers being affected by negative price discrimination, as a result of their choice to not switch suppliers. During two sectoral regulators' investigations into this collective harm, they found that the consumers that suffered from this price discrimination were characteristically unfamiliar with searching for better offers using comparison services.[200] Price comparison sites have been routinely found to increase competition in related markets, as they drastically reduce the search cost of consumers and the asymmetrical balance of information.[201]

The likely result of the EC's finding against Google for the integration of its comparison shopping services will be a significantly reduced incentive for other tech companies to innovate and improve accessibility by attaching their price comparison service to their main platform. Equally, there will be less incentive for tech firms to enter into specific price comparison markets, such as insurance or broadband, where a more accessible service could significantly improve competition for the benefit of consumers in the related market. Therefore, it is arguable that the regulatory approach that increased the transparency within online platforms was the correct approach to preventing anti-competitive effects, compared to the far reaching consequences of the EC's theory of harm present within the Google Shopping decision, which constrain the undertaking's ability to compete effectively in both markets – limiting the potential benefit to consumer welfare.

It is difficult to determine the positive effects that the EC had envisioned when it decided against Google. The EC's theory of harm foresaw two negative impacts from the potential

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199 Competition and Markets Authority, 'CMA to investigate 'loyalty penalty' super-complaint' (2018) <www.gov.uk/government/news/cma-to-investigate-loyalty-penalty-super-complaint>.

200 Ofcom, 'Qualitative research: Consumer engagement in fixed broadband' (Executive Summary, 25th September 2019), [3.5.2], <www.ofcom.org.uk/__data/assets/pdf_file/0018/168210/qualitative-research-engagement-fixed-broadband.pdf>; Financial Conduct Authority, General insurance pricing practices Interim Report' (2019) Market Study MS18/1.2, Interim Report, [3.15]-[3.18] <www.fca.org.uk/publication/market-studies/ms18-1-2-interim-report.pdf >.

201 Competition and Markets Authority, 'Digital comparison tools market study' (2017) Final Report, pages 32-33 <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf> .

loss of competition in the market as a result of Google's integration. Firstly, a direct loss of choice for the consumer in terms of which comparison shopping service to use. Secondly, consumers would pay a higher cost for products as a result of online merchants passing on the increased advertising fees charged by Google using its unilateral market power.

However, were these effects an actual result of Google's alleged anti-competitive conduct? Foundem, one of the chief complainants against Google's conduct, still maintains that the Google's remedy is preventing effective competition in the market, as it apparently is a mere replication of the original conduct. Nevertheless, the EC did not seem to initially object to Google's remedy, as it satisfied the requisite burden of equal treatment. This raises the question of whether the EC's intervention has achieved its aim. If Google's competitors are to be believed, then Google are still on track to secure greater market share and stronger unilateral market power. Therefore, consumers will likely lose out in terms of less available choices and increased prices despite the EC's intervention. The overall effect of the EC's decision for consumer welfare is the same as if the decision mirrored that of the FTC's findings, with the exception being a dramatic decrease in legal certainty.

The FTC had held that Google's product design change improved the consumer experience, based on the evidence of Google testing its changes to earn the most attention from end-users. The result of such a decision is that a dominant undertaking can innovate the design of its product if they justify it with evidence of a conferred benefit for the consumer. It allows for innovation to continue in a market that is highly concentrated, which is characteristically the case in digital markets, despite the incentive to innovate being limited by a lack of effective competition. The English High Court also held that Google's integration of its online map service into its general search service was a form of improving the 'efficiency' of the services and was subsequently objectively justified as a 'technical improvement' to Google Search for the benefit of consumers.[202] This decision would have also led to a similar result as the FTC's decision but for the EC's intervention against Google Shopping.

The EC's decision has the opposite effect. It has led to a remedy that seems to comply with the directions given by the EC whilst simultaneously failing to satisfy either the EC or the aggrieved competitors. Equally, by disregarding the evidence of testing designs for the optimal benefit to consumers, the EC has blurred the dividing line between when a product design change should be considered anti-competitive or objectively justified as a technical

[202] *Streetmap* (n 14) [147].

improvement. As stated previously, consumers will lose out on potential innovation in markets that lack the effective competition to incentivise it. Neither will consumers benefit from a greater plurality of available choices for suppliers or the reduced prices that the EC aimed to protect. Unlike the recent regulation mandating transparency in how online intermediaries aggregate their results, it is difficult to identify how this decision benefits the competitive process or consumers.

iii) The Differing Perceptions of Enhanced Welfare in the "New Economy"

What has become clear from the analysis of the two decisions relating to Google's conduct is that both jurisdictions have come to drastically different conclusions on how to promote consumer welfare in digital markets. These markets have come to best reflect what is termed the 'new economy'.[203] The case law of both jurisdictions demonstrate a shared goal of protecting consumer welfare by preventing and constraining the use of unilateral market power. Where the bodies of law diverge is the overarching framework of the analysis. In practice, this is demonstrated with American antitrust law concerning itself with the individual outcome of an intervention for the consumer, whereas European competition law seeks to preserve an effective competitive process within the market, which in turn will naturally constrain the actions of an exploitative monopolist.

In a broad sense, there are merits to both approaches, however, in this specific instance one approach has caused a clear detriment to legal certainty. This raises the question of why the EC intervened to protect consumer welfare without a clearly identified resultant benefit. The answer is most likely due to the cultural context of European competition law, which might betray the extent of its ordoliberal heritage. Ordoliberalism is the German economic theory based on the philosophy that governments should regulate markets in such a way that market outcomes approximate the theoretical outcome of a perfectly competitive market.[204] Ordoliberalism places a strong emphasis on preventing cartels and monopolies and

[203] Daniel J. Gifford, Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy*, (University of Chicago Press 2015), page 11.
[204] Sebastian Dullien, Ulrike Guérot, 'The Long Shadow of Ordoliberalism, European Council on Foreign Relations' (2012) <https://www.ecfr.eu/article/commentary_the_long_shadow_of_ordoliberalism> accessed 27 April 2020.

preventing the exercise of substantial market power. The influence of ordoliberalism has been identified in European competition law by several commentators and academics.[205]

Whereas, there exists a contrasting influence in early American antitrust law, where market concentration was permitted to a level that was necessary to benefit from efficiency. Scholars addressing the concept of imperfect competition, such as Edward Mason and John Maurice Clark, coined the term 'workable competition'.[206] This theory of workable competition accepted that the accumulation of market power was inevitable. As a result, antitrust interventions should act principally to curb excessive concentrations of market power rather than attempt to prevent any concentration at all. This approach stands in stark opposition to the tenants of ordoliberalism, which seeks to produce conditions within a market that are as close to perfect competition as possible.

Although it might be difficult to distinguish between which doctrine of thought is motivating an authority's intervention to preserve competition in traditional markets, it is comparatively clear what is guiding the authorities when intervening in new digital markets. Digital markets are characteristically prone to tipping and are highly susceptible to the influence of network effects. These features best exemplify the differences between both schools of thought.

European Competition authorities react suspiciously to new technological developments in traditional markets. This is demonstrated by the clear disparity in recent activity undertaken by the EC when compared to its American counterparts.[207] Its actions can be described as being motivated by '[a] European reflex against disruptive change in favor of "fairness toward market participants"',[208] where fairness dictates market participants cannot draw upon external factors to provide them a commercial advantage over their rivals. By preventing actions such as Google's conduct, European competition authorities maintain a plurality of competitors in the market that can compete strictly on the established parameters of competition in the market. In this sense, innovation is focused on improving the product

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[205] Gifford and Kudrle (n 203), pages 10-11; Flavio Felice, Massimiliano Vatiero, 'Ordo and European Competition Law', https://www.siecon.org/sites/siecon.org/files/oldfiles/uploads/2013/09/Felice-Vatiero.pdf accessed 27 April 2020.
[206] Gifford and Kudrle (n 203) page 11; Joe S. Bain, 'Workable Competition in Oligopoly: Theoretical Considerations and some Empirical Evidence', (1950) 40(2), The American Economic Review pages 35– 47; Joe S. Bain, *Barriers to new competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press, 2013); Joe S. Bain, Industrial Organization, (1960) 25(1) Journal of Marketing pages 112-114.
[207] Stigler Report (n 33) page 31.
[208] Gifford and Kudrle (n 203) page 11.

quality or the efficiency of production, resulting in tangible benefits for consumers, as opposed to being aimed at excluding competitors and unfairly monopolising the market.

It is a philosophy that can be likened to a sense of sportsmanship among competitors, where they remain within the set rules of the game and the best player wins. Nevertheless, this philosophy is ill-equipped to deal with revolutionary periods, such as the present, where huge strides are made in technological developments and entire industries can be made obsolete overnight. How should competition authorities act when market behaviour has clear tangible benefits for consumers but simultaneously risks the elimination of all potential competition?

American antitrust law has provided us with the alternative view. What if the best course of action to enhance overall consumer welfare in dynamic markets is to tear down the foundations of the market and begin again, otherwise termed as embracing a process of creative destruction. David Evans and Richard Schmalansee propose that these new dynamic markets possess characteristics that differ from traditional markets.[209] In dynamic markets, competitors do not compete for a share of the market but for the overall market itself by creating the next 'killer product'.[210] As Evans and Scmalansee describe:

> [t]hese industries tend (1) to have high- fixed (sunk) costs and low marginal production costs; (2) to make more intensive use of labor and less intensive use of tangible capital; (3) to generate network effects; (4) to be involved in competition to create or replace an existing product through drastic innovation, which often involves winner- take- all races; (5) to provide industry leaders with substantial amounts of supra competitive profits (viewed ex post); and (6) to have firms whose fortunes are tied to success in the creation of intellectual property.[211]

This process is described as "Schumpeterian competition",[212] where consumers benefit not from granular increases in the efficiency of manufacturing and quality of their products, but 'from drastic innovation in which an existing technology is replaced by an entirely new technology, often one that initially is unfamiliar or unanticipated'.[213] Consumer welfare is increased by the availability of efficient new technologies, which may have only been developed due to the manufacture's confidence in recuperating the cost of the development

[209] David Evans, Richard Schmalansee, 'Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries', National Bureau of Economic Research Working Paper Series, Working Paper 8268, May 2001.
[210] ibid, page 2.
[211] Gifford and Kudrle (n 203), page 190.
[212] Evans and Schmalansee (n 209) page 2.
[213] Gifford and Kudrle (n 203), page 190.

through securing a super-dominant share of the market. Undertakings are able to take advantage of network effects within the market to tip the market in their favour. This was encouraged during the Bush administration, where the former assistant Attorney General responsible for the antitrust division, Thomas O. Barnett, sought to maintain what he saw as incredibly valuable innovation by bending the traditional antitrust rules.[214] Although the American perception of network effects may have later pivoted toward viewing them as anti-competitive rather than pro-competitive incentives for innovation, the attitude is still far less hostile than that of their European counterparts.[215]

While European authorities in previous decisions, such as *Microsoft,*[216] have outright perceived network effects as anti-competitive and needing to be overcome, US authorities have been capable of identifying the potential benefits of network effects for consumer welfare.[217] Network effects can benefit consumer welfare by removing uncertainty over interoperability barriers with other products.[218] In some circumstances, such as Google's integration of its specialised search service, the disruptive change may prove more beneficial to consumers than a diverse plurality of competitors. If more advertisers are listed on Google's comparison shopping service, there is greater competition between product offers on the service. Although it can be said that a broader choice of suppliers may offer consumers better terms in other aspects such as user privacy, the lack of user privacy could equally incentivise competitors to produce a novel better functioning product that is less intrusive.

Nevertheless, it is still paramount to scrutinise whether the innovation achieved is worth the loss of competition within the market. Gifford and Kurdle have questioned whether Barnett's assessment of Apple's iTunes should have been considered as sufficiently innovative to permit special antitrust treatment.[219] It would perhaps be the best course of action for both American and European authorities to conduct an intensive analysis in each case, where cooperation and convergence on standards would lessen the cost of such investigations.

By abandoning pre-conceived notions on how consumer welfare is traditionally enhanced, European competition authorities could act in a manner that best serves the consumer by

[214] ibid, page 191.
[215] ibid, pages 192-193.
[216] *Microsoft v Commission* (n 5).
[217] Gifford and Kudrle (n 203), page 192.
[218] Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries*, (Hart Publishing 2012), pages 194-196.
[219] Gifford and Kudrle (n 203), page 193.

analysing the disruptive conduct in its appropriate context. This would allow them to make the necessary calculations to determine whether the innovation's benefit to consumers objectively justifies the lessening of competition in the market. In this sense, European authorities should be less alarmed and reactive to changes in the market's structure without possessing the necessary information to make an informed decision. The dynamic nature of these markets means that 'the actual elimination of competitors'[220] from the market would only ever be temporary, as the Schumpeterian competition that takes place for the market would continue to incentivise future rivals to compete to replace the incumbent firm. Therefore, there is less of a pressing need for ex-ante antitrust enforcement that prevents the distortion of competition in traditional markets, as the dynamic nature of the market could result in the incumbent becoming obsolete before the intervention has even been finalised.

[220] *Tetra Pak* (n 125) [44].

CONCLUSION

The EC's decision to find Google's conduct abusive is clearly worthy of controversy. It is a drastic extension of the duty of care and liability that face dominant undertakings when implementing changes to their product design. Nevertheless, it has provided a valuable opportunity to compare the development of both European and American competition law and determine how they are reacting to the challenges of regulating digital markets.

The comparison shopping service and general search service markets share similar characteristics that pose difficulty for competition regulators. Both markets are highly susceptible to the influence of network effects that cause the market to tip toward a super dominant firm. Equally, both markets allow firms to benefit from increasing economies of scale in terms of the processing of past user search data, allowing them to better determine which advertiser sponsored content would appeal to an end-user's search query. As a result, both regulators on either side of the Atlantic are concerned that if conduct bequeathing an unfair advantage is not remedied promptly, it could quickly lead to the elimination of all effective competition in the market.

However, despite this shared concern, the two jurisdictional authorities arrived at contrasting conclusions. The reason for the divergence is not due to a difference in the relevant law. Both Article 102 of the TFEU and Section 2 of the Sherman Act aim to primarily protect consumer welfare by preventing firms from unfairly monopolising the market. Neither legal statute seeks to artificially shield inefficient competitors from competition on the merits. Furthermore, both legal systems permit conduct that may exclude competitors, provided that it is objectively justified by producing a sufficient benefit to consumer welfare that mitigates the lessening of competition. It follows that the divergence is due to a substantial difference in the interpretation of which conduct should be objectively justified.

The Google Shopping decision falls outside the scope of past European case law. Although the ECJ was shown to both value and desire to protect the choice of suppliers available to the consumer in the *Microsoft* judgement, they also warned of the malleable and dynamic nature of the boundaries between complementary technological products. The ECJ did not want to establish a general principle due to the specific complexities of the case. The margin for interpretation afforded by past jurisprudence is demonstrated by the English High Court's judgement, which contrasts with the EC's decision, by considering near identical conduct by

Google to be objectively justified, as it provided a sufficient benefit in terms of an improvement in the quality of the service.

On the other hand, the FTC's decision to not judge Google's conduct as an attempt to unfairly monopolise the market is perfectly aligned with previous jurisprudence. More importantly, it demonstrates the benefit of an approach that encourages a case by case intensive assessment when dealing with complex markets, as the FTC were able to accurately recognise that a decision against Google would be tantamount to second guessing its commercial strategy. Google's success must at least be partially attributed to its minimalist and accessible user interface design. Equally, the interrelated and indirect competition between specialised and general search services will inevitably lead to either type of service adopting functionality changes to better serve the consumer's needs. It is therefore a compelling argument that Google's integration of its specialised search service would serve a similar purpose to its integration of its online mapping service, this being a cleaner and more efficient service for the consumer. Does this not resemble competition on the merits?

Consequentially, the EC's disagreement with Google's conduct threatens to rob the consumer of the benefits provided by Schumpeterian competition. Digital markets, such as comparison shopping services, are far from reaching their maximum potential. The reports from the UK regulators demonstrate that there is still a significant number of consumers who are denied the benefits of specialised search services. Further innovation resulting in these services becoming more accessible to consumers could lead to a substantial improvement in overall consumer welfare, not only in the comparison shopping market, but in all markets that can be aggregated within a price comparison service.

To realise these benefits, it is necessary to reflect on our established pre-conceptions of the competitive process. European competition law has developed to protect the traditional structure of a competitive market, where there is a multitude of suppliers that pressure each other to produce the best product. American antitrust law has similar goals to incentivise the best quality output, but it is far more accepting of different market structures should they ultimately lead to the best outcome for consumer welfare. Digital markets do not reflect their traditional counterparts and the relevant antitrust rules should accommodate this instead of fruitlessly attempting to change their natural structure. As shown by the English High Court's acceptance of this type of innovation, European competition law is also capable of embracing the needed flexibility for digital markets, perhaps only when leaning away from its ordoliberal heritage and toward the lighter touch of the Anglo-American perspective.

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ANNEX I – ABSTRACT (EN)

The European Commission's decision in 2017 to find Google guilty of abusing its dominant market position and self-favouring its subsidiary service is still highly controversial. A key reason for the controversy is the decision made by the Federal Trade Commission to close its investigation into the same conduct in 2012. This noted divergence between American and European competition law is interesting for several reasons, particularly because it provides a strong evidence of how both jurisdictions are reacting to the challenges of enforcing antitrust law in digital markets.

Through detailed analysis of previous case law, it becomes apparent that although both jurisdictions speak of the promotion of consumer welfare to be at the heart of their enforcement strategy, there remains a large discrepancy in the analysis of potential pro-competitive effects for consumers. American antitrust law is hallmarked by its adherence to the improvement of the economic welfare standard of the consumer, resulting in lower prices and better-quality products. If a highly concentrated market with imperfect competition produces the best deal for the consumer, then it is an acceptable outcome. European competition law differs in its application of general principles to preserve the structure of the competitive process, aiming to promote market behaviour that best resembles perfect competition. This approach enables the competitive process to naturally benefit consumers in terms of lower prices, better quality of products, and a larger range of available choices. Both approaches have their merits, but when it concerns the highly complex nature of digital markets, the European Commission's decision in Google Shopping demonstrates a glaring flaw in European competition policy.

The European Commission has effectively second-guessed what best serves consumers in the general and comparative search service markets. Its intervention has led to a significant decrease in legal certainty with no clear and identifiable enhancement of consumer welfare. Treating these digital markets in the same way as their traditional counterparts has led to consumers in other markets missing out on the potential benefits that could have been provided to them through specialised search services. The Google Shopping decision demonstrates the danger of holding pre-conceptions about how consumers are best served by competition law. Instead of a futile effort to transform the structure of digital markets to resemble the traditional concept of perfect competition through antitrust intervention, it should be antitrust rules adapting to reflect the nature of digital markets.

ANNEX II – ABSTRACT (DE)

Die Entscheidung der Europäischen Kommission im Jahr 2017, Google des Missbrauchs seiner marktbeherrschenden Stellung und der Selbstbegünstigung seiner Dienstleistungstöchter für schuldig zu erklären, ist nach wie vor höchst umstritten. Ein Hauptgrund für die Kontroverse ist die Entscheidung der Bundeshandelskommission ihre Untersuchung desselben Verhaltens im Jahr 2012 einzustellen. Diese festgestellte Divergenz zwischen amerikanischem und europäischem Wettbewerbsrecht ist aus mehreren Gründen interessant, vor allem, weil sie ein starkes Indiz dafür ist wie beide Gerichtsbarkeiten auf die Herausforderungen bei der Durchsetzung des Kartellrechts in digitalen Märkten reagieren.

Durch eine detaillierte Analyse der bisherigen Rechtsprechung wird deutlich, dass, obwohl beide Jurisdiktionen davon sprechen, dass die Förderung des Wohlergehens der Verbraucher im Mittelpunkt ihrer Durchsetzungsstrategie stehen soll, nach wie vor eine große Diskrepanz in der Analyse potenzieller wettbewerbsfördernder Auswirkungen für die Verbraucher besteht. Das amerikanische Kartellrecht zeichnet sich durch einen Fokus auf einen Prozess der intensiven Analyse aller bekannten wirtschaftlichen Auswirkungen aus welche infolge des Verhaltens eines jeweiligen Unternehmens entstehen könnten. Die Gerichte ziehen wirtschaftliche Literatur deutlich vermehrt in Betracht anstatt sich ausschließlich auf die Einschätzung von Ermittlungsbehörden zu verlassen. Im Vergleich dazu unterscheidet sich das europäische Wettbewerbsrecht in der Anwendung allgemeiner Grundsätze zur Erhaltung der Struktur des Wettbewerbsprozesses, wachsam gegenüber der Notwendigkeit den Wettbewerbsprozess unverzüglich zu schützen bevor irreversible Verzerrungen entstehen können. Beide Ansätze haben ihre Vorzüge, geht es jedoch es um die hochkomplexe Natur digitaler Märkte, so zeigt die Entscheidung der Europäischen Kommission im *Google Shopping* Fall einen eklatanten Fehler in der europäischen Wettbewerbspolitik auf.

Die Europäische Kommission hat praktisch vorausgesagt was den Verbrauchern auf den Märkten für allgemeine und vergleichende Suchdienste am besten dient. Ihr Eingreifen hat zu einem erheblichen Rückgang der Rechtssicherheit geführt, ohne dass dabei das Wohlergehen der Verbraucher klar und erkennbar verbessert wurde. Durch die gleiche Behandlung digitaler Märkte mit ihren traditionellen Pendants haben sie sich möglicherweise potentielle Vorteile die den Verbrauchern anderer Märkte hätten zugutekommen können entgehen lassen. Die *Google-Shopping* Entscheidung zeigt die

Gefahr auf vorgefasste Meinungen darüber anzunehmen wie Wettbewerbsrecht für Verbraucher die höchste Dienlichkeit erweisen kann, wo anstelle vergeblicher Bemühungen die Struktur digitaler Märkte so zu verändern dass sie sich den traditionellen wettbewerbsrechtlichen Prinzipien angleicht, es jedoch eigentlich die Kartellvorschriften sein sollten die sich anpassen um die Beschaffenheit digitaler Märkte zu reflektieren.