GOOGLE SEARCH (SHOPPING): AN OVERVIEW OF THE EUROPEAN COMMISSION'S ANTITRUST CASE

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1. INTRODUCTION

In June 2017, the European Commission concluded its 7-year-long investigation into Google Shopping, imposing the unprecedented fine of €2.42 billion on Google for abusing its dominance as a general search engine by giving illegal advantage to its own comparison shopping service[2]. In particular, the Commission objects that Google has leveraged its market dominance in general internet search into comparison shopping services, by giving prominent placement to its own comparison shopping service and by demoting rival comparison shopping services in its search results (the "Conduct").

After a description of the evolution of Internet search engines over time (section 2), this article provides a factual description of the investigation (section 3) and of the analysis undertaken by the European Commission (section 4). Taking into account the Decision's remedy (discussed in section 5), some brief final remarks are presented in section 6.

2. THE EVOLUTION OF SEARCH ENGINES

As Google's Chief Economist once put it, "*The web without search engines would be like Borges' universal library with no card catalog*"[3]. A cursory look at Google's website might not reveal any significant change over the years: users are still

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[1] Italian Competition Authority. The views and opinions expressed in this article are personal and do not necessarily reflect those of the Italian Competition Authority.

[2] See Commission decision of 27 June 2017 in Case 38606 - AT.39740 Google Search (Shopping), (the "Decision"). At the time, the Commission had already come to the preliminary conclusion that Google had abused a dominant position in two other cases, which are still being investigated. The first (Case 40099) concerns the Android mobile operating system, where the Commission is concerned that Google has stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy on mobile devices to protect and expand its dominant position in general internet search. The second (Case 40411) concerns the advertising platform AdSense, where the Commission is concerned that Google has reduced choice by preventing third-party websites from sourcing search ads from Google's competitors.

[3] Hal R. Varian, 2006, The Economics of Internet Search, *Rivista di Politica Economica*, XI-XII.

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presented with a minimalistic page where they can input a query and obtain a list of results "free of charge". In reality, a lot has changed under the surface: over time, Google Search has evolved from a service that provides users with a tool to find websites of their interest to a tool that (also) provides users directly with the information they look for. This process has been described as an evolution through three generations, which also correspond to different sets of results that coexist in today's search results pages[4].

2.1 First-generation search engines: generic results

In a "first-generation" general search engine, users can search by entering a search term and obtain as a response a list of links to potentially relevant websites, the so-called "generic" or "organic" search results. Search engines provide these results by using software that crawls, collects and indexes hundreds of billions of web pages and algorithms that rank them in order to provide users with the results that might be more relevant and useful to them.

For instance, Google explains that its algorithms analyze hundreds of different factors to try to surface the best information the web can offer, from the freshness of the content, to the number of times your search terms appear and whether the page has a good user experience[5]. In order to assess trustworthiness and authority on its subject matter, Google also looks for sites that many users seem to value for similar queries and that are linked by other prominent websites. Apart from general information of this kind provided by search engines, ranking algorithms are a "black box" to the public: its internal workings are a web engine's best kept secret. Lack of transparency is well justified by the need to avoid "gaming" by websites and preserving the single most important factor of a search engine's success.

The algorithms that govern the ranking of generic results are subject to changes over time. Most notably, Google introduced two different algorithms in 2004 and 2011 (the latter is known as the "Panda" update). Whilst aiming at improving search results for users, for instance by demoting low-quality websites with little original content, the impact of these algorithms on competing specialised search engines is an element of Google's conduct that has been investigated by the European Commission.

Generic search results are thus a free listing in Google Search that appears because it is relevant to someone's search terms. When a

[4] For a description of the evolution of Google's search engine see Michael A. Salinger, Robert J. Levinson, The Role for Economic Analysis in the FTC's Google Investigation, available at: http://www.law.northwestern.edu/research-faculty/searlecenter/events/internet/documents/Salinger_Economics_of_Google_and_Antitrust_Case_Searle_conference_version.pdf. Note that the authors were consultants to Google during the FTC's investigation, and Google provided financial support for the paper.

[5] See Google's own explanation on how search works, available at: https://www.google.com/search/howsearchworks/algorithms/.

user clicks on a generic search result, Google does not receive a monetary remuneration. In practice, setting aside the value of the data collected from users, the provision of organic search result is financed through the revenues from the sale of advertising spaces that appear in the search results pages (traditionally in the form of search ads). In fact, in response to a user's query on Google Search, Google might also display search advertisements, which typically appear above or below generic search results with a label informing users of their nature as advertisements. Search ads are drawn from Google's auction-based advertising platform "AdWords", through which advertisers can compete to purchase the advertising spaces.

2.2 Second-generation search engines: the introduction of specialised results

The introduction of specialised search results for different classes of Web content alongside general search results – Google introduced "Product Universals" in 2007 – marks the evolution to the "second generation" of general search services. Specialised (or "vertical") results – in the form of links to external websites – are identified through an algorithm that is specifically optimized for identifying relevant results for a particular type of information such as news, local businesses or product information. They are often displayed with attractive graphical features and are positioned above generic search results of among the first of them. In some cases, specialised search results are a free listing that appears because it's relevant to someone's search terms and in other cases are paid listings, i.e. third-party websites have to enter into an agreement with Google in order to be listed among specialised search results.

Google's comparison shopping service is one of Google's specialised search services. It allows users to compare the prices of a product across online sellers and was originally introduced in 2004 as "Froogle", was re-named "Google Product Search" in 2008 and since 2013 has been called "Google Shopping" (for simplicity, it will be referred to as "Google Shopping"). At the time of its introduction, similar services had already been developed by third parties and could be readily found among Google's organic search results. Since 2012, Google has introduced a "paid inclusion" model for its comparison shopping service, whereby merchants pay Google when their product is clicked on Google Shopping.

2.3 Third-generation search engines: providing direct answers to users' queries

In the "third generation" of general search, search engines have started to provide direct answers to users' queries, i.e. to directly providing users with the information they wanted rather than providing only a link to an external website. For instance, if a user search for the weather, Google presents directly in its result pages weather forecasts, and not just links to other weather forecast websites.

3. The Investigation

The investigation of the European Commission against Google started in 2010, following complaints by two specialised search engines,

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which were then joined by more than 20 other complainants over the course of the proceedings.

The Commission set out to investigate whether Google had abused a dominant market position in online search by lowering the ranking of natural search results of competing "vertical search" services - services which are specialised in providing users with specific online content such as price comparisons - and by according preferential placement to the results of its own vertical search services in order to shut out competing services[6].

Since the beginning of the investigation, Commissioner Almunia's clear preference was to reach a legally binding commitments decision[7] and indeed, over a period of more than three years, Google offered various rounds of commitments, which were subject to two market tests. In 2014, Commissioner Almunia stated that Google's (third version of) proposals seemed capable of addressing the competition concerns so that it was possible to move forward towards a decision based on commitments[8]. In particular, Google had proposed to guarantee that whenever it would promote its own specialised search services on its page, the services of (three) rivals would also be displayed in a comparable way, i.e. prominently on the page and with the same visibility and attractive features (such as pictures) for users.

Google had also set out the mechanism that it would use to select which ones, among the set of rivals, would be displayed in such a way. In particular, where Google does not charge for inclusion in its specialised search service, rivals would have not been charged to participate in the rival links and would be chosen based on their ranking in natural search. However, where Google charges merchants for inclusion in its specialised search service, such as in Google Shopping, the three rivals would have been chosen on the basis of a dedicated auction mechanism.

Google's proposal faced fierce opposition from the complainants, mainly for the mechanism proposed by Google, which would have entailed paid listings. These negative responses, together with new data and considerations introduced by some complainants, led the Commission not to accept Google's proposal and to move forward with the investigation.

In April 2015, the European Commission sent a Statement of Objections to Google alleging that the company had abused its dominant

[6] The investigation also encompassed allegations that Google imposed exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools. Finally, the Commission intended to investigate suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms. The Commission has sent a separate Statement of Objections to Google on the restrictions that the company has placed on the ability of certain third party websites to display search advertisements from Google's competitors (see European Commission, Press Release of 14 July 2016).

[7] See Joaquín Almunia, *Statement on the Google investigation*, SPEECH/14/93, available at *http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm*.

[8] *Ibid.*

position in the markets for general internet search services by systematically favouring its own comparison shopping product in its general search results pages. One year later (in July 2016), in a supplementary Statement of Objections, the Commission reinforced its conclusion with additional evidence and data and considered in detail Google's argument that comparison shopping services should be considered together with the services provided by merchant platforms, such as Amazon and eBay. The final decision was adopted in June 2017.

4. Relevant markets, dominance and the theory of harm

4.1 Relevant markets

Market definition always plays a particularly important role in abuse of dominance cases, if anything for the legal requirement to assess dominance. However, in this case, market definition is probably even more important since the theory of harm is that Google has leveraged its dominance in one market to extend it onto one or more adjacent markets: understanding what these different markets are and how they are related is therefore key. Moreover, in the case at hand, market definition needs to take into account the fact that the services involved are provided by ("non-transaction") multi-sided platforms[9], which offer a free search service to consumers and paid advertising spaces to advertisers.

The Commission defines two distinct relevant product markets: the market for general search services, and the market for comparison shopping services. Both market are national in scope.

(a) The market for general search services

The Commission had already defined the relevant product market for general search services in some merger cases, where it had also distinguished it from "vertical" Internet search, i.e. search services focuses on specific segments of online content such as for example legal, medical, or travel search engines[10].

Internet search services are typically provided for free to users who want to search for information on the Internet. Despite the fact that users are offered these services without paying a monetary price, the Commission explains that the provision of general search services constitutes an economic activity for three main reasons[11].

First of all, the Commission recognizes the role of personal data as a "currency": even though

[9] A multisided platform is one that sell different services to different groups of consumers (users and advertisers/retailers), while recognizing that the demand from one group of customers depends upon the demand from the other group and, possibly, *viceversa*. See, for instance, Filistrucchi, L., Geradin D., van Damme E., and Affeldt P., 2014, "Market Definition in two-sided marktes: theory and practice", *Journal of Competition Law & Economics*, 10(2), pp. 293-339 and OECD, 2018, *Rethinking antitrust tools for multi-sided platforms*.

[10] See, for instance, Commission decision of 18 February 2010 in case COMP/M.5727 - *Microsoft/Yahoo! Search Business*.

[11] See paragraphs 157-160 of the Decision.

users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query[12].

Second, the Commission considers the multisided nature of Google's platform, which connects distinct but interdependent demands: offering a service free of charge can thus be an advantageous commercial strategy because it attracts users, thereby allowing the platform to sell advertising space to companies that are interested in reaching those users[13].

Third, the Commission observes that general search services compete on non-price parameters of competition such as: *i)* the relevance of results; *ii)* the speed with which results are provided; *iii)* the attractiveness of the user interface; and *iv)* the depth of indexing of the web.

The Commission finds that there is limited demand side substitutability between general search services and other online services and most notably specialised search services. While general search services aim to provide all possible relevant results for queries, specialised search services focus on providing specific information limited to a particular content category. In addition, the two types of search services also rely on different sources of data (web crawling vs. user input/information supplied by third parties) and generate revenue in different way (search advertising vs. paid inclusion, service fees or commissions). The Commission also observes that its conclusion is supported by the history of the development of the products concerned and Google's commercial practice, such as the fact that specialised search services have been offered on a standalone basis for several years and the fact that Google itself offers and describes its specialised search services as distinct from its general search service.

(b) The market for comparison shopping services

The second relevant product market defined by the Commission is that for comparison shopping services, which are specialised search services that: *i)* allow users to search for products and compare their prices and characteristics across the offers of several online retailers and merchant platforms; and *ii)* provide links that lead to the websites of such online retailers or merchant platforms. According to the Commission, these services are substitutable neither with the services offered by online search advertising platforms nor with merchant platforms (such as Amazon and eBay)[14].

With respect to the former[15], the Commission observes that consumers perceive comparison

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[12] On the role of data as a currency see, for instance, the *Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, March 2014.

[13] The definition of a relevant market for general search services appears consistent with the approach proposed for the definition of relevant markets with non-transaction multisided platforms. See, for instance, OECD, 2018, *Rethinking antitrust tools for multi-sided platforms.*

[14] See section 5.2.2 of the Decision.

[15] See paragraphs 196-206 of the Decision.

shopping services as a service to them whereas users do not enter a query in a general search engine specifically in order to receive search advertising results. Moreover, comparison shopping services and online search advertising platforms are complementary and not substitutable from the perspective of online retailers and other advertisers.

With respect to merchant platforms, Google claims that they exert strong competition in product search and price comparison so that for the large majority of product searches, merchant platforms are users' preferred search option and most users start their product searches there.

However, the Commission finds that there is only limited substitutability between comparison shopping services and merchant platforms, which serve a different purpose for users and for online retailers[16]. In fact, comparison shopping services: *i)* act as intermediaries between users and online retailers/merchant platforms; *ii)* do not offer users the possibility to purchase a product directly on their websites; *iii)* do not offer after-sale support; *iv)* typically list offers only from professional sellers for new products[17].

The Commission observes that Google itself distinguishes the different purpose and characteristics of Google Shopping and of merchant platforms and that it allows merchant platforms, but not competing comparison shopping services, to participate in Google Shopping. In addition, the majority of comparison shopping services and merchant platforms indicated that they are rather business partners in a vertical relationship, not competitors. In fact, comparison shopping services list offers from merchant platforms based on the same terms and conditions applied to online retailers and eBay and Amazon are consistently among the top online retailers in terms of revenues for many comparison shopping services.

4.2 Dominant position

The analysis of dominance in multisided platforms normally raises a number of methodological questions. Clearly, the overall aim is always to assess if the company enjoys a position of economic strength which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. When this analysis is undertaken with regard to a (non-transaction) multi-sided platform, it might be necessary to adapt the traditional approach and tools employed in the assessment of dominance, such as the analysis of market

[16] This is discussed at length in Section 5.2.2.4 of the Decision. In section 7.3.2. of the Decision, the Commission outlines that, in any case, Google's conduct would have been abusive even if comparison shopping services and merchant platforms were considered part of the same market.

[17] On the other hand, merchant platforms: *i)* act as a place where retailers and consumers can conclude sales; *ii)* are perceived by users as multi-brand retailers; *iii)* offer after-sale support; and *iv)* list offers for second-hand products from non-professional sellers (see Paragraph 219 of the Decision).

shares, to the fact that a (traditional) price does not exist on one side of the platform. Also, in dynamic markets, the analysis of barriers to entry become all the more important and it needs to take into account some typical features of platforms such as network effects, (big) data availability and users' behavior in terms of single or multi-homing.

In the case at hand, the Commission finds that Google holds a dominant position in (each national market for) general search services. First of all, the Commission observes that Google has enjoyed strong and stable (volume) market shares across the EEA since 2008, and there has been no effective entry in any EEA country during that period[18]. In particular, apart from the Czech Republic and Slovenia, Google's market shares in all EEA countries since 2008 have always been above 85%.

Second, the Commission considers the existence of barriers to expansion and entry[19]. The establishment of a fully-fledged general search engine requires significant investments. Also, because a general search service uses search data to refine the relevance of its general search results pages, it needs to receive a certain volume of queries in order to compete viably and to improve the relevance of its results for uncommon queries. General search services constantly invest to improve their product and a new entrant would have no choice but to attempt to match these investments.

The analysis of barriers to entry also takes into account the multi-sided nature of Google's platform and the relevant network effect: in fact, the Commission outlines that positive feedback effects on both sides of the two-sided platform create an additional barrier to entry[20]. In addition, the Commission considers the fact that only a minority of users that use Google as their main general search service multi-home, i.e. use other general search services[21].

The finding of dominance holds notwithstanding the fact that general search services are offered free of charge. In fact, the Commission observes that even though users do not pay a monetary sum for the use of the general search service they contribute to the monetisation of the service by providing data with each query[22].

4.3 The abuse

The abusive conduct consists in the more favourable positioning and display, in Google's general search results pages, of Google's own comparison shopping service relative to competing comparison shopping services. In

18 As explained in section 6.2.1. of the Decision, the Commission has used market shares by volume as a proxy because market shares by value cannot be computed since general search services are provided free of charge to the users. Also, the Commission was not able to obtain precise values regarding the revenue per search of the main general search services. In addition, advertisers look at usage shares when deciding where to place their search advertisements.

19 See Section 6.2.2 of the Decision.

20 See paragraphs 292-296 of the Decision.

21 See Section 6.2.3 of the Decision.

22 See Section 6.2.5 of the Decision and in particular, paragraph 320.

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particular, competing comparison shopping services can appear only as generic search results and are prone to the ranking of their web pages in generic search results on Google's general search results pages being reduced (demoted) by certain algorithms. In fact, comparison shopping services are prone to be demoted by at least two different algorithms, which were first applied by Google in 2004 and 2011, respectively. By contrast, Google's own comparison shopping service is prominently positioned, displayed in rich format and is never demoted by those algorithms.

The Commission considers that this constitutes a practice falling outside the scope of competition on the merits as: *i)* it diverts traffic, i.e. it decreases traffic from Google's general results pages to competing comparison shopping services and increases traffic from Google's general results pages to Google's own comparison shopping service ("traffic diversion"); *ii)* it is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services.

The theory and the analysis of anticompetitive foreclosure largely rests on the quantitative analysis of the impact of the Conduct on the traffic (i.e. consumers' visits) from Google's general results pages to competing comparison shopping services and to its own comparison shopping service. This is based on the premise that user traffic is key for the ability of a comparison shopping service to compete for several reasons[23]: *i)* traffic enhances the ability of comparison shopping services to convince merchants to provide them with data about their products; *ii)* traffic generates revenue that can be used to invest in order to improve the usefulness of the services provided; *iii)* traffic allows comparison shopping services to improve the usefulness of the service they offer to users through machine learning effects, experiments and the ability of comparison shopping services to offer search terms that may be of interest to users; *iv)* traffic allows comparison shopping services to generate more original user reviews.

The Commission remarks that it is not required to prove that the Conduct has had actual effects on traffic, but only that is capable of having, or likely to have, such effects[24]. Demonstrating a precise causal link between the conduct and the decrease in traffic to competing comparison shopping services and the increase in traffic to Google's comparison shopping services is not an easy exercise, since it involves disentangling the effects of many different factors that over time affect the traffic patterns of individual comparison shopping services in different countries.

Nevertheless, the Commission outlines that it has demonstrated by "tangible evidence" that the conduct decreases traffic to competing comparison shopping services and increases traffic to Google's own comparison shopping service. In addition, the Commission has

[23] See Section 7.2.2 of the Decision.

[24] See paragraph 606 of the Decision.

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showed that the traffic diverted by the Conduct accounts for a large proportion of traffic to competing comparison shopping services and cannot be effectively replaced by other sources currently available to comparison shopping services. The Commission then concludes that the Conduct has potential anti-competitive effects in the national markets for comparison shopping services as well as in those for general search services.

(a) The Conduct decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service.

The analysis of Google's conduct essentially relies on quantitative evidence related to the existence and magnitude of traffic diversion, i.e. the impact of Google's conduct on traffic from Google's general search pages to comparison shopping services.

First, the Commission considers an analysis of user behavior[25]. The evidence shows that consumers click far more often on results that are more visible, i.e. the results appearing higher up in Google's search results[26]. Crucially, the Commission is able to conclude that users do so because they tend to consider that highly ranked generic search results on Google's are the most relevant for the queries and click on them irrespective of whether other online results would be more relevant[27]. In particular, the evidence shows that moving the first result to the third rank leads to a reduction in the number of clicks by about 50%.

The Commission then proceeds to consider the evidence of the impact of the Conduct on generic search traffic from Google to competing shopping services[28]. The Commission presents first specific examples of the impact of the Conduct[29]. Second, the Commission presents evidence according to which the evolution of generic search traffic from Google's general search result pages to the websites of three competing comparison shopping services in the UK, France and Germany follows a similar trend to an index that measures these sites "visibility" in Google's generic search results pages[30]. Third, the Commission also observes that, while the evolution of traffic in a given country can be influenced by several factors, the Conduct has in most instances led to a decrease in traffic from Google's general search results pages on a

[25] See Section 7.2.3.1 of the Decision.

[26] According to the evidence provided in the Decision, while the first result receives an average click rate of 34%, the second result receives an average click rate of 17% and the 10th result only 3%.

[27] In fact, it is possible that the top results get more click because users consider them more relevant than the other results, i.e. because Google's algorithms is effective in providing users with the results they want. If this were the case, the simple evidence on users' behavior would not necessarily imply that, if a given website were to be "demoted" in the rank, its click rate would necessarily decrease accordingly. In order to identify a causal effect, the Commission considered then the results of an ad-hoc economic study that aimed at addressing this technical issue, confirming the conclusion that a modification of the rank of a generic search result has a major impact on traffic, even if users adapt their behavior.

[28] Section 7.2.3.2 of the Decision.

[29] Paragraphs 463-474 of the Decision.

[30] Paragraphs 475-477 of the Decision.

lasting basis to almost all competing comparison shopping services in each of the 13 countries in which the Conduct took place[31].

Following the demotions applied by Google, traffic to rival comparison shopping services dropped significantly: for example, the Commission found specific evidence of sudden drops of traffic to certain rival websites of 85% in the United Kingdom, up to 92% in Germany and 80% in France. These sudden drops could also not be explained by other factors. Some competitors have adapted and managed to recover some traffic but never in full.

The other facet of "traffic diversion" concerns the impact of Google's conduct on the traffic of its own comparison shopping service[32]. The Commission observes that before the start of the conduct, in October 2007, Google's comparison shopping service had been unsuccessful in gaining traffic. In November 2007, the first month after the launch the Product Universal in the US, traffic to Google's comparison shopping service at least doubled. Google itself indicates that paid search results in the Shopping Unit attract more traffic and leads compared to text ads shown in the same location for Google shopping searches. The Commission has also undertaken an analysis that indicates that higher trigger rates of Google's own comparison shopping service in its general results pages are associated with increased traffic to that service and presents evidence according to which the conduct has led to a lasting increase in traffic in each of the EEA countries in which it took place.

In fact, since the beginning of each abuse, Google's comparison shopping service has increased its traffic 45-fold in the United Kingdom, 35-fold in Germany, 19-fold in France, 29-fold in the Netherlands, 17-fold in Spain and 14-fold in Italy.

Google contests the conclusions drawn by the Commission on the basis of the analysis of traffic patterns[33]. In particular, Google claims that the changes to the algorithm use for tanking organic results has not led to any decrease of traffic to competing comparison shopping services because traffic to these services has not decreased in a consistent manner in each of the 13 countries involved. Rather, Google argues that the business model of the competing comparison shopping services and the presence of merchant platforms, in particular Amazon, in a given country are "more plausible" causes of the decrease in generic search traffic from Google's general search results pages to competing comparison shopping services.

Google also presents two economic analyses according to which Google Shopping is unlikely to have led to any (material) decrease in generic search traffic from Google's general search results pages to competing comparison shopping services. At the same time, according to Google, traffic to its own comparison shopping service has increased not because of

31 Paragraphs 478-488 of the Decision.

32 Section 7.2.3.3 of the Decision.

33 Google's arguments and the Commission's response are discussed in section 7.2.3.4 of the Decision.

the positioning and display of Google Shopping, but because Google applies specific relevance criteria when determining whether to display results from its comparison shopping service in general search results pages; and the rich features of the Product Universal and the Shopping Unit allow users to better assess their relevance.

(b) The traffic diverted by the Conduct accounts for a large proportion of traffic to competing comparison shopping services and cannot be effectively replaced by other sources currently available to comparison shopping services.

Google's conduct could hardly have the potential to foreclose comparison shopping services if the traffic diverted by Google's conduct did not account for a large proportion of traffic to these websites and if they could effectively replace this traffic by other sources. The Commission does not undertake an analysis of the evolution of total traffic of comparison shopping services over time. But it first shows that the traffic diverted by the Conduct accounts for a large proportion of traffic to competing comparison shopping services.

The Commission then outlines that comparison shopping services cannot recover generic search traffic from Google's general search results pages from other sources (including direct traffic, affiliate websites, social network, generic or paid traffic from other general search results). For instance, comparison shopping services could not do so by increasing their spending on AdWords and that, in any event, this would not be an economically viable solution for them when competing against Google Shopping. Similarly, it considers that mobile applications are also not a substitutable source of traffic as the mobile channel is a minor source of traffic for major comparison shopping services (in account for around 5% of traffic to comparison shopping websites) and most apps developed by comparison shopping services have not led to a significant increase in traffic to their websites due to user preferences (and not to their alleged lack of quality).

(c) The Conduct has potential anti-competitive effects on several markets

The Commission relies on the analysis of traffic diversion to conclude that the Conduct is capable of having anti-competitive effects in the national markets for comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation[34]. In addition, the conduct is likely to reduce the ability of consumers to access the most relevant comparison shopping services.

The Commission outlines that this conclusion would still hold even if comparison shopping services and merchant platforms (such as Amazon and eBay) were to be included in the same relevant market[35]. This is because competing comparison shopping services

[34] See Section 7.3.1 of the Decision. A brief discussion of consumer harm is also developed in Chiara Fumagalli, 2017, A note of the Google (comparison shopping) case, *mimeo*, available at: *http://didattica.unibocconi.eu/myigier/index.php?IdUte=49033&idr=30081&lingua=eng&comando=Apri.*

[35] See the rather long discussion in Section 7.3.2 of the Decision.

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would be the closest competitors to Google's own comparison shopping service and would account for a sizeable share of this wider market, and because traffic to merchant platforms remained relatively stable or increased at a lower rate compared to Google's comparison shopping service.

The Commission identifies also potential anti-competitive effects in the national markets for general search services as the conduct may make it more difficult for competing comparison shopping services to reach a critical mass of users that would allow them to compete against Google.

5. The remedy

The Decision recognizes that there is more than one way through which Google can end its infringement and that the choice rests on Google (and its parent company Alphabet). The overarching principle is that any measure should "*[…] ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages.*"[36].

Following an approach that appears to resemble the principle of "equivalence-of-input" in the telecommunication industry[37], the Commission explains that any measure should subject Google's own comparison shopping service 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[38]. 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.

A requirement on Google to treat competing comparison shopping services no less favourably than its own comparison shopping service within its general search services does not generally prevent it from monetizing its general search results pages. Google can choose the specific measures through which it intends to comply with the Decision and the possible measures do not preclude the monetization of its general search results pages when making its choice. At the same time, the Decision clarifies that any measure should not lead to competing comparison shopping service being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by the Decision.

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36 Paragraph 699 of the Decision.

37 In the telecommunications industry, Equivalence of Inputs (EoI) means the provision of services and information to internal and third-party access seekers on the same terms and conditions, including price and quality of service levels, within the same time scales using the same systems and processes, and with the same degree of reliability and performance. See, for instance, Commission Recommendation of 11 September 2013 on *Consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment* (2013/466/EU).

38 Paragraph 700 of the Decision.

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Google appears to have changed its specialised results by letting comparison shopping services to pay to appear in the same place above results for product searches as Google's own comparison shopping results. According to statements by Google[39], Google Shopping will compete on equal terms and will operate as if it were a separate business, participating in the auction in the same way as everyone else[40].

Comparison shopping services, however, have claimed that Google's current remedy proposal is no better than Google's Commitment proposals under Commissioner Almunia, and in some ways may be worse[41]. First, the companies observe that without full ownership unbundling, Google Shopping's participation in the auction is essentially meaningless. Second, without explicit measures to prevent it, any fully- or over-subscribed auction inevitably leads to competing services being charged a fee that has the equivalent object or effect as Google's infringement. Third, the aggregation of rich product ads (derived from product feeds or their equivalent) in itself constitutes a comparison shopping service which Google is favouring in its general search results. Moreover, the companies observe that Google's current remedy proposal does nothing to address Google's conduct related to the demotion of competing services in organic search results.

6. FINAL REMARKS

The Google Shopping antitrust case has been defined by Commissioner Vestager as being "old school in new markets", while several scholars have highlighted its innovative elements[42]. It broadly fits the category of "leveraging market power", i.e. using a dominant position in one market to extend it onto one or more adjacent markets. It also vaguely echoes other types of abuses such as refusal to supply. However, Google's claim that the conduct should be considered abusive only if the criteria established in the Bronner case are fulfilled has been dismissed by the Commission on the basis that the conduct is not a passive refusal, but active behavior relating to the more favourable positioning and display by Google of its own comparison shopping service compared to competing ones. Indeed, the Commission examines the impact of the Conduct on traffic

39 See, for instance, the statements reported by the *Wall Street Journal* at *https://www.wsj.com/articles/google-rolls-out-search-shopping-ad-changes-in-europe-1506528301*.

40 Some commentators have argued that Google's auction remedy complies with the Decision. See, for instance, Bo Vesterdorf and Kyriakos Fountoukakos, 2018, 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, *Journal of European Competition Law & Practice*, 9(1).

41 See the open letter that on 28 February 2018 19 signatories have sent to Commissioner Vestager, available at *http://fairsearch.org/*.

42 For a critical position on the Commission's case see, for instance, Ioannis Kokkoris, 2017, The Google case in the EU: is there a case?, *The Antitrust Bulletin*, 6(2), pages 313-333 and Robert H. Bork and J. Gregory Sidak, 2012, What does the Chicago school teach about Internet search and the antitrust treatment of Google, *Journal of Competition Law & Economics*, 8(4), 663-700 (please note that this report was commissioned by Google).

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for comparison shopping services, but it does not claim that Google Search is indispensable for comparison shopping services to compete, i.e. that Google Search is an essential facility.

Many aspects of this case – from the definition of relevant markets to the theory of harm – highlight the complexity of the digital ecosystem, where value is created through complex relationships among different services, which often involve both substitutable and complementary aspects, and are rather distant from the linear vertical value chain that is often used to describe "traditional" industries. Indeed, as the OECD had already observed in 2010[43], it is important to appreciate that Internet intermediaries may have different and potentially competing simultaneous roles as intermediaries, end-users and content/service providers. For example, some Internet service providers deliver their own content; some e-commerce platforms sell goods that they take title to.

This multifaceted nature of Internet intermediaries appears to be also at the heart of the Google Shopping case. Indeed, even if general search services are a separate relevant market from specialised search services, general search engines such as Google act as multisided platforms where the provision of "free" organic search results is financed through the sale of advertising space, including that related to the provision of a proprietary comparison shopping service. At the same time, general search engine listings are also the main source of traffic for competing comparison shopping services. The ecosystem is even more complex, as some merchant platforms that advertise on comparison shopping services also offer search services that allow users to find and compare products sold by third-party competing retailers.

In this scenario, Google claims that its Conduct amounts to a legitimate change and improvement to its search platform aimed at improving the quality of Google's search service for users and advertisers. Indeed, in 2013, the Federal Trade Commission closed its investigation concluding that Google did not change its search results primarily to exclude actual or potential competitors but to improve the quality of its search results"[44]. The European Commission, instead, promptly dismisses Google's objective justification and efficiency claims. In particular, it highlights that the Decision does not prevent Google from applying adjustment mechanisms to its search engine or from displaying categories of specialised search results that users might be interested into. Rather, Google is required to ensure that competing comparison shopping services are treated no less favourably than its own comparison shopping service within its general search results pages.

From a different perspective, it is possible to observe that this Decision may well have an impact on Internet search over and beyond comparison shopping services. In fact, Google

[43] See OECD, 2010, *The Economic and social role of Internet intermediaries*.

[44] *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, available at *http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf*.

displays various specialised services that contain third-party ads (such as Google Maps), and the general principle of "equal treatment" set in the Decision is potentially far-reaching and does not apply only to comparison shopping services. In fact, the Commission has already stated that it will continue to examine Google's treatment in its search results of other specialised search services offered by Google, which can be assessed against the framework established in this Decision on the basis of a case-specific analysis to account for the specific characteristics of each market[45].

At the same time, the digital ecosystem is in constant evolution and adaptation and the way users search for information and purchase goods and service online might also develop: digital butlers might soon provide personal online shopping services sending alerts when items are low in stock, dropped in price or restocked[46]. Can antitrust keep pace with the dynamic competition and innovation that is at the heart of the evolution of digital markets?

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45 See the Commissions' Press Release of 27 June 2017.

46 See Julian Mitchell, This e-commerce startup gives online buyers a smart personal shopper, *Forbes*, 22 March 2017, available at: *https://www.forbes.com/sites/julianmitchell/2017/03/22/this-e-commerce-startup-gives-online-buyers-a-smart-personal-shopper/*.