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Online challenges for EU competition policy

Analysis of the Google Shopping Decision

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Justin Pierce

Semester of graduation: Period 1, spring semester of 2018

Contents

SUMMARY	1
SAMMANFATTNING	2
PREFACE	3
1 INTRODUCTION	4
2 RESEARCH QUESTIONS, SCOPE OF THIS THESIS, MATERIALS AND RESEARCH METHOD	6
2.1 Purpose and research questions	6
2.2 Scope of this thesis	7
2.3 Materials and methods	7
3 COMPETITION REGULATION IN THE EU	9
3.1 The overall goal for competition regulation	10
3.2 Scope of article 102	11
3.3 Relevant market	12
3.3.1 <i>Demand side substitutability</i>	13
3.3.2 <i>Supply side substitutability</i>	14
3.3.3 <i>Potential Competition</i>	15
3.3.4 <i>Geographical dimension</i>	15
3.3.5 <i>Dominant or not?</i>	16
3.4 Abusive behaviour	17
3.4.1 <i>Refusal to supply</i>	17
3.4.2 <i>Price discrimination</i>	19
3.5 Competition and personalisation	19
4 CASE STUDY, GOOGLE SHOPPING	22
4.1 Background to the Google Shopping Case	22
4.1.1 <i>Generic search results</i>	23
4.1.2 <i>Online search advertising results</i>	24
4.1.3 <i>Specialised search results</i>	24
4.1.4 <i>Google Shopping</i>	25
4.1.5 <i>The main issue</i>	25
4.2 The commissions approach to market definitions	26
4.2.1 <i>Relevant product markets</i>	26
4.2.2 <i>Relevant geographical market</i>	27

4.2.3	<i>The assessment of dominance</i>	27
4.3	Abuse of dominance	28
4.4	Analysis of the Commissions decision	28
5	BEYOND GOOGLE SHOPPING	33
5.1	What is Amazon.com	33
5.2	Amazons relevant market	34
5.3	Is Amazon dominant in its market?	35
5.4	Outcomes of dominance	36
5.4.1	<i>External perspective</i>	36
5.4.2	<i>Internal perspective</i>	36
5.5	Analysis of the Amazon case	37
6	CONCLUSIONS	39
	APPENDIX A	40
	BIBLIOGRAPHY	42
	<i>Regulations</i>	42
	<i>Literature</i>	42
	<i>The Commission</i>	43
	<i>Others</i>	43
	TABLE OF CASES	44

Summary

We live an increasingly larger part of our lives online. The Internet has fundamentally changed how we find information, buy products, connect with friends and find entertainment such as video streaming and digital distribution of books. The Internet has changed the competitive landscape for many markets. Local sellers suddenly face competition from sellers around the globe, introducing more choice and added transparency. Online marketplaces, such as E-bay or Amazon, have more or less erased the former geographical barriers and lowered search costs for consumers. The emergence of new markets, such as Internet search and online retail, that largely operates new business models focused on monetizing user data with advertisements whilst providing their service for ‘free’ to the consumer might make established competition enforcement tools difficult to use. Personalisation might blur transparency and make for a new kind of abusive behaviour, sorting consumer into separate markets based on personal data such as purchasing history and recent web searches. The recently released decision by the Commission in the Google Shopping case provide an insight into where competition law is moving in an online market environment. However, the Commissions decision provides far more questions than answers, especially when the principles of that decision is applied to the hypothetical case of Amazon’s online market. The look into Amazons online marketplace also hints towards the existence of a new type of abusive behaviour, where Amazon curates consumer choice within its marketplace with the possibility to deny its sellers competition on the merits of their offerings and its consumers of transparency. The thesis comes to the conclusion that reform is needed to bring legal certainty to this area of business and that perhaps the most powerful competition enforcement tool of the future is the General Data Protection Regulation.

Sammanfattning

Vi lever en allt större del av våra liv online. Internet har i grunden förändrat hur vi söker information, köper produkter, interagerar med vänner och konsumerar underhållning såsom streamingtjänster och digital distribution av böcker. Internet har förändrat konkurrenslandskapet för många marknader. Lokala säljare står plötsligt inför konkurrens från säljare runt om i världen som bidrar med fler val och ökad transparens. Online-marknadsplatser, som E-bay och Amazon, har mer eller mindre raderat geografiska handelshinder och sänkt konsumenternas sökkostnader. Framväxten av nya marknader, som Internet-sök och online-detaljhandel, som i stor utsträckning bygger på nya affärsmodeller där tjänsten är 'gratis' för konsumenten och betalas av riktad annonsering, kan göra det svårt att använda etablerade konkurrensverktyg. Individanpassade tjänster kan obstruera transparens genom att sortera konsumenter i separata marknader baserat på personuppgifter, såsom köphistorik och surfvanor. Det nyligen offentliggjorda beslutet från EU-kommissionen i Google Shopping-fallet ger en inblick i vart konkurrenslagstiftningen är på väg för internetbaserade marknader. Beslutet ger emellertid fler frågor än svar, särskilt när principerna från beslutet tillämpas på ett hypotetiskt fall baserat på Amazons onlinemarknadsplats för konsumentvaror. Undersökningen av Amazon tyder också på att det kan finnas en ny typ av dominansmissbruk, där Amazon kurerar vilka varor som lyfts fram på sin marknadsplats, med risk att snedvrider konkurrensen mellan säljare och erbjuda en lägre grad av transparens för konsumenter. Examensarbetet landar i slutsatsen att reform är nödvändig för att skapa rättssäkerhet för onlinebaserade marknader och att kanske det framtida mest effektiva konkurrenshanteringsverktyget för framtiden är den allmänna dataskyddsförordningen.

Preface

With this thesis I conclude my studies of law at Lund University. Four and a half years passed by quickly and I have many to thank for my achievements and experiences during these years.

First and foremost I would like to thank my fiancé Emma, who has fully supported my decision to abandon my career and follow my dreams throughout the years. I would also like to thank my children, Julian and Ruben, for putting up with all the stress and also for all the moments of joy that reminds me of what is really valuable in life.

My mother Inger, my father Christer and my sister Hanna for all the encouragement, support and for always being no less than a phone call away.

My supervisor Justin Pierce, for providing a sense of direction and clarity to my thoughts throughout the creation of this thesis.

The many old and new friends for all the laughs, coffee breaks and discussions that truly makes up the silver lining of university life.

And last but not least, Alma and Adrian, for invaluable support, criticism and friendship throughout the years.

Lund 2018-05-22

Nils Renström

1 Introduction

The Internet revolution has fundamentally changed how buyers and sellers connect.¹ It has challenged geographical market definitions, reduced search costs, lowered entry barriers and provided consumers and businesses with a seemingly endless supply of information and choice. Consumers can buy groceries, rent a movie, buy a new car and insurance for it, book plane tickets and buy that vintage Ghostbusters collectable figure from the comfort of their own home.² In essence, by being able to find the best price for almost any object, and having it shipped to your location, the local seller is now exposed to the competition from a seller of the same item located in the next town, or Hong Kong, or virtually anywhere around the globe.³

The online marketplace has increased competition since sellers from around the globe congregate on platforms like Ebay or Amazon and compete for the sale. The online marketplace is also helping consumers to reduce search costs. Economic theory indicates that high search costs will likely lead to increased market power for sellers, at the expense of product quality and price.⁴ When the search cost becomes too high in relation to the price of the goods, quality no longer becomes a factor and consumers are more likely to buy sub-par items at premium prices and in that sense reduce consumer welfare.⁵ Price comparisons between many different retailers can be done with the aid of an online price comparison website, or just simply browsing the webpages of a few outlets for a specific good as opposed to physically having to move from store to store before making a purchase. One thing that is easy to forget when comparing modern price comparison websites to the

¹ A. Ezrachi, M.E. Stucke, Harvard 2016, Virtual competition, p. 1.

² See for instance Amazon.com, netflix.com, kvd.se, pricerunner.com, trivago.com and ebay.com.

³ See for instance https://www.ebay.com/sch/i.html?_odkw=kyosho+pull+stat&_osacat=0&_from=R40&_trk

³ A good example of this is using the search term "Kyosho pull start" on ebay.com. https://www.ebay.com/sch/i.html?_odkw=kyosho+pull+stat&_osacat=0&_from=R40&_trk sid=p2045573.m570.11313.TR0.TRC0.H0.Xkyosho+pull+start.TRS0&_nkw=kyosho+pull+start&_sacat=0

⁴ See for instance R. Thaler, 1980, Journal of Economic Behavior and Organization 1, Toward a positive theory of consumer choice, Page 50, section 5. Read at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.454.6386&rep=rep1&type=pdf>

⁵ A. Ezrachi, M.E. Stucke, Harvard 2016, Virtual competition, p. 5.

old method of moving from store to store to find the best deal for a certain item, is that most price comparison websites are essentially businesses that in themselves need funding to operate and to be profitable enough to last. This might be problematic from a consumer transparency perspective where these businesses might choose to promote goods or services from which they receive more revenue. The online marketplace might also provide challenges to competition regulation, where the classic tools, such as the small but significant transitory increase in price (SSNIP) test might be ineffective, and a market situation where geographical constraints may no longer be relevant as services are offered at no monetary cost to the user and sellers can reach the globe with their products.⁶ This thesis revolves around the issues that arise in online environments where established tools to assess markets might be difficult to use, which might lead to some unexpected outcomes.

⁶ See chapter 3.3.1 for more on the SSNIP test.

2 Research questions, scope of this thesis, materials and research method

2.1 Purpose and research questions

Ever since the Internet made its debut as a place for businesses in the mid 90's it has become an increasingly important component of our daily routines. We consume more services and buy more things online than ever before. The emerge of multi sided markets, and the rise of players such as Google and Facebook where consumers are serviced for 'free' by contributing with information about themselves and their consumer patterns, allows the market players to influence consumer choices more accurately than ever before.⁷ Online marketplace companies such as Amazon and E-bay have developed platforms to accurately connect buyers and sellers regardless of physical location. These strong online positions, with their own set of market rules, could not only be seen as "another retail outlet" but new markets in its own right, which may be seen as a powerful market position from a competition law perspective. With great power there must also come great responsibility, and with the power to effectively connect consumers to different products or services these platforms have tremendous leverage regarding what articles, advertisements, products and information that reaches the consumer.⁸ This raises the question whether established competition policy at the European Union level is fit to tackle possible competition infringements that may arise from such powerful market positions.

⁷ Multi sided markets refer to markets that serve two different categories of customers simultaneously, such as the market for video gaming consoles in which market participants need to attract consumers to get developers to create games for their console and at the same time develop games to attract consumers.

⁸ S. Lee, S. Ditko 1962, *Amazing Fantasy #15*, Spider man comic, p. 13, last panel narrative. Available at <http://readcomiconline.to/Comic/Amazing-Fantasy-15-Spider-Man/Full?id=62737#13> as of 2018-05-21.

The main focus of this thesis is to examine how competition regulation applies to online businesses and to what extent the tools commonly used to assess abuse of dominance under article 102 TFEU (102) can be deemed effective in an increasingly complex digital economy.

2.2 Scope of this thesis

Since the purpose of this thesis is to examine competition policy in relation to market power I have chosen to only include application of article 102. I have chosen to limit the scope of this thesis to include Google and Amazon.com only. I look specifically at Google due to the fact that the Commission recently released its decision to fine Google for abuse of a dominant position in the market for general Internet search, which may indicate how this area of law is expected to develop. Amazon will serve as a hypothetical case study against which the findings from the Google Shopping Case can be applied in an attempt to assess how the Commission reasoning from the Google case might affect other online businesses in similar positions.

2.3 Materials and methods

For this thesis I have chosen to include materials regarding EU competition law only. The Commissions guidelines on various aspects of application of competition law are a key source as well as the Commission's decision in the Google Shopping Case. However, there is little literature available on this specific topic. Most literature tend to either assess competition issues in relation to mergers such as the Google/DoubleClick merger or discusses plausible challenges for competition law in this area.⁹ This might not come as a surprise as the Commissions decision on the Google Shopping Case is expected to be indicative on where competition law is going in this area.

⁹ Such as A. Ezrachi, M.E. Stucke's Virtual competition used extensively in the introduction.

This thesis deals first and foremost with EU policy issues and questions regarding application of EU competition policy. For that reason I have been leaning on EU-law method as described by Korling & Zamboni. The European Union is an organization, which has capacity to enact law and issue binding decisions at many levels, such as the EU parliament, the courts and soft law by decisions from the Commission.¹⁰ Although the Commissions decisions are not binding per se, they are considered indicative on what is considered legal, especially in competition law.¹¹ I will also apply a critical perspective to the Commissions decision in chapter five, analysing and comparing it in the light of established EU-case law and competition legislation. In this sense I will make use of analytical methods described in Claes Sandgren's "Rättsvetenskap för uppsatsförfattare".¹²

¹⁰ F. Korling, M. Zamboni, 2015, Juridisk Metodlära, P. 115.

¹¹ F. Korling, M. Zamboni, 2015, Juridisk Metodlära, P. 127.

¹² C. Sandgren, 2016, Rättsvetenskap för uppsatsförfattare, 3:rd edition, chapter 6.4.

3 Competition regulation in the EU

Competition has always been an important part of the European Union, and a logical necessity of the single market policy. It is widely accepted that goods and services are produced more efficiently in competition with others offering the same, or similar goods and services.¹³ Competition arises naturally when there are more manufacturers of a product than consumers, and they must offer additional consumer benefits in order to attract customers. Examples of such an advantage may be an improved manufacturing process, which leads to a lower price that increases the competitiveness of the product and leads consumers to prefer that product instead of another that can fulfil the same needs. This forces other manufacturers to streamline their operations or find other means of competition in order to remain competitive. The competition legislation itself is contained in Articles 101 and 102 of the EU Treaty and has further developed in practice.¹⁴ In short, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition in the internal market are prohibited.¹⁵ Furthermore, one or more companies' abuse of dominance in the internal market or in a substantial part of this is prohibited.¹⁶ The primary objective for EU competition law is to maximise efficiency in the common market in terms of *consumer welfare* and allocation of resources.¹⁷

¹³ See for instance S. Bishop, M. Walker, 2002, Sweet & Maxwell, The Economics of EC competition law, chapter 2.

¹⁴ The legislation is available at: <http://eur-lex.europa.eu/legal-content/SV/TXT/?uri=celex%3A12012E%2FTXT>

¹⁵ EU Treaty, article 101.

¹⁶ EU Treaty, article 102

¹⁷ P. Craig, G. De Búrca, Oxford, 2015, EU LAW, text, cases and materials, 6th edition, s. 1001.

3.1 The overall goal for competition regulation

There have been some uncertainties on how to interpret the concept *consumer welfare* in relation to EU competition policy.¹⁸ One could certainly argue that consumer welfare is achieved if consumers in general are happy with any price that they *feel* brings value for their money. The general definition of consumer welfare is described in some circles as “the maximisation of consumer surplus, which is the part of total surplus given to consumers”.¹⁹ This definition only encapsulates the term “surplus” without narrowing it down. “Surplus” could be interpreted as time, funds or any other quantitative concept. The Commission, however, suggests that consumer welfare is achieved when competition leads to “lower prices, better quality and a wider choice of new and improved goods and services”.²⁰ The main beneficiary of EU competition law is the consumer, in terms of transferring wealth from producers to consumers. This overall goal for EU competition policy is also clear in the Guidelines on the application of article 81(3) [101(3)] of the Treaty which states that; “*The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product.*”²¹ This consumer welfare approach to competition regulation factors in equity considerations, like distribution of resources, rather than solely focusing on market efficiency, which would be the case if total welfare approach to competition was used.²² A “total welfare” consideration

¹⁸ K. J. Cseres, Kluwer law 2005, Competition Law and Consumer Protection p. 251.

¹⁹ Citation, K. J. Cseres, Kluwer law 2005, Competition Law and Consumer Protection p. 20.

²⁰ Guidance on the commission’s enforcement priorities in article 82 (102) of the EC treaty to abusive exclusionary conduct by dominant undertakings, note 5.

²¹ Commissions Guidelines on the application of article 81(3) of the Treaty (2004/C 101/08).

²² K. J. Cseres, Kluwer law 2005, Competition Law and Consumer Protection, p. 22.

does not factor in who the main beneficiary is, as long as more value is produced with fewer resources.²³ It also means that some anti competitive practices can be tolerated if they are beneficial to the consumer. This overall objective is important to have in mind when addressing the Google Shopping Case analysis in chapter 4.4 of this thesis.

In the context of this thesis it is also important to recognize that “consumer welfare” and “consumer harm” are in no way fixed definitions as such. Even though the Commission appear to have defined “consumer welfare” as the transfer of wealth to the consumer through competition, the European Data Protection Supervisor suggested that violation of data protection rights should be included in the concept “consumer harm” in the context of European competition policy.²⁴ This thesis will focus on the characteristics and application of article 102 from now on.

3.2 Scope of article 102

In order to better understand the competition challenges of the online marketplace it is important to understand the current application of article 102, and its current limits. There are limits to the application of article 102. The anti-competitive conduct must be carried out by an “undertaking”. The term “undertaking” is not defined in the treaties but has been given such a broad definition in EU case law that it effectively covers all forms of meaningful economic activity.²⁵ The territorial scope of the article is the territory of EU’s member states. However, there has been some extraterritorial application of the articles in some cases, including cases where the anti-competitive behaviour originated from areas outside the EU but where there is an effect on competition within the union.²⁶ The main

²³ K. J. Cseres, *Kluwer law 2005, Competition Law and Consumer Protection*, p. 21

²⁴ EDPS, 2014 “privacy and competitiveness in the age of big data”, p.31-32.

²⁵ R. O’Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2nd edition, p. 14, section 1.3.2.1

²⁶ R. O’Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2nd edition, p. 15, section 1.3.1, see also cases T-201/04 *Microsoft v Commission* and COMP/37.990 *Intel*, Commission decision of 13 May 2009.

function of article 102 is control over market power. Market power can be understood as the degree of care that market participants must take in relation to its competitors while operating. In the ECJs words; *“The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”*.²⁷ An undertaking with high market power can act more or less without considering what the competitors might do, leading to a monopoly like situation which tend to lead to higher prices and lower quality than under competitive conditions, thus reducing consumer welfare. An important feature of the application of article 102 is that market power is not forbidden per se, it is the abuse of market power that is prohibited. It would be strange if successful firms, which by the introduction of superior products at competitive prices were prohibited to attain market power on these conditions. The established assessment of market power under article 102 requires the definition of the relevant market, and subcategories relevant product market and relevant geographical market.

3.3 Relevant market

The relevant market is highly dependent on the objective and circumstances in each situation where article 102 might be applicable.²⁸ The relevant market generally includes all products or services which are regarded to be in competition with each other.²⁹ The principal characteristic of competition in is interchange ability between products by consumers. All products that can fulfil the same consumer need is generally considered to be competing in the same relevant market.

²⁷ C-27/76, United brands, note 65, p. 277

²⁸ Commission Notice on market definition, paragraph 10.

²⁹ OECD Roundtable On Market Definition, June 2012, p.10, note 1.

When assessing the relevant market there are three basic principles that govern the assessment:³⁰

- Demand side substitutability
- Supply side substitutability
- Potential competition.

However, the Commission puts emphasis on its open approach to evidence when assessing relevant markets and stresses that it does not follow a rigid hierarchy of different sources for or types of evidence.³¹

3.3.1 Demand side substitutability

Demand side substitutability refers to a range of products that might be substitutable by consumers given a small but permanent relative increase in price (SSNIP) of the goods and areas being considered.³² If the consumers would move to other products in response to the increased price, those products are deemed substitutable and thus included in the relevant product market. The commission states that *“a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”*.³³ The analysis usually factors in utility, price but also “soft” product characteristics such as texture and taste or other qualities such as Internet uplink capacity.³⁴ Assessment of demand side substitutability relies heavily on price as the main factor for when consumers either switch products, or in the United Brands case, stops buying the product.³⁵ Considering that many of the online services are essentially free to use for the consumer, or at least have no monetary cost,

³⁰ Commission Notice on market definition, paragraph 13.

³¹ Commission Notice on market definition, paragraph 26.

³² See OECD Roundtable On Market Definition, June 2012, p.31. and R. O’Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 110, section 3.3.2.1. Henceforth referred to as the SSNIP test, small but significant non transitory increase in price.

³³ Commission Notice on market definition, paragraph 7.

³⁴ See C-27/76 United Brands Company and United Brands Continentaal BV v Commission, note 34 and Case T-340/03 France Télécom SA v Commission 2007 ECR II-107, note 88.

³⁵ Commission Notice on market definition, paragraph 19.

can make the SSNIP test for assessing relevant market difficult to use since price is not a factor for consumer behaviour.

3.3.2 Supply side substitutability

Supply side substitutability may also be a factor when assessing the relevant market. Supply side substitutability refers to the situation where suppliers are able to switch production to the relevant products at short notice with no significant costs or risks in response to a small and permanent change in relative prices.³⁶ The commission uses the paper industry to illustrate how this might come to play, as paper is manufactured in a wide range of qualities for different uses (consider the paper used for billboard adverts in relation to paper towels). However, paper plants can be easily adjusted to produce different kinds of paper at short notice and with negligible costs, thus being able to compete in many different demand side markets for paper.³⁷ The ability to do so typically puts all kinds of paper in the same market despite the obvious differences in demand side substitutability. In order to assess supply side substitutability it is necessary to answer the following questions:³⁸

- What production-, distribution- and marketing assets are needed to produce the relevant product?
- Do other suppliers possess these assets?
- Can the assets be acquired without significant, irreversible new investment?

In the area of business covered by this thesis, production and distribution tools are essentially software, which can be shaped to almost any product with varying development efforts. This may limit the application of supply side substitution as a tool to assess the relevant market. It is also unclear how supply side substitution would apply to multi sided markets and markets that rely on network effects. There are indications that the use of

³⁶ Commission Notice on market definition, paragraph 12.

³⁷ Commission Notice on market definition, paragraph 22.

³⁸ A. J. Padilla, 2001, The role of Supply Side Substitution in the Definition of the Relevant Market in Merger Control, Page 35, paragraph 2.

single sided market tools in multi sided market settings can lead to very narrow market definitions.³⁹

3.3.3 Potential Competition

Potential competition is a condition generally assessed after the relevant product markets have been found. This assessment greatly depends on the relevant product market and the conditions under which potential competition would constitute a competitive restraint.⁴⁰ This could refer to barriers of entry, such as high entry costs or in the case with Google Shopping, the advantage Google has over its competitors in terms of knowledge about its users, its different array of additional services and its overall market position.⁴¹

3.3.4 Geographical dimension

The relevant market is always defined in a geographical context. The ECJ has defined the relevant geographical market to be “the territory in which all traders operate in the same conditions of competition in so far as concerns specifically the relevant products”.⁴² The assessment of what constitutes the relevant geographical market is highly dependable on the product at hand.⁴³ The relevant geographical market in absence of any special provisions is generally the EU as a whole.

³⁹ R. O’Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2nd edition, p. 139, section 3.5.4, paragraph 4.

⁴⁰ Commission Notice on market definition, paragraph 24.

⁴¹ Daly. A, Hart 2016, “Private power, Online Information Flows and EU Law: Mind the Gap, page 75.

⁴² T-83/91 *Tetra Pak vs Commission*, note 91.

⁴³ For instance, in the decisions by the commission 82/861 *British Telecommunications* the relevant market for message-forwarding was Great Britain and in 88/518 *Napier Brown-British Sugar* the relevant geographical market was limited by transport costs.

3.3.5 Dominant or not?

After finding the relevant product- and geographical market comes the assessment of dominance. Establishing dominance is an essential prerequisite under article 102. Dominance is not per se forbidden, but there can be no abuse of dominance regardless of any anti-competitive conduct.⁴⁴ Dominance can generally not be assessed mechanically. Dominance and market power is not absolute terms, they are always a matter of degree which will depend of the circumstances in each case.⁴⁵ The Commission and the EU courts emphasizes that an undertaking's ability to act independently of its competitors must be assessed in the light of all relevant circumstances.⁴⁶ A good starting point for the assessment of dominance is the distribution of market shares in the relevant market.⁴⁷ Assigning market shares by examining volume or value data will be sufficient in most cases.⁴⁸ However, the Commission recognizes that market shares are not conclusive evidence of dominance and as such cannot replace proper investigation of market conditions.⁴⁹ There are some generally accepted market share indicators that could point towards dominance. Market shares in excess of 70% are considered to raise a strong presumption of dominance, market shares between 50-70% makes the presumption weaker and shares between 40-50% generally need close examination of the facts in order to assess dominance.⁵⁰ The market shares of rivals are also a factor to consider when assessing dominance. A difference in market shares greater than 20% between the largest undertaking and the second largest indicates that

⁴⁴ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 141, section 4.1, paragraph 1.

⁴⁵ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 143, section 4.2.1, paragraph 1,

⁴⁶ See C-27/76 *United Brands Company and United Brands Continentaal BV vs Commission*, note 66-67.

⁴⁷ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings, note 14

⁴⁸ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 144, paragraph 2.

⁴⁹ Commissions guidance on enforcement priorities in applying article 82 (102) of the EC treaty to abusive exclusionary conduct by dominant undertakings.

⁵⁰ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 147, paragraph 2

dominance is more likely than in other situations.⁵¹ Undertakings who's market shares approaches a near-monopoly situation, usually over 90%, has been described as "superdominant".⁵² The rationale being that such undertakings has a particular obligation not to abuse their dominance. This view has gained some acceptance in following case law but can be debated since article 102 does not correspond levels of dominance to responsibility. The same legal principles applies to a dominant undertaking regardless of conduct, although it might be easier to show anti-competitive effects in markets which operates as near-monopolies.⁵³

3.4 Abusive behaviour

The Commission has identified four specific forms of abusive behaviour in its guidelines. These are exclusive dealing, tying and bundling, predation and refusal to supply/margin squeeze.⁵⁴ For the sake of this thesis I have chosen to only include the refusal to supply situation and various price discrimination practises, including tying, bundling and predation since these practises are the ones that best applies to the cases in chapter four and five.

3.4.1 Refusal to supply

This form of abuse of dominance typically has the dominant firm refusing to supply customers with product A unless the customer behaves in a certain way. This typically can be the case where the dominant firm also competes on a downstream market.⁵⁵ This can be illustrated with the joint cases *6 and 7/73 Istituto Chemioterapicio Italiano SpA and Commercial Solvents vs Commission*, where Commercial Solvents Corporation (CSC) produced a

⁵¹ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 150, paragraph 2

⁵² Opinion of Advocat General Fennelly in Joined cases C-395/96 P and C-396/96 P, *Comagnie Maritime Belge Transports SA, Compagnie maritime belge SA abd Dafra-Lines A/S vs Commission*.

⁵³ R. O'Donoghue, J. Padilla, Hart 2013, *The Law and Economics of Article 102 TFEU*, 2ⁿ edition, p. 208, paragraph 4

⁵⁴ Commissions guidance on enforcement priorities in applying article 82 (102) of the EC treaty to abusive exculusionary conduct by dominant undertakings, notes 32-90.

⁵⁵ Commissions guidance on enforcement priorities in applying article 82 (102) of the EC treaty to abusive exculusionary conduct by dominant undertakings, note 76.

raw material used by downstream firm Zoja who used the materials to make products. When CSC raised the price to Zoja it found an alternative supply for the raw material. This source eventually dried up and when Zoja asked to buy the raw materials from CSC it refused to supply, stating that it had entered Zojas market and could not provide enough raw material for its own and Zojas need. The ECJ found that by refusing to supply Zoja CSC effectively eliminated competition in the downstream market for the finished product. Another interesting case regarding refusal to supply is the Commission decision regarding Microsoft and abuse of dominance.⁵⁶ In the late 90's Microsoft was regarded to be in a dominant position for PC operating systems with its software Microsoft Windows. It used this dominance to control other markets, such as the market for media players, which at the time was composed by other software vendors offerings. Microsoft refused to allow access to certain APIs that limited the competitors possibilities to integrate with the Microsoft Windows operating system, giving its own windows media player a significant advantage. This case also relates to the *Essential Facilities Doctrine* which is the idea that an owner of a facility which is not easily replicated, and competition on a market is seriously limited without access to that facility, has to provide access to that facility to its rivals.⁵⁷ In the case with Microsoft, the facility was the API's necessary for integrating a media player into the operating system Microsoft Windows.⁵⁸ Refusing to supply access to these API's would effectively eliminate competition in these markets. The impact of the essential facilities doctrine has been limited in later decisions. The Court of First instance in both the ENS and Bronner cases held that there has to be no real or potential substitute to an essential facility to be considered necessary.⁵⁹

⁵⁶ Case COMP/C- 3/37.792 Microsoft.

⁵⁷ See OECD roundtable on The Essential Facilities Concept, 1996, p. 8.

⁵⁸ For more case law regarding essential facilities see C-241 and 242/91 and T-70/89.

⁵⁹ P. Craig, G. De Búrca, Oxford, 2015, EU LAW, text, cases and materials, 6th edition, p. 1076. Cases T-374, 375, 384 and 388/94 European Night Services LTD (ENS) vs Commission, C-7/97 Bronner.

3.4.2 Price discrimination

The concept of price discrimination covers many different practises, all revolving around the price and cost of items and services. It may be geographical, that is charging different prices in different local markets while restricting inter-market competition. Selling the same product at different prices with no relation to cost or selling the same cost product at different prices are all examples of price discrimination. Different kinds of rebates or product ties are another form of price discrimination.⁶⁰ Predatory pricing and selective pricing refers to the practise where a firm uses its profits in one market where its dominant to sell its products or services in another market well below production costs in order to eliminate competition in that market.⁶¹ Price discrimination also typically divides into two categories. Primary-line injury refers to the harm suffered by a competitor at the same level as the dominant firm while second-line injury refers to harm suffered by the purchaser of the product. To determine if there is price discrimination in a particular market there must be some assessment of production costs, which may be difficult to assess when the price of the offered service is zero. Increased market transparency can act as a countermeasure to price discrimination. When buyers can access information on how they can be entitled to certain rebates, or has knowledge of production costs or if the price of a certain good or service is widely known, buyers are typically in a better position to negotiate which in turn leads to lower prices thus promoting consumer welfare.

3.5 Competition and personalisation

The commission has recognized that greater transparency is needed for consumers to understand how the information presented to them is shaped

⁶⁰ P. Craig, G. De Búrca, Oxford, 2015, EU LAW, text, cases and materials, 6th edition, p. 1077.

⁶¹ P. Craig, G. De Búrca, Oxford, 2015, EU LAW, text, cases and materials, 6th edition, p. 1082.

or personalised in the context of online marketplaces.⁶² Online markets are typically multi-sided meaning that they typically serve two distinct groups of customers, such as advertisers on one hand and consumers on the other. Consumers are often part of the product, or instrumental in improving the product.⁶³ For example, online giant Amazon recognizes that “*information about our customers is a important part of our business and we are not in the business of selling it to others*”.⁶⁴ Amazon also states that that they use information to, amongst other things, “communicate with you about orders, products, services, and promotional offers, update our records and generally maintain your accounts with us, display content such as wish lists and consumer reviews and recommended merchandise and services that might be of interest to you”⁶⁵. While this might not be surprising to the consumer, Amazon clearly labels different parts of the website “Because you viewed”, “Other users bought” and so on, providing some degree of transparency, there is no way for the consumer to assess what products and/or prices Amazon does not display. A fair question in relation to this is to what extent the consumer expects amazon to find the best deal for an item, and in what pieces of information amazon factors in when presenting its search results. Another example of this is Google’s general search engine, which operates on at least two different markets.⁶⁶ The search engine is free to use for consumers and monetized by selling ads to businesses based on the search keywords that consumers enter. It also uses consumer data from its search to constantly improve its ad side of the business. Like Amazon, ads are also marked in the search results, but transparency can still be a challenge, not only towards its users, but in the sense of not using plausible dominance to distort competition for other businesses operating on the Internet. The Commission recently fined Google for abuse of its dominance in the market

⁶² COM(2016) 288 Final, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, p. 10-11

⁶³ As is the case with Google Shopping outlined in chapter 5 of this thesis.

⁶⁴ Amazon privacy policy, See:

https://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_privacy?ie=UTF8&nodeId=201909010, paragraph 5.

⁶⁵ Amazon privacy policy, See:

https://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_privacy?ie=UTF8&nodeId=201909010.

⁶⁶ See www.google.com

for general Internet search. This decision will be closely looked into in chapter four.

This perspective opens up for a new set of competition problems. The most obvious is that an online retailer might not use its dominance to push competitors out of business, but to use its knowledge about its customers in such a way that it deprives certain customers of certain choices, thus distorting competition. This is especially a factor when the online retailer functions as a marketplace through which other retailers sell their items side by side with items manufactured by the online retailer itself. The online marketplace may allow any retailer access to the marketplace to avoid the classic problems with market restriction and denial of entry, but it may not apply a transparent algorithm when a consumer searches for a particular item. This raises the question whether consumers with different preferences might constitute different markets. It also raises the question whether the consumer might have given the online marketplace, such as Amazon, the task to display only the most relevant results to a product search based on information that Amazon already knows about the consumer. This could constitute a whole new kind of abuse of dominance, which would be incredibly hard to assess given that there are, in fact, no baseline result to compare other results against. This particular characteristic of personalisation can be problematic for the application of competition regulation and will be looked more into in the case studies in chapter four and five.

4 Case study, Google Shopping

Between 2010 and 2014 the Commission received a number of complaints against Google pursuant to article 7(2) of Regulation (EC) No 1/2003.⁶⁷ The Commission found in its preliminary assessment of the complaints that Google's business practises that may infringe Article 102 of the Treaty and article 54 of the EEA Agreement in four distinct situations.⁶⁸ However, the scope of this thesis is the application of competition law in online retail situations thus limiting the analysis of the Google Shopping Case to the first of these four points;

- *“The favourable treatment, within Googles general search results pages, of links to Google’s own specialized search services as compared to links to competing specialised search services (“first business practise”).”⁶⁹*

Assessing the above issue requires the Commission to define relevant product market and relevant geographical market as well as establishing dominance and analysing interchange ability without using price as a parameter, as often is the case with online search services.

4.1 Background to the Google Shopping Case

Google operates a business model that relies on offering internet search and other services, such as e-mail service, maps services, word processing services etcetera, to consumers and offering advertising services towards businesses from which it generates the main source of revenue.⁷⁰ The main

⁶⁷ See the Commission decision of 27.6.2017 relating to the proceedings under article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 – Google Search (Shopping)), henceforth “Google Shopping Case”, note 38-70.

⁶⁸ Google Shopping Case, note 63.

⁶⁹ Google Shopping Case, note 63, p1.

⁷⁰ Google Shopping Case, note 7.

service that Google offers to its consumers is its general search engine that allows users to search the Internet for information by entering a keyword or a number of keywords.⁷¹ This can be done from a number of devices, such as personal computers, mobile phones and even through voice activated devices such as Google's Internet connected speaker "Google home".⁷² Regardless of input method, the underlying search engine is basically the same and generates similar results.⁷³ When a user enters a keyword into the search engine, it runs two sets of search algorithms, one generic and one specialised. The generic algorithm ranks pages containing any possible content, including pages containing competing specialised search services. The specialised algorithm is specifically designed to identify relevant results for a particular type of information, such as locations, apparel, electronics and so on.⁷⁴ The search engine returns up to three different categories of results comprised into one coherent list that may span one or more pages.⁷⁵

- Generic search results,
- Online search advertisements,
- Specialised search results.

It is important for the case to understand the key differences between the categories of search results.

4.1.1 Generic search results

The generic search results appear on the left side of the search result page and are sorted according to their "web rank".⁷⁶ The "web rank" relies heavily on the PageRank algorithm that is a method developed by Google for "*rating Web pages objectively and mechanically, effectively measuring the human interest and attention devoted to them*".⁷⁷ The algorithm is based on the assumption that more important websites receives more links from other websites than less important ones. Google determines this using a

⁷¹ Google Shopping Case, note 8-9.

⁷² See for instance https://store.google.com/us/product/google_home

⁷³ Google Shopping Case, note 9.

⁷⁴ Google Shopping Case, note 10-12.

⁷⁵ Google Shopping Case, note 10.

⁷⁶ Google Shopping Case, note 14.

⁷⁷ S. Brin, L. Page, The PageRank Citation Ranking; Bringing order to the web", Page 1. Available at: <http://ilpubs.stanford.edu:8090/422/1/1999-66.pdf>, downloaded 23/4 2018.

process called crawling, which is essentially constantly scanning the Internet for new content and indexing such content on discovery, effectively making new content available for the PageRank algorithm.⁷⁸ Google does not charge any fees to either the consumer or the creator of a crawled and indexed webpage for this part of its business.⁷⁹

4.1.2 Online search advertising results

Depending on what the user used as a search keyword Google might display advertisements from its search-advertising platform “AdWords”. These appear among the generic search results marked with the term “ad” or similar. Anyone can purchase an ad for a specific keyword or phrase through Google’s auction based ad business. It is not uncommon for a specific keyword to have a number of ads tied to it. The order in which the ads appear is determined by their “Ad Rank”, which is a combination of how much the advertiser is willing to pay for a click on it’s ad and the ads “quality score”.⁸⁰ Google gets paid for the advertisement every time a user clicks on an “AdWord” ad. The “AdWords” business allows advertisers who probably would not appear in the generic search results to lead consumers to their offerings. Competing specialised search services also purchase “AdWords”.⁸¹

4.1.3 Specialised search results

Google operates a number of specialised search services specifically designed to search a certain topic, for example Google Flights, Google Finance and Google Shopping. When a user enters a search keyword Google might display results from it’s specialised search services. These results typically appear at the very top of the results page, often coupled with an image and a tag that indicates that these results are sponsored or

⁷⁸ Google Shopping Case, note 15-16.

⁷⁹ Google Shopping Case, note 17.

⁸⁰ Google Shopping Case, note 18-21.

⁸¹ Google Shopping Case, note 22.

paid, similar to the marking used in the online search advertising results. These results are typically reserved for Google's business partners and websites has to enter into an agreement with Google to be featured in the specialised search results. These agreements are typically pay per click, as is the case with the specialised search service Google Shopping.⁸²

4.1.4 Google Shopping

Google has been operating a comparison shopping service in different markets and under different names since 2002.⁸³ The service is specialised for searching products by offering options to search for product in a specific price range in different categories such as electronics, home décor and so on.⁸⁴ In 2012 it changed the name to "Google Shopping" and changed the business model of this service to a "paid inclusion" model similar to the AdWord business, where the merchant pays Google if the user clicks the product displayed in the search results. By clicking on a displayed product the user is taken directly to the Google merchant partner's site where the purchase can be made. Since 2012 Google has launched its comparison shopping service across most of Europe.⁸⁵

4.1.5 The main issue

The commission argues that the generic search results, the online advertisement results and the specialised search results essentially are different markets, which congregate into one coherent list of search results for the end user. By promoting specialised search results from Google Shopping on its general search results page *and* adjusting its "PageRank" algorithms to make competing comparison shopping services appear further down on the list for organic results, Google is using its dominance on the market for general search services to promote its offering on the market for

⁸² Google Shopping Case, note 23-25.

⁸³ Google Shopping Case, note 27.

⁸⁴ See <https://www.google.com/shopping?hl=en> .

⁸⁵ Google Shopping Case, note 31-35

comparison shopping services and also reinforcing its dominance on the market for general search services, in violation of article 102.⁸⁶

4.2 The commissions approach to market definitions

4.2.1 Relevant product markets

The Commission concludes that there are separate markets for general search services and comparison shopping services.⁸⁷ The main reasons for this is the alleged limited demand side substitutability, the difference in business models and overall objective of these services.⁸⁸ It argues that general search services, although offered for free to the consumer, is an economic activity based on the fact that the user contributes to the service by providing data with each use of the search engine. In most cases a user enters into a contractual relationship with Google, which allows Google to store and use that data to improve the quality of the search engine and to improve the relevance of its advertising business. The Commission also argues that general search engines compete on non-economic factors such as relevance of search results, the amount of searched content, user interface and speed.⁸⁹

There is also limited demand side substitutability between general search services and content sites such as Wikipedia, IMDb and the likes.⁹⁰ The Commission argues that general search services and content sites serves different purposes, describing the former as a service whose objective is to lead the user off its website as efficiently as possible and the latter as an end destination for a specific type of content. Search services that are embedded into content sites are not suited for general Internet search.⁹¹ The

⁸⁶ Google Shopping Case, note 589.

⁸⁷ Google Shopping Case, note 154.

⁸⁸ Google Shopping Case, chapters 5.2 – 5.2.2.5

⁸⁹ Google Shopping Case, note 158-160.

⁹⁰ See www.wikipedia.com and IMDb, the internet movie database, at www.imdb.com.

⁹¹ Google Shopping Case, notes 163-165.

Commission also argues that there is limited demand side substitutability between general search services versus specialised search services on the merits that specialised search services tend to focus on providing results in a narrow field, such as electronics, news and air tickets, compared to the general search services.⁹² They also argue that specialised search services tend to rely on information supplied by third parties, such as business partners and, and not by crawling and indexing as outlined in 5.1.1.⁹³ Another key difference is that specialised search services generate revenue by other means than running ads, such as paid inclusion or commission on sales.⁹⁴

The commission comes to the conclusion that general search services, specialised search services, content sites and merchant platforms are all in different product markets.

4.2.2 Relevant geographical market

The commission simply concludes that the relevant geographical markets are all national markets in scope for this case.⁹⁵

4.2.3 The assessment of dominance

The Commission approaches this assessment in a very broad way, stating that this assessment is made on the basis of a number of factors that each might not, in itself, be determinative. It mentions the fact that very large market shares is a sign of dominance because they tend to give the dominant firm a position of strength in relations to its competitors thus providing a freedom of action in the relevant market for the dominant firm.⁹⁶ There is little dispute over the fact that Google dominates the market for general

⁹² Google Shopping Case, note 167.

⁹³ Google Shopping Case, note 168.

⁹⁴ Google Shopping Case, note 168.

⁹⁵ Google Shopping Case, note 251-252.

⁹⁶ Google Shopping Case, note 265-266.

search services, with market shares typically reaching over 90% for national markets in the EU in the relevant timeframe.⁹⁷

4.3 Abuse of dominance

The Commission states that “*Dominant undertakings have a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market. A system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators*”.⁹⁸ By curating its PageRank algorithms to promote certain type of content Google did distort competition.⁹⁹ Google however, argues that the changes were made to provide its users with more original content and less duplicates of the same content being aggregated over a number of different webpages, thus leaving the consumer with less available information than it otherwise would have had.¹⁰⁰

4.4 Analysis of the Commissions decision

It should be noted that the Commission refrains from using any existing anti-competitive label, such as refusal to supply, price discrimination or denial of market entry on Google’s business practises, nor does it apply established competition tools such as the SSNIP¹⁰¹ test to the case. Instead it tends point towards Google’s overall dominance in the general search market, but the Commission does not seem to view Google’s general Internet search as an essential facility.¹⁰² One theory for this is that this area of business, and its consumers, is moving faster than almost anything else,

⁹⁷ Google Shopping Case, chapter 6.2

⁹⁸ Google Shopping Case, Note 331.

⁹⁹ Google Shopping Case, Note 341.

¹⁰⁰ Google Shopping Case, Note 358 a-d.

¹⁰¹ Small but Significant and non-transitory increase in price, see chapter 3.3.

¹⁰² Consider the essential facilities doctrine briefly described in chapter 3.4.1.

which means that a service or business practise that was widely used one day might be gone in the next. It also highlights the inability for old world competition policy tools to properly address competition issues where no objective criteria is present, such as price, when it comes down to market definitions. Another thing to note is that the Commission fails to address is the behaviour of the end consumer it sets out to protect. In the supplied evidence the Commission claims that Google's practice harms the consumer because it reduces, or has the potential to reduce choice in the market for comparison shopping services. However, the Commission does not factor in consumer behaviour in relation to the overall goal for the consumer, which must be assumed to get information on and possibly purchase an item or service as efficiently as possible. It only addresses this in terms of Internet traffic. It also does not take into account that user behaviour regarding how the user approaches ads might have an impact on how users react to the Google shopping results.

This decision might, in fact, protect a market, which is becoming obsolete as other means of finding products become more refined and efficient from a consumer perspective.¹⁰³ The commission does separate the market for comparison shopping services and the market for merchant platforms such as Amazon, but concerning the overall goal for the consumer this divide seems artificial due to the fact that merchant platforms offer most of the functionality and range of products as comparison shopping services, but also contains purchase and delivery functionality.¹⁰⁴

One interpretation of this judgment could be that Google has reached a point where it cannot innovate and develop its general search engine without the risk of abusing its dominant position in the area of general Internet search. Consider the scenario in which Google becomes so good at delivering relevant search results that it, in fact, can equip its results page with additional filters based on the results? In some ways this is already

¹⁰³ Daly. A, Hart 2016, "Private power, Online Information Flows and EU Law: Mind the Gap, page 78.

¹⁰⁴ Google Shopping Case, note 210.

happening with some queries. A search for “Queen Elizabeth” will return, apart from the results list populated by AdWord ads and PageRank results, an information box to the right of the screen containing information about Queen Elizabeth composed by information and images from mainly Wikipedia but possibly other websites.¹⁰⁵ A search for the movie “Blade Runner 2049” returns information from Wikipedia, but also contains a link to the trailer on YouTube, another company owned by Google, but not the only available video distribution service.¹⁰⁶ A search for “iPhone X” will populate the same space with offers to buy the device, all marked with the word “sponsored”, but a search for the term “iPhone X specs” displays no such results at all.

Although the commission might have a point when it claims that adjusting the PageRank algorithms to position some search results further down the list might indeed impact the amount of traffic those results get. It apparently does not have a problem with the function of the PageRank system in general, or Google’s overall mission to deliver the most relevant search results to its users. As described in section 3.3, a dominant undertaking has an obligation to consider the effects on competition, but in the case with Google shopping, it remains unclear exactly how Google can act to ensure equal competition on the merits of each undertakings strengths and weaknesses. The conclusion can only be that the Commission generally considers the PageRank algorithm, which powers the “organic” search results as objective, even though it is truly curated by Google alone. This will make it exceptionally hard for anyone who is in the business for search to figure out in what ways they can develop their search engines to ensure undistorted competition among the things it is designed to search for.

The Commission basically says that Google can not promote its own comparison shopping service because of the impact that has in the market for comparison shopping services. The commission then supplies Internet

¹⁰⁵ Wikipedia.com is explicitly mentioned in the Google Shopping Decision as a “content site” which is not considered to be substitutable with Googles general internet search.

¹⁰⁶ See for instance www.vimeo.com

traffic analysis over time to prove that traffic to the other comparison shopping services decreased ever since Google started to promote Google Shopping. However, it would probably be equally harmful to comparison shopping services as a whole if any of them was to get promoted in a similar way, that is if Google implemented an "organic" approach to most relevant results from comparison shopping services, yet the Commission does not question the way that general search results are ranked and/or curated. The Commission tends to accept the AdWord/PageRank business as a whole. My main point is that it seems like the effect on consumer welfare, i.e. the reduction of choice and the possible foreclosure of certain comparison shopping services, could not be avoided even if Google would have implemented the comparison shopping service results onto its general search results page as a pay per click model open for any comparison shopping service, just like AdWords. This would be a natural extension of the main mission for Google's general search engine, which is to provide the most relevant results to any query. This raises the question if you can abuse your dominant position even if you're not in fact better off while doing so. Without a doubt such a scenario would still be abusive to the market for comparison shopping services.

After all, Google is the main curator of all three types of search results, PageRank, AdWord and the Specialised, which, in the light of the Facebook/Cambridge Analytica debacle, might be an even more delicate problem.¹⁰⁷ The Commission's arguments stay valid as long as Google refrains to incorporate features that essentially makes specialised search more or less obsolete, and in my opinion that is just a matter of time.

Another key assumption in the assessment of the Google case is that every user gets the same results from Google's general search service, at least every user in a particular market. This raises the question if Google was to be considered to be abusing its dominant position if it factored in user

¹⁰⁷ See Mark Zuckerbergs post on Facebook about the incident at: <https://www.facebook.com/zuck/posts/10104712037900071>

preference in its search results, which is if every search returned a slightly different result based on the vast amount of data Google has on each of its users. This is managed by the different sorting options, such as price, in today's comparison shopping services. To be able to define behaviour as abusive one reasonably has to be able to point to a behaviour that is not abusive. Lets say that Google did not position its Shopping service among its search results as a business practise, but because the user told it to, or because it displayed the most relevant result in return to it's query. There is also the issue on search results that isn't returned to the user as text on a screen but by other means, such as the case with voice assistants, which limits the amount of information that can be returned to the user and where ranking might have an even larger impact on consumer choice.

5 Beyond Google Shopping

In the wake of the Google Shopping case, other online businesses might consider the impact this ruling may have on their own operations. In this chapter I will try to apply the lessons learned by the Google Shopping case on online shopping giant Amazon.com, who share some similarities with Google in terms of size, multi-market operations, the use of user data as a means for business and the use of a search engine as a starting point for their customers. For the purpose of this thesis I will assume that the relevant product market is online retail, and that the relevant geographical market is every national market across the European Union.

5.1 What is Amazon.com

Amazon operates businesses in a number of areas globally. Their prime objective is online retail, connecting buyers and sellers of primarily consumer goods in its online marketplace. Amazon also manufactures some items themselves, such as the E-book reader Kindle and the home assistant software Alexa that is being integrated into various devices, such as internet connected speakers similar to what Google is offering.¹⁰⁸ This case will only look into the product marketplace Amazon.com and more specifically, the way that Amazon's search engine delivers results to users. According to Amazon itself, personal data is an important part of their business.¹⁰⁹ It uses personal data for a number of reasons, including helping sellers on their online marketplace with promotional offers.¹¹⁰ This will be an important

¹⁰⁸ See for instance:

https://www.amazon.co.uk/dp/B06Y5ZW72J/ref=gw_aucc_rd_spring_v2?pf_rd_p=bebcc848-1db5-41ef-9a14-96633882cc25&pf_rd_r=43ET3R69K5RV83Z9TX32 and https://store.google.com/ca/product/google_home.

¹⁰⁹ See:

https://www.amazon.co.uk/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201909010 under the headline "Does Amazon.co.uk share the information it receives?".

¹¹⁰ See:

https://www.amazon.co.uk/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201909010 under the headline "Does Amazon.co.uk share the information it receives?", point 3.

factor when considering second-line abuse of dominance later on in this case.

5.2 Amazons relevant market

Depending on how you interpret Amazon's business in general it could be placed in many markets. According to the Google Shopping decision, Amazon is, at least, in the market for online marketplaces.¹¹¹ Key indicators for that market are that the marketplace is not solely selling its own products but rather serves as a platform for other companies to sell its products on. There is also some kind of product search present and an integrated payment, delivery and product return functionality.¹¹² The requirement for a search engine could be debated since that conclusion is based on the Commissions views of the differences between a comparison shopping service and an online marketplace although it would be hard to imagine an online store of any kind without a search engine built into it. On the other hand, Amazon could be seen as an online retailer as well considering that they make and sell products of their own. The difference between an online retailer and an online merchant seems to be the origins of the products that are for sale.¹¹³ There are, however, indications that could point to e-commerce, defined as all kinds of selling things from an online store regardless of who's objects that are for sale, being a relevant market in itself.¹¹⁴ This definition would essentially put online retailers such as HM.com, Inkclub.com and others alongside online marketplaces such as Cdon.com, E-bay.com and Amazon.com. For the sake of this case study I will assume that online marketplaces as outlined by the Commission constitute a relevant product market as a subcategory within the e-commerce definition and that the geographical dimension of that market constitutes the European Union as a whole. The reason for this being that online retailers

¹¹¹ Google Shopping Decision, note 219.

¹¹² Google Shopping Decision, note 220.

¹¹³ Google Shopping Decision, note 210.

¹¹⁴ See for instance: <https://www.recode.net/2017/10/24/16534100/amazon-market-share-ebay-walmart-apple-e-commerce-sales-2017>

such as HM.com generally have a much narrower product field mainly consisting of their own brand products while online marketplaces such as Amazon.com focus their efforts on filling its marketplace with other companies products. This also has the potential to put Amazon.com in a position where they can control competition on their own marketplace.

5.3 Is Amazon dominant in its market?

When considering the criteria used to assess dominance outlined in chapter 3.3.5. we have to examine the amazons market share in the market for online marketplaces. Data from the US market would suggest that amazon is indeed dominant in that geographical market, holding around to 43% of the relevant market.¹¹⁵ Statistics from Europe suggests that Amazon has a strong market position.¹¹⁶ The assessment of market share in Europe for this kind of business is difficult because of the nature of online retail in itself. The marketplace is accessible for anyone regardless of geographical location and given the nature of the internal market in the EU, goods are easily sent across borders, which means that some of the sales reported for Germany in the European statistics might, in fact, be sent to other markets. There is also evidence that Amazon is indeed dominant in some markets, especially the market for E-books. The Commission took action against Amazon regarding some clauses in their distribution agreement for E-books.¹¹⁷ In this case the Commission held the view that Amazon was dominant in the market for electronically distributed books, that is enjoying a position in which it could act independently of its competitors. For the sake of this example, I will assume that Amazon would be considered dominant in the market for online marketplaces.

¹¹⁵ See: <https://www.recode.net/2017/10/24/16534100/amazon-market-share-ebay-walmart-apple-ecommerce-sales-2017>.

¹¹⁶ See: <https://www.funglobalretailtech.com/research/identifying-e-commerce-winners-the-fung-global-retail-technology-internet-retailers-ranking-for-western-europe/>

¹¹⁷ Summary of the Commissions decision in Case AT.40153 E-book MFNS and related matters, notes 9-11

5.4 Outcomes of dominance

5.4.1 External perspective

Companies enjoying dominant positions are typically necessary business partners for other companies. The Commission decision against Amazon's E-book business shows that Amazon was such an important outlet for E-books that it could impose very aggressive conditions on its distribution agreements. Given that Amazon, at least in this case, is dominant in the market for online marketplaces it would typically have to be careful not to apply dissimilar conditions to its trading partners, or using other clauses to limit the competition in the market for online marketplaces. In the context of the market for online marketplaces it is fair to assume that the main priority for an investigation by the Commission would be focused on the terms for market entry, similar to the E-book case. However, the online marketplace market is typically a multi sided market, where Amazon and its competitors needs to attract enough sellers to be relevant for the consumers, and also attract enough consumers to be relevant to the sellers. This opens up for another perspective on distortion of competition.

5.4.2 Internal perspective

The main goal for Amazon is to *connect* buyers and sellers within its marketplace, where sellers compete for customers on terms essentially curated by amazon in a similar way as the search results within PageRank is curated by Google.¹¹⁸ In the Google Shopping Case this meant that the commission put emphasis on Google, the curator of its search results, not to distort competition by curating its search results in certain ways. If this is an obligation that applies to all businesses that are dominant in their relevant market, and operate a search engine to deliver value to their customers, it

¹¹⁸ See for instance <https://www.aboutamazon.com/supporting-small-businesses/small-business-impact-report> .

could mean that Amazon has an obligation not to discriminate between retailers on its marketplace. Amazon makes no secret about that it uses the data it collects about its customers, that is those who buy stuff from amazon, to better promote products or services. These promotions can have an impact on what product the consumer choses to buy. Considering the overall goal of competition regulation, being the promotion of consumer welfare defined as the situation when the consumer receives the monetary surplus that the efficiency gains a competitive market brings, the way Amazon curates choice for consumers, and manages competition among its sellers might not be aligned to that goal. This approach to consumer data and the curating of its own marketplace can be exemplified by using the same search term in Amazons product search engine, in this case the search term “mehano train” which refers to a toy train set by a specific manufacturer. The search term was entered in an anonymous browser window and as a returning customer and yielded quite different results as shown in figures 1 and 2 in appendix A. Moreover, Amazon also curates different sellers for specific products, tending to promote their own “amazon prime” shipping options over other shipping options as shown in figures 3 and 4 in appendix A. In relation to the consumer welfare objective, the cheapest option probably should be listed first. This practise could be comparable with how Google curated its PageRank algorithm to push competing comparison shopping services further down the search results. Another aspect of the internal perspective is that it is increasingly hard to assess what the actual undistorted market within the online marketplace actually is due to the degree of personalization within the search results as illustrated by figures 1 and 2 in appendix A.

5.5 Analysis of the Amazon case

Although this look into Amazon’s online marketplace business is based on assumptions rather than hard facts it shows how the principles laid out in the Google Shopping Case might affect other online businesses. A major difference between the Google Shopping Case and Amazon as a whole is, of

course, that both buyers and sellers on the Amazon platform has agreed to the terms and conditions when entering that marketplace while there is no such process when being listed with Google's general Internet search engine. However, the idea that you can agree on entering a market situation where the market operator, in this case Amazon, curates the conditions for competition in that market does not make competition law any less applicable. If Google's way of curating its search results to allegedly promote its own comparison shopping service is a breach of antitrust law, then Amazons curating of its online marketplace to promote certain sellers probably is too, given the conditions that it holds a dominant position in the market for online marketplaces.

6 Conclusions

In the light of the Commissions decision in Google Shopping I think it is safe to say that EU competition policy is in need of reformation to keep up with the fast paced developments of online platforms, such as Google and Amazon. The Commissions inability to, in my view, properly recognize the principal characteristic of online business, that is constant change, is a setback to this field of law and makes for a less predictable legal environment. The Commission refrains from using established terminology in this decision. Google's general Internet search is not an essential facility, nor is the conduct tying, bundling or refusal to deal. Google is simply dominant, and therefore they must be doing something abusive. In my opinion the Commissions decision has a protectionist aura, and as pointed out in the chapter four analysis, might put an end to innovation at the cost of consumer welfare. I fear that the Commissions decision might open up for more claims of abuse by other competing services, such as Vimeo. On the bright side have we yet to see what effects the General Data Protection Regulation¹¹⁹ has on competition policy and the use of personal data. As mentioned in the introduction, in a functioning competitive environment market transparency is an essential feature. The case study of Amazon highlights this, and also demonstrates that the perhaps most powerful tool for the future of competition policy is now in the hands of consumers, not the Commission.

¹¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Appendix A

Figure 1. Search results from anonymous browsing.

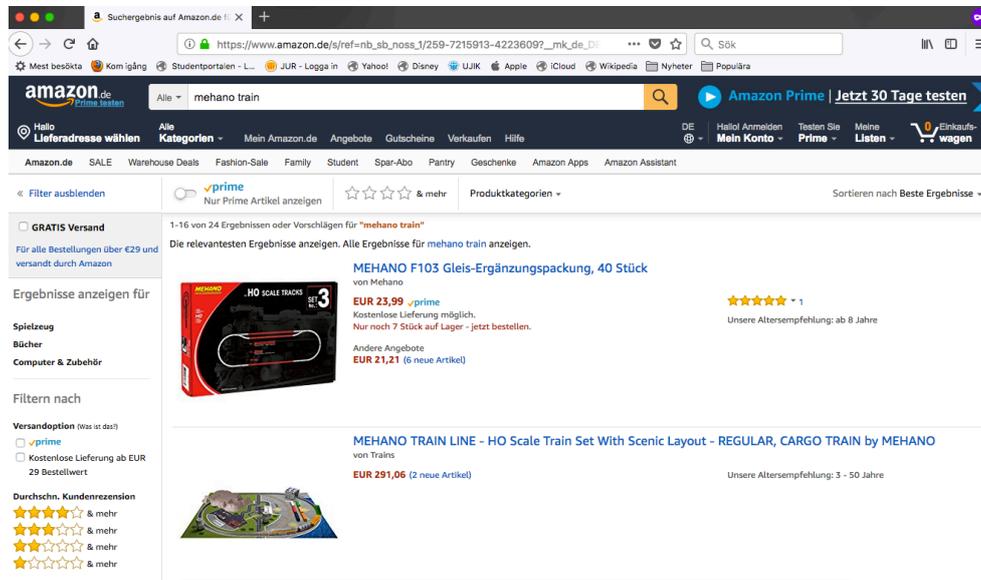


Figure 2. Search results from a returning customer.

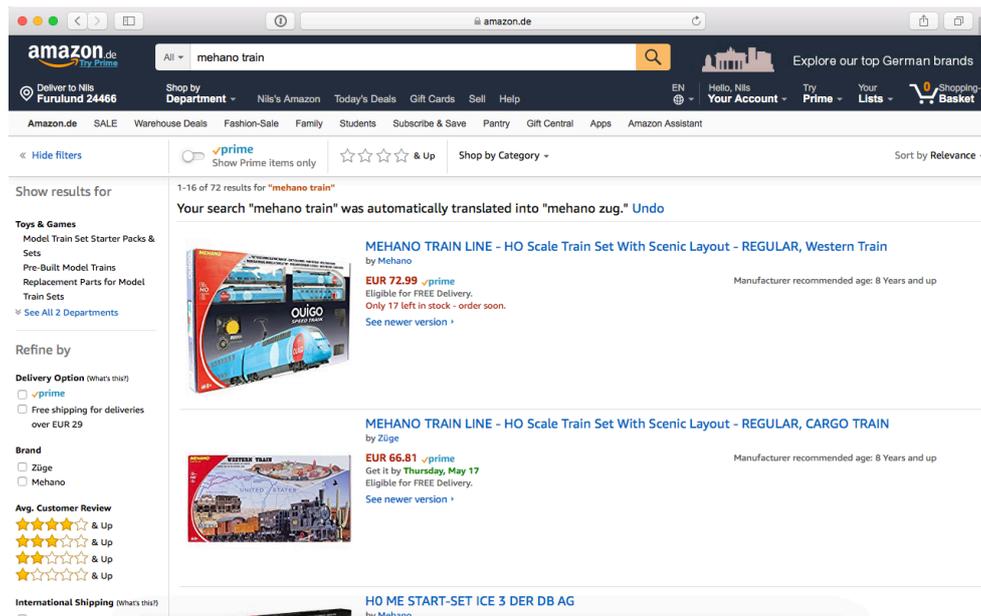


Figure 3, a specific product with more than one seller.

The screenshot shows the Amazon.de product page for 'HO ME START-SET ICE 3 DER DB AG' by Mehano. The product is priced at EUR 99.95 with free delivery. It is currently in stock, with only 4 units left. The page includes a product image, a description, and a list of other sellers on Amazon, with ChoiceToys being the primary seller.

HO ME START-SET ICE 3 DER DB AG
by Mehano
★★★★★ 3 customer reviews | 4 answered questions
Our Price: **EUR 99.95** **FREE Delivery**. Delivery Details
Prices for items sold by Amazon are **Inclusive of German VAT**. For other items, please see [details](#).
Only 4 left in stock.
Want it delivered by **Wednesday, 16 May?** Order within **10 mins** and choose **Expedited Delivery** at checkout. Details
Sold by **ChoiceToys** and Fulfilled by Amazon. For Returns, please check the seller link. Gift-wrap available.
7 new from **EUR 86.99**

- 1x motorbetriebe und 1x Lokomotive, 1x Personenkraftwagen erster Klasse und 1x zweiter Klasse.
- Streckenbaumlänge: 3 Meter.
- Lokregler (Traflo) + Regler enthalten.

[See more product details](#)
[Report incorrect product information.](#)
 Want to recycle your electrical or electronic appliance for free? [Do it here.](#)

Other Sellers on Amazon
7 new from **EUR 86.99**
Have one to sell? [Sell on Amazon](#)

Figure 4, seller ranking within that product.

The screenshot shows the 'Offers for this product' section on the Amazon.de product page. It displays a table comparing four different sellers for the 'HO ME START-SET ICE 3 DER DB AG' product, including their prices, delivery conditions, seller ratings, and delivery options.

Price + Delivery	Condition	Seller Information	Delivery	Buying Options
EUR 86,99 FREE Delivery	New	Conrad Electronic SE ★★★★★ 84% positive over the past 12 months. (20,745 total ratings) Conditions and other vendor information.	<ul style="list-style-type: none"> Dispatched from Germany Delivery rates 	Add to Basket
EUR 87,99 + EUR 5,95 Delivery	New	get goods ★★★★★ 90% positive over the past 12 months. (188 total ratings) Conditions and other vendor information.	<ul style="list-style-type: none"> Dispatched from Germany Delivery rates 	Add to Basket
EUR 99,95 ✓prime & FREE Delivery. Details	New	ChoiceToys ★★★★★ 100% positive over the past 12 months. (497 total ratings) Conditions and other vendor information.	<ul style="list-style-type: none"> FULFILLED BY AMAZON Want delivery by Wednesday, 16. May? Order it in the next 0 hours and 9 minutes, and choose Expedited Delivery at checkout. See details Delivery rates and return policy. 	Add to Basket
EUR 99,95 + EUR 3,00 Delivery	New	ChoiceToys ★★★★★ 100% positive over the past 12 months. (497 total ratings) Conditions and other vendor information.	<ul style="list-style-type: none"> Arrives between May 25 - Jun. 12. Dispatched from United Kingdom Delivery rates 	Add to Basket

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