



6th GRUR Int./JIPLP Joint Seminar

Internet Search engines in the focus of EU competition law
– a closer look at the broader picture

EU vs. Commission: Does the Commission have a case against Google?

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I. Factual Background: Froogle

The screenshot displays the Froogle search engine interface. The browser window title is "Froogle Search: digital camera - Mozilla Firefox". The address bar shows the URL "http://froogle.google.com/froogle-0218.html?hl=en&oeq=1000". The search bar contains the text "digital camera" and buttons for "Search Froogle" and "Search the Web".

The search results are displayed in a list format. The first result is "Canon Camera: Canon 3.2 MP Digital Camera S1050A001" with a price of \$211.99. The second result is "Fuji Photo Film FinePix S4100 Digital Camera" with a price of \$294.99. The third result is "Canon Camera: Canon 5.1 Megapixel Digital Camera S3418A001" with a price of \$266.78. The fourth result is "Canon S410 4.3 Megapixel Digital Camera" with a price of \$199.99.

The interface includes a sidebar on the left with filters for "View" (List view, Grid view), "Sort By" (Best match, Price, etc.), "Price Range" (with input fields for \$ and to \$), "Search within" (All Categories, Electronics, Cameras, Digital Cameras), and "Search by brand" (Canon, Fuji, etc.).

On the right side, there are "Sponsored Links" for "Digital Camera" (Let Froogle help you find the right digital camera for your budget), "Best Buy Digital Cameras" (Free Shipping On Digital Cameras), "Best at Circuit City" (Official Site - Circuit City process Free shipping on orders \$25 and up), "Digital Camera" (Find the Best Price on Photography), "Digital Camera" (Get the Right Camera a Great & Fabulous Price for Photography Professionals), and "Digital camera" (Find the best prices and deals. Compare products, specs, and reviews).

I. Factual Background: Product Search

The image shows a search results page for the keyword "tent". Red arrows point from four callout boxes to specific elements on the page:

- AdWords Text Ads:** Points to the top advertisement for Eddie Bauer's "Back-packing Camping Tent".
- Product Listing Ads:** Points to the product listings for Coleman tents, which include images and prices.
- Web Search Listings (Free):** Points to the search results section, which includes related searches and a list of products from Coleman.
- Shopping Search Listings (Free):** Points to the "Shopping results for tent" section, which displays product images, prices, and store availability.

Other visible search results include:

- Canopy Tent - 70% off:** Advertisement from canopy.com.
- Tent at REI:** Advertisement from rei.com.
- Cheap Tents at Walmart:** Advertisement from walmart.com.
- Tent Backpack Sale:** Advertisement from sierratradingpost.com.
- Camping Tent Tents:** Advertisement from target.com.
- Exercise Gear at Sears®:** Advertisement from sears.com.

I. Factual Background: Google Shopping

The screenshot shows a Google search for "telescopes". The search bar is at the top with the text "telescopes" and a search button. Below the search bar, the text "Search" and "About 52,300,000 results (0.18 seconds)" are visible. On the left side, there is a navigation menu with options like "Everything", "Images", "Maps", "Videos", "News", "Shopping", and "More". Below the menu, there are filters for "Mountain View, CA" and "Any time". The main search results area is divided into several sections:

- Ads for telescopes:** This section contains two ads. The first is "Telescopes Super Sale - Top Rated Telescopes Site" from www.telescopes.com, offering a 50% discount. The second is "All Telescopes Ship Free | ProTelescope.com" from www.protelescope.com, offering 40-50% off and free shipping. A yellow box highlights these two ads.
- Shop for telescopes on Google:** A sponsored section featuring a grid of five telescope products with their prices and retailers: Celestron NexStar 4 S... (\$499, Amazon.com), Celestron 21035 70m... (\$54, Buy.com), Celestron NexStar SLT... (\$349, Walmart), Orion SkyQuest X... (\$346, Homya), and Meade 20218 NG70-SM Alt... (\$73, Wayfair).
- Why these ads?:** A section explaining the ads, with a red arrow pointing to the highlighted ad section.
- Ads - Why these ads?:** A section listing more ads: "All Telescopes Ship Free" from www.protelescope.com, "Telescope On Sale" from www.opticsplanet.net, "2012's Top Telescopes" from www.telescopes.shopfinal.com, and "2012 Best Telescopes" from www.telescopes.housekool.com. Red arrows point from the "AdWords Ads (paid)" box to these ads.
- Organic Links:** A section with organic search results: "Orion Telescopes & Binoculars - Telescope.com", "Celestron Telescopes, Telescope Accessories, Outdoor and ...", and "YouTube Space Lab". A red arrow points from the "Organic Links (free)" box to the Orion Telescopes link.

AdWords
Ads
(paid)

Google
Shopping
Ads
(paid)

Organic
Links
(free)

II. Market Definition

*The main purpose of market definition is to **identify** in a systematic way **the competitive constraints that the undertakings involved face*** (Commission's Notice on market definition, 1997)

*„Google has a dominant position in **providing general online search services** throughout the EEA, with market shares above 90% in most EEA countries“* (Commission's MEMO-15-4781 on its Statement of Objections in the „Google Shopping“ case)

II. Market Definition

1. Is there a „general online search market“?

- Market definition is about determining **competitive pressure** by substitute products or services.
- The relevant question is **what *users* regard as substitutes**.
- Users look for **answers to specific queries** (like „Buy iPhone“ or „Book Hotel in Munich“).

⇒ There is no „general online search market“, but a mosaic of separate **markets for product search**, flight search, hotel search etc.

II. Market Definition

2. Which services must be included in the „product search market“?

Only

(1) **Horizontal search engines** (e.g. Google, Bing, Yahoo!)?

or also

(2) **Specialised (vertical) search engines** (e.g. Foundem)?

and

(3) **Vendor platforms** (e.g. Amazon Marketplace, eBay)?

⇒ **Market for product search includes (1) + (2) + (3)!**

III. Dominance

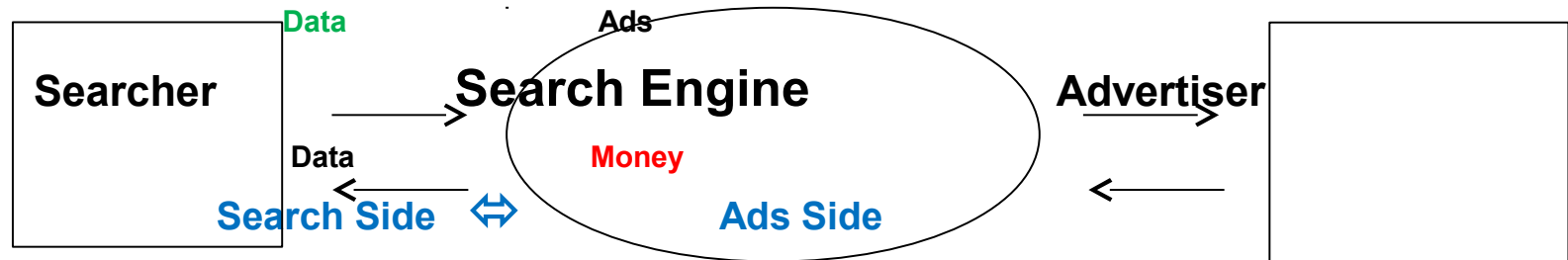
Commission's MEMO-15-4781:

*„Google has a **dominant position** in providing general online search services throughout the EEA, **with market shares above 90%** in most EEA countries.“*

⇒ Do market shares of above 90 % indicate – or even prove – dominance within the meaning of Article 102 TFEU?

III. Dominance

1. Product Search is offered on a multi-sided market



⇒The search markets are **at least two-sided**; maybe even three-sided, if there is an „indexing market“.

⇒An accurate assessment of dominance **must take into account all sides**, and some market power must exist on all sides.

III. Dominance

2. High market (usage) shares are a very weak indicator for dominance in the digital economy

- **Microsoft-cases (2004 and 2009):** Market shares $\geq 90\%$ which have been stable for more than 10 years indicate **dominance** in connection with other factors like scale economies, network effects, user lock-in.
- **Microsoft/Skype (2011):** Market shares $\geq 90\%$ are irrelevant if the market is dynamic and users are able and willing to switch to other services (particularly in the case of free services) => **no dominance**

⇒ Social Networks? MySpace ▶ StudiVZ ▶ Facebook ▶ ?

⇒ Internet Search? AltaVista ▶ Yahoo! ▶ Google ▶ ?

⇒ Mobile OS? WM ▶ Symbian ▶ iOS ▶ Android ▶ ?

III. Dominance

3. Innovation rather than price is the most relevant factor for competition in the digital economy

Dominance = “a position of economic strength ... which enables it to prevent effective competition ... by affording it the *power to behave to an appreciable extent independently* of its competitors, its customers and ultimately of consumers”

- **Traditional Market:** power to *increase prices* without losing (much) business
- **Market of the Digital Economy:** power to *stop innovating* without losing (much) business

=> Compare „Browser War“ to Google Shopping case!

IV. Abusive Behaviour

*“The Statement of Objections alleges **that Google treats and has treated more favourably**, in its general search results pages, **Google's own comparison shopping service** "Google Shopping" and its predecessor service "Google Product Search" compared to rival comparison shopping services.*

*“Google's conduct may therefore **artificially divert traffic from rival comparison shopping services and hinder their ability to compete**, to the detriment of consumers, as well as stifling innovation”.*

[\(Commission's MEMO-15-4781\)](#)

IV. Abusive Behaviour: **Discrimination?**

1. Is Google obliged to treat competitors in the same way as it treats its own services?

German Federal Court of Justice (BGH): No!

“an undertaking --... [that] forms a single economic unit with the [dominant firm]... cannot be considered as an undertaking of the same kind in relation to the [competitor]” (BGH, 24.10.2011, Case KZR 7/10, GRUR 2012, 84, para. 31 – Telefon- und Branchen-verzeichnisse)

⇒ even a dominant undertaking is not obliged to treat competitors in the same way as its own subsidiaries,

because *“no one is required to sponsor third-party competition at his own expense” (BGH, 11.11.2008, Case KVR 17/08, NJW 2009, 1753, para. 24 – Bau und Hobby).*

IV. Abusive Behaviour: **Discrimination?**

- EU competition law also recognizes the **single economic unit exception** (e.g. ECJ, 24.10.1996, Case C-73/95 P, ECR 1996, I-5482, at paras. 50 et seq. – *Viho*).
- ⇒ There is **no general „equal treatment rule“** in German or EU competition law, **except for**
 - special regulatory law rules or
 - **essential facilities cases** (see ECJ, 26.11.1998, Case C-7/97, ECR 1998, I-7791, at paras. 39 et seq. – *Bronner*).
- Competing comparison shopping services can be easily found on the internet without Google.
- ⇒ **Google Search is not an essential facility.**

IV. Abusive Behaviour: **Discrimination?**

- **Google Product Search** (until May 2012) and **Google Shopping** (since May 2012) are **completely different services**:

Google Product Search

- was a **(free) search service** and
- was part of the organic (free) search list,
- was subject to the general search algorithms

The **competing comparison** shopping services are **still part of the free organic search list** and subject to the search algorithm. They do not pay Google for being listed.

IV. Abusive Behaviour: Product Search

The image shows a search engine results page for the keyword "tent". It is annotated with four categories of ads:

- AdWords Text Ads:** Includes "Back-packing Camping Tent | EddieBauer.com" and "Canopy Tent - 70% off".
- Product Listing Ads:** Includes "Coleman Instant 14 X 10 Foot 8 Person..." and "Tent at REI".
- Web Search Listings (Free):** Includes "Coleman - Tent | Tents | Family Tent | Camping Tent | Backpacking..." and "Tent Backpack Sale".
- Shopping Search Listings (Free):** Includes "Coleman Instant 14- by 10- Foot 8- Person Two Room Tent" and "Stearns 2000001594 Montana 8 Tent 16x7MODIFIED Dome".

Red arrows point from the labels to the corresponding ads. The search results also include "Related searches for tent" and "Shopping results for tent".

IV. Abusive Behaviour: Google Shopping

The screenshot shows a Google search for 'telescopes'. The search bar is at the top with the Google logo and a search button. Below the search bar, there are navigation links for 'You', 'Search', 'Images', 'Maps', 'Play', 'YouTube', 'News', 'Gmail', 'Documents', 'Calendar', and 'More'. The search results are displayed in a grid format. On the left side, there is a sidebar with filters for 'Everything', 'Images', 'Maps', 'Videos', 'News', 'Shopping', and 'More'. Below the sidebar, there are filters for 'Mountain View, CA' and 'Any time'. The main search results area is divided into sections: 'Ads for telescopes', 'Sponsored', and 'Organic search results'. The 'Ads for telescopes' section includes several advertisements for telescopes, such as 'Telescopes Super Sale - Top Rated Telescopes Site', 'All Telescopes Ship Free | ProTelescope.com', and 'Telescope On Sale'. The 'Sponsored' section features a 'Shop for telescopes on Google' advertisement with a grid of telescope products and their prices. The 'Organic search results' section includes links to 'Orion Telescopes & Binoculars - Telescope.com' and 'Celestron Telescopes, Telescope Accessories, Outdoor and ...'. Red arrows point from the 'AdWords Ads (paid)' box to the 'Telescopes Super Sale' and 'All Telescopes Ship Free' ads, from the 'Google Shopping Ads (paid)' box to the 'Shop for telescopes on Google' ad, and from the 'Organic Links (free)' box to the 'Orion Telescopes & Binoculars' organic result.

AdWords
Ads
(paid)

Google
Shopping
Ads
(paid)

Organic
Links
(free)

IV. Abusive Behaviour: **Discrimination?**

Google Shopping

- **is an ad service like Google AdWords,**
- shows sponsored (paid for) links to vendor sites,
- is neither part of the search market (side)
- nor of the organic search results list.

The general search algorithms, by definition, do not apply to ads!

⇒ To treat services that are not even part of the same market (side) differently, does not constitute „discrimination“ within the meaning of Article 102 TFEU.

IV. Abusive Behaviour: **Foreclosure?**

2. Does it violate competition law to „divert traffic“ from competing comparison shopping sites?

- Google does **not actively foreclose** any traffic from competing site (like MS did with regard to Windows).
- In effect, the Commission claims that Google violates competition law by **not sharing** its innovations and success with less successful competitors.

⇒ Not sharing is not forbidden because *“no one is required to sponsor third-party competition at his own expense”*,

innovative services (like Booking.com or Idealo) do not need a „free-ride“ on Google Search in order to be successful.

IV. Abusive Behaviour: **Consumer Harm?**

3. Does it violate competition law not to show users „*the most relevant service or services*“?

- Not sharing does not reduce, but rather **increases competition and innovation.**
 - There is **no such thing as** an „objectively correct“ or „**most relevant**“ search result.
 - The fact that different search engines show different results is an expression of **competition of search engines, not abuse.**
 - Users who use Google/Foundem/Ciao etc. want to see the most relevant results according to Google/Foundem/Ciao etc.
- ⇒ **Not sharing does neither harm innovation nor consumer welfare.**

V. Remedies

*“Google should treat its own comparison shopping service and those of rivals in the same way. **This would not interfere with either the algorithms Google applies or how it designs its search results pages.** It would, however, mean that when Google shows comparison shopping services in response to a user's query, **the most relevant service or services would be selected to appear in Google's search results pages**” (Commission's MEMO-15-4781)*

1. Showing 300 or more shopping boxes on the search page?
2. Presenting results of competitors in the Google Shopping box (offered by Google in 2014, but rejected by the Commission)?
3. Presenting only „the most relevant service“?
4. Removing Google Shopping (and maybe all Universal services) from Google's European web pages?

Thank you very much for your attention!



**Daten und Wettbewerb
in der digitalen Ökonomie -
Dateneigentum, Datenschutz,
Datenmacht**

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Sponsored 

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