CLEARY GOTTLIEB

About the Google Shopping Case

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The speaker's firm (but not the speaker) represents Google in this case. All views and positions expressed here are personal and not attributable to the firm or any of its clients.

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Some controversial issues

- market definition
- Causation
- Effects on competition
- Legal test of abuse

Product market definition online

- In an online environment, blurred distinctions between content providing, advertising, commercial transactions
- Compare with traditional media (two-sided market): tv must distinguish advertising, less interaction between viewers and contents
- Online: less regulation (e.g. advertising limits), ads and content mix up, click to ads leads to shopping
- Freedom to navigate also makes tying/bundling more difficult
- Enhanced complementarity of online services/contents (e.g., information or entertainment through online news, videos, search facilities on different websites, etc.)
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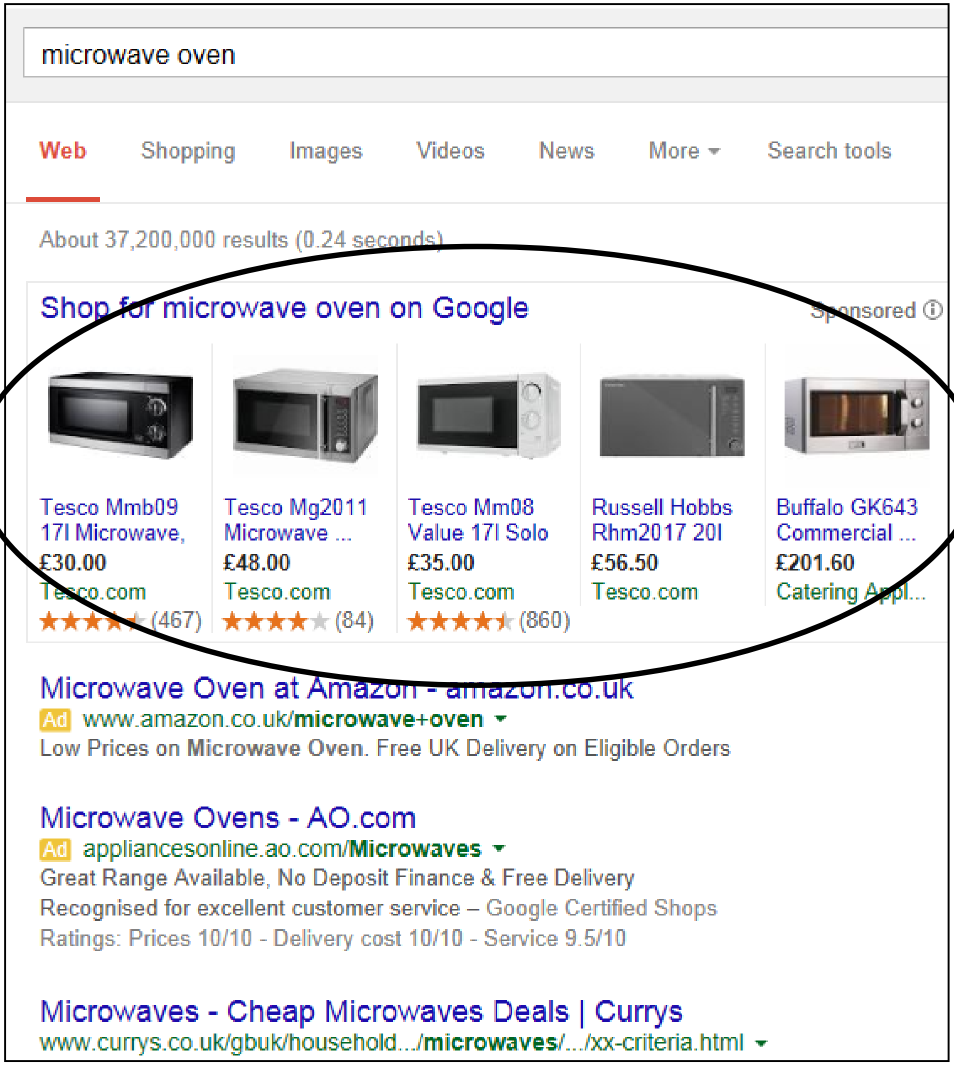
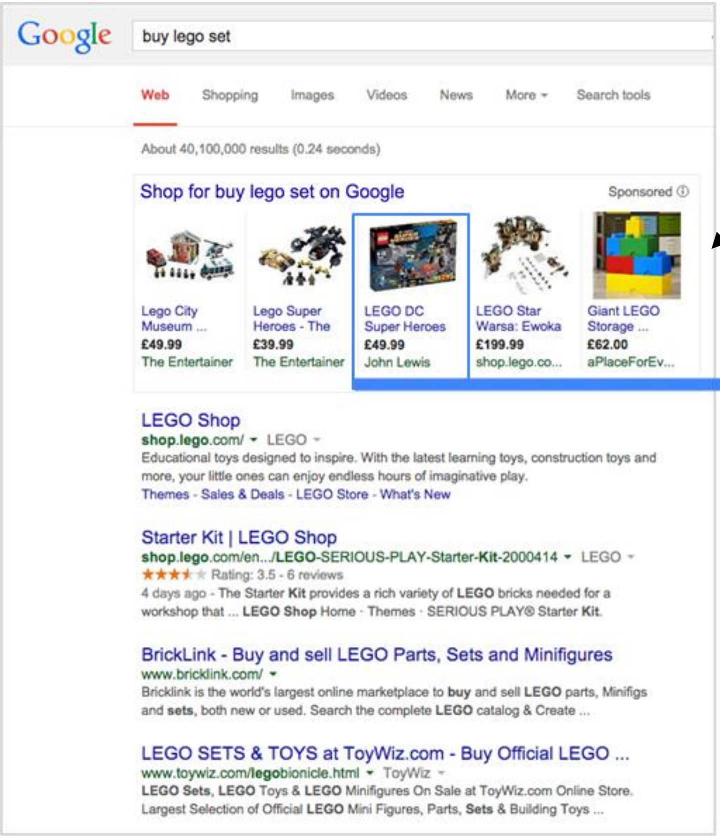
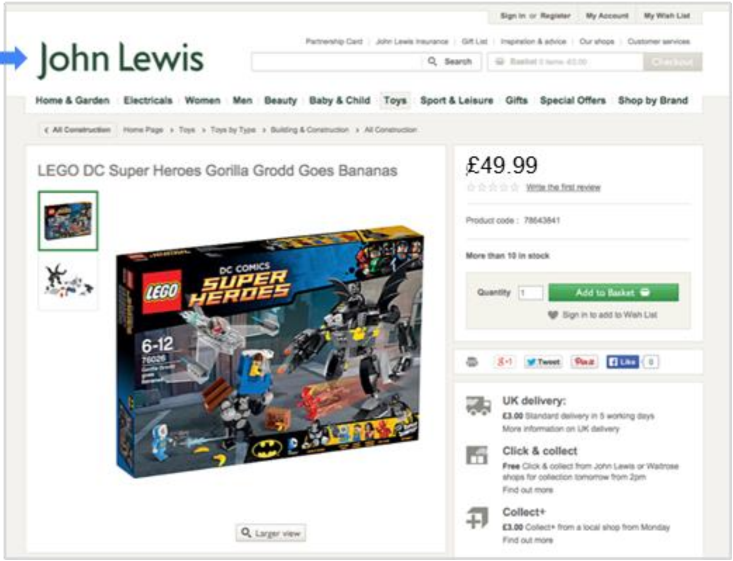


Product market definition: Google Shopping case



Shopping Units appear in ad space, are marked as "Sponsored", and clicks on them lead users to third-party advertisers

Because Shopping Units contain ads, they are ranked based on different mechanisms than apply to free results



- To Google, Shopping Units (SUs) are ads: the revenue-generating side of generic search (GS).

Product market definition: Google Shopping case

- To the Commission, SUs and price comparison websites are in a specialised search market for comparison shopping services (CSS), different from GS, online search advertising (OSA) and merchant platforms (MP).

- Pidgeon-holes, but with overlaps (complementarity/limited substitutability). Questions:

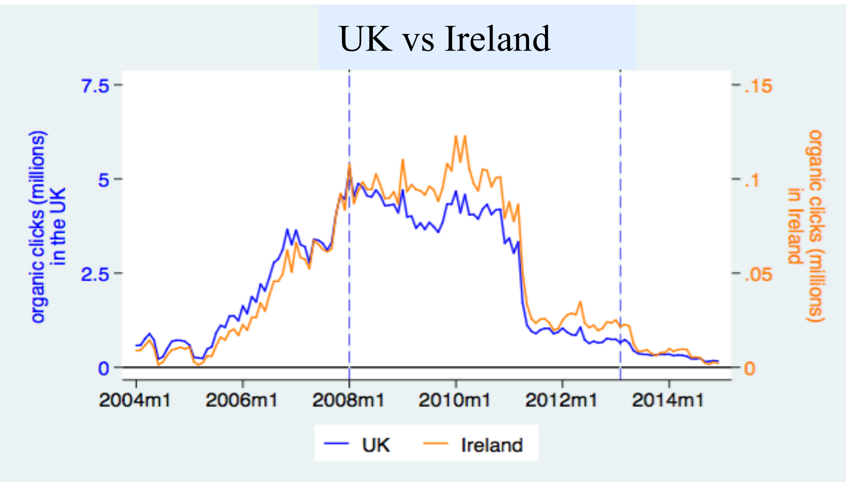
  - must GS not answer product searches? Must GS provide worst-quality answers than CSS to preserve market boundaries? Must GS cease to act as a proprietary business to provide CSS-grade answers?

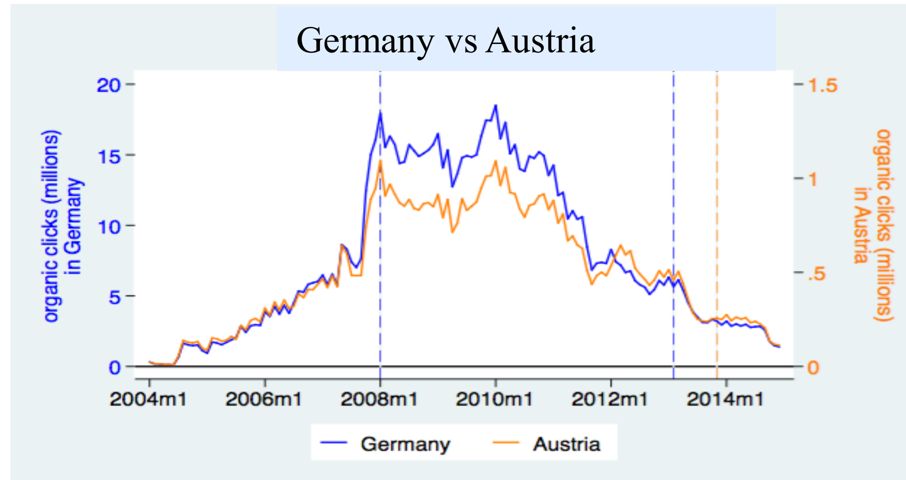
  - are online ads like store windows and part of the shop? Or just improved ads (sponsored sales vs. plain tv spots)?

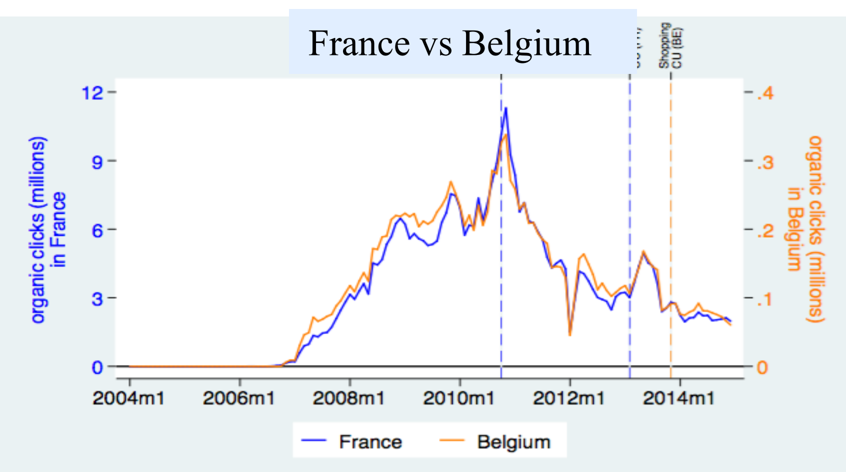
  - do merchant platforms (Amazon, e-Bay) not answer product searches? If ads are shops, then why are shops in a different market?

  - Disruptive innovation makes market definition less important (PCs vs. typewriters), should one look more at competitive constraints?

Causation (1): Showing SUs did not impact traffic to CSSs







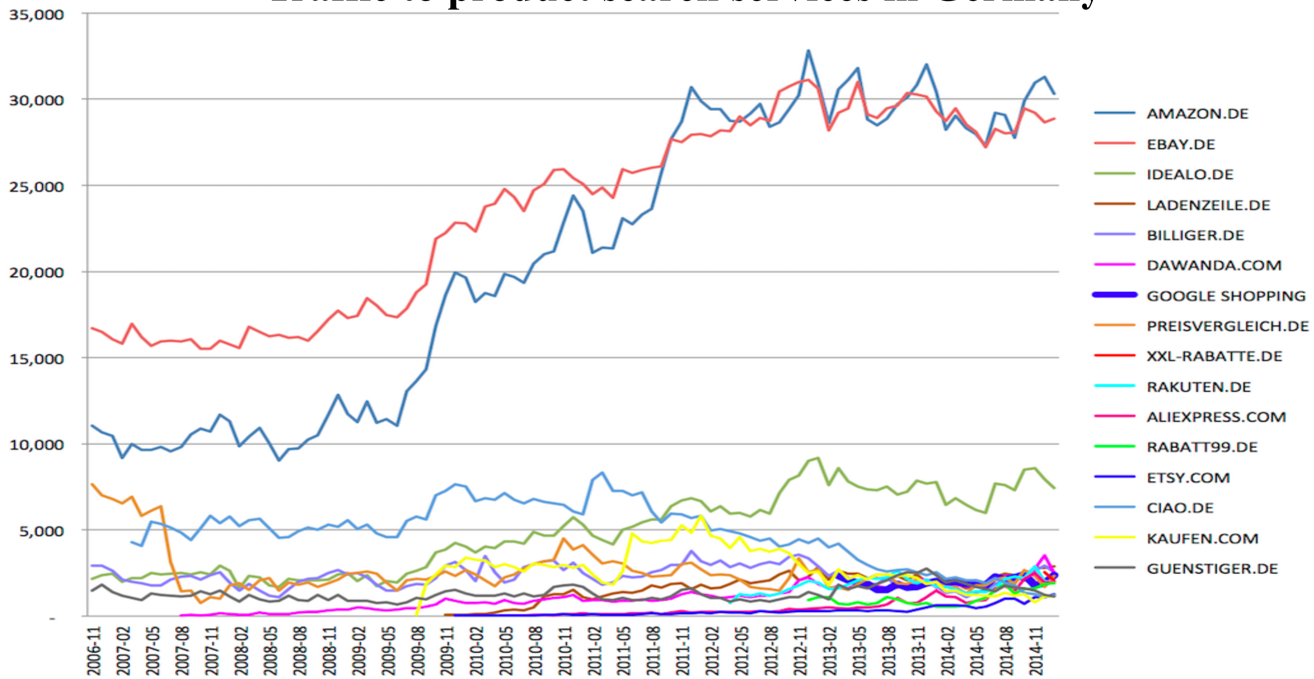
Blue line = country with Shopping Unit
Orange line = country without Shopping Unit (or only later)

Trends are the same. Shows that CSS traffic loss is not caused by Google showing Shopping Units

Causation (2): merchant platforms

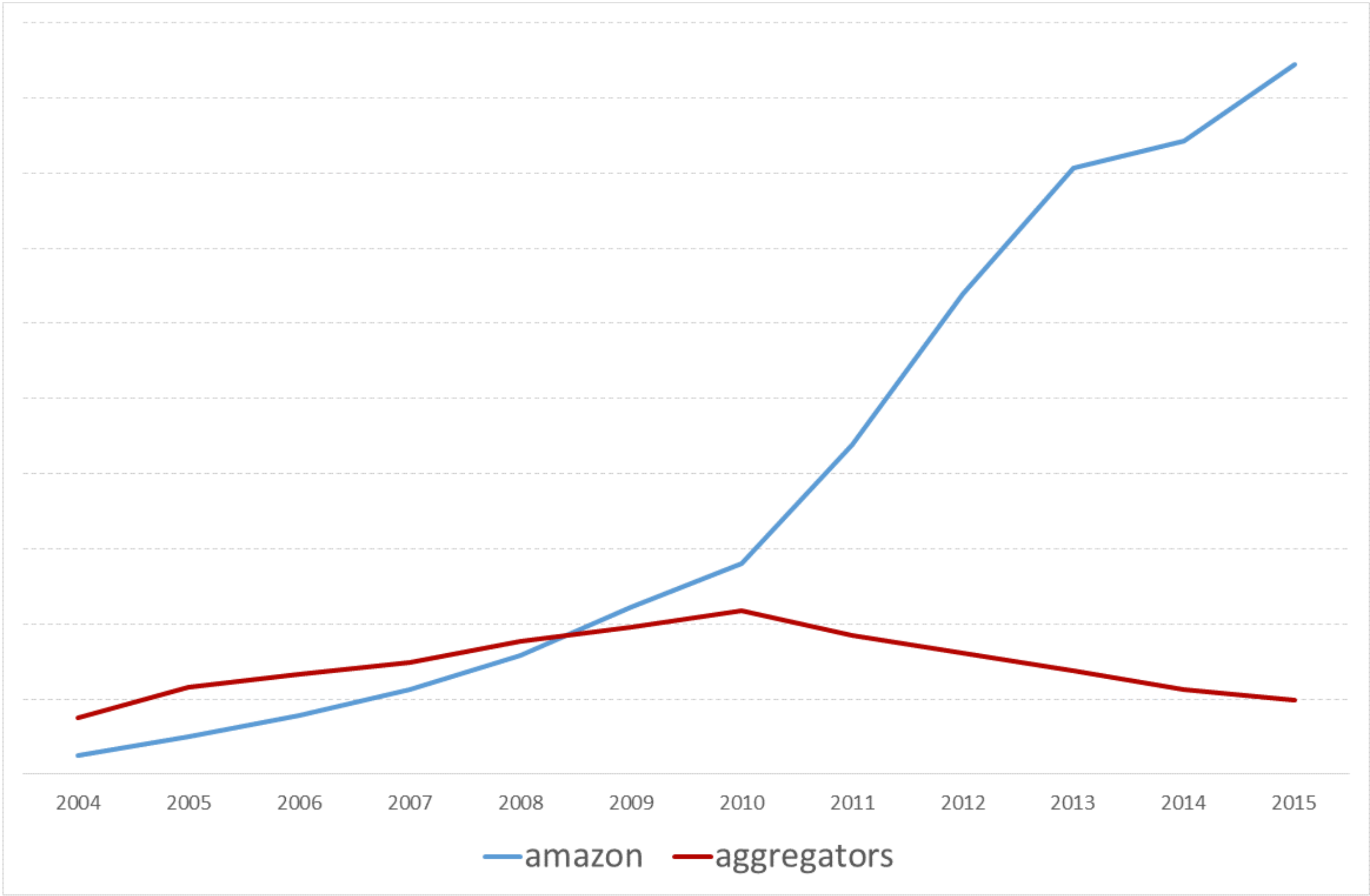
- The EC says that Amazon and eBay do not compete with CSSs because, in addition to product search and comparison functionality, they also allow users to buy products on their websites
- But additional functionality (offered free of charge) is no reason to exclude players from the market (consider a SSNIP or SSNDQ test)

Traffic to product search services in Germany



Causation (3): merchant platforms

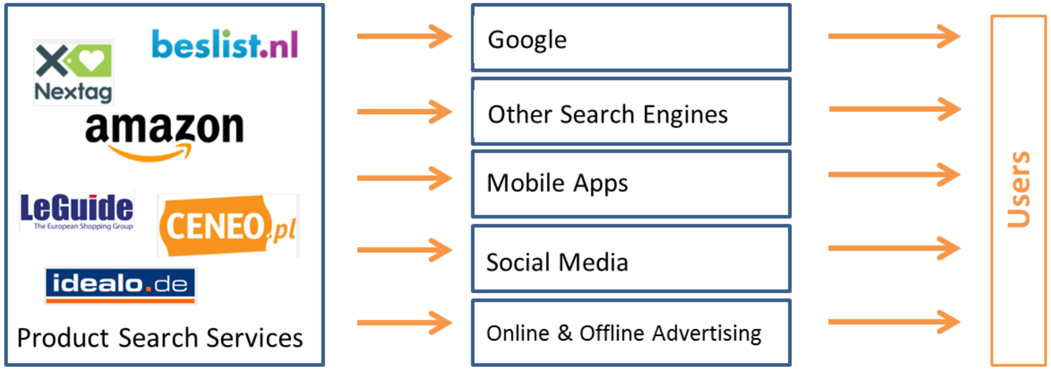
Total Google Traffic: Aggregators vs. Amazon 2004-2016 (UK)



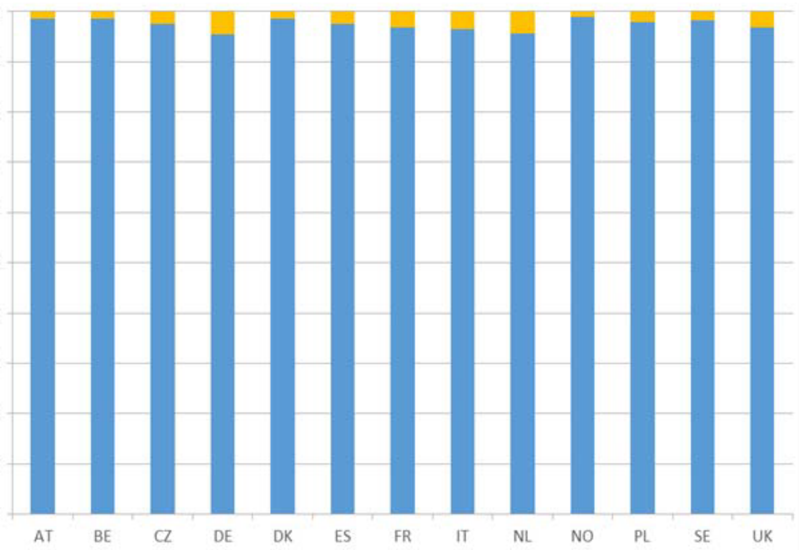
Effects on competition

- CSS continue to operate

- Different sources of traffic to CSS. GS traffic directed to SU not indispensable.



- Limited impact of SU traffic (yellow) on total traffic received by aggregators, as measured by Google (EU Commission takes issue with it)



Legal test of abuse

- Leverage without tying, discrimination without indispensability
- *Bronner* on refusal to supply watered down by *Teliasonera* in margin squeezes cases.
- *Slovak Telecom* (2014) applies *Teliasonera* doctrine to constructive refusal to supply:
  - — input may not be essential, as long as it is important
  - — but there must be a supply relationship between the dominant firm and customers/competitors in the downstream market where the dominant firm also operates
- In Google Shopping, CSS benefit from a free by-product of GS services. There is no disruption of supply. Product development or ads improvement – spurred also as a response to Amazon (and E-Bay)'s rise – leads to reduced spillover benefits for CSS. Is that an abuse?
- How does the "favouring" charge fit with vertically-integrated walled garden models of many big internet-based companies? More to come…