Georg-August-Universität Göttingen
Juristische Fakultät

Prof. Dr. Torsten Körber, LL.M.
Lehrstuhl für Bürgerliches Recht und Kartellrecht,
Versicherungs-, Gesellschafts- und Regulierungsrecht

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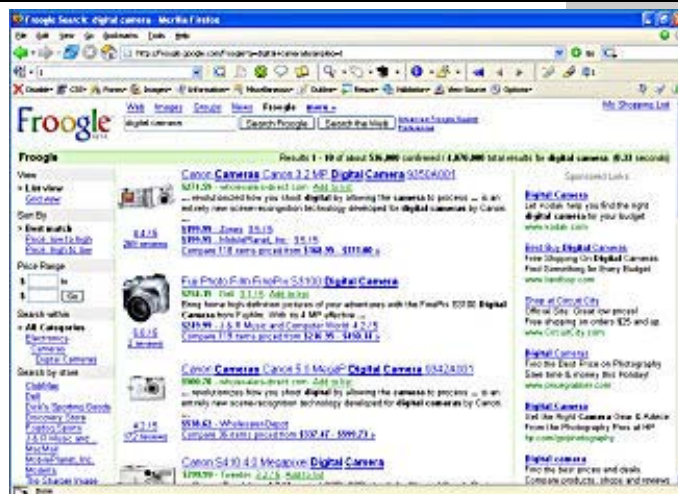– a closer look at the broader picture

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

Prof. Dr. Torsten Körber, LL.M. (Berkeley)
Georg-August-Universität Göttingen

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I. Factual Background: Froogle

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I. Factual Background: Product Search

I. Factual Background: Google Shopping

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)

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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.

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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)!

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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?*

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III. Dominance

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

	Data →		**Ads** →	
Searcher	←	**Search Engine**	←	**Advertiser**
	Data	⇔	**Money**	
	Search Side		**Ads Side**	
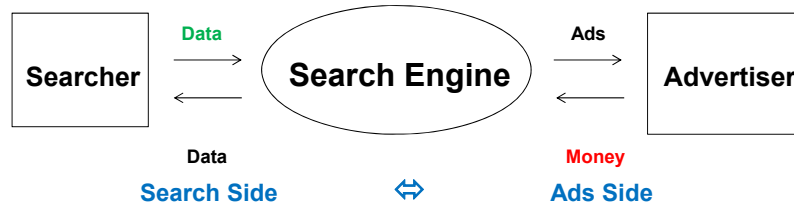
⇒ The search markets are **at least two-sided**; maybe even three-sided, if there is an „indexing market".

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

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III. Dominance

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

• *Microsoft-cases (2004 and 2009):* Market shares ≥ 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 ≥ 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 ► ?

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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 loosing (much) business
- **Market of the Digital Economy:** power to stop innovating without loosing (much) business

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

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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)

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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*).

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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.

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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.

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IV. Abusive Behaviour: Product Search

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IV. Abusive Behaviour: **Google Shopping**

AdWords Ads (paid)

Google Shopping Ads (paid)

Organic Links (free)

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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.

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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.

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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.

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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?

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Thank you very much for your attention!

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

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Prof. Dr. Torsten Körber, LL.M. (Berkeley)
www.ls-koerber.de▾
22.01.2016 – Email: koerber@ls-koerber.de

Georg-August-Universität Göttingen
www.uni-goettingen.de▾
22.01.2016 – Paulinerkirche, Papendiek 14, 37073 Göttingen

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