

CLEARY GOTTLIEB

Google Shopping

Henry Mostyn

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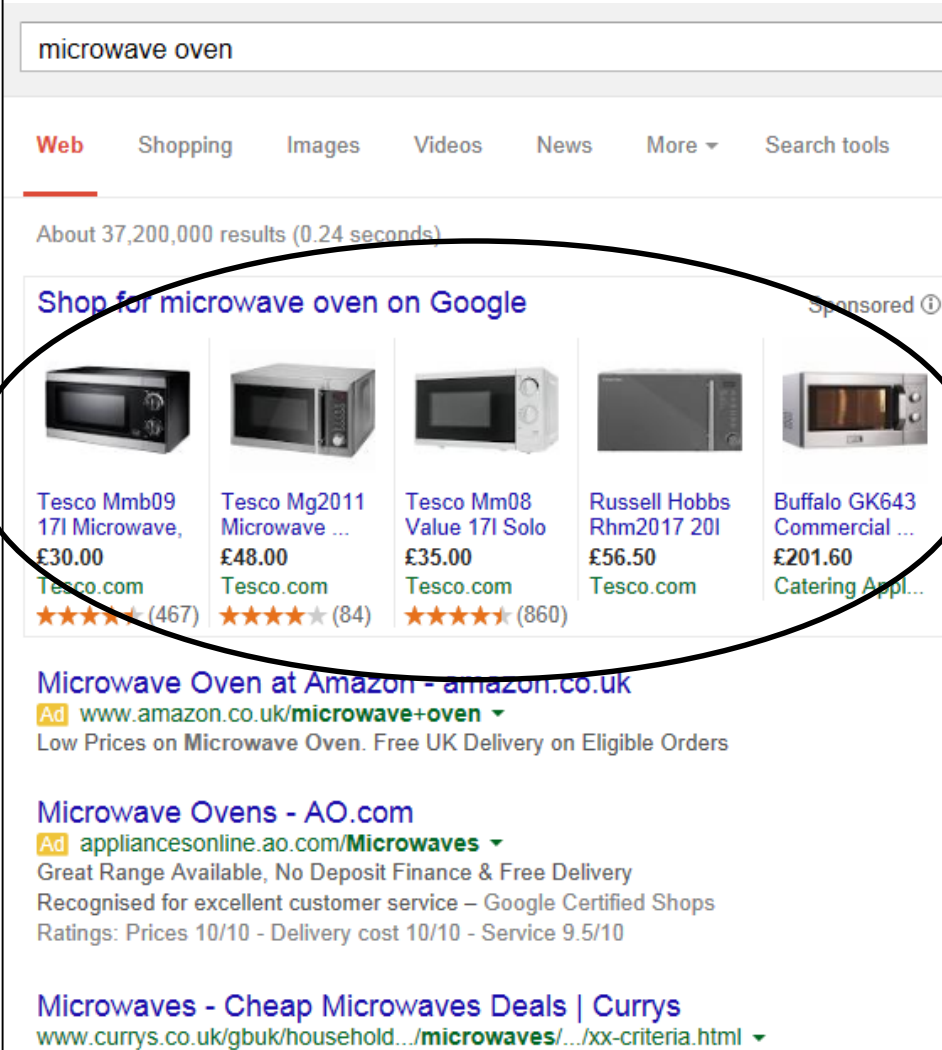


Chronology of Google Shopping Proceedings

- The EU Commission (EC) opened its formal investigation on November 30, 2010: initial investigation wide-ranging covering four preliminary concerns
- The EC initially agreed to settle the case through commitments. Negotiations started in 2012 and first agreement reached January 2013.
- October 2013: Google and the EC agree a second, improved settlement
- February 2014: Google and the EC agree a third settlement. Competition Commission Almunia states “*we have heard all the parties; we know their arguments. The commitments are final*”
- November 2014: New Commission takes office
- April 2015: EC sends a statement of objections limited to comparison shopping, alleging that Google favors its comparison shopping service in its general search results
- April 2015-April 2017: Google and the EC trade written arguments
- June 27, 2017: the EC adopts a an infringement decision, finding that “*Google has abused its market dominance by giving its own comparison shopping service an illegal advantage*” and fining Google EUR 2.42 billion

The EC's Theory

- Google is dominant in general search
- Comparison shopping search is a separate market to general search, and does not include merchant platforms, like Amazon and eBay
- Google favours its comparison shopping service (CSS) in its general search results compared to rival CSSs
- The favouring arises because Google treats product ads in Shopping Units differently from free search results for CSSs
- The EC does not object to the ranking of rival CSSs in free results or the display of product ads as such. The issue is only with the difference in treatment



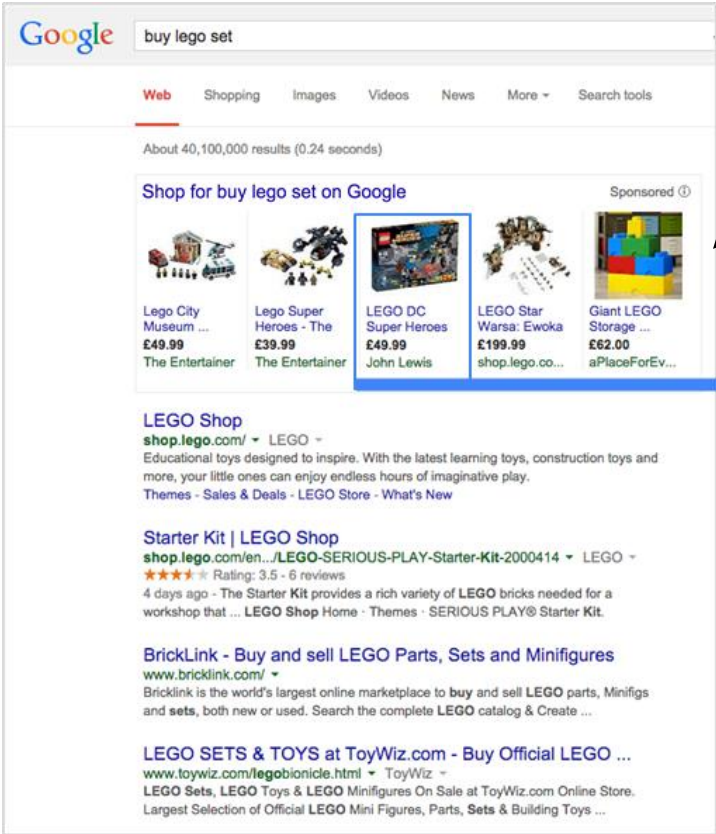
The screenshot shows a Google search for "microwave oven". The search results are divided into a Shopping Unit and organic search results. The Shopping Unit is circled in black and contains five product listings:

Product	Price	Rating
Tesco Mmb09 17l Microwave	£30.00	★★★★★ (467)
Tesco Mg2011 Microwave	£48.00	★★★★★ (84)
Tesco Mm08 Value 17l Solo	£35.00	★★★★★ (860)
Russell Hobbs Rhm2017 20l	£56.50	
Buffalo GK643 Commercial Catering Appl...	£201.60	

Below the Shopping Unit, there are three organic search results:

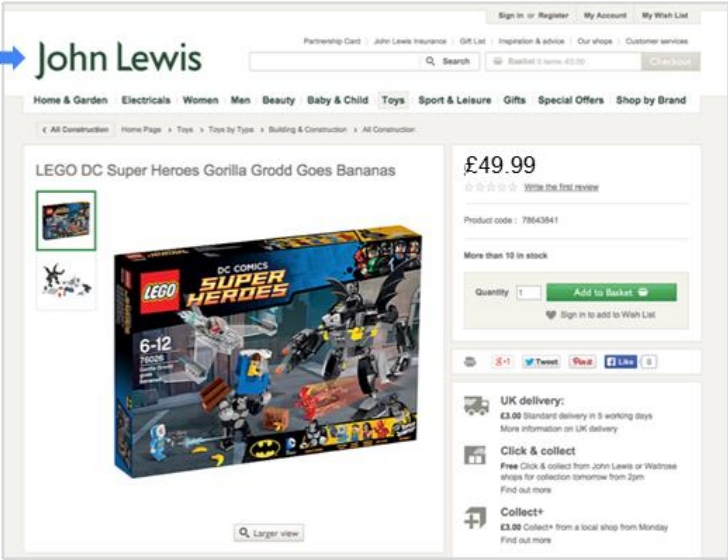
- Microwave Oven at Amazon - amazon.co.uk**
Ad www.amazon.co.uk/microwave+oven
Low Prices on Microwave Oven. Free UK Delivery on Eligible Orders
- Microwave Ovens - AO.com**
Ad appliancesonline.ao.com/Microwaves
Great Range Available, No Deposit Finance & Free Delivery
Recognised for excellent customer service – Google Certified Shops
Ratings: Prices 10/10 - Delivery cost 10/10 - Service 9.5/10
- Microwaves - Cheap Microwaves Deals | Currys**
www.currys.co.uk/gbuk/household.../microwaves/.../xx-criteria.html

Shopping Units show specialized ads for product offers



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



Showing ads differently from free results is not favoring

- Mere different treatment is not favoring – a claim of favoring implies discrimination
- Favoring and discrimination arise only if (i) similar things are treated differently, and (ii) there are no “legitimate commercial reasons” for that different treatment (*Michelin*)
- But Google treats different things differently: product ads are not the same as free results for CSSs
- All two-sided, ad-funded businesses show their own ads in a different way to their free content – this is how they monetize. Showing their own ads is not favoring

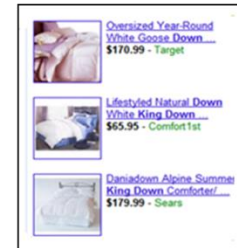


Google developed product ads to show better ads for product offers

Product Ad Extensions - 2008



Product Listing Ads - 2009



Product Listing Ads - 2011



Shopping Unit - 2013



- Product improvement constitutes competition on the merits, even if the improvement causes other firms to leave the market (*Post Danmark I, Intel, Decca Navigator, Microsoft*)
- Contrast the situation with *Microsoft*: there were “no technical reasons” for MSFT to tie Windows Media Player (**WMP**) to Windows, and WMP was a qualitatively inferior product
- Decision does not ask Google to stop showing product ads, but to give rival CSSs access to these ads

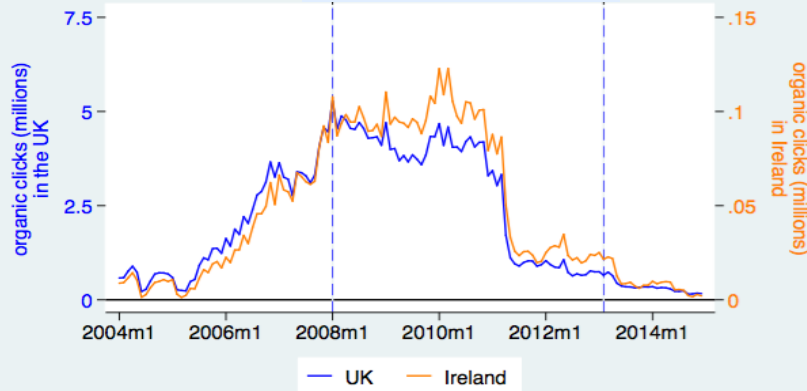
The Decision imposes a duty to supply without meeting the legal conditions

- The Decision does not ask Google to stop showing Shopping Units, but to give rival CSSs access
- Labelling the abuse as “favoring” does not change that the Decision requires Google to give CSSs access to Shopping Units or to stop showing Shopping Units altogether
- The Decision never shows, however, that access to Shopping Units is indispensable for competition, as it was required (*Bronner*)
- Google already showed CSSs in Shopping Units before the Decision based on the same processes as for the Google CSS. The Decision does not explain why this was insufficient

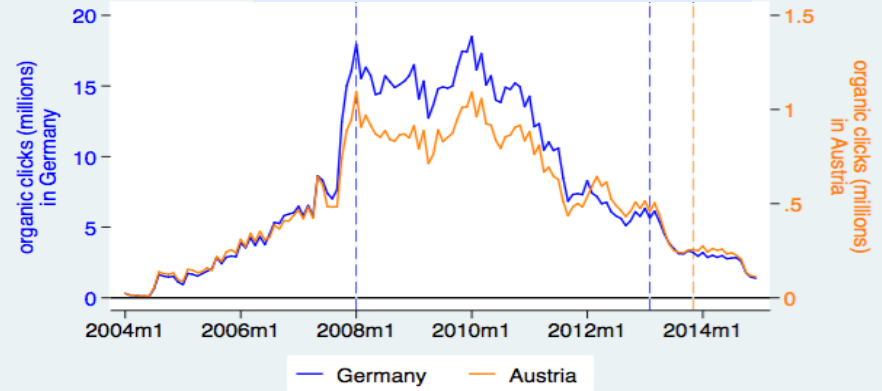


Showing Shopping Units did not impact traffic to CSSs

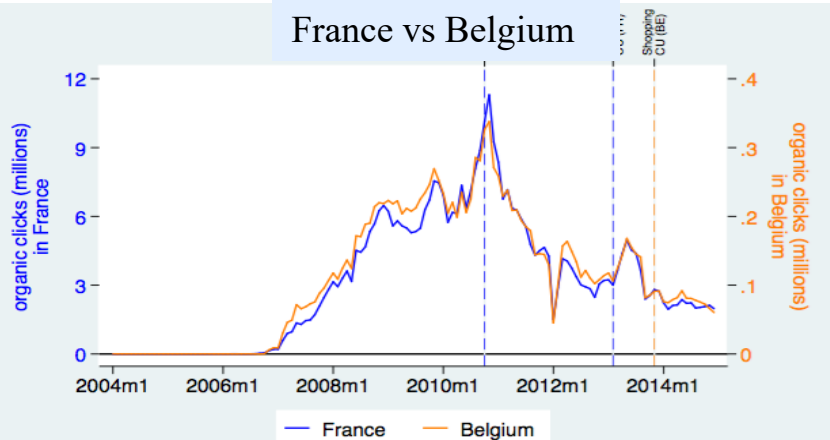
UK vs Ireland



Germany vs Austria



France vs Belgium



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

The Decision mischaracterizes competition in comparison shopping

- The Decision defines a market for CSSs that excludes merchant platforms, like Amazon, despite:
 - Internal documents identify platforms, such as Amazon, as the competitive threat
 - Industry reports confirm Amazon's leading position in product search and comparison
 - User surveys evidence users' view that Amazon and leading CSSs are substitutable
- The Decision gives two main reasons for excluding platforms: (i) platforms allow users to buy products, and (ii) platforms are customers of CSSs
- If platforms offer direct purchasing *and* product search and comparison, that makes them a stronger constraint
- A customer relationship is not relevant for demand substitution and users' choice

The screenshot shows a section of the Guardian website titled "promoted links from around the web" with the subtext "Recommended by Outbrain". It features four promotional cards:

- Card 1:** A portrait of a man with the headline "Brexit or not, only a fool ignores the march of Europe's new..." and the source "THE TIMES" circled in red.
- Card 2:** A photo of Barack Obama and Mitt Romney with the headline "RANKED: The Smartest U.S. Presidents" and the source "INSIDEGOV | BY GRAPHIQ".
- Card 3:** A cartoon of two men at a table with speech bubbles containing "\$65,000?" and "\$100,000,000?". The headline is "The average salary in the UK is £33,157. Calculate how much your CV is worth" and the source "THE INDEPENDENT NEWS" is circled in red.
- Card 4:** A photo of the London skyline with the headline "Post-Brexit: Could a weaker pound help some UK companies?" and the source "ISHARES. CAPITAL AT RISK".

Merchant platforms offer advanced product search and comparison functionality

The screenshot shows the Amazon UK search results for 'lego technic porsche'. The search results are sorted by Relevance. Annotations highlight several key features:

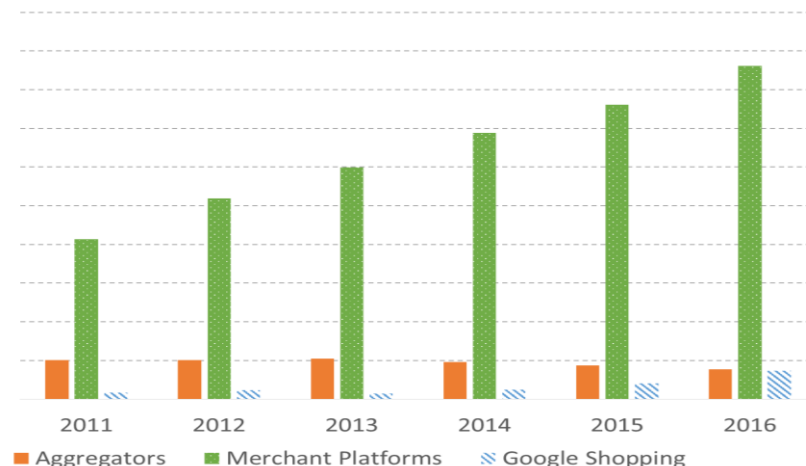
- Detailed search filters:** A box on the left side of the page lists various filters such as 'Toys & Games', 'Building & Construction Toys', 'Delivery Option', 'Delivery Day', 'Toddler Toy Material', 'Brand', 'Toys & Games by Age', 'Toy & Game Character', and 'Avg. Customer Review'.
- Sort by menu:** A box highlights the 'Sort by' dropdown menu, which includes options like 'Relevance', 'Price: Low to High', 'Price: High to Low', 'Avg. Customer Review', and 'Newest Arrivals'.
- Multiple ranking options (including price):** A box points to the 'Price: Low to High' and 'Price: High to Low' options in the sort menu.

The screenshot shows the product page for the 'LEGO 42056 Technic Porsche 911 GT3 RS Building Set'. The page displays the product image, price (£234.95), and customer reviews (6 stars). Annotations highlight the following features:

- Offers from 66 merchants for the same product item:** A box at the top right indicates that there are 66 offers for this product.
- Sorted by price + delivery cost:** A box points to the 'Price + Delivery' filter option in the 'Refine by' section.
- Filter functionality:** A box points to the 'Filter' button in the 'Refine by' section.

If less efficient competitors lose share, that is not anticompetitive foreclosure

- The Decision accepts that merchant platforms offer everything that CSSs do, as well as providing additional functionality (e.g., direct purchasing, after-sale support)
- If less efficient competitors lose share, that is not anticompetitive foreclosure (*Post Danmark I, Intel*)
- Google Shopping's share after 10 years of alleged abuse is marginal. Speculating about future anticompetitive effects when real world developments can be observed would be “paradoxical” (*Servier*)



What the Decision requires as a remedy

- The Decision finds that:
 - Google’s ranking of blue links is not a problem (para. 662)
 - New types of rich and prominent display, such as Shopping Units, are not a problem either (para. 661)
 - Google is entitled to charge for showing product ads in its ad space (para. 664)
- The Decision does not:
 - Dictate a particular outcome in terms of ad slot allocation
 - Object to Google applying generic demotion algorithms
 - Require restitution for past conduct (the Decision is limited to a cease and desist order).
- According to the Decision, the issue is that Google’s product results and ads appeared in Shopping Units, while others sites were only accessible through blue links
- The Decision requires that Google treat Google Shopping equally to CSSs
- In the words of the EC, the Decision requires Google to “*give equal treatment to rival comparison shopping services and its own service -- not more, not less.*”

The remedy provides CSSs with equal opportunity to place product ads on Google's result pages as Google Shopping

- Google Shopping competes on equal terms and operates as if it were a separate business, participating in the auction in the same way as other CSSs



- Under the remedy, CSSs bid to appear in Units on equal terms as Google Shopping. As before the Decision, clicks on product ads under the remedy still lead to a page where users can buy.
- The EC has confirmed that it does not object to the buy page requirement, which provides “*relevance*” and “*clarity*” for users.
- No changes to generic ranking or demotions are required as part of the remedy.
- The EC stated in March 2019 that the remedy does not raise compliance issues.



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