Self-preferencing alla luce del caso Google Shopping e oltre

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Seminario Concorrenze - **Concorrenza Digitale e Big Data**

Universita' degli Studi di Milano, 31 gennaio 2020

PROMOTING CHOICE • SECURING STANDARDS • PREVENTING HARM

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Self-preferencing in the light of the Google Shopping case and beyond

Overview:

1. The Google Shopping case background

2. What's the problem with self-preferencing?

3. Conclusion: Is ex-post competition policy suited to the issues or do we need ex-ante regulation?

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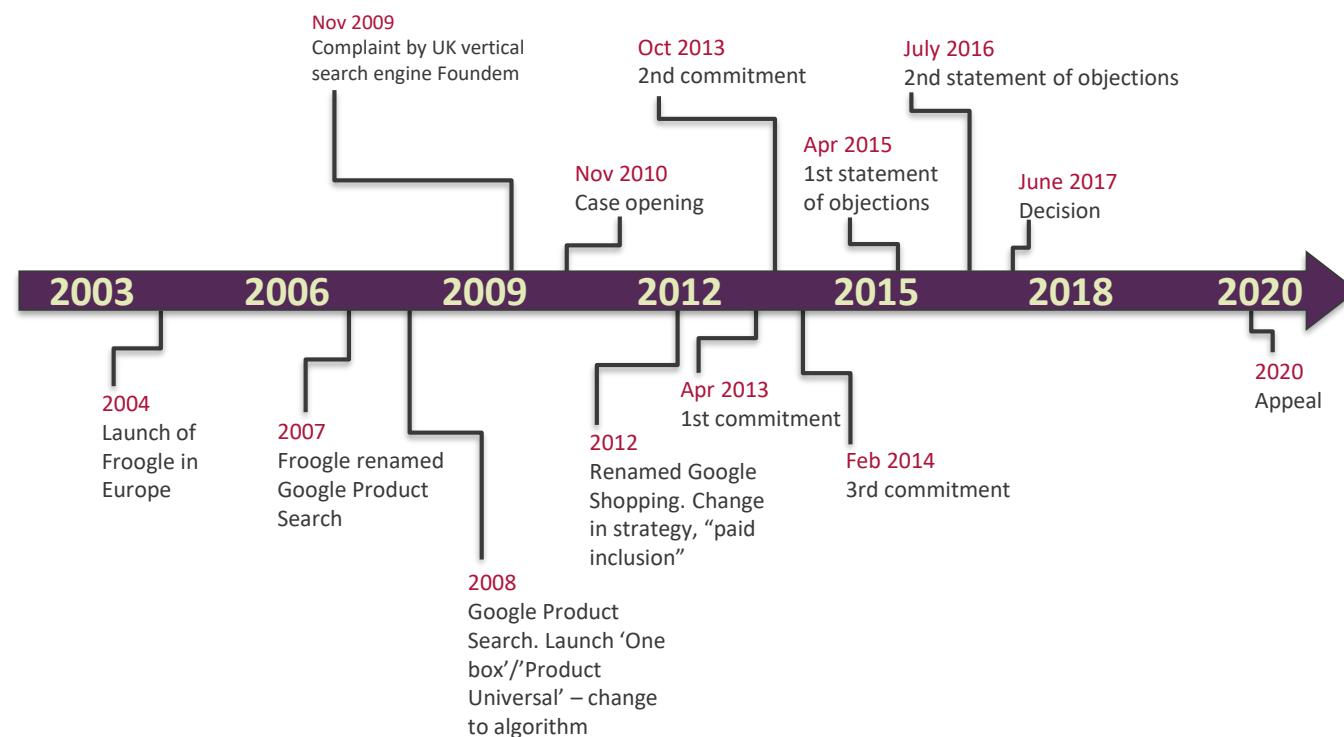
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1.1. The Google Shopping case background: A very long timeline

Very long history of the case:

- 2004 launch of Froogle as standalone

- One box at the top of the search results page launched in **2008**, along with changes to the algorithm- triggered complaint by **Foundem**, a shopping comparison website, in **2009**

- European Commission (EC) opens investigation in **2010**.

- June **2017** - EC Infringement Decision

- **2020** Appeal …

Nov 2009
Complaint by UK vertical search engine Foundem

Oct 2013
2nd commitment

July 2016
2nd statement of objections

Nov 2010
Case opening

Apr 2015
1st statement of objections

June 2017
Decision

2003 **2006** **2009** **2012** **2015** **2018** **2020**

2004
Launch of Froogle in Europe

2007
Froogle renamed Google Product Search

Apr 2013
1st commitment

2012
Renamed Google Shopping. Change in strategy, "paid inclusion"

Feb 2014
3rd commitment

2020
Appeal

2008
Google Product Search. Launch 'One box'/'Product Universal' – change to algorithm

1.2. The Google Shopping case background: The infringement decision and the conduct

The decision:

In 2017 the EC imposed a record **fine** of **€2.42bn** on Google for **abusing its dominant position in online search by giving preferential treatment to its own comparison shopping service**

The abusive conduct:

Google's shopping options (own comparison shopping service) are presented quite prominently at the top of the page, in a dedicated space with enhanced features ('Product Universal' or 'One Box'), while other competing comparison shopping services' results are demoted by Google's algorithms in a lower-ranked position. These appear as general search entries with no added features (e.g. images, price, merchant information)


Source: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_87

1.3. The Google Shopping case background: The definition of the relevant market- not an obvious question

Market definition: What is the relevant market?

- Vertical or **specialised search** platforms for different types of search queries (Comparison shopping services; Amazon in retail; Booking.com in travel)- COMPLEMENT rather than SUBSTITUTE for **general search** since a substantial number of consumers access specialised search via general search: "*Google often serves as a gateway to specialised search rather than an alternative*" (CMA 2019, 3.38) Vertical rather than horizontal relationship therefore **distinct markets**

- According to EC the conclusion applies even if market includes both comparison shopping services and merchant platforms (e.g. Amazon; eBay)

- If market includes merchants sites, impact of conduct can look different

- What is the correct relevant market?

Graph 53: United Kingdom - Traffic from Google's general search results pages to Google's comparison shopping service compared to total traffic to a sample of competing comparison shopping services
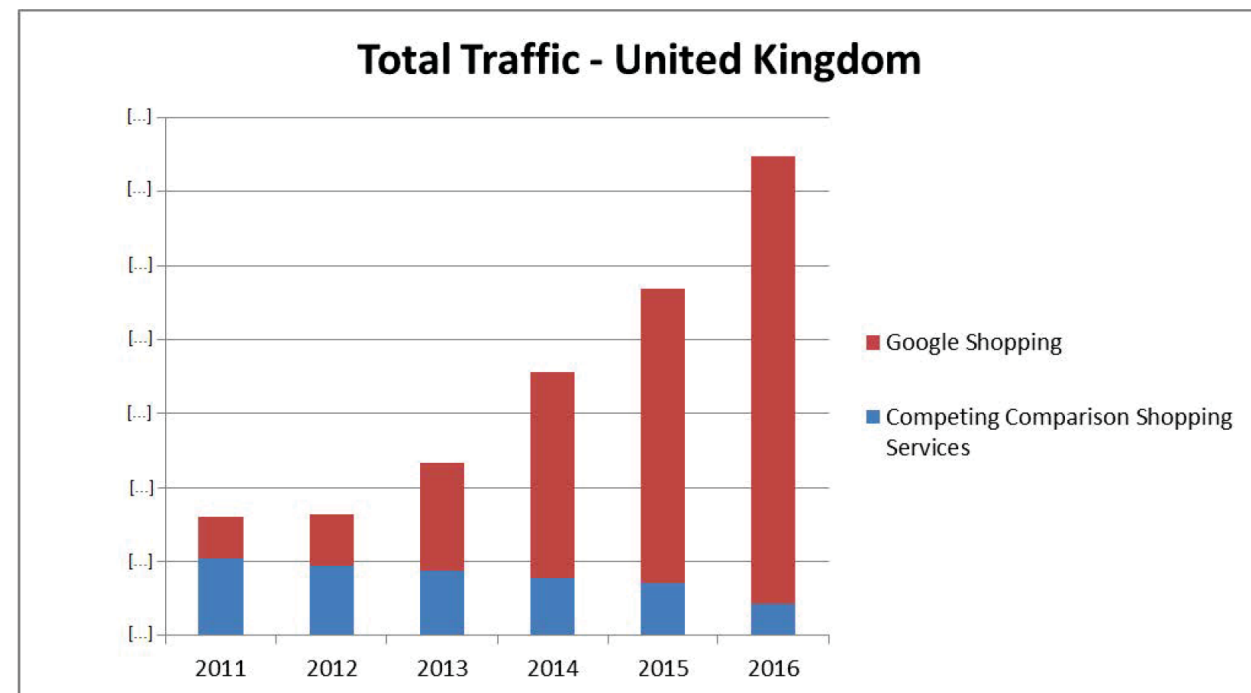
Source: European Commission (2017), Google Search (Shopping) Decision, page 152.

1.4. The Google Shopping case background: Harmful conduct?

Conduct: Leveraging market power from a market in which Google is dominant (general search) into a competitive market (comparison shopping services)

- General search results account for a large share of traffic for comparison shopping services

- Google's conduct is capable of extending Google's dominance from general search to comparison shopping and of protecting its dominance in general search

Harm: **Exclusionary abuse.** Foreclosing competition: This conduct reduces traffic from Google general search to competing comparison shopping services and diverts it to its own comparison shopping service

Exclusionary abuse BUT IS IT? What is the theory of harm? Actual or potential effect of reduced traffic. Large share of traffic diverted

If general search is a necessary network for access to consumers for comparison shopping services, tantamount to anticompetitive foreclosure harmful to competitors. But is it harmful to consumers?

1.5. The Google Shopping case background: Harm to consumers? But what does case law say?

Other channels?
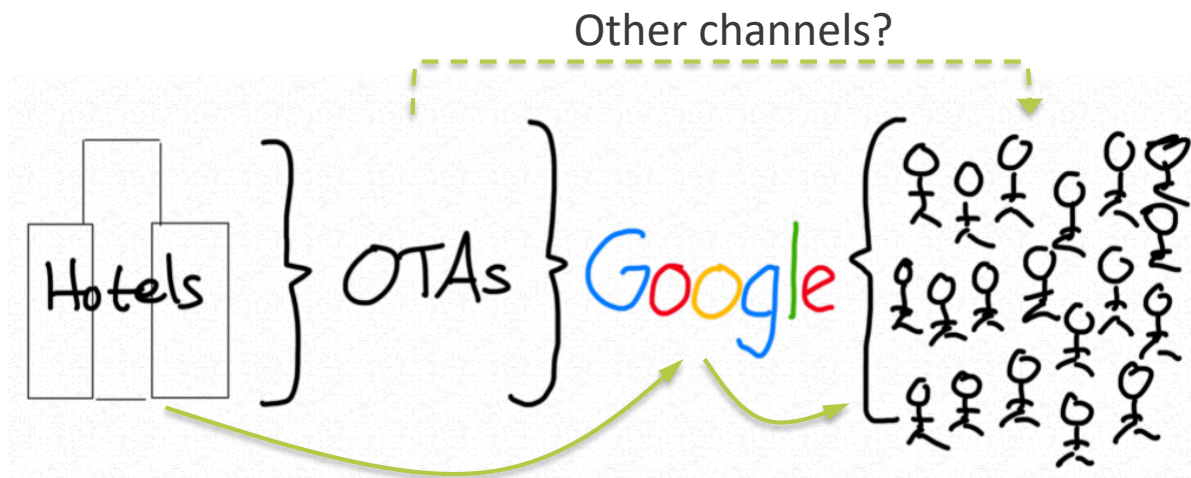
OTA: Online Travel Agents. Source: Elaboration on https://stratechery.com/2019/the-google-squeeze/

Harm to consumers? Traffic diversion indicates that anti-competitive effects may lead to reduced choice for consumers, higher fees for merchants, higher prices for consumers, and less innovation.

Case Law: No need to demonstrate essential facility? Does case law not fit the case? Gateway…

EC took stricter stance (FTC dismissed similar concerns)

Source: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_87

1.6. The Google Shopping case background: The remedy?

- In its decision the EC did not impose a remedy but **placed the burden on Google** to propose a remedy that solved the competition concerns within 90 days

- In 2014 some remedies had been proposed by Google, but rejected by the EC as Google would be able to extract significant rents from the allocation in the prominent box

- Lack of clear direction on what is acceptable conduct and what is not?

Source: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_87

1.7. The Google Shopping case background: The outcome

… Ten years later: Are consumers better off?

Any measure should ensure that Google treats comparison shopping **no less favourably** than its own comparison shopping service within its general search results…
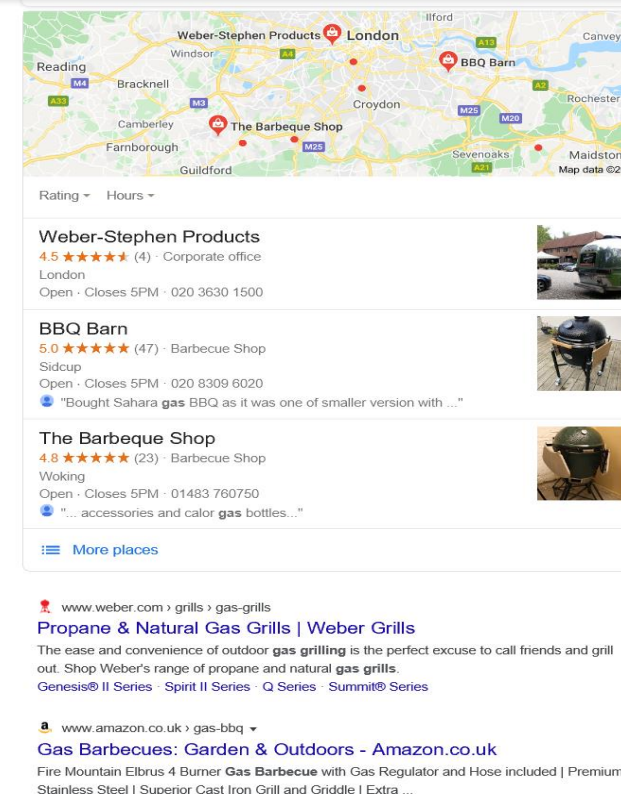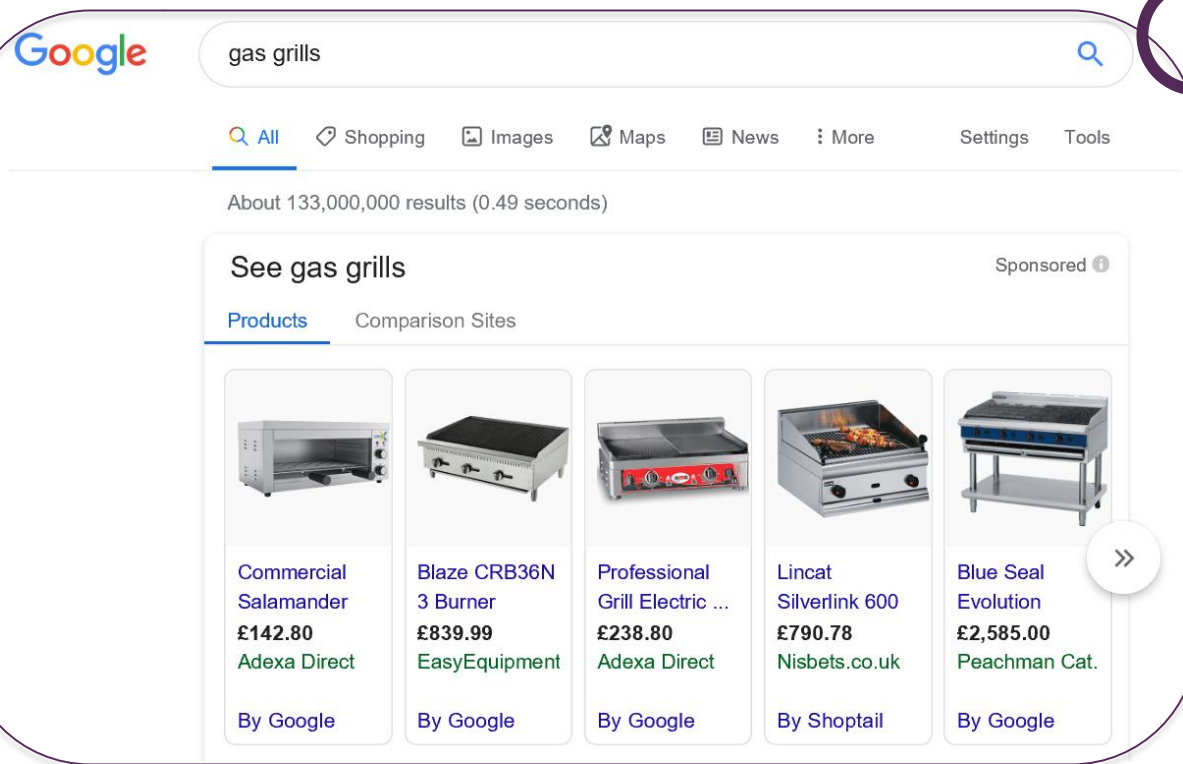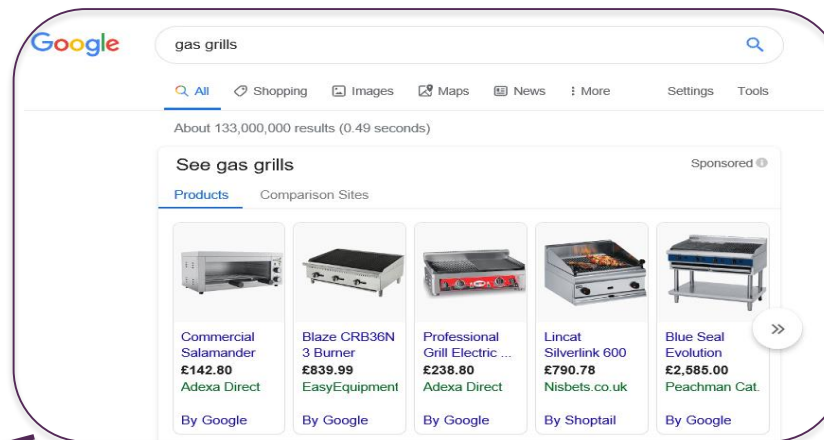
Source: Personal search on 15 January 2020

1.8. The Google Shopping case background: Where are we now?

"Changes in Google's search algorithm have lessened visibility on search results, resulting in a heavier reliance on paid advertising, CFO Alan Pickerill explained during the company's earnings call." (CNBC)

By being dominant in search, Google can leverage its dominance through Self-Preferencing

Google pays whatever it takes to be the default search engine. This enables it to maintain high barriers to entry and protect its market power.

(Evidence from CMA 2019)

Expedia, TripAdvisor fall more than 20% after blaming poor earnings on decrease in Google search results

PUBLISHED THU, NOV 7 2019•10:41 AM EST | UPDATED THU, NOV 7 2019•2:30 PM EST

Ganesh Setty

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KEY POINTS

- Shares of Expedia and TripAdvisor both reached new year-to-date lows during mid-day trade Thursday.

- The stock plunge follows both the travel stocks reporting third-quarter earnings misses after the bell Wednesday.

- Expedia's shares are down nearly 9% year-to-date, while TripAdvisor's shares are down about 42% year-to-date.

- The companies blamed weakened visibility in Google search results.

Source: CNBC https://www.cnbc.com/2019/11/07/expedia-and-tripadvisor-stocks-tank-after-poor-third-quarter-earnings.html

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2. **What's the problem with self-preferencing?**

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2.1. Self-Preferencing: What does it mean?

Self-Preferencing: *Giving preferential treatment to one's own products or services, when they are in competition with products and services provided by other entities.*

- **This is not per-se anticompetitive** (prohibition limited to essential facilities)

When is it a problem?

- Having achieved market power in one market, by leveraging into other markets, platforms are able to integrate and expand. While this can provide more functionalities and thus benefit consumers, it can result in market power at various stages of the chain

- Can lead to discrimination by a platform in favour of its own vertically integrated services to the detriment of competitors. This can occur without essential facility – particularly in **gateway/bottleneck markets**

- As platforms develop into vertically integrated eco-systems, self-preferencing becomes a **serious concern**

*"To deal with these types of problem, we believe that – because of their function as regulators –dominant platforms have a responsibility to ensure that their rules do not impede free, undistorted, and vigorous competition without objective justification. A dominant platform that sets up a marketplace **must ensure a level playing field on this marketplace and must not use its rule-setting power to determine the outcome of the competition**." (Competition Policy for the Digital Era, Report for DG Comp, Cremer et al., 2019, p. 6)*

- Problem **exacerbated** by a number of vertical mergers (Google/Doubleclick; Google/ITA; etc.)

2.2. Self-preferencing: Ecosystems- The elephant in the room

New business models have developed into ecosystems

Stylised and partial illustration of the Google ecosystem

Source: Ofcom 2019

Note: the blue shading highlights services within the Google ecosystem.
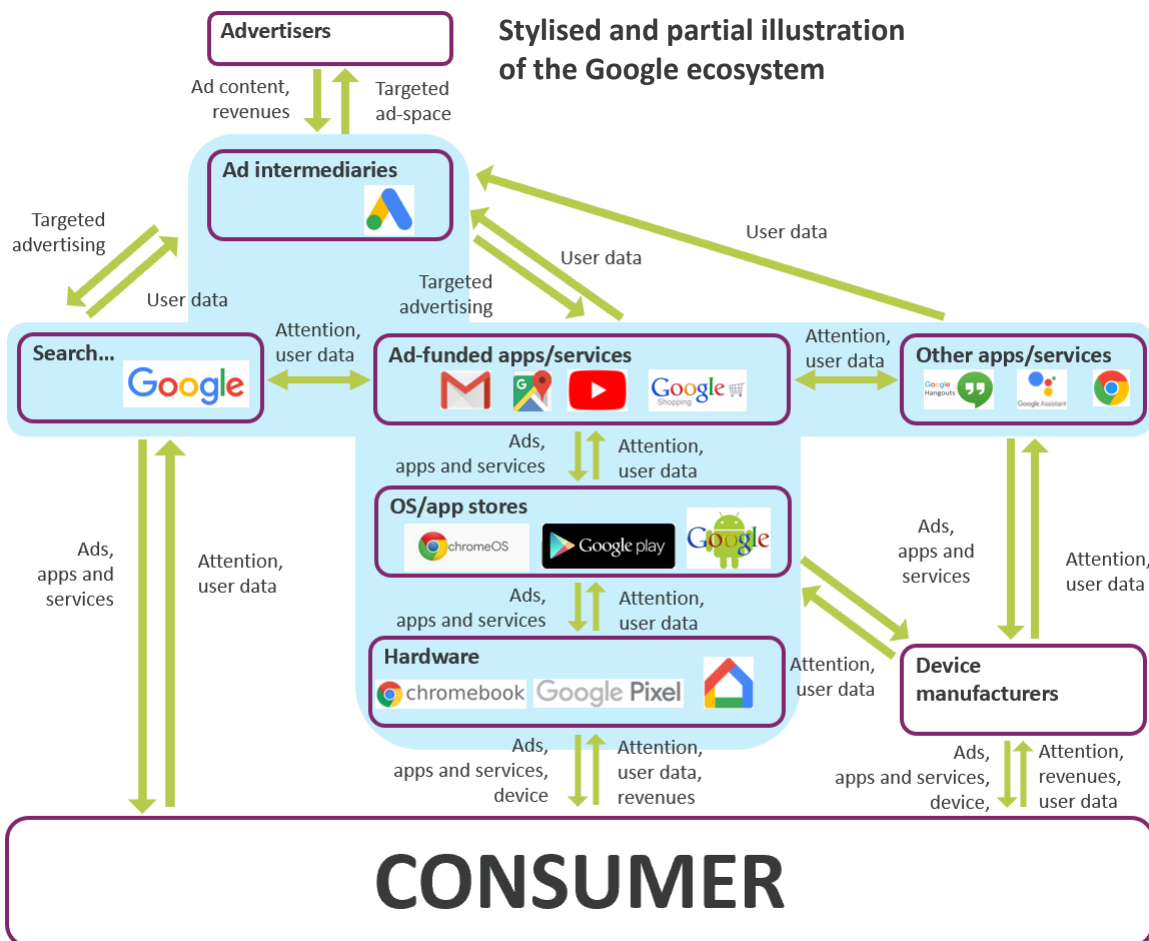
If we focus on one small piece of the jigsaw we risk not capturing the issues:

- A variety of intertwined services which defy traditional business models (and market definition!)
- Services offered in one market monetized in a different market
- Often multi-sided markets and Zero prices
- Users' data and/or attention means of exchange
- Vertical integration and competition with their own business customers (e.g. Google Ad stack)

2.3. Self-preferencing? – Market power and key enabling features

Some platforms present some key characteristics which enable them to acquire market power
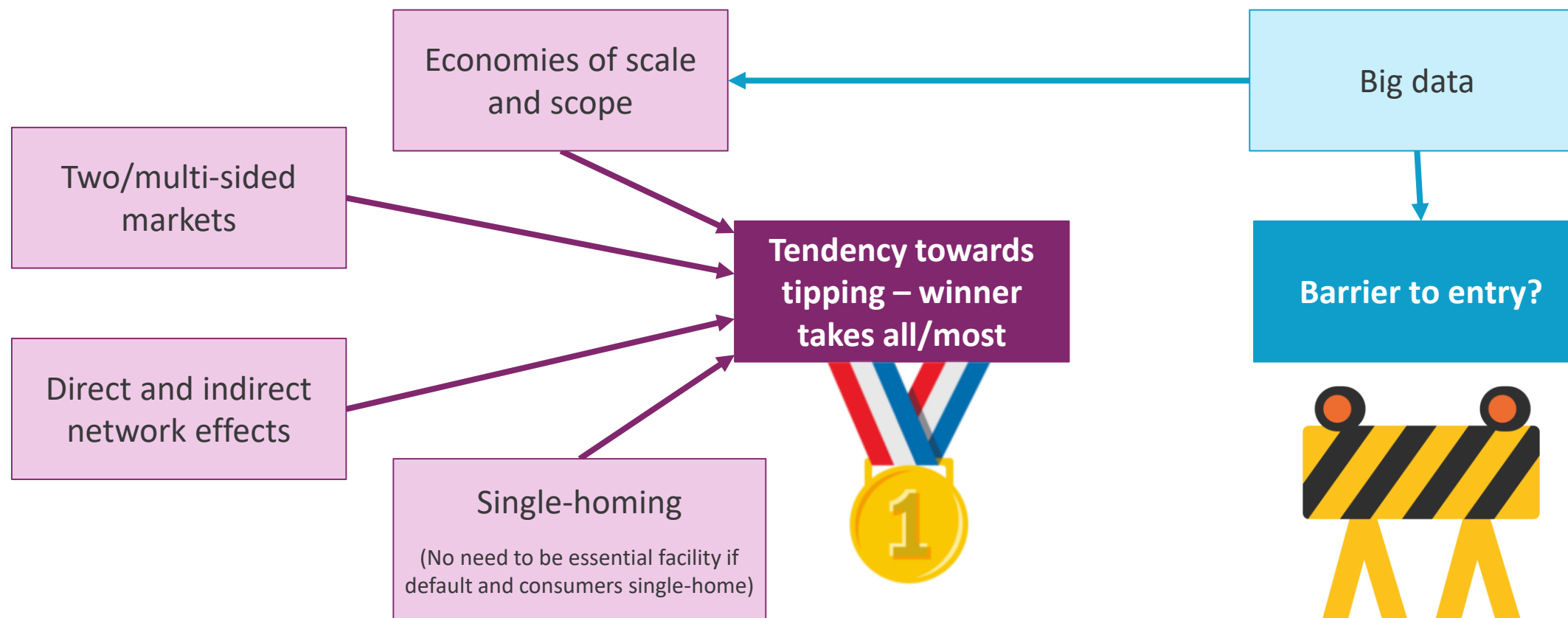
Self-preferencing enables leveraging this market power into other markets

2.4. Could Self-preferencing be pro-competitive?

	Amazon	Apple	Google	Facebook	Microsoft
Advertising platforms	👁		👁	👁	👁
Browsers	▭	▭	▭		▭
Cloud services	☁	☁	☁		☁
Digital assistants	🎤	🎤	🎤	🎤	🎤
Email and messaging		✉	✉	✉	✉
General Search			🔍		🔍
Maps		🗺	🗺		🗺
Operating systems	🖥	🖥	🖥		🖥
Smartphones/tablets	📱	📱	📱		📱
Social networks				🕸	🕸
Streaming video	▶	▶	▶	▶	

H. Varian: "*Competition is just one click away*" … but is it?

- Competition among ecosystems?

- Can self-preferencing be used to compete against incumbents in other services if competition occurs between ecosystems?

Source: Ofcom, drawing on Varian (2017), Use and abuse of network effects

2.4. What is the problem with competition in digital markets? – Market failures

Market features might lead to market failures or market imperfections – *Ofcom (2019)*

Market power
- Access to Big Data
- Network effects
- Economies of scale/scope

Information asymmetry
- Consumers do not have information or choice: e.g. use of their data (T&Cs); sponsored v organic search results, etc

Externalities
- Platforms may not fully consider the societal impact of their actions: e.g. attention maximising features that can potentially harm users' wellbeing via harmful content

Barriers to switching
- Lack of data portability
- Learning costs (eg iPhone to Android)
- Technical barriers and tying

Behavioural biases
- Salience (e.g. zero price)
- Default bias (pre-installed apps)
- Prominence/framing (dark pattern techniques used to nudge consumers to making choices in the best interest of the platform, CMA 2019, 4.110)

Characteristics often mean competition is *for* the market rather that *in* the market – but is it?

And can this competition address market failures? Evidence to date says "Not really"

2.5. Google's persistent market power in search- The CMA's Market Study

UK digital advertising £13.4 bn in UK (experiencing rapid growth).
Now accounts for 57% of total advertising revenues (CMA 2019, 2.31)

Google has **market power** in search advertising- its rivals face significant barriers to attracting advertisers, in addition to the barriers to building share on the consumer side

Figure 5.2: Estimated UK search advertising revenues by year (2010-2018)
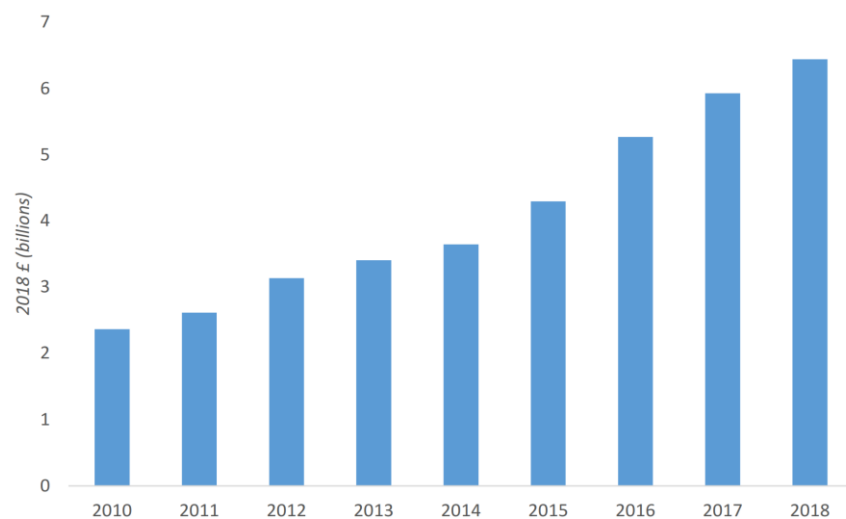
Source: CMA analysis of parties' data.

Figure 3.3: Shares of supply by page referrals from January 2009 to June 2019
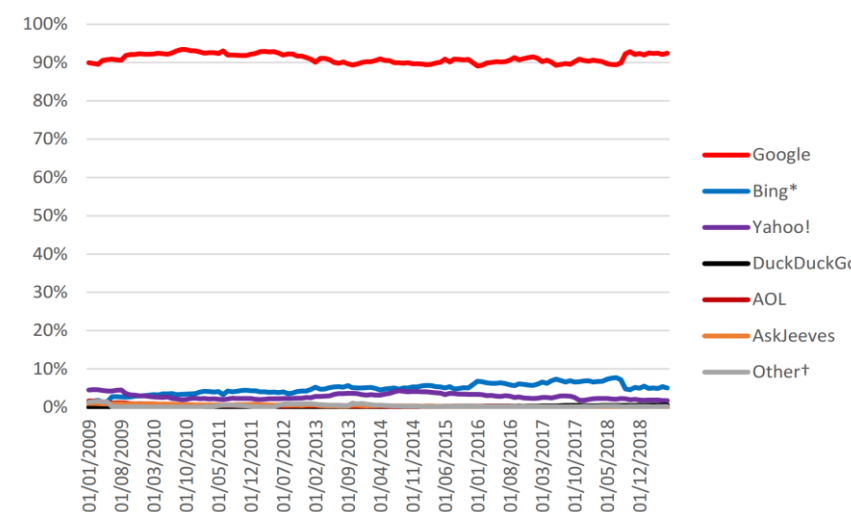
Source: Statcounter Global Stats.

"*In search, Google has negotiated agreements with Apple and with many of the largest mobile phone manufacturers under which it pays a share of search advertising revenues to these partners in return for **Google Search occupying the default search positions on the device**. The scale of these payments is striking and demonstrates the value that Google places on these default positions. In 2018, **Google paid $1.3 billion in return for mobile default positions in the UK alone**, the vast majority of which was paid to Apple for being the pre-installed default on the Safari browser. Rival search engines to Google that we spoke to highlighted these default payments as one of the most **significant factors inhibiting competition in the search market**.*" (CMA 2019, para 30)

2.6. Leveraging market power in Digital Advertising. The CMA's Market Study

Online publishers (such as newspapers) sell their inventory (advertising space) on a market which relies on a **complex and opaque chain of intermediaries- the 'ad tech stack'**. This has been consolidating and **Google now holds a strong position at each level of the chain**. This raises two sets of concerns:

- Google faces a strong conflict of interest in acting simultaneously as an intermediary for other players and a player itself

- Google is able to leverage the market power from its 'owned and operated' advertising inventory into the open display market and make it harder for third-party intermediaries to compete

These concerns can manifest themselves in many ways:

- **Lack of transparency of auction process:** Publishers and advertisers rely on intermediaries to manage the auction process but cannot observe what the intermediaries are doing or how much they are being charged at different points in the supply chain (CMA 2019, Ch.5)

- **Self-preferencing in display advertising:** Google's vertically integrated advertising intermediation business allows self-preferencing between different elements of its advertising inventory (CMA 2019, Ch.5)

- **Foreclosure of publishers:** Impact on journalism and democracy. Digital advertising is a vital source of revenue for content providers such as online newspapers. Problems in the digital advertising market mean that such providers receive a lower share of advertising revenues, which may reduce incentives and ability to invest in news. A thriving and competitive market for independent news and journalism is essential for an effective democracy. (Carirncross Review, 2019; CMA, 2019)

2.7. Monopoly Profits? The CMA's Market Study

- Google sets the reserve price and ranking weightings in auctions which can enable it to increase the price paid by advertisers, thus extracting more economic rents

- Benefits for customers of increasingly integrated services but- is this harming competition? And, most important, does it ultimately harm consumers?

  o Other Google cases: Tying of Android Operating System with Google applications in mobile devices; Google Ad Sense......

- Control of vast amounts of consumers data and its position in search enable Google to extend market power to digital advertising

- Figure D.1 shows Google's parent company, Alphabet, increasing revenue and profit over time. Google Search is the main driver of this profitability. (CMA, 2019, Appendix D)

**Figure D.1: Alphabet Group Revenue and Profit between 2004 and 2018**
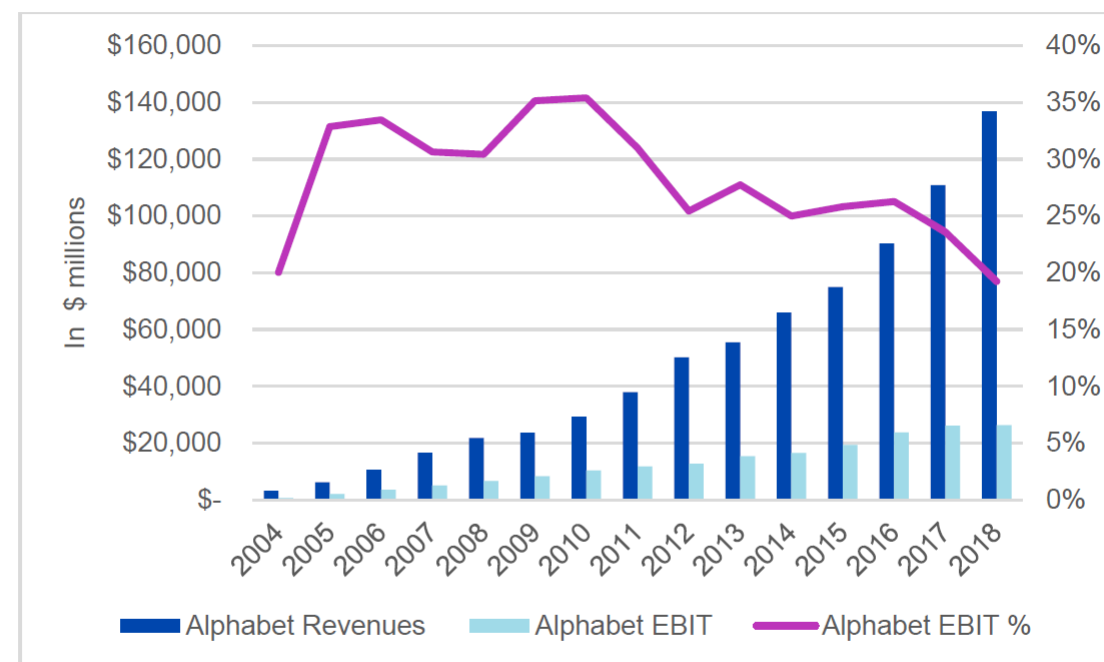
Source: CMA analysis of Alphabet 10-K

2.8. Google's Profitability. The CMA's Market Study

- Rate of return on capital employed (ROCE), normal measure of profitability derived using accounting profits which are then adjusted to arrive at an **'economically meaningful measure of profitability'**

- In a competitive market we would expect firms to **'earn no more than a "normal" rate of profit'**

- ROCE is calculated by dividing EBIT, shown in Figure D.1 (see previous slide), by the value of capital that is employed in the relevant business.

- ROCE is a good measure to test where profits for a particular firm or sector are high, because it can be compared against an objective benchmark, the weighted average cost of capital (WACC) (CMA 2019)

- ROCE for Google search advertising >40%, upper bound confidential (CMA 2019, Appendix D, para 56)

Figure D.5: ROCE comparison across Alphabet and Google Search for 2018
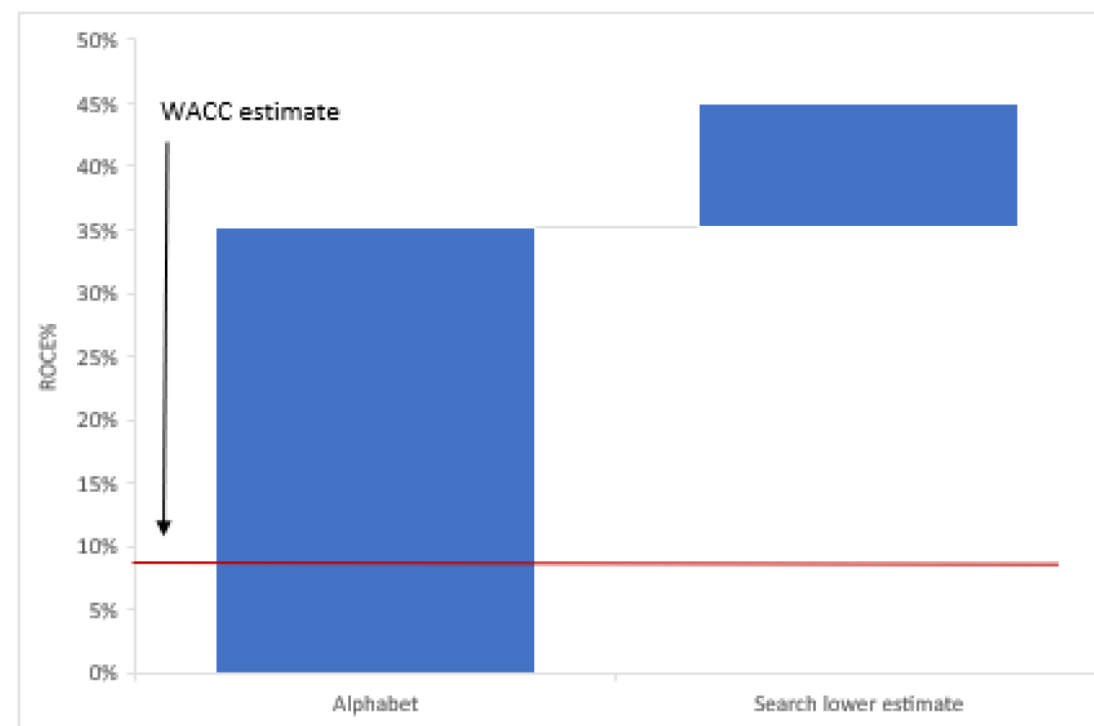
Source: CMA analysis of Google submissions

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3. Conclusion: Ex-post (competition policy) v ex-ante (regulation)

Google Shopping case demonstrates the problems with ex-post intervention: Competition Policy suffers from severe limitations in tackling anticompetitive outcomes emerging in digital markets:

- **Cases take very long time** (10+ years and counting…)- too late by the time you intervene in markets where 'winner takes all'

- Markets are fast moving, often multi-sided and business models are new and complex (ecosystems): **problems with market definition**

- **Problems with identifying harm** (e.g. zero prices in some markets and monetisation in different markets)- Existing theories of harm have been stretched beyond their traditional application. Typically **exclusionary abuses** BUT is this more an issue of **exploitative abuses**? Harms in other areas (e.g., privacy; harmful content; publishers' sustainability)

- **Limitations of existing case law**- Too high bar for data: essential facility for (*Bronner, IMS Health, Microsoft*) as mostly theoretically able to be duplicated and non-rivalrous; No real case law on exploitative abuses

- **Problems with remedies**:
  - Fines not a sufficient deterrent
  - Behavioural remedies difficult to design and monitor (e.g. monitoring algorithms!?)- see *Google Shopping* case example
  - Structural remedies: unbundle ownership/structural separation (very interventionist; risk chilling incentives to invest and undermining businesses
  - Behavioural biases- Exploitation of consumers' behavioural biases can make remedies ineffective (e.g. Defaults; framing; myopia etc.)
  - Need constant monitoring and adaptation to avoid remedies becoming ineffective overtaken by business changes

- **Calls for ex-ante regulation** (Furman report; EC Experts report; Stigler Center report)