



Google's (Non-) Compliance with the EU Shopping Decision

a study based upon empirical data of
25 comparison shopping services



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FOREWORD

On 27 July 2017, the European Commission adopted a decision in proceedings pursuant to Article 102 TFEU (Case AT.39740) addressed at Google Inc. and Alphabet Inc. (Google). In its Decision, the Commission found that, between January 2008 and 27 July 2017, Google infringed Article 102 TFEU by positioning and displaying more favourably, its own comparison shopping service (compared to competing comparison shopping services) in the general search results pages of its search service “Google Search”.

This study assesses whether the measures taken by Google since the Decision conform with the obligations imposed by the Decision’s operative part. The study is based upon empirical data (for example, data covering consumer traffic, conversions, revenues and customer reactions) provided by 25 European comparison shopping services¹ operating in 21 European markets², including the market leaders in 7 of the 13 commercially most relevant countries³. Such services have combined their data for a representative economic and legal market analysis of the implications of Google’s chosen compliance mechanism.

Following an executive summary (see below at pp. 14 et seq.), as well as a summary in 13 illustrations with corresponding explanations (see below pp. 35 et seq.), the main analysis will first outline the core elements of the Decision (Chapter 1) before explaining the measures that Google implemented to remedy the abuse (Chapter 2). The central assessment then follows in Chapter 3, examining the economic impact of Google’s chosen compliance mechanism and in Chapter 4, examining the mechanism’s compliance with the Decision. Chapter 5 outlines the consequences of the findings for Google and the Commission.

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¹ These are in alphabetic order: Ceneo.pl, Choozen, Ciao, Compare Group, Bianco, FAVI, Geizhals, Glami, Guentiger.de, Heureka, idealo, Kelkoo, Koopkeus, KuntoKusta, LeGuide, LionsHome, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, PriceRunner, Testberichte.de, Trovaprezzi, Ladenzeile.de/Shopalike.com, x24factory_Moebel24.

² Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland and the United Kingdom.

³ Germany, Poland, Czech Republic, Hungary, Italy, France, Slovakia, all figures are based on data from SimilarWeb (category “E-Commerce price-comparison”), 25 September 2020.

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The information and views set out in this study are those of the author and do not necessarily reflect the official opinions of the companies that participated in the study. Since the study is based upon data provided by external parties, the author does not guarantee the accuracy of the data included in this study and cannot be held responsible for the use which may be made of the information contained therein.

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BRIEF TABLE OF CONTENTS

FOREWORD.....	4
BRIEF TABLE OF CONTENTS	6
TABLE OF CONTENTS	7
EXECUTIVE SUMMARY	14
A SUMMARY IN 13 ILLUSTRATIONS.....	35
MAIN ANALYSIS	62
Chapter 1: Google Search (Shopping) Decision.....	63
Chapter 2: Google’s Compliance Mechanism.....	79
Chapter 3: Economic impact of Google’s Compliance Mechanism	107
Chapter 4: Legal assessment of Google’s Compliance Mechanism	171
Chapter 5: Consequences for Google and the Commission.....	317
LIST OF ABBREVIATIONS	321
LIST OF REFERENCES.....	323
LIST OF ILLUSTRATIONS.....	332
ANNEX 1 – SCREENSHOTS OF VARIOUS SHOPPING UNITS.....	338
ANNEX 2 – ANALYSIS OF ‘CSSS’ TAKING PART IN GOOGLE’S CM.....	386

TABLE OF CONTENTS

FOREWORD	4
BRIEF TABLE OF CONTENTS	6
TABLE OF CONTENTS	7
EXECUTIVE SUMMARY	14
A SUMMARY IN 13 ILLUSTRATIONS.....	35
MAIN ANALYSIS	62
Chapter 1: Google Search (Shopping) Decision.....	63
A. Introduction	63
1. Overview: decision – remedy – compliance mechanism – monitoring	63
2. Industry concerns regarding the inefficiency of Google’s Compliance Mechanism	66
B. Interplay of abuse, remedy and compliance in competition law	69
1. Requirements for an effective remedy in digital markets.....	69
2. Compliance in the framework of the remedy imposed	72
C. The Google Search (Shopping) decision	73
1. The identified abuse	73
2. The imposed remedy.....	77
Chapter 2: Google’s Compliance Mechanism.....	79
A. Shopping Ads	80
1. The new design and features of the CM-Shopping Units.....	80
1.1 New “Product View of Shopping Unit” for price comparison.....	81
1.2 New “Showcase View of Shopping Unit” for grouped offers.....	84
2. The new auction mechanism for Shopping Ads in Google’s CM-Shopping Units	85
3. The bidding of Google Shopping Europe (GSE) and competing CSSs for Shopping Ads	89
4. Discounts and free support for merchants that use CSSs other than GSE – the combination of “SpendMatch”, “self-service” and account “waiver”.....	91
4.1 How Google described the CSS Partner Program and the SpendMatch discount scheme.....	92
4.2 How the market understood the CSS Partner Program and SpendMatch – rise of agencies acting as ‘CSSs’ with pretence frontend and no backend	94
4.3 Rise of white label ‘CSSs’ for merchants’ “self-service”	100
4.4 Google granting free customer support to merchants that switch to another CSS signing a “waiver” to reactivate the GSE account.....	101
4.5 Google’s broadest possible definition(s) of a ‘CSS’ to gloss over the statistics.....	102
B. Comparison Listing Ads	104

Chapter 3: Economic impact of Google’s Compliance Mechanism	107
A. Results of a representative traffic and revenue data analysis of 25 CSSs from across Europe	107
1. Methodology of the data analysis	108
2. Results of the data analysis	110
2.1 Despite growing e-commerce, the CM has not led to any increase in generic search traffic from Google’s general search service to competing CSSs	111
2.2 The value of generic search traffic decreased as its bounce rate increased due to a lower propensity to buy of those users let through to competing CSSs by the CM	113
2.3 Profitability of generic search traffic has declined significantly since the CM	117
2.4 The only links in a Shopping Unit that lead users to a website of a CSS, the “By CSS” and “view more” links, account for less than 1% of traffic	118
2.5 Leadouts to merchants via clicks on Shopping Ads are not profitable for CSSs	119
2.5.1 Leadouts to merchants via clicks on Shopping Ads have increased	120
2.5.2 Due to increasing auction costs, profits for CSSs from bidding for Shopping Ads are low and stagnating as Google expropriates competing CSS’s surplus	121
2.6 Revenues for CSSs from bidding for Shopping Units do not provide compensation for the losses from declining generic search traffic profitability	123
2.7 Since the launch of the CM, the overall profitability of traffic coming from Google has declined significantly	126
B. Assessment of the Compliance Mechanism’s economic impact	128
1. The CM further weakens (genuine) competing CSSs	128
1.1 The business of a CSS – what constitutes the relevant product market?	129
1.1.1 Consumer-facing frontend to engage with consumers	130
1.1.2 Merchant-interface to engage with merchants	131
1.1.3 Core: backend to best match consumer query and merchants’ offers	133
1.1.3.1 Product and content database	133
1.1.3.2 Algorithm-driven intelligence for matching query and offers / content	134
1.1.4 How CSSs compete – and why investments in the backend matter	136
1.1.5 The role of online intermediaries (marketing agencies, affiliate networks and ad tech companies) on the separate markets for digital advertising services	137
1.2 CSSs do not benefit from the CM, as it only affects the business of online intermediaries operating on a separate market	138

TABLE OF CONTENTS

1.2.1 CSSs do not benefit and do not participate in the CM because, at best, it only allows them intermediation activities outside of their CSS market.....	138
1.2.2 Google (needed to) incentivise intermediaries to set up fake ‘CSSs’, so that they could be presented as ‘success stories’ of the CM.....	139
1.2.3 The economics of the CM do neither incentivise nor enable online intermediaries to sufficiently invest in the infrastructure required to become genuine CSSs	144
2. The CM only benefits Google’s own (on-SERP) CSS	147
2.1 The CM turns CSSs from competitors into paying customers and cost-free sales teams to recruit and onboard new merchants to Google’s CSS	147
2.1.1 Google presents the CM as a service to merchants – not to CSSs	148
2.1.2 Google’s published ‘success stories’ only show the advantages of <i>Shopping Ads</i> for merchants – no growth of competing CSSs	150
2.2 Google makes its profits with the newly formed on-SERP-CSS, not with the standalone website left to the subordinated Google Shopping Europe (GSE).....	151
2.2.1 How Google split up the former <i>Google Shopping</i> into a highly profitable on-SERP-CSS and an advertising intermediary called GSE.....	151
2.2.2 At its best, the CM allows for equal treatment with the intermediary GSE but not with Google’s on-SERP-CSS	153
2.3 (Only) Google’s on-SERP-CSS provides the entire CSS value chain.....	155
2.4 The CM significantly strengthens Google’s on-SERP-CSS.....	156
3. Consequences: The CM monopolises the entire value chain for Google’s own CSS to the detriment of consumers and merchants alike.....	159
3.1 Consumers and merchants increasingly single-home with Google’s on-SERP-CSS	160
3.2 The CM monopolises the entire value chain for Google’s on-SERP-CSS	162
3.3 Google’s CM harms consumers	163
3.4 Google’s CM harms merchants	166
C. Summary: the new structure of the comparison shopping value chain	168
Chapter 4: Legal assessment of Google’s Compliance Mechanism	171
A. Google’s failure to bring the conduct identified in Article 1 of the Decision to an end	171
1. The provision of CM-Shopping Units constitutes a CSS in itself (on-SERP-CSS) that Google favours on its general search results pages over competing CSSs.....	172
1.1 The Decision’s central prohibition of the favourable positioning and display of “parts or all” of any CSS operated by Google	172
1.1.1 The definition of “favourable positioning and display” in footnote 3	172
1.1.2 Distinction between favouring of “links to” and “parts or all” of Google’s own CSS	173

TABLE OF CONTENTS

1.2 The Decision's assessment of the provision of Shopping Units	173
1.2.1 The Decision defines the provision of Shopping Units in and of itself as "part" or "all" of Google's own CSS	174
1.2.2 The Decision defines the provision of Shopping Units within general search results pages as "all" of Google's own CSS when there is no corresponding standalone website	175
1.2.2.1 The provision of Shopping Units is a "part" of Google's own CSS where there is a corresponding standalone CSS website	175
1.2.2.2 The provision of Shopping Units is "all" of Google's own CSS where there is no corresponding standalone CSS website	175
1.2.2.3 The Decision defines the provision of Shopping Units as a standalone CSS operated by Google	176
1.2.3 The provision of Shopping Units is treated as a CSS throughout the entire Decision	178
1.2.3.1 The definition of "favouring" of its own CSS refers to Shopping Units	179
1.2.3.2 The definition of Google's CSS explicitly covers Shopping Units	179
1.2.3.3 The definition of a "comparison shopping service" does not require a standalone website	180
1.2.4 The Decision also identifies the standalone provision of equivalent Product Listing Units by other search services as a standalone CSS	180
1.2.4.1 The Decision identifies the provision of Product Listing Units by general search services, including Bing, as a separate CSS	181
1.2.4.1.1 Bing's Shopping Units work "the same" as Google's Shopping Units	183
1.2.4.1.2 Google and the Decision call the provision of Bing's Product Listing Units a CSS	192
1.2.4.2 The Decision identifies the provision of Product Listing Units on third-party websites as a CSS	192
1.2.4.2.1 Product Listing Units displayed on third-party websites work "the same" as Google's Shopping Units	193
1.2.4.2.2 Google and the Decision call the provider of Product Listing Units a CSS, not the third-party host website	195
1.2.5 The description of the "abusive conduct" treats the provision of Shopping Units as a separate CSS, not least because >80% of the diverted traffic led users directly from the Unit to merchants, not to the Google standalone website	196
1.2.6 The calculation of the fine takes the significant revenues from the isolated provision of Shopping Units into account	197

TABLE OF CONTENTS

1.2.7 Google's only defence: "the Shopping Unit is not a CSS in itself" – and what recitals (408), (412) and (423) actually mean	198
1.2.7.1 The difference between the invisible backend of providing Shopping Units and the Shopping Unit as the visible consumer-facing frontend	199
1.2.7.2 Recitals (408), (412) and (423) only clarify that in order to constitute a CSS not every single Shopping Unit it displays needs to contain different offers for the same product item	202
1.2.7.3 While it was not "the Commission's case" that Shopping Units in and of themselves constitute a CSS, the Decision clarifies the fact that their provision constitutes a CSS	208
1.2.7.4 While the SO/SSO/LoF were still ambiguous on whether a CSS requires a standalone website, the Decision clarified that it does not	210
1.2.7.4.1 The SO/SSO/LoF referred to Shopping Units and product ads as mere "emanations" of a Google CSS, and not yet as clearly as "all of" Google's CSS.....	210
1.2.7.4.2 Google responded that Shopping Units and Shopping Ads do not constitute a CSS in themselves, but are part of Google's general search service.....	211
1.2.7.4.3 The Decision rejected Google's argument and clarified that providing Shopping Units is not just an "emanation" of a Google CSS, but an independent CSS.....	212
1.2.8 A look to Turkey: adopting the Decision's rationale, in its January 2020 decision on Google Shopping, the Turkish Competition Authority explicitly treats Google's provision of Shopping Units as an independent CSS	215
1.3 The provision of CM-Shopping Units continues to constitute a CSS.....	216
1.3.1 The CM is akin to Bing's powering of Shopping Units – which Google and the Decision identified as a CSS	217
1.3.2 The richer CM-Shopping Units allow even more product comparisons than its predecessors.....	218
1.3.3 Including product ads uploaded by CSSs on behalf of merchants does not alter the fact that the provision of CM-Shopping Units constitutes a CSS.....	235
1.3.4 That CM-Shopping Units are meant to guide the user to the merchant's website as quickly as possible by satisfying their comparison demand directly further confirms the CSS status	236
1.3.5 The fact that consumers use Shopping Units more and more although the frontends of competing CSSs offer more filtering options further confirms the CSS nature of Shopping Units and the continuing abuse	237
1.3.6 The provision of CM-Shopping Units only fits into the definition of the market for CSSs	239
1.3.6.1 Google's provision of Shopping Units is not part of the market for general search services	239

TABLE OF CONTENTS

1.3.6.2 Google's provision of Shopping Units does not fall into the market for online search advertising platforms	245
1.3.6.3 Google's provision of Shopping Units does not fall into the market for merchant platforms	247
1.3.6.4 Filters and sorting tools directly in the results unit are not a constitutive criterion for a CSS as defined in the Decision	251
1.3.6.4.1 Google has included several powerful filters and sorting tools around its on-SERP-CSS frontend	251
1.3.6.4.2 The Decision's defining of specialised search services in general, CSSs in particular and Google Shopping without mentioning any tools of filtering and sorting	258
1.3.6.4.3 While distinguishing CSSs from other services, the Decision does consider tools of filtering and sorting as a relevant distinguishing criterion	259
2. Google continues to favour its own on-SERP-CSS on general search results pages	261
2.1 No other CSS may display equivalent groupings of search results sourced from its own product database and selected by its own specialised algorithms	261
2.2 Only Google's own CSS may provide its service to consumers directly on Google's general search results pages, without any need for a click and at no cost to Google's CSS	261
2.3 Allowing the uploading of product feeds and the bidding for ads in favoured Shopping Units reserved to Google's CSS provides no equal treatment	262
2.3.1 CSSs could bid on behalf of merchants prior to the CM – without this precluding the abuse	262
2.3.1.1 The Decision requires equal treatment on general search results pages, not any access to Shopping Units	262
2.3.1.2 Competing CSSs always had 'access' to Shopping Units if they acted as pure intermediaries – which did not prevent the abuse	263
2.3.1.3 Google's "access to the Shopping Unit" does not apply to the market for CSSs, as it only allows activities that take place outside of this market	266
2.3.2 Voluntarily adding "By CSS" and "view more" links that no one clicks at does not create equal treatment	268
2.3.3 The case does not concern CSSs' access to Shopping Units, but the favouring of Shopping Units within Google's general search results pages as such	268
2.3.3.1 A response to Google's advisers <i>Graf</i> and <i>Mostyn</i> defending the CM in the Journal of Competition Law & Practice, September 2020	268
2.3.3.2 Google's 'access argument' in light of Slovak Telecom	284
2.3.3.3 Google's 'access argument' in light of the failure of Google's 'access remedy' to have any economic impact	285

TABLE OF CONTENTS

B. Google's failure to bring the anti-competitive effects of the conduct referred to in Article 1 to an end	286
1. The CM fails to cease the diversion of traffic from Google's general search results pages away from rival CSSs and to Google's own CSS	286
1.1 Instead of increasing, the CM further decreases generic search traffic from Google's general search results pages to rival CSSs	287
1.2 Instead of decreasing, the CM further increases search traffic to Google's own CSS	289
1.2.1 The Decision's coherent methodology for calculating traffic	291
1.2.2 Applying the Decision's methodology for calculating traffic, 99% of the clicks on CM-Shopping Units is traffic for Google's on-SERP-CSS	294
1.3 Competing CSSs do not benefit economically from clicks on links within the CM-Shopping Unit in the same manner as Google's on-SERP-CSS	299
2. Excursus: Would (more) CLAs suffice to remedy the infringement?	303
2.1 If integrated in a Google-powered CSS interface, CLAs suffer from similar flaws as Shopping Ads	304
2.2 Being inferior by design, CLAs cannot provide compensation for the substitution effect that Google's Shopping Units have	305
C. Google's failure to refrain from a conduct having the same or an equivalent object or effect as the infringement pursuant to Article 3 para. 2	307
1. Google's CM constitutes a technical tying between Google's general search service and its CSS – with even stronger anti-competitive effects	308
2. Tying is the most drastic form of self-preferencing	311
2.1 Comparison with the Microsoft Windows Player case	311
2.2 Self-preferencing and tying as two closely linked, and partially overlapping elements of abusive leveraging of intermediation power	314
D. Another look to Turkey: adopting the Commission Decision's rationale, the Turkish Competition Authority rejected Google's EU Compliance Mechanism as "not a solution"	315
Chapter 5: Consequences for Google and the Commission	317
A. Remaining options for Google to implement the remedy imposed by the Decision	317
B. Options for the Commission to bring the abuse to an end	319
1. Investigation for non-compliance since the launch of the CM	319
2. Investigation for non-compliance since the launch of richer Shopping Units	320
LIST OF ABBREVIATIONS	321
LIST OF REFERENCES	323
LIST OF ILLUSTRATIONS	332
ANNEX 1 – SCREENSHOTS OF VARIOUS SHOPPING UNITS	338
ANNEX 2 – ANALYSIS OF 'CSSs' TAKING PART IN GOOGLE'S CM	386

EXECUTIVE SUMMARY

- 1 Following three years in operation, all empirical economic data shows that the so-called Compliance Mechanism (“**CM**”) that Google chose to implement the remedy imposed in the European Commission’s (“**Commission**”) *Google Search (Shopping)* Decision of 27 June 2017 (the “**Decision**”) has failed to improve the market conditions for competing comparison shopping services (“**CSS**”). On the contrary, it has further strengthened Google’s position on the national markets for CSSs and has entrenched its dominance in general search. This is not because the Commission imposed the wrong remedy. It is because Google’s chosen CM fails to comply with the remedy imposed in the Decision.
- 2 Google’s CM fails to comply at all relevant levels. Contrary to Article 3 para. 1 of the Decision, Google has not brought the infringement to an end, in terms of either the relevant Conduct or its anti-competitive effects. Moreover, contrary to Article 3 para. 2 of the Decision, Google’s CM fails to comply because it has the same object and effect as the prohibited infringement.

A. Google’s failure to cease the prohibited Conduct

- 3 Google failed to bring the favouring of its own CSS on general search results pages to an end. Google does not treat CSSs equally within its boxes with specialised search results, called Shopping Units (see 1.), let alone treat CSSs equally on its general search results pages, as it is actually required to do (see 2.).

1. No equal treatment (even) within Shopping Units

- 4 Google’s CM is based upon the assumption that Google would only need to treat rival CSSs equally *within* the Shopping Units that Google prominently displays. Accordingly, Google focuses all attention on the claim that it would now “*compete on the same terms for slots in the Shopping Units by placing bids for slots and paying for them in the same way as aggregators*”.⁴ Equal treatment solely within Shopping Units is clearly not what is required by the Decision.⁵ However, even if one were prepared to accept this narrow assumption, then Google’s CM still fails to comply with the Decision.

⁴ Google, Response to the Court’s Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.8.

⁵ Decision, Article 1: “*By positioning and displaying more favourably, in Google Inc.’s general search results pages, Google Inc.’s own [CSS] compared to competing [CSS], the undertaking [...] has infringed Article 102*”, see also recital (700) and the Decision’s definition of favouring in footnote 3. The Decision does not talk about access to Google’s Shopping Units anywhere.

- 5 First, any compliance measure would require a positive act that actually changes something. Yet, Google's CM did not create any opportunity for competing CSSs to 'access' the Shopping Unit that did not already exist. CSSs *"already had the same access to Shopping Units as the Google CSS before the Decision"*.⁶ In particular, the Decision found that the prominent positioning and display of Shopping Units constitutes a favouring of its own CSS, even if Google invites rival CSSs to place product ads in such Shopping Units by *"adding a direct purchase functionality"* on their results pages (i.e. by becoming a merchant) or by *"acting as intermediaries for placing merchants' paid product results"* (i.e. by acting as a marketing agency).⁷ The Decision found that these two conditions amounted to disallowing CSSs participation in Shopping Units altogether. This is because, in order to fulfil the conditions, CSSs would have to *"change their business mode"*⁸ into that of merchants or advertising agencies that both operate on markets separate to that of CSSs.⁹ Since such conditions would thus have obliged rivals to *"stop being CSSs"*,¹⁰ the Decision considered them as tantamount to denying rivals participation in Shopping Units altogether. However, if such conditions did not prevent the abuse, then Google maintaining them now under its CM cannot also cease it.
- 6 Second, the only permanent change to the way Shopping Units now include competing CSSs is the voluntary introduction of the *"By CSS"* and the *"view more"* links below the product ads. Yet, as Google has revealed, only 1% of users click on such links. In September 2020 more than half of all product ads and hence half of the corresponding *"By CSS"* links led to *Google Shopping*.¹¹ This means that all rival CSSs *together* currently receive less than 0.5% of the clicks on Shopping Units. Surely, a change of less than 0.5% cannot be insufficient to remedy the abuse. The fact that, in theory, users may click on these links to get to competing CSSs, is irrelevant as long as due to an

⁶ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.12.

⁷ Decision, recitals (439), (220)(2).

⁸ Decision, recital (439).

⁹ See Decision, sections 5.2.2.2. and 5.2.2.3.

¹⁰ See Commission, Defence in Case T-612/17, para. 151: *"prior to the Decision [...] competing CSSs could appear in Shopping Units only if they introduced a "buy" button or were acting as agents / intermediaries for placing merchant results in Shopping Units, i.e. if they changed their business model and stopped being CSSs"*.

¹¹ *Guersent*, speech 17 September 2020, ICN 2020, Virtual Annual Conference, Unilateral Conduct Working Group, <https://bit.ly/32Pi1ZF>, reporting that according to Google's latest report, 47% of clicks go to ads placed by other companies than GSE.

inherent salience bias¹² they are not sufficiently doing so to counter the anti-competitive effects of Google's favouring practice.¹³ Moreover, these links are not ranked and do not reflect the relevance of a CSS. They are annexes to the *Shopping Ad* of a merchant. Merchants with the highest profit margins (due to highest prices) appear more often in Shopping Units – and (fake) CSSs placing that merchant's bids along with them. Hence, users do not find the most relevant CSSs in these links, but those that won auctions for product ads. Regrettably, the lower the quality of the CSSs listed in the "By CSS" and "view more" section, the more often users will get frustrated after a click on these links. Creating a negative feedback-loop, consumers will learn to ignore such links altogether and focus on finding all information directly in the Shopping Unit instead.

- 7 Third, the so-called *Comparison Listing Ads* (CLAs) that Google, again "voluntarily", tests "outside of the remedy"¹⁴ and currently displays "only for a fraction of Shopping Units" (= in less than 1% of relevant queries) were ever rolled out on a global basis, this would not make a difference. That is because Google has designed them in such a way that "only few users click on the CSS button"¹⁵ and there is "little CLA ad inventory".¹⁶
- 8 Fourth, from the outset, a design of Shopping Units where all relevant data from any engagement of the searcher with the unit (e.g., any hovering, adjustment of the search term or click) only flows through Google's servers and is available only to Google to improve its product, cannot constitute 'equal treatment' as defined in the Decision. Searchers engaging with Shopping Units by browsing through the various options, fine-tuning their searches and clicking back and forth between merchants creates a torrent of crucial data regarding user habits and interests. Google collects and saves all such data in order to improve its own comparison service. Yet, no competing CSS is able to benefit from such data.

¹² In behavioural economics, salience bias describes the tendency to focus on items or information that are more prominent displayed while ignoring those that do not grab our attention, even if they are more relevant. See The Decision Lab, "Why do we focus on items or information that are more prominent and ignore those that are not? – The Salience bias, explained", <https://bit.ly/33WfeNo>.

¹³ This is clarified in Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*, OJ 2019/C 402/08, paras. 916 et seq., 923.

¹⁴ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 5.

¹⁵ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.14.

¹⁶ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 5.

- 9 Fifth, during the investigation Google emphasised that “*search services compete by showing their results, not results from other services*”.¹⁷ Yet, Google chose a CM whereby the Shopping Units do not show the results selected by competing CSS but where the results are selected exclusively by Google’s own CSS infrastructure. The results in Shopping Units are sourced from Google’s own product index, based upon Google’s own specialised product search algorithms. The CSSs uploading product feeds have no influence on the matching of the query with corresponding offers.¹⁸ Hence, under the CM they do not compete by showing *their* results. Google’s CSS shows *its* results and adds a meaningless “By CSS” label of another CSS to it which merely uploaded an offer to Google’s index that could be matched but remains invisible to consumers during their entire customer journey from entering Google to purchasing a product.¹⁹
- 10 Sixth, whilst not the focus of this study (and its criticism of the CM), from the outset, an auction amongst rivals for result slots in which, in lack of a full ownership unbundling, one bidder (*Google Shopping Europe*) (i) has access to more data that is relevant for winning the auction as compared to all other bidders, (ii) may make bids that are directly or indirectly cross-subsidised by the auctioneer (Google) and (iii) does not need to generate any profits, while still maximising the profits for its parent auctioneer (Google) can never constitute ‘equal treatment’ with rival CSSs in the sense of recitals (699) and (700).²⁰ Under the CM, Google does not (only) make its profits with clicks on product ads served by *Google Shopping Europe*. Google obtains revenue from each click on a product ad in the Shopping Unit, no matter which CSS bids for it. It is irrelevant to Google whether or not *Google Shopping Europe* operates profitably. Google’s auction is

¹⁷ Decision, recital (657).

¹⁸ See *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, p. 4: “*Google selects winning ads based on CSS-neutral criteria [...]. The mechanism that selects winning ads is blind as to whether the ad comes from Google Shopping or a rival CSS.*”

¹⁹ See *Marsden*, “Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (an How to Fix it)”, *Journal of European Competition Law and Practice*, 17 September 2020, p. 1: “*To me, it seemed obvious that in a case that is all about the visibility of comparison shopping services (CSS) on Google, all that the remedy guaranteed was their invisibility*” (“visibility” emphasised by *Marsden*).

²⁰ Cf. *Feasey and Krämer*, “Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms”, 2019, <https://bit.ly/3j7ToNq>, p. 43 “*in the absence of structural separation, the bids for prominence that are made by the affiliate [=Google’s CSS] will take the form of accounting transfers or ‘wooden dollars’ which pass from one part of the digital platform to another, whereas the payments made by third parties represent real costs. The affiliate therefore faces a different set of constraints [...] which are likely to give it a significant advantage in any auction*”.

designed to create a ‘prisoners dilemma’ where no CSS commits to not bid for a top position in the sponsored Shopping Unit, but ultimately all CSSs are worse off by doing so because the auctioneer – Google – expropriates the CSSs’ surplus.²¹ These economics of over-subscribed auctions allows Google to use *Google Shopping Europe* to drive up auction prices with a view to maximising Google’s overall profits, whilst also increasing competing CSS’s acquisition costs at the same time.

2. No equal treatment within Google’s general search results pages

- 11 Google’s entire CM is based upon the premise that the imposed remedy solely “*means that when Google shows a Shopping Unit, Google must give aggregators the same access to the Shopping Unit as it gives the Google CSS [GSE], using the same mechanisms (processes and methods) to allocate access*”.²² This premise is false.
- 12 Google itself observed that “[t]he Decision does not dispute that aggregators can participate in Shopping Units. Nor does it identify anything that Google could and should change in the way that it gives aggregators access to the Shopping Unit.”²³ This is because, as much as Google would like it to be the case, the Decision is simply not about any access by competitors to Google’s Shopping Unit.
- 13 The Decision does not oblige Google to provide equal “*access to the Shopping Unit*”. The remedy obliges Google to treat CSSs equally “*within its general search results pages*” (recital (700)). This is an entirely different benchmark. Specialised search results like those in Shopping Units are just *one* element of Google’s general search results pages. Recital (699) clarifies that the equal treatment “*principles mentioned in recital (700) should apply irrespective of whether Google chooses to display a Shopping Unit or another equivalent form of grouping of links*”. Thus, the obligation of ‘equal treatment’ does not oblige Google to display any form of Shopping Units at all, let alone to grant rivals ‘access’ to the Shopping Units if it does. The relevant legal benchmark is whether all competing CSSs are treated equally in terms of “*visibility, triggering, ranking or graphical format [...] in Google’s general search results pages*”.²⁴ This is not the case

²¹ Cf. *Krämer and Schnurr*, “Is there a need for platform neutrality regulation in the EU?”, (2018) 42 Telecommunications Policy, 514, 525.

²² Google, Response to the Court’s Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.4; *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, p. 4.

²³ Google, Application in Case T-612/17, para. 201.

²⁴ Decision, recital (700)(c).

today, where Google allows its own CSS to provide its comparison service directly on Google's general search results pages, while no competing CSS may provide a similar service on such pages, even though they could compile much more relevant groupings of results.²⁵

- 14 Under the CM, users find Google's CSS pre-selected on Google's general search service. This makes them far less likely to use any alternative CSS as they already see and may directly use a service that provides the comparison shopping functionalities they demand.²⁶ No competing CSS is able to achieve an equivalent level of market penetration without having the advantage in terms of internet distribution that Google's own CSS (provided via Shopping Units) enjoys as a result of Google's use of its general search service.²⁷
- 15 The provision of the Shopping Units that Google has displayed since the launch of the CM ("**CM-Shopping Units**") continues to constitute a CSS in itself, operated by Google, because such Shopping Units enable users to compare products and prices directly on the general search engine results pages ("**SERP**"). Unlike before, this 'on-SERP-CSS' is operated not by what was previously "Google Shopping" (and is now "GSE"), but by a new unit within Google. The providing of Shopping Units is nothing other than the provision of a CSS website placed in a smaller frame. Google continues to favour this own CSS because no competing CSS is able to compile and display any similar grouping of product search results within Google's general search results pages. They are only entitled to become customers of Google's favoured on-SERP-CSS. This is not objectively justified because competing CSSs with larger product databases and better algorithms could provide more relevant Shopping Units or equivalent groupings of search results on Google's general search results pages, thereby benefitting consumers and merchants.

²⁵ According to Google's advisers "*Today, more than 600 CSSs participate in the remedy, placing ads for over 30,000 merchants*", Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 5. Competing CSSs have more merchants and offers in their indexes and could provide more relevant results boxes.

²⁶ That this amounts to an abusive leveraging is apparent when reading the Court of First Instance's *Microsoft* judgement, Case T-201/04, *Microsoft*, ECLI:EU:T:2007:289, para. 1041.

²⁷ Such distribution advantage was a central reason for finding Microsoft's bundling practices abusive: see *Microsoft*, *ibid.*, para. 1039.

16 While leaving open the question of the precise threshold, the entire Decision presupposes that the provision of certain Shopping Units can constitute a CSS in itself, for instance here:

- Recital (191) defines CSSs as services that *“allow users to search for products and compare their prices and characteristics across the offers of several different online retailers and provide links that lead to the website of such online retailers and provide links that lead to the website of such online retailers or merchant platforms”*. This is exactly what Google’s various types of Shopping Units do. Triggered by a search query entered on Google, they display matching product offers and further information to allow consumers to compare products and prices before they click through to the merchant: *“[a]s a result of its structure as a multi-sided market, providing Shopping Units offers advertising services to e-commerce websites, on the one hand, and comparison shopping services to consumers, on the other.”*²⁸
- In the entire section 2.2.5. describing “Google’s own CSS”, there is just one illustration of the service – that of a Shopping Unit. The illustrated Shopping Unit is far less sophisticated than many of those we find today.
- Recital (31) explicitly refers to Google’s own CSS as *“both the standalone website and the Universal”*. Shopping Units succeeded Product Universals.²⁹
- According to recital (744), in those six countries in which Google launched the Shopping Unit in 2013 (with the standalone Google Shopping website following only in 2016), the infringement started with the launch of the Shopping Unit alone. Thus, the Decision found that Google favoured a particular CSS – which only consisted in the powering of Shopping Units – by prominently displaying exactly these Shopping Units. If in these six countries, a favouring of Google’s own CSS was found for a full three years without any standalone Google Shopping website, this can only mean that the provision of the Shopping Unit was in itself regarded as a standalone CSS. The Commission could have easily found that the infringement only began with the launch of a standalone website. Yet, it did not do so, because simply the provision of Shopping Units in itself fulfilled all criteria of a CSS.

²⁸ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, <https://bit.ly/3hTlv1h>, para. 259, with reference to the Commission’s Decision.

²⁹ Decision, recital (424).

- Similarly, the Decision identified an infringement only in countries where Google provided Shopping Units. In those 14 European countries where Google (just) demoted competing CSSs, but did not show Shopping Units, there was no infringement.³⁰ Hence, the decisive element of Google's CSS was the provision of Shopping Units.
- Only this understanding explains the definition of favouring in footnote 3. It is exactly because the powering of Shopping Units may in itself constitute a CSS that the definition does not solely include the favourable positioning and display of "*links*" that lead to a CSS; rather, it also includes the favouring of "*parts or all of Google's CSS*" directly in general search results pages. Shopping Units form a "*part*" of Google's own CSS if a corresponding standalone website exists, and form "*all*" of Google's CSS if no such website exists. The term "*all of*" Google's CSS makes sense only if the provision of Shopping Unit is seen as a standalone service.
- Recital (613)(a)(3) lists as "*comparison shopping service*" "*the product listing units displayed on the general results pages of Ask, Bing, T-Online and Yahoo*" – because Google itself considered them as the equivalent to its Shopping Units.³¹ Google emphasised that Bing "*shows the same kind of units with product ads for product queries as Google*".³² If the Decision considered the provision of "*product listing units*" directly on the general search results pages of the general search services of Ask, Bing, T-Online and Yahoo as a separate CSS, the same must apply to providing Shopping Units on Google's general search results pages.
- Along the same lines, recital (613)(a)(4) also identifies "*the product listing units displayed on third party websites by Kelkoo, LeGuide, Idealo (Axel Springer)*" as an independent CSS in addition to the service that the mentioned companies provide on their standalone websites,³³ provided "*these units are displayed in reply to a query*". The underlying rationale is simple – if, in return of a search query entered on a third-party website, a company provides a grouping of product results extracted from its own database in accordance with its own algorithms, such company (and not the third-party website) operates a CSS. If the Decision considers the powering

³⁰ Cf. *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 9 (footnote 49).

³¹ Cf. Google, SSO Response in Case AT.39740, para. 275-276: "*Other general search services, such as Bing [...] show the same kind of units with product ads for product queries as Google*".

³² Google, SSO Response in Case AT.39740, para. 276.

³³ See Decision, recital (613)(a)(1) where these operations of the same companies are listed.

of “product listing units” on third-party sites only as a CSS if the powering entity also determines how the boxes are filled (i.e., carries out the “matching”), the same must also apply to Google’s powering of CM-Shopping Units on the pages of Google’s general search service. In addition, since rival CSSs have no influence on the design and content of CM-Shopping Units, it is apparent that the boxes are not their products, and clicks on them cannot be seen as ‘traffic’ to them, but traffic for the company powering the box – that is, Google.

- The Decision’s entire methodology of counting ‘traffic’ for CSSs is based upon the premise that a CSS is an entity that, in return of a search query, determines the search results included in any consumer-facing interface (its own website, Shopping Unit, product listing unit, etc.). In particular, the Decision counted all clicks on links in Google’s Shopping Unit and in Bing’s Product Listing Unit as traffic for the CSS Google (Shopping) and Bing (Shopping) – not for the aggregators (CSSs), which had always been allowed to serve product ads in such units.³⁴ Consequently, according to the Decision, it is the powering of such query-matching interfaces (units) that constitutes the CSS.
- *“The Decision argues that the Google CSS benefits economically from the product ads that it places in the Shopping Unit and therefore treats clicks on product ads as visits to the Google CSS (Decision, recital 421, 614, 630)”.*³⁵ Crucially, during the infringement, the more than 80%³⁶ of the clicks on such product ads did not lead to the Google Shopping standalone website but directly to merchant customer’s websites. Google’s standalone website did not directly benefit of such traffic. In other words, more than 80% of the anti-competitive traffic advantages for Google’s CSS that the Decision condemned, was not an advantage for Google’s provision of a standalone website but an advantage for Google’s provision of Shopping Units. This confirms once more that the case is based on the premise that the provision of Shopping Units constitutes a CSS, irrespective of a standalone website.

³⁴ Decision, recital (603) for Google Shopping and footnote 581 for Bing Shopping.

³⁵ As correctly summarised by Google’s advisers *Graf* and *Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, p. 3.

³⁶ *Ibid.*, p. 4: “Clicks on product ads that went to third-party merchants account for the vast majority (more than 80 per cent) of the traffic increase that the Decision attributes to Google’s CSS from the display of Shopping Units.”

- 17 Contrary to what Google claims,³⁷ this finding is not called into question by recitals (408), (412) and (423), which state that “*Commission’s case is not that the Shopping Unit is in itself a comparison shopping service*”. Rather, what this means is that the Commission did not have to decide which of the various forms of Shopping Units that Google deployed pass the threshold of comparing different offers of different merchants: “*[i]n the same way, generic search results leading to competing [CSS] are not [CSSs] in themselves.*”³⁸ The Commission did not have to decide this, because it is indeed not simply the Shopping Unit in itself that forms a CSS. Rather, it is the *entire infrastructure* that is required to compile Shopping Units that match the users’ search query that makes up the CSS. A CSS needs to onboard merchants, index and catalogue product feeds, develop algorithms for the matching of a search query with its catalogue, etc. Ultimately, the CSS makes a complex decision regarding which particular products and corresponding product information is displayed to the user’s particular query. The Shopping Unit or a “Product Listing Unit” is solely the interface through which the outcome of all the underlying infrastructure and work is fully presented. Thus, whilst the Shopping Unit in itself is not a CSS, the powering of Shopping Units in response of search queries entered on Google’s website is a CSS.
- 18 It is also incorrect for Google to claim³⁹ that the provision of Shopping Units cannot be seen as a CSS because in recital (172) the Decision explains that Google offers its CSS “*as a separate standalone service, and describes its functionalities and purpose differently to how it describes its general search service*”. The provision of Shopping Units is a standalone service that is separate from Google’s general search service. The Decision does not require a separate standalone *website* as a frontend to qualify as a CSS.
- 19 Google’s provision of Shopping Units to compare products and prices directly within its SERPs is not part of the markets for general search services. Rather, it only fits the definition of a CSS. In particular, unlike Google text ads (formerly *AdWords*), Shopping Units do not comprise some random collection of ads that can be perceived as a service

³⁷ Ibid., p. 6: “*But the Decision is clear that the Shopping Unit is not a CSS itself (Decision, recitals 412, 423)*”.

³⁸ Decision, footnote 463.

³⁹ *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, p. 6 (footnote 28).

solely for advertisers. Google has clearly designed Shopping Units in a way to provide a comparison service to consumers.⁴⁰

- Google argues that, if the powering of Shopping Units constitutes a CSS, then the results pages of Amazon and other merchant platforms constitute CSSs as well. Yet, the fundamental distinction between a CSS and a merchant platform as set out in the Decision⁴¹ does not relate to the design of the frontend and the results pages, but relates to the different underlying business models. Such differences remain in place. Based upon its purpose and use by searchers and merchants, Google's Shopping Units are only capable of fitting the definition of a CSS.
- Ultimately, Google's own design of Shopping Units leaves no other conclusion than its provision being a CSS. There is an undeniable consumer demand for comparison shopping services that underlie the corresponding market.⁴² Under Google's current CM, a user may enter any product search query on Google to express his or her demand for a product or price comparison. No matter how generic or specific the query is, Google will match it with a corresponding Shopping Unit that reflects the likely 'level' of the user in his or her consumer journey. Within these units, the user can click back and forth to get all the information s/he requires. Crucially, 99% of the clicks that ultimately lead the user to a website outside of Google go directly to a merchant's website, where the product can be purchased ('buy page condition'). On such merchant's website, however, users cannot further compare products and prices. They can only purchase the individual product. If the user does not find what s/he was looking for on this page, s/he needs to click back to Google's Shopping Unit. This is how users search for products today: they click back in forth within Google's Shopping Units and between the unit and the various merchants' websites with individual product offers; each click triggering a payment to Google. During this entire customer journey, from entering the first search query to finally purchasing the product, the user has only ever seen one frontend for the comparison of the products and prices: Google's Shopping Units. If the user makes a purchase, s/he must have consumed the comparison service somewhere. The only service that can have satisfied a user's demand for a product or price comparison between entering a query on Google Search and purchasing a product on a merchant's site is Google's provision of Shopping Units. Since no other CSS is involved in this

⁴⁰ Cf. TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 259.

⁴¹ Decision, recitals (216)-(250).

⁴² See Decision, section 5.2.2.

customer journey, there can be no doubt that the provision of Shopping Unit as such constitutes the relevant CSS.⁴³

- 20 The core of a CSS is the algorithm-based matching of a search query with available product offerings. Google's on-SERP-CSS remains the only CSS that is entitled to prominently display and populate Shopping Units within Google's general search results pages for presenting the outcome of such matching. No other CSS is able to display an equivalent box. For equal treatment to apply, if Google decides to display boxes with which it directly compares products and prices within its general search results pages, all competing CSSs need to receive an option to set-up and display these boxes with results from their own product index and selected by their own algorithms.

3. No end of algorithmic demotions

- 21 *"Google has not changed or removed the demotion algorithms for its generic results to comply with the Decision",⁴⁴ even though the Decision found that such algorithms disadvantage rival CSSs and constitute an abusive self-favouring.⁴⁵ Google's own CSS is still not subject to them. Hence, Google has not even tried to remedy half of the abuse identified in the Decision.*

B. Google's failure to bring the anti-competitive effects of the infringement to an end

- 22 To bring the infringement to an end, the undertaking concerned must cease the conduct as identified by the Commission and undo the anti-competitive effects resulting from the conduct. Google failed to remedy the anti-competitive effects because the problematic traffic diversion established in the Decision continues to exist:
- 23 One would expect that once the abusive favouring has been removed and competing CSSs are free to compete on the merits, the logical consequence would be that market

⁴³ See TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 283: *"Shopping Unit [...] is not only an ad space, but also a space where product prices can be compared."*; Marsden, "Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (an How to Fix it)", *Journal of European Competition Law and Practice*, 17 September 2020, p. 4.

⁴⁴ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.8.

⁴⁵ Decision, section 7.2.1.1.1.

share of Google's CSS falls while that of competing CSSs rises.⁴⁶ Yet, Google's CM had the opposite effect of further increasing Google's market share on the CSS markets.

- 24 First, the condemned impact of the abuse was a "*diversion of generic search traffic*" from Google's general search results pages to CSSs.⁴⁷ Yet, empirical data shows that the CM continues to deprive rival CSSs of generic search traffic. Since the Decision, there was no overall increase in generic search traffic at all. For desktop devices traffic even dropped by 1.5%. Alarming, between June 2017 and June 2020, on average, the bounce rate⁴⁸ for such generic search traffic on the CSS's websites increased by 7.4% and the profitability of such traffic for competing CSSs halved by 51.4%. Thus, despite (or rather because of) Google's CM, today rival CSSs earn half as much with generic search traffic coming from Google as they did during the infringement. Matters did not improve, they got worse.
- 25 Second, under Google's CM, the only links in Shopping Units that lead a user to the website of a competing CSS and thereby generates traffic (which the Decision is concerned about), are the "*By CSS*" and "*view more*" links below product ads. Yet, these meaningless links account for less than 1% of the clicks in Shopping Units (see above, ¶6).
- 26 Third, clicks on product ads that were uploaded by CSSs (acting as agents for merchants) to be included in Shopping Units do not constitute traffic to participating CSSs and hence cannot be considered. The Decision set out a clear methodology for counting clicks on Google's website and allocating it to a CSS. Applied to Google's CM, all clicks on product ads in Shopping Units must be counted as clicks to Google, not to the CSSs that were uploading the product offers and bid on product categories:

⁴⁶ See Commissioner Kroes "*once the illegal abuse has been removed and competitors are free to compete on the merits, the logical consequence of that would be to expect Microsoft's market share to fall*", cited in Marsden, "Article 82 and Structural Remedies After Microsoft", International Competition Forum St. Gallen 22-23 May 2008, <https://bit.ly/2G37TDz>, pp. 4-5.

⁴⁷ Decision, recitals (341) and (342).

⁴⁸ Bounce rate means the percentage of visitors to a particular website who navigate away from the site after viewing only one page.

- When counting clicks on Google's Shopping Units,⁴⁹ Bing's Product Listing Units⁵⁰ and Product Listing Units displayed on third-party websites,⁵¹ the Decision consistently counted all clicks on links that lead users directly to a merchant as traffic for the company that carries out the matching of the search query with the responses, i.e. that compiled and powered the units. The Decision did not consider such clicks as traffic for any intermediary that uploaded the product feeds and bid on product categories in order to be considered for such matching. When applied to Google's CM, the methodology means that Google's CM now sends 99% of the traffic to Google's own (on-SERP-) CSS. That is because it is Google's CSS that matches the queries and the results. Rival CSSs have no influence whatsoever on which product ads appear in Shopping Units. They only serve as intermediaries for merchants.
- None of the Commission's reasons for counting clicks on product ads displayed in Shopping Units as traffic for Google Shopping (rather than traffic for Google's general search service or traffic for merchants to which the clicks lead users to) apply to CSSs that are now entitled to bid for product ads in Shopping Units:
- Google itself emphasised that, under the CM, rival CSSs now "*access*" the Shopping Unit "*in exactly the same way*" as merchants previously did, because the "*buy page condition*" persists. This means that CSSs are not actually 'accessing' the unit as a CSS, but as pure intermediary on behalf of a merchant. The clicks are still 'clicks' on the Google-powered Shopping Unit, just as they were during the infringement.

⁴⁹ The Decision counted all clicks on links in Shopping Units as traffic for Google's CSS, including clicks on links that led the user directly to a merchant's site. Conversely, the Decision did not count such clicks as traffic for the merchant or the intermediary (marketing agency, affiliate network etc.) that Google had always allowed to bid for product ads on behalf of merchants. This is despite the fact that such clicks triggered a commission for the intermediary in the same way that clicks trigger a commission for a 'CSS's placing such ads under Google's CM. See Decision, recitals (421), (630).

⁵⁰ The Decision counted all clicks on Bing's Product Listing Units as traffic for Bing's CSS, including clicks on product ads that were placed by aggregators (including CSSs) on behalf of merchants. Google's current CM is a copy-cat of Bing's model to include aggregators; Decision, footnote 581.

⁵¹ The Decision counted all clicks on Product Listing Units displayed on third-party websites as traffic for the company powering the entire unit (by matching the query with results); not as traffic for the third-party site 'hosting' the Product Listing Units (by integrating it into its site) or as traffic for intermediaries uploading product feeds to the CSS that powers the units; Decision, footnote 581.

- According to recital (630), the Decision counted clicks “*on links within the Shopping Units that lead the user directly to a webpage of a merchant[...] as visits to Google Shopping because Google's comparison shopping service benefits economically from clicks on those links in the same manner as if the user had taken the intermediary step of going through the standalone Google Shopping website before clicking on the product of that merchant partner.*” This logic then must also hold for ads now placed by other CSSs if users are led directly to the merchant’s website. It is Google (its on-SERP-CSS) that benefits economically from this ad. Rival CSSs do not benefit economically from clicks on links in Shopping Units anywhere near “in the same manner” as though the user had gone through a CSS’s website:
 - During the period of the infringement, clicks on a Shopping Unit benefited Google Shopping “*in the same manner*” because Google Shopping did not have to pay its parent company, Google Inc., for any click in the Shopping Unit or on the Google Shopping standalone website. Both clicks only triggered revenues, and not costs. In contrast, CSSs now have to surrender a large part of their margin when buying an ad in order to pay Google for every click in a Shopping Unit.
 - Google Shopping benefited from clicks in Shopping Units because “*Google presented the Shopping Unit and the standalone Google Shopping website as a single service or experience to merchants and users*” (recital (420)). In contrast, under the CM, neither users nor merchants associate the Shopping Units with the standalone websites of any rival CSS. They perceive the powering of Shopping Units as a service provided by Google. Accordingly, clicks on it are clicks for Google’s CSS.
 - Google Shopping benefited because “*the selection of paid product results displayed in the Shopping Unit presents many common technological features and measures with the selection of results on the standalone Google Shopping website*” (recital (415)). In contrast, under the CM, the selection of CSS’s paid product results in Shopping Units has nothing in common with the selection of results on the CSS’s standalone websites and hence does not benefit the latter “*in the same manner*”.
 - Google Shopping benefited because clicks in Shopping Units generated machine-learning effects, allowed experiments, generated additional user reviews and increased user engagement (see section 7.2.2.). None of such

benefits arise for CSSs if they provide inventory for product ads in Shopping Units under the CM.

27 Fourth, even if one were prepared to consider clicks on paid product ads in Shopping Units as ‘traffic’ for the CSSs that placed bids on behalf of a merchant, such ‘traffic’ is not an economically viable substitute for free generic traffic from Google’s general search results pages. The Decision rejected traffic from *AdWords* text ads as alternative for the generic traffic that Shopping Units divert because “*it would not be an economically viable solution*” (recitals (544), (559)). The costs for CSSs made the traffic too expensive for CSSs to purchase as a substitute for generic traffic. Yet, the product ads offered under the CM are an even weaker substitute for the deprived generic traffic – due to the ever-increasing auction prices, product ads are just as unprofitable costly as text ads:

- Empirical data from participating CSSs shows that because CSSs need to pay Google for such clicks (based on an auction), clicks on Shopping Ads are less than half as profitable as clicks on generic search results. Moreover, since the launch of the CM, due to increasing auction prices, the profitability of clicks on Shopping Ads for CSSs has nearly halved by 46.5%. The profits from such clicks are so low that they could never finance the costs of a (genuine) CSS, let alone form the basis for any growth.
- In addition, Google (text) Ads at least (i) lead users to the website of the CSS, (ii) allow the CSS to match the query by bidding on keywords rather than product categories and (iii) in case of product ad, enable the CSS to distinguish its product by means of a unique text. In contrast, as regards Shopping Ads, the CSS may only upload standardised product feeds with no influence on their display whatsoever, and clicks on these ads do not lead to the CSS’s website. Thus, if the Commission rejected Google Ads as a substitute for deprived generic search traffic, it may even less so accept Shopping Ads as an alternative.

28 Fifth, at best, the CM only allows for pure price competition amongst CSSs. Whoever may bid the highest price to Google for a product ad, ‘wins’ such result in a Shopping Unit. Yet, the central competitive factor on the market for CSSs is not the price a CSS charges to its merchants (or the prices they in turn charge consumers), but the quality of the matching of product queries with merchant offerings. Such factor, however, plays no role in Google’s CM. It is not the CSS with the highest quality of its matching capabilities who wins the bids for a product ad, this quality plays no role. Instead, CSSs

compete solely on how little margin they are prepared to accept upon the click. This creates a downhill spiral that only benefits Google.

29 Sixth, instead of enhancing competition, the CM reduces consumer choice and increases prices even further.

- The Shopping Units are purported to contain the most relevant offerings for the respective product search. Yet, in reality, they only contain the offerings of a subgroup of merchants. The 600 (mainly fake) 'CSSs' that participate in the CM *together* have only uploaded product offers for 30.000 merchants. Yet, leading (genuine) CSSs achieve such numbers *on their own*.⁵² It is thus incorrect to assume that Google's CM creates the broadest database for product offers in the interest of consumers. Competing CSSs have larger product indexes and could therefore compile more relevant, equivalent boxes.
- Moreover, Google's Shopping Units only contain those merchants that were willing and able to bid the highest price. Such offers are typically not the 'best' for consumers, as they indicate the highest profit margin and hence the lowest consumer surplus. This explains why on average, following the CM, the price for products in Google's Shopping Units is 14% higher than the prices users could find for the same products on other CSSs.⁵³ The CM further monopolises the entire digital value chain for comparison shopping. The CM allows rival CSSs no influence on the content of Shopping Units, i.e., the matching of query and offerings. Thus, the CM leaves the industry with just one product catalogue, one product index, one sorting and retrieval system, one specialised product search algorithm – all in the hand of one CSS: Google. With the further foreclosure of rival CSSs, this puts the matching of consumers' demand with merchants' supply at the mercy of Google's rent-seeking interests.

C. Google's failure to refrain from conduct having the same or an equivalent object or effect as the infringement

30 In addition to bringing the conduct (self-preferencing) and its anti-competitive effects (traffic diversion) to an end, the remedy also obliges Google to refrain from any act or

⁵² For instance, Billiger.de counts 22.500 merchants, idealo 50.000 merchants, see c't Magazin für Computertechnik, issue 18/2020 of 15th August 2020, „Schnäppchenfahnder: Preisvergleichsdienste im Überblick“ (= comparison of CSSs), p. 95.

⁵³ Thornton, "Google shopping EU benchmark, Data analysis study", 12 April 2019.

conduct “*having the same or an equivalent object or effect*” (Article 3 para. 2). Moreover, any measure that Google chooses to implement the remedy must be “*in conformity with the Treaty*” (recital (698)); i.e. it must not constitute another form of anti-competitive conduct. Google fails to comply with these requirements as well, because the CM has the very same leveraging effect that the prohibited conduct had and constitutes an abuse of dominance in itself.

- 31 The economic rationale underlying the Decision is that Google’s conduct was “*capable of extending Google’s dominant position in the national markets for general search services to the national markets for comparison shopping services*”.⁵⁴ Such leveraging of market power has been condemned for many years. In the *Shopping* case, the identified conduct used to lever dominance from general search into adjacent markets for CSSs was the prominent positioning and display of results for Google Shopping.
- 32 The CM has the same effect because it continues to extend Google’s dominance in general search into the markets for CSSs. This is true irrespective of the fact that, at this time, the website of GSE no longer plays a major role (because the Shopping Units do not lead users there and it generates little direct traffic). Google’s central CSS with which it monopolises the market is not GSE, but its on-SERP-CSS.
- 33 From a legal perspective, it makes no difference whether Google expands its dominance in general search into the markets for CSSs via the favouring of an on-SERP-CSS or the favouring of a standalone website. In fact, the outright integration of a CSS into general search results pages without a corresponding standalone website may be seen as the most extreme form of an anti-competitive leveraging. In the early years of the infringement, Google diverted users to its standalone website as relevant frontend. In later years it provided the CSS function directly on the SERP, using the Shopping Unit as relevant frontend, and it continues to do so throughout the CM. Accordingly, instead of a mere diversion of users to a standalone website, Google now brings such service directly to the user – by firmly integrating it into its general search results pages. Such a direct integration of an ancillary service into a dominated service, however, is an even more apparent leveraging practice than the self-preferencing identified in the Decision. It constitutes a classic technical tying of separate services, which EU law has, pursuant to its jurisprudence, condemned for decades.

⁵⁴ Decision, recital (342).

- 34 Today, Google provides the most powerful CSS available directly on its general search results pages. Users who turn to Google to consume the general search service have no choice but to also consume Google’s on-SERP-CSS. They are unable to perform searches on Google without Google displaying its CM-Shopping Units, through which it operates a CSS. Google thereby technically bundled two services (general search and CSS) together without giving consumers the option of using such services separately. Google’s CM thus constitutes an abuse irrespective of the fate and treatment of *Google Shopping Europe*’s standalone website.
- 35 A comparison with the Commission’s *Microsoft* decisions as well as the *Android* case encapsulates the point further. All three decisions have found that a software company that is dominant on one market may not simply incorporate a software program that operates on another market into its dominated primary product. This is because using the distribution channel of the dominated primary service to spread the separate service on a secondary market would generate an unjustified advantage for the favoured secondary service. This, however, is exactly what the CM brought about. Google is using its general search service as a distribution channel for its CSS (offered through Shopping Units). Such conduct can easily be qualified as a tying, akin to that in *Microsoft* and *Android*. Hence, the CM has “the same effect” as the prohibited favouring – to lever dominance from general search into CSS markets.

D. Consequences

- 36 “*When remedies for intermediation bias are proposed by the digital platforms themselves, as has been the case to date, the competent authorities can be certain that every such proposal is the result of a rigorous internal experimentation process to test its impact.*”⁵⁵
- 37 Against this background, we must not assume that Google is unaware of the failures of its CM – and it would be wishful thinking to expect Google to improve it on its own volition. Google’s public defence of the CM⁵⁶ rather suggests that, despite ten years under investigation and three prohibition decisions, it continues to prefer adhering to a three-pronged strategy of maintaining maximum non-transparency, maximum

⁵⁵ *Feasey and Krämer*, “Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms”, 2019, p. 50, <https://bit.ly/3j7ToNq>.

⁵⁶ See *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020; see below Chapter 4 A 2.3.3.1 (¶¶598 et seq.) for a response.

misrepresentation of both the facts and law and an outright denial of any wrongdoing whatsoever.

- 38 Regulation 1/2003 does not provide for the approval of compliance measures. However, it is the duty of the Commission to act in respect of such non-compliance. A failure by the Commission to do so could give rise to actions against the Commission itself, in particular under Articles 263 and 265 TFEU.
- 39 To address the non-compliance, the Commission may issue a first warning under Article 24(1) Regulation 1/2003, with or without providing a preliminary notice, and subsequently follow up with a full non-compliance finding and penalty.
- 40 At this point, the Commission appears to have two options to bring the abuse to an end:
 - **Investigation for non-compliance from the launch of the CM:** The Decision enables the consideration of the powering of *all Shopping Units* (including pre-Decision *Shopping Units*), which contain more than one product offer and thereby allow users to compare prices and characteristics across the offers of several retailers, as constituting a CSS as defined in the Decision. Following the Decision, Google decided to run its on-SERP-CSS and to favour this in its general search results pages. By reserving attractive boxes to itself, the CM was non-compliant from the outset. Therefore, the Commission could enforce its 'equal treatment' provision and force Google to quickly find a new compliance mechanism.
 - **Investigation for non-compliance from the launch of richer Shopping Units:** If the Commission is not prepared to assume that all *Shopping Units* with more than one product have always formed a CSS (but believes that the Decision left this issue open), the Commission may still issue a warning for non-compliance for the time period from when Google released *Shopping Units*, which clearly fulfil all criteria of a CSS.

A SUMMARY IN 13 ILLUSTRATIONS

1 Digital Value Chain of a Comparison Shopping Service

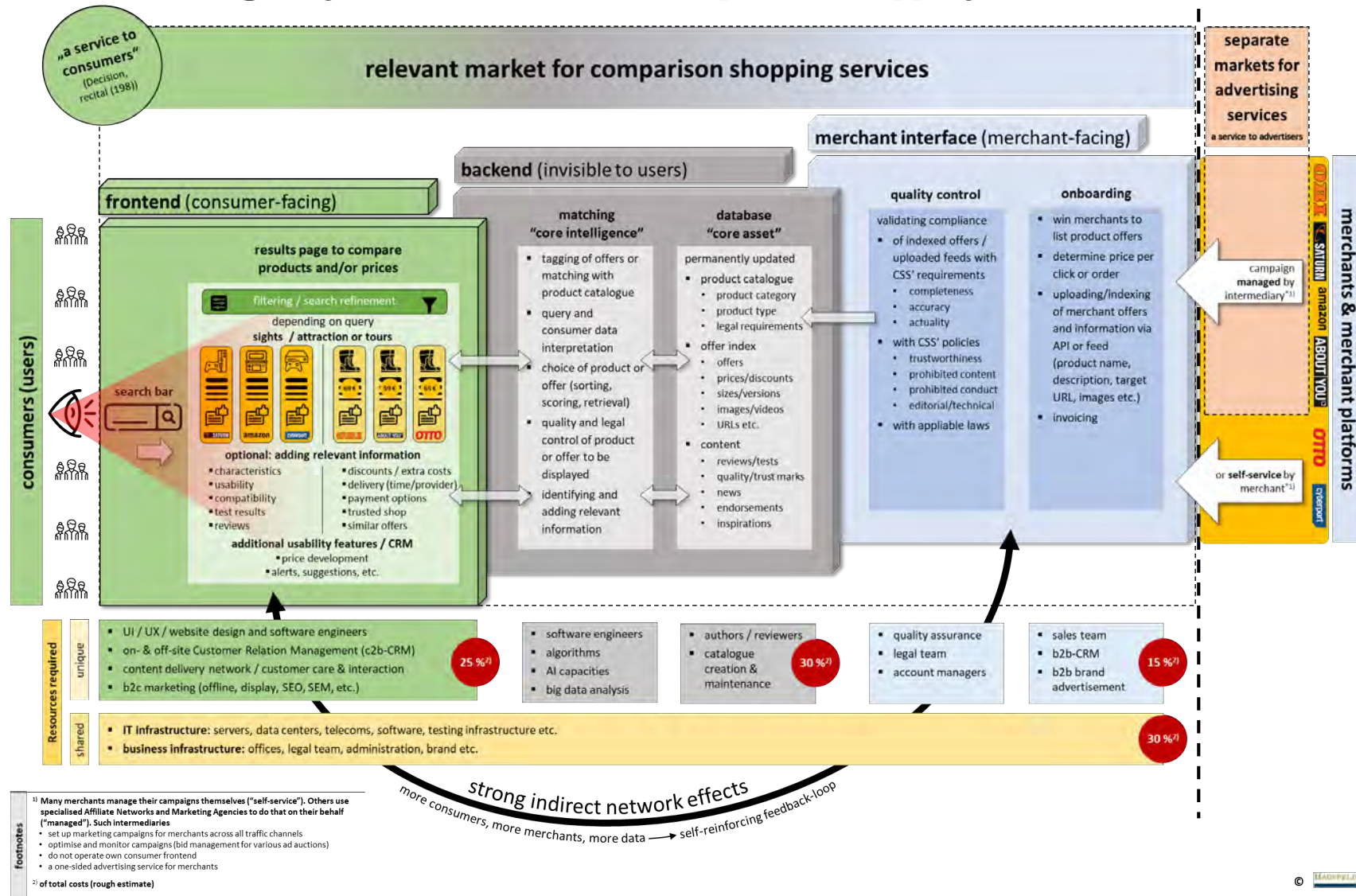


Illustration 1: Digital value chain of a comparison shopping service

Comments on Illustration 1:

The Decision concerns the protection of competition on the national markets for specialised search services, in particular on the markets for CSSs. The Decision distinguished the markets for CSSs, *inter alia*, from the markets for general search services and the markets for online advertising services, including from marketing agencies and affiliate networks that arbitrate (i.e., buy and sell) or redistribute traffic on behalf of advertisers.⁵⁷ To grasp this case, understanding precisely what constitutes a specialised search service, in particular a CSS, is essential.

Illustration 1 shows the entire digital value chain of a CSS and allocates the average percentage of the total costs associated with the respective element. Looking at such figures reveals that the heart and soul of every CSS is the intelligence and infrastructure required to match any given query, entered on any given frontend (i.e., interface for a consumer) with the CSS's own database of available product offers and accompanying information regarding their relevance provided by merchants (i.e., via a merchant interface). Given the two-sided structure of the platform (with consumers and merchants as separate user groups), the quality of such matching of query and available product offers determines the quality of a CSS and ultimately its commercial success on the market. The better the matching, the more consumers will use the service and the merchants are willing to upload product information to the CSS and to pay a price. Due to the strong positive indirect network effects at play, the costs for winning and onboarding new merchant customers decline with the success of a CSS. If, thanks to an attractive frontend and powerful backend, a CSS has a large base of unique users and matches their queries well (leading to a high conversion of traffic into actual sales), merchants no longer need to be convinced to engage with this CSS to reach such unique users. They may only require some overall advertising strategy (regarding the suitable distribution channels and advertising campaign) along with technical support with the uploading of their product feeds. However, specialised service providers, 'intermediaries' assist with this: i.e. marketing agencies, affiliate networks and other ad tech companies. Their services are not part of the CSS market as their management of a campaign may not always be required. Many merchants create and maintain campaigns fully independently, which is referred to as "self-service".

⁵⁷ See Decision, sections 5.2.1.2.2.; 5.2.2.2.; recitals (198), (604).

2 Google's Comparison Shopping Service before the Decision

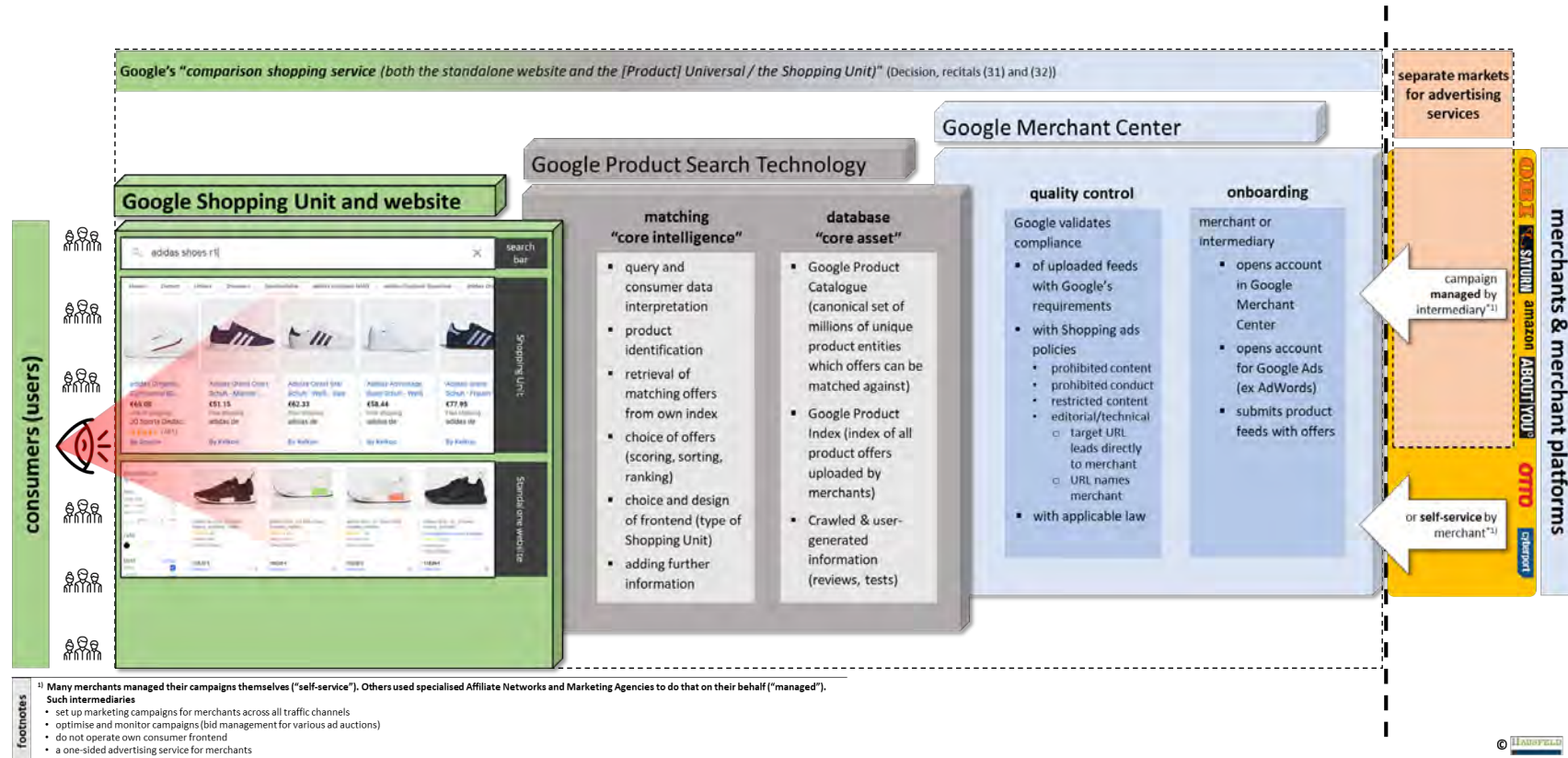


Illustration 2: Google's CSS before the Decision

Comments on Illustration 2:

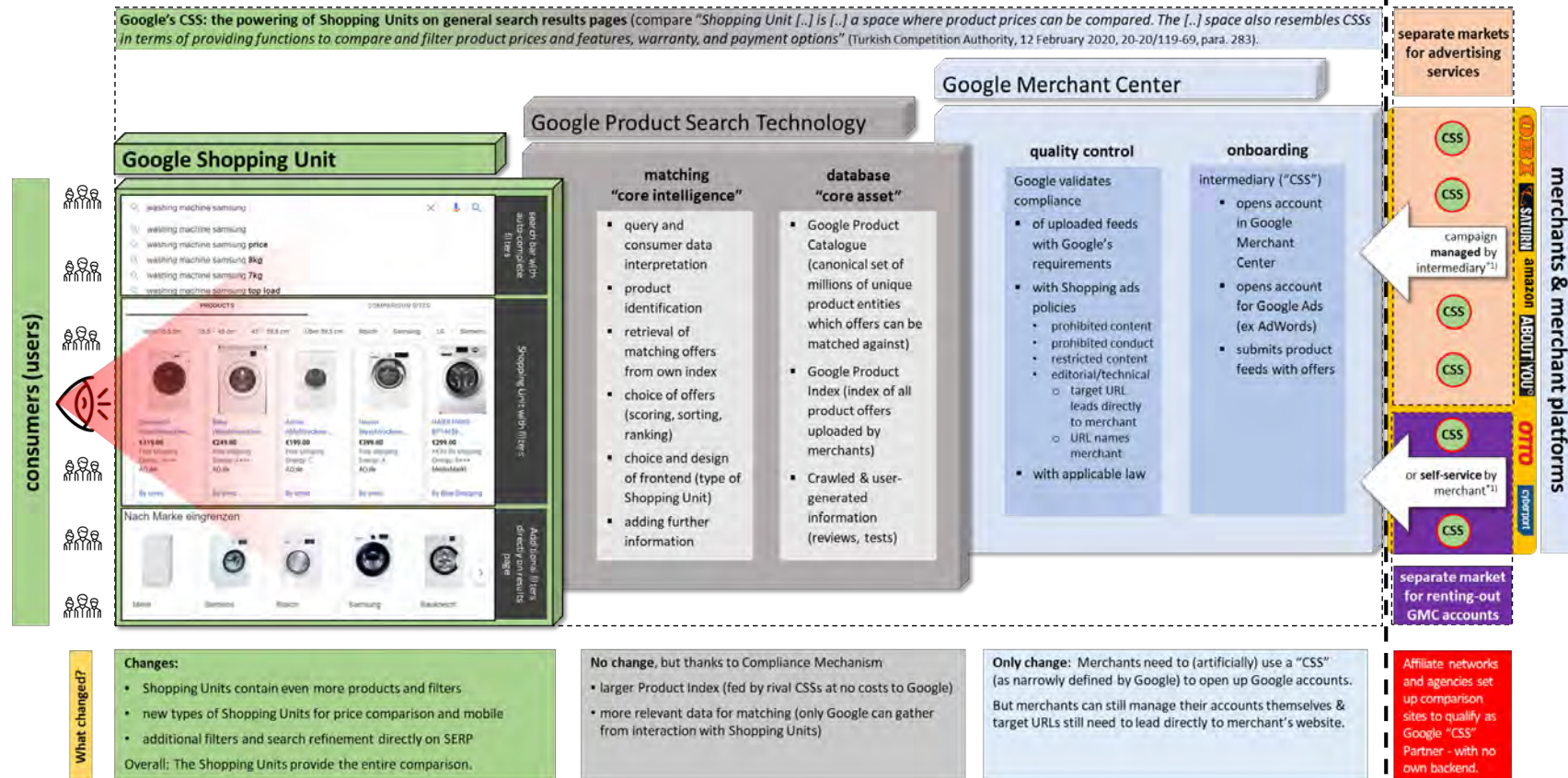
Illustration 2 shows the digital value chain of Google's own CSS prior to the Decision and therein referred to as "Google Shopping". This service employed two separate frontends for users to enter a search query and to then compare the matching products and prices.

In all countries where an infringement was found, users could enter the query in the toolbar of Google's general search service and compare products and prices in a variety of separate boxes with product offers, so-called "Shopping Units", which Google displayed on its general search results page in return of the query. If a user clicked on a link in such a box, this led the user directly to a merchant's website to conclude a sale.

In seven of the thirteen countries in which an abuse was found, Google in addition operated a standalone *Google Shopping* website, where users could enter a query and compare the products and prices separately. However, such websites attracted only few users and had a low share of the Google Shopping business as compared to Shopping Units.

The results in both frontends, the Shopping Units and the standalone website were powered by a common Google infrastructure that constituted *Google Shopping*. Such infrastructure consisted of a special search technology (backend) and a merchant interface to onboard and validate product offers via structured data uploaded from merchants. As is the case for every CSS (see *Illustration 1*), merchants could either 'self-service' their marketing campaign or use a specialised intermediary as a service provider to 'manage' the co-operation on their behalf.

3 Google's (On-SERP) Comparison Shopping Service after the Decision



footnotes

⁴¹ Under the "Compliance Mechanism", many merchants still manage their campaigns themselves ("self-service"). Others use specialised Affiliate Networks and Marketing Agencies to do that on their behalf ("managed"). Google defines the "managed service" for merchants as follows: "In this case, the CSS creates a Merchant Center and a Google Ads account on your behalf. You provide your product data to the CSS and they optimize your feed, upload it to Google, and manage your campaigns." It defines the "self-service" for merchants as follows: "In this case, the CSS creates a Merchant Center and a Google Ads account on your behalf and then gives you access to these accounts." (See: <https://support.google.com/merchants/answer/9133811>)

Illustration 3: Google's (on-SERP) CSS service after the Decision

Comments on Illustration 3:

Illustration 3 shows the lack of changes brought about by Google's chosen CM. Google further neglected the standalone website in favour of a full focus on the Shopping Unit as the central consumer-facing frontend. Google introduced even more sophisticated Shopping Units (see *Illustration 6*) to neatly match the (permanently refined) search queries entered by users in the Google search toolbar. The underlying infrastructure powering such Shopping Units, however, remains unchanged. The only change that the Google's CM brought for competing CSSs is that merchants must now formally upload their product feeds through a 'CSS' as defined by Google.

As the CM provides no benefit to genuine CSSs, the uptake of the CM amongst them was low. To counter this, Google defined a "CSS" that could take part in the CM so minimally that online intermediaries (marketing agencies, affiliate networks and other ad tech companies) could fulfil such criteria in just a few days. They could qualify for the CM by building empty frontends (websites) with no own backends for the central matching of queries and offers and just a small number of merchants that would never allow any genuine product or price comparison.

Having set up the scheme, Google did its best to incentivise merchants to use such 'fake' CSSs instead of *Google Shopping Europe* to bid on their behalf. Google: (i) granted merchants that switch to such 'CSSs' a discount of up to 30%; (ii) allowed CSSs to (merely) rent out accounts to merchants that wish to continue operating a 'self-service' of their campaign; (iii) allowed companies to offer White Label Solutions (i.e., 'CSSs' with their own brand, which are in fact powered by another company's CSS); and (iv) continues to provide merchants with the support service that they previously received from their Google (Shopping) Account Managers at no cost after a migration to (fake) CSS. All of this aimed at making it as easy and lucrative as possible for advertising intermediaries to qualify as a 'CSS', in order that Google could present them to the Commission as apparent market entries and the success of the CM. Yet, the activities that such intermediaries provide still fall outside of the relevant market for CSSs. The CM makes it impossible for them to ever compete on the CSS market. That would require a portfolio of product offers that actually allows a comparison. A CSS can only attract a broad range of merchants with a unique customer base. Such customer base, in turn, requires a strong own front- and backend. Since the CM does not provide any visibility to the frontends and replaces the backends of the 'CSSs' taking part in it, they will never be able to get all assets in place required to compete viably as a CSS.

4 Zoom on the Google CM-Shopping Unit

Different designs and functions, depending on search query and device

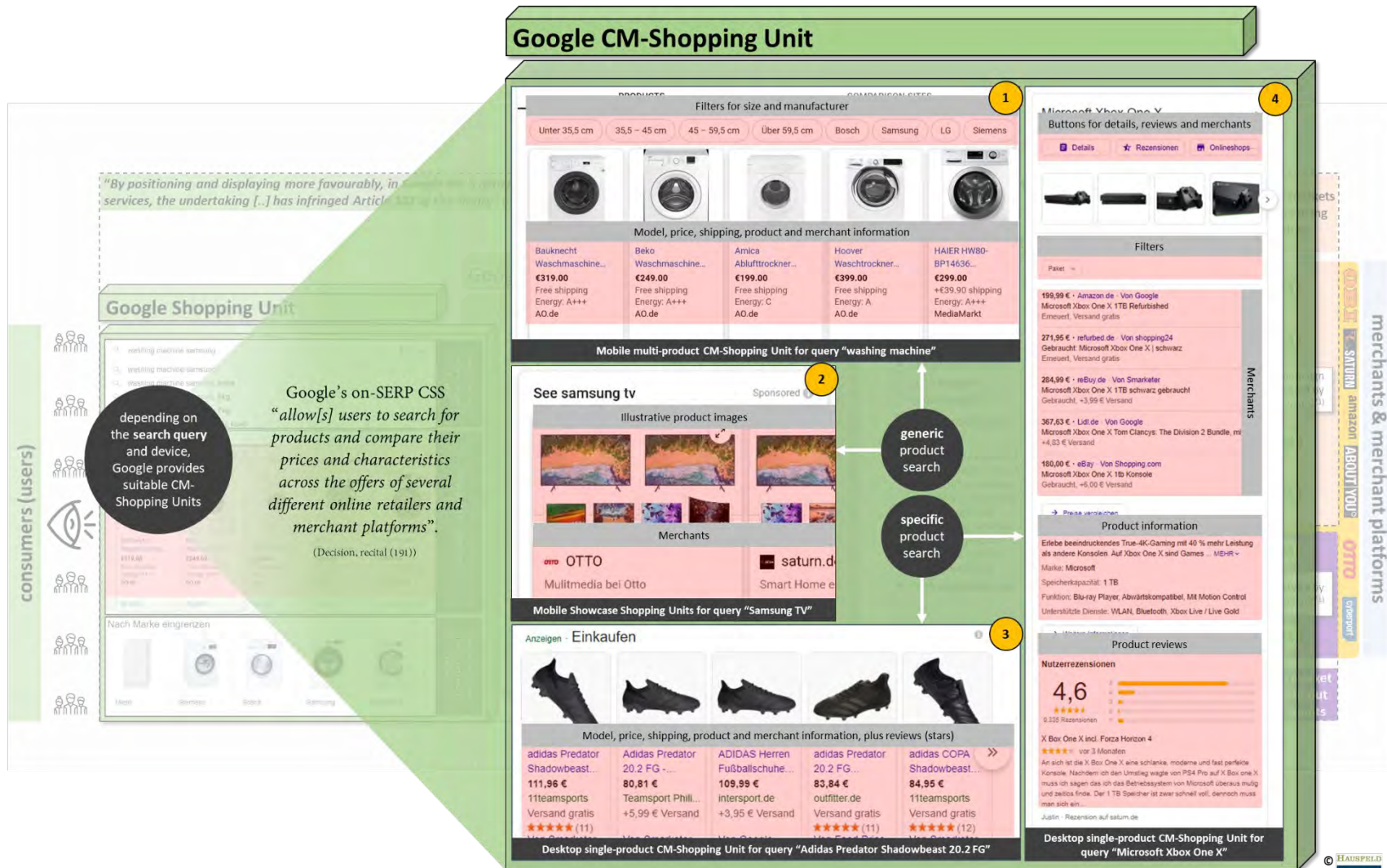


Illustration 4: Zoom on the Google CM-Shopping Unit

Comments on Illustration 4:

Illustration 4 looks closely at the new central frontend of Google's own CSS, the various versions of Shopping Units it provides directly on general search results pages. Google has designed different Shopping Units that correspond to respective level of the user's purchasing journey as expressed through the search query that it enters.

If a user enters a more generic search query such as a search for a "washing machine", Google will display traditional Shopping Units that contain different types of washing machines. Such units then contain filters to allow the user to fine-tune his or her search, e.g. by selecting a particular size, the manufacturer or a price range (see screenshot 1). If the search query is slightly more specific, such as a search for a "Samsung TV" (screenshot 2), Google may display a different Shopping Unit, in this case with so-called "*Showcase Shopping Ad*", which bundle offerings of merchants.

Finally, if the search query that a user has entered suggests or if his or her subsequent clicking behaviour on Google's general search results pages suggests an interest in a particular product (such as a search for "Adidas Predator Shadowbeast 20.2 FG", a football shoe), Google will display Shopping Units that only include product offers of different merchants for the same product (screenshot 3). Alternatively, Google may display a so-called "Product View of Shopping Units" version (screenshot 4). Such units fully focus on this particular product and compare all prices of different merchants, providing further background information on the product along with reviews, ratings and a several product images.

The different units contain an increasing number of specific filters and sorting functionalities (such as those for size, age, price, capacity etc.). The different design, content and focus of the boxes allows Google to neatly match each consumer query with a suitable comparison frontend. All of this is entirely powered by Google's own CSS infrastructure (*Illustration 3*), which is technically and commercially separate from Google's general search service.

5 Google's Abuse of Dominance before the Decision

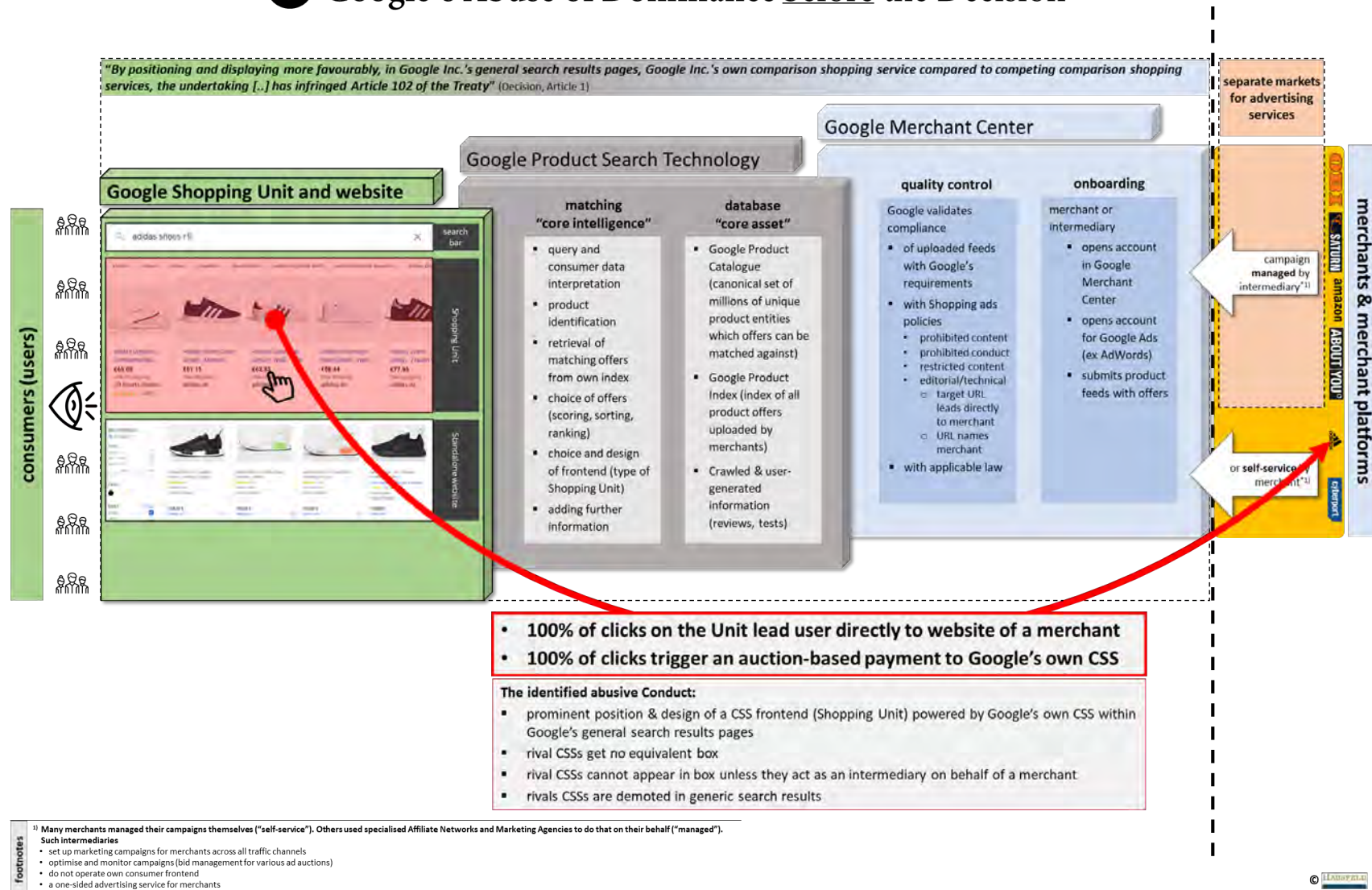
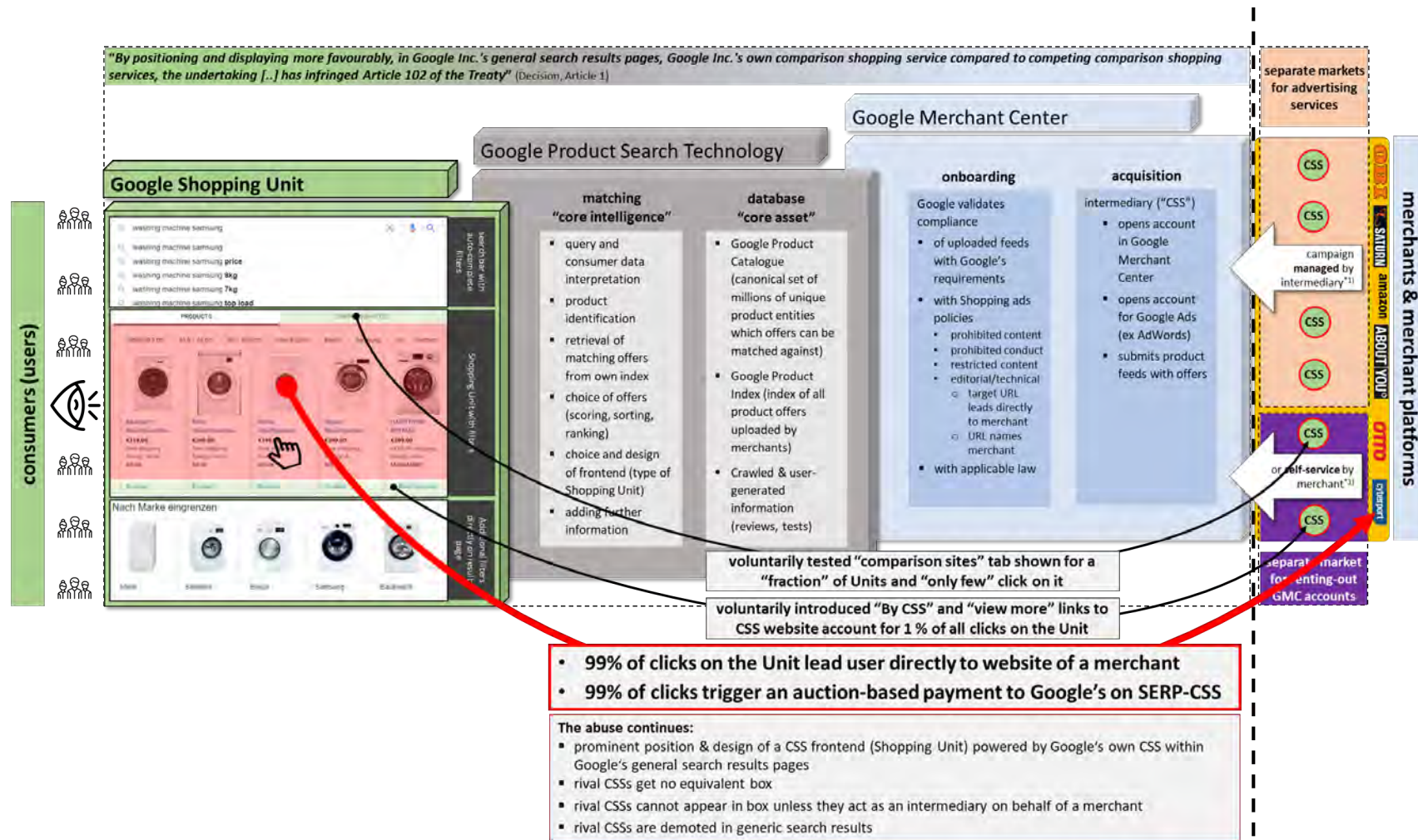


Illustration 5: Google's abuse of dominance before the Decision

Comments on Illustration 5:

Illustration 5 shows the abuse as established by the Decision. Google displayed and positioned the frontend of its own CSS, namely the Shopping Units, more prominently than competing CSS. The latter only appeared as blue hyperlinks below the Shopping Units. No competing CSS was entitled to compile and display equivalent units or frontends on Google's general search results pages. Such favouring had anti-competitive effects, because users were incentivised to click on links in the Shopping Units, which in turn led them directly to merchants, triggering a payment to Google's own CSS and boosting its underlying comparison technology. Conversely, more relevant CSSs with larger product databases, more sophisticated product search algorithms and better customer service were no longer found in the search results, received less traffic and could not invest in their services as much as they otherwise could have done absent the infringement.

6 Google's Continuing Abuse after the Decision



footnotes

¹¹ Under the "Compliance Mechanism", many merchants still manage their campaigns themselves ("self-service"). Others use specialised Affiliate Networks and Marketing Agencies to do that on their behalf ("managed"). Google defines the "managed service" for merchants as follows: "In this case, the CSS creates a Merchant Center and a Google Ads account on your behalf. You provide your product data to the CSS and they optimize your feed, upload it to Google, and manage your campaigns." It defines the "self-service" for merchants as follows: "In this case, the CSS creates a Merchant Center and a Google Ads account on your behalf and then gives you access to these accounts." (See: <https://support.google.com/merchants/answer/9133811>)

¹² Source for all data: Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.14 and footnote 73 and own analysis of data from 15 CSSs.

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Illustration 6: Google's continuing abuse after the Decision

Comments on Illustration 6:

Illustration 6 shows that Google's chosen CM has made no difference. Google still simply displays the frontend (Shopping Units) of its own CSS within its general search results pages. Such "CM-Shopping Units" are powered in exactly the same way by exactly the same underlying CSS infrastructure as the Shopping Units during the infringement period. In particular, every click on a product result in the unit leads the user directly to the merchant to conclude a sale, thereby triggering a payment to Google's (on-SERP-)CSS. The voluntarily added "By CSS" and "view more" links indicate which intermediary uploaded the respective product feed on behalf of a merchant customer. However, as they attract less than 1% of the clicks and are entirely unrelated to the relevance of the CSS (as they are annexes to the merchant's offer), such links are meaningless. In other words, Google's chosen CM has simply not addressed the abuse in any way.

The reason for this ultimately stems from the legal theory that Google relied upon throughout the entirety of the Commission's investigation. Google has always argued that the case solely concerned "access" of competitors to the Shopping Units. The Decision clearly rejected this, clarifying that the case concerned the more favourable positioning and display by Google of its own CSSs within its general search results pages (of which Shopping Units are just one element) (recital (650)). However, when setting up the CM, Google ignored this part of the Decision and simply adhered to its own (but rejected) theory. *"The remedy chosen by Google is therefore framed as an 'access remedy' in that, through the auction mechanism, Google is giving rival comparison shopping services access to the Shopping Unit".*⁵⁸ Google focuses on the equal conditions for "access to the Shopping Unit" to suggest that an equal right of CSSs to bid for product ads was sufficient to comply. Yet, equality within a Shopping Unit is less than equality within Google's general search results pages, which the Decision actually demands. The relevant legal question is not whether Google grants CSSs any access to Shopping Units but rather whether it *"treats competing [CSSs] no less favourably than its own [CSS] within its general search results pages"* (recital (699)). This is not the case as long as Google's own CSS is the only service that may compile and display Shopping Units sourced from its own product index and based upon its own product search algorithms, while competing CSSs are limited to appearing as meaningless blue links.

⁵⁸ See Google's advisers *Vesterdorf* and *Fountoukakos*, "An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law", (2018) 9 Journal of European Law & Practice, 3.

7 Sections of the CSS Digital Value Chain that the CM

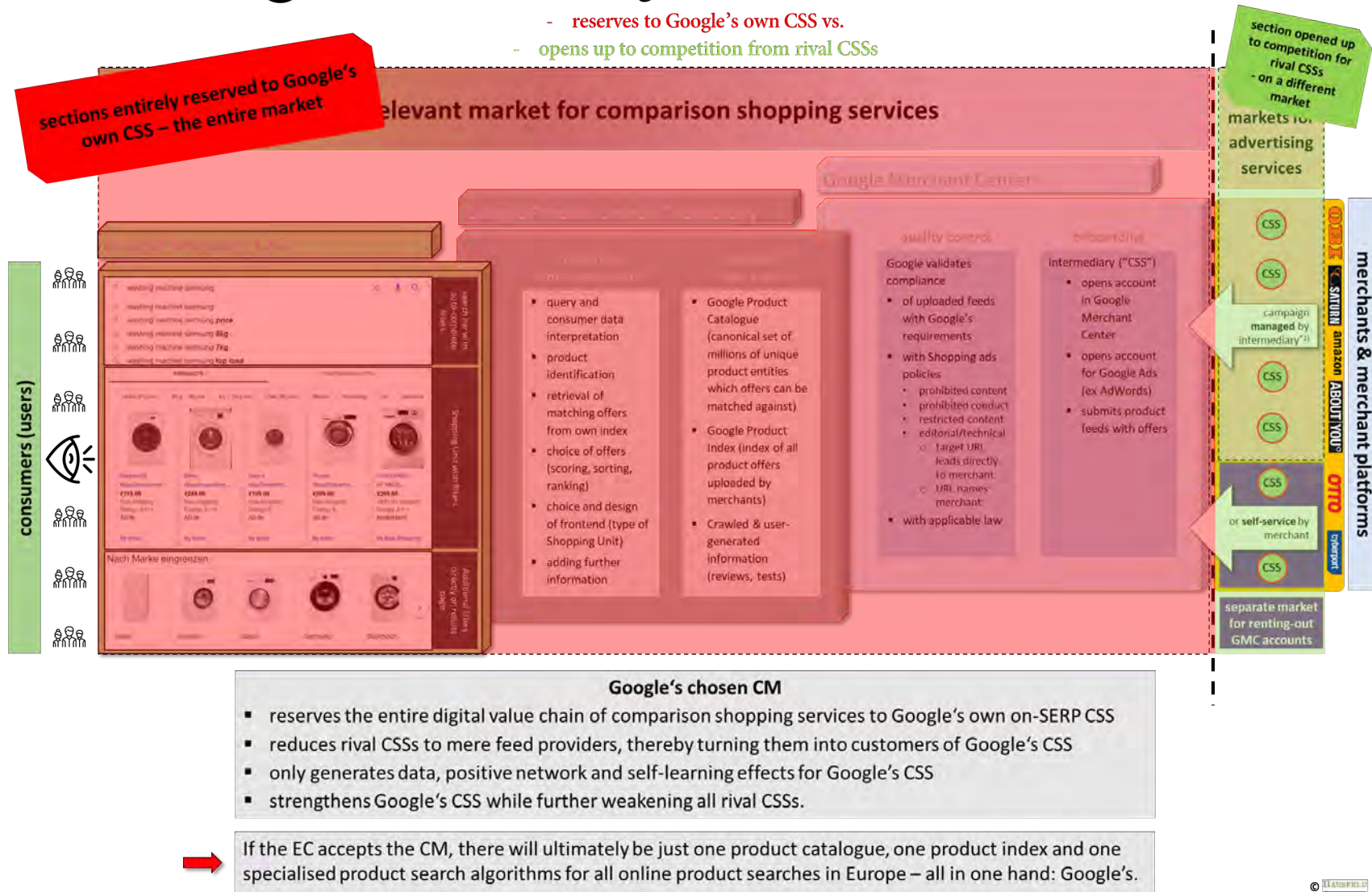


Illustration 7: Sections of the CSS digital value chain that the CM (1) reserves to Google's own CSS vs. (2) opens up to competition from rival CSSs

Comments on Illustration 7:

Illustration 7 shows the elements of the digital value chain of CSSs in which Google's CM allows competition.

The unfortunate reality is – nowhere. Google only allows rival CSSs to upload product feeds on behalf of merchants into Google's own product database. The rival CSSs have no influence, however, on when and where the uploaded product feeds are displayed anywhere in Google's general results pages. Under Google's CM, the entire matching of query and results – what makes up a CSS – is left to Google's own CSS. The rival CSSs are only invited to provide product feeds into Google's system, thereby making it even stronger. They cannot, however, use their own product database or their own specialised search algorithms to present users with their comparisons and their best choices. In addition, they no longer have any opportunity to provide such services, at least via their own websites (as frontends) as they are no longer found below Google's boxes. Google's CM has the goal of rendering Google's Shopping Units into a 'one-stop shop' meta-CSS for the consumer – the single place to go to compare products and prices. The more rival CSSs feed their inventory into this system, the more often Google can trigger suitable Shopping Units and the more offers it can include. Yet, the more consumers only engage with the unit, the less they ever see and use the frontends of rival CSS. 99% of the clicks in the box lead users directly to the merchant's site. They do not see anything of the CSS that uploaded the feed.

The economic reality is that Google's CM reserves the entire value chain for CSSs to Google and thereby monopolises the market. If the mechanism is not stopped, there will ultimately be just one single product catalogue, one product index, one specialised product search algorithm and one comparison interface – all in the hands of one company – Google. As a result, both consumers and merchants will be at the mercy of Google's commercially driven matching system that, contrary to genuine CSSs, inherently favours the more expensive products. Supply and demand will no longer be matched by market mechanisms; rather this will be achieved by Google's auctions.

8

Development of Total Generic Desktop Traffic

Daily Sum from January 1, 2016 to April 30, 2020

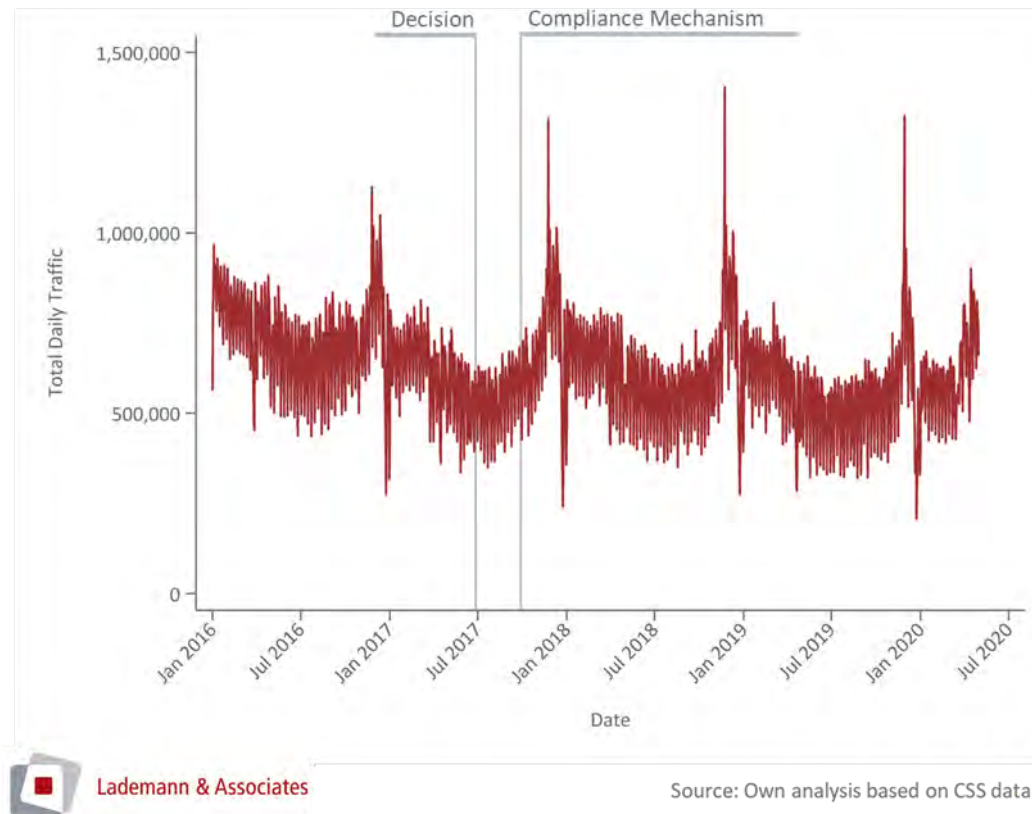


Illustration 8: Calculation – Development of total generic search traffic from Google's general results pages to rival CSSs⁵⁹

⁵⁹ Notes: Traffic is defined as the daily clicks to CSS. Included CSSs: Ceneo.pl, Choozen, Ciao, Kelkoo, Koopkeus, LeGuide, Preis.de, PriceRunner, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

Comments on Illustration 8:

Illustration 8 shows the development of generic search traffic coming from Google's general search results pages to rival CSSs. Based upon traffic and revenue data provided by 25 of the leading European CSSs, the development confirms that Google's CM did not improve the situation for competing CSSs, as envisaged by the Decision, but only for Google's own on-SERP-CSS.

The Decision found Google's favouring of its own CSS abusive because it had *"led to a decrease in generic search traffic from Google's general search results pages on a lasting basis to almost all competing [CSS]"*.⁶⁰ As such, one would assume that, at the very least, ceasing the abuse would lead to an increase in such generic search traffic to rival CSSs. However, this did not happen.

Based upon empirical traffic data assessing nearly 3.9 billion clicks, the statistic shows that the total number of daily visits ("leads") to a CSS website originating from a click on a generic search result on Google's general results pages has not increased since the introduction of the CM. Despite an overall increase of e-commerce activities and corresponding demand for CSSs, the generic traffic coming from Google's general search results pages stayed unchanged. On desktop devices, it even dropped by 1.5%. Nothing improved because Google simply continued what it had been doing prior to the Decision: that is, place its CSS box above generic search results for more relevant rival CSSs.

To be clear, this statistic does not suggest that competing CSSs demand that they receive more 'free clicks' from the remedy. In fact, they do not call for any particular traffic to their website at all, as long as Google does not provide such traffic to its own service. The statistic only serves to show that the CM did not change anything as regards the visibility of competing CSSs in generic results and the traffic resulting from that.

⁶⁰ Decision, recital (462).

9

Development of Profitability - Generic Traffic and Shopping Ads

Daily Average per Lead to Merchant from January 1, 2016 to April 30, 2020

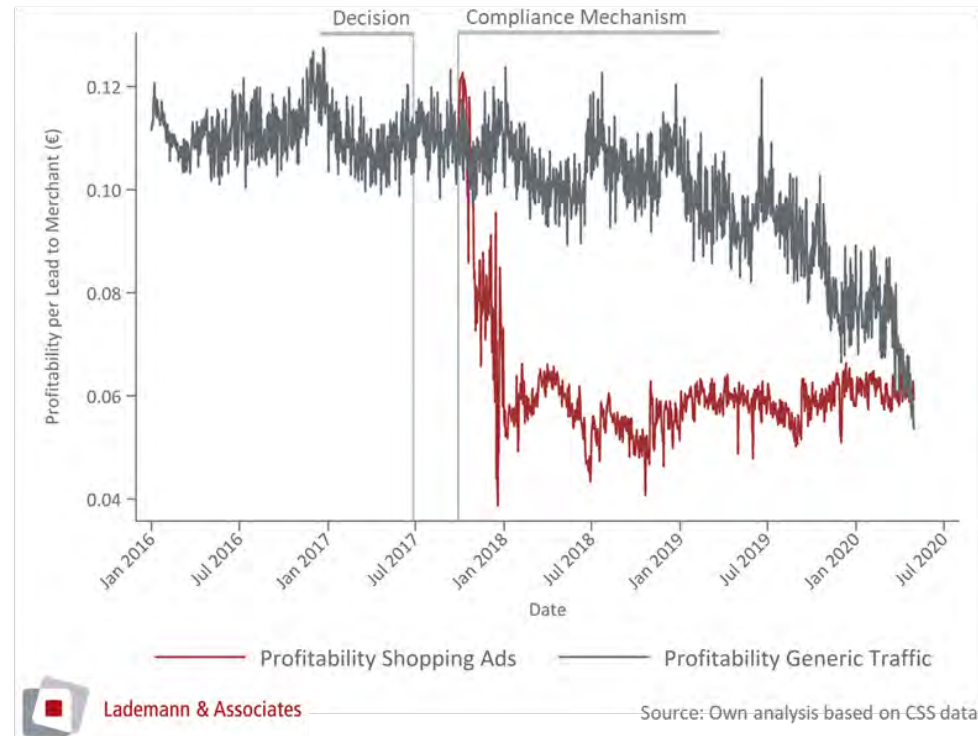


Illustration 9: Calculation – Development of profitability of generic search traffic and leads from Shopping Ads for CSSs combined⁶¹

⁶¹ Notes: Profitability is defined as the average of the daily revenue minus daily cost divided by the number of leads to merchants at that day. Revenue is the payment received by CSS from merchants for leads. Costs are either the spending of CSS for PLAs or spending for SEO activity according to recital (560) of the Decision. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom, Unbalanced Panel Data.

Comments on Illustration 9:

Illustration 9 compares the development of the profitability of clicks on generic search results with the development of the profitability of clicks on *Shopping Ads*.

The graph shows that despite a constant amount of generic search traffic (*Illustration 8*), its profitability for CSSs declined significantly since the launch of the CM. Even during the infringement period, a click on a generic search result generated revenue of (on average) €0.11. In April 2020, this number halved to less than €0.05 per visit. The drop in profitability cannot be explained by the coronavirus crisis, as the downward trend already commenced in 2019. Rather, it is due to the fact that Google's Shopping Units are increasingly directly satisfying the demand of the users with the highest propensity to buy (and corresponding highest click-through rate to merchants). Conversely, of those users that 'still' click on generic search results, the percentage increases that have no immediate intention to compare and buy. Clicks from such users are less likely to convert into a click on a merchant's offer which would (only) trigger a payment to the CSS. They are therefore less profitable.

The graph also shows that CSSs cannot recover their losses from declining generic search traffic from Google's general search results pages (due to Google's self-preferencing) by increasing their (or rather their merchant customers') spending on product ads in Shopping Units. Any such attempt would not appear as an economically viable solution. Since clicks on product ads lead users directly to merchants, the only possible benefit a CSS can get out of them is the commission it may receive for the leadout from a merchant. Yet, the illustration shows that due to increasing auction costs for placing such ads (i.e., payments to Google), since the launch of the CM profitability of clicks on product ads stayed at a constantly low margin of €0.06 per click. Such a margin does not suffice to cover the costs of a genuine CSS with its own front- and backend infrastructure. The Decision found that Google *AdWords* (text ads) are not a viable alternative to generic search traffic due to their high auction-driven costs.⁶² Given that in contrast to Google text ads, Shopping Ads do not even lead users to a CSS's website first, they are even less of an alternative for CSSs.

⁶² Decision, recitals (559)-(567).

10 Decision's consistent treatment of intermediaries that place product ads in Shopping or Product Listing Units

Comparison of Units	Google Shopping Units before 9/2017	Bing Product Listing Units since 8/2013	Product Listing Units on third-party websites	Google Shopping Units since 9/2017
host: website with search bar where user enters query and results Unit is displayed	Google (Google Search)	Bing (Bing Search)	any third-party website (here: mydealz)	Google (Google Search)
provider of Unit: service matching query with results from own product database using own special algorithms	Google (Google Shopping)	Bing (Bing Shopping)	idealo	Google (Google on-SERP-CSS)
example image of website and Unit (marked red)				
party uploading product feeds to product database used to select results in Unit	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)
conditions for intermediary to upload product feeds	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary
website to which clicks on product results in Unit lead to	merchant	merchant	merchant	merchant
standalone comparison website user sees during its journey to merchant	none	none	none	none
space where user compares products & prices before click to merchant to conclude sale = where demand for CSS is satisfied	Unit	Unit	Unit	Unit
service earning CSS revenue directly from click in Unit	provider of Unit: Google (Google Shopping)	provider of Unit: Bing (Bing Shopping)	provider of Unit: idealo	provider of Unit: Google (Google on-SERP-CSS)
service earning commission for online advertising/marketing	self-service: none or managed: intermediary	self-service: none or managed: intermediary	self-service: none or managed: intermediary	self-service: none or managed: intermediary (if via Google Shopping Europe)
service the Decision attributes clicks as "traffic" to if user clicks on result in Unit	provider of Unit: Google (Google Shopping) (see in particular recitals (421) and (630) of the Decision)	provider of Unit: Bing (Bing Shopping) (see in particular recital 613 (a) (3) and footnote 581 of the Decision)	provider of Unit: idealo (see in particular recital 613 (a) (4) and footnote 581 of the Decision)	Applying the Decision's methodology, it can only be the provider of the Unit: Google (Google on-SERP CSS).
service the Decision identifies as the CSS	provider of Unit: Google (Google Shopping) (see in particular recitals (31) and (32) of the Decision)	provider of Unit: Bing (Bing Shopping) (see in particular recital 613 (a) (3) of the Decision)	provider of Unit: idealo (see in particular recital 613 (a) (4) of the Decision)	Applying the Decision's methodology, it can only be the provider of the Unit: Google (Google on-SERP CSS).

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Illustration 10: Decision's consistent treatment of intermediaries that place product ads in Shopping or Product Listing Units

Comments on Illustration 10:

Illustration 10 shows why, from a legal perspective, following the introduction of the CM, Google's providing of Shopping Units can only be seen as a CSS in itself. This is because the Decision, and Google itself, treated the provision of (i) Google's previous Shopping Units, (ii) Bing's equivalent Product Listing Units and (iii) the equivalent units displayed by Kelkoo, idealo and LeGuide on third-party websites as a CSS in itself, irrespective of any corresponding standalone shopping website. This is despite the fact that all of such units contained product results based upon product feeds uploaded by other aggregators, including CSSs. Had the Decision treated such services as a standalone CSS, Google's current provision of even more sophisticated Shopping Units must constitute a CSS even more so.

Since Google continues to reserve the right to its own CSS to display a frontend directly within its general search results pages, the favouring of its own CSS (the provision of Shopping Units) and hence the abuse continues unabated. Google is thus not complying with the Decision.

11 Traffic attribution to the providers of Shopping and Product Listing Units according to the Decision

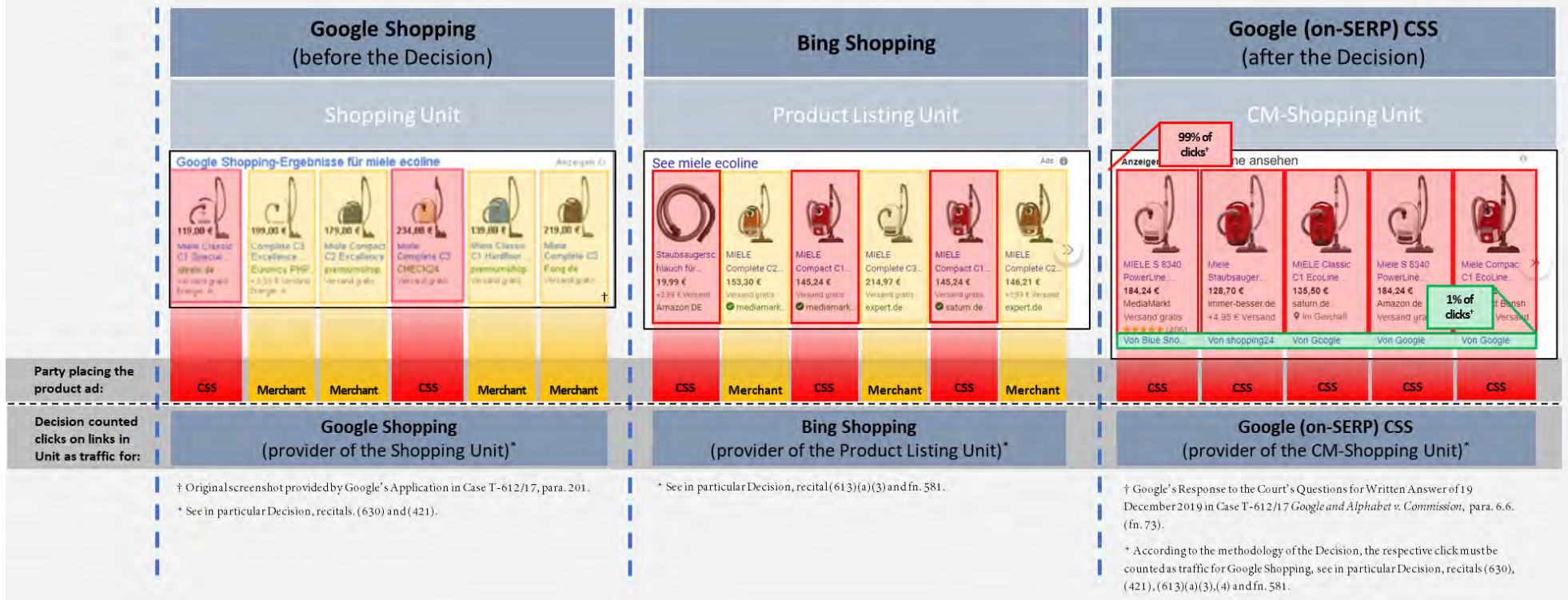


Illustration 11: Traffic attribution to the providers of Shopping and Product Listing Units according to the Decision

Comments on Illustration 11:

Illustration 11 shows the same crucial point as *Illustration 10* albeit from a different perspective. Aggregators have always been able to serve product ads in Google's and Bing's Shopping Units. Nevertheless, the Decision considers the provision of such units as a CSS and has counted all clicks on product ads within such units as clicks for the party providing the unit (i.e., carrying out the matching of query and result), and not as traffic for the aggregator (or merchant) that uploaded the respective feed. When applied to Google's CM, the provision of Google's current CM-Shopping Units must also be viewed as a CSS. The methodology used in the Decision also means that Google's CM now sends 99% of the traffic to Google's own CSS, while just 1% of traffic goes to all rival CSSs put together. This does not constitute equal treatment.

12 Google's only defence: "the Shopping Unit is not a CSS in itself"

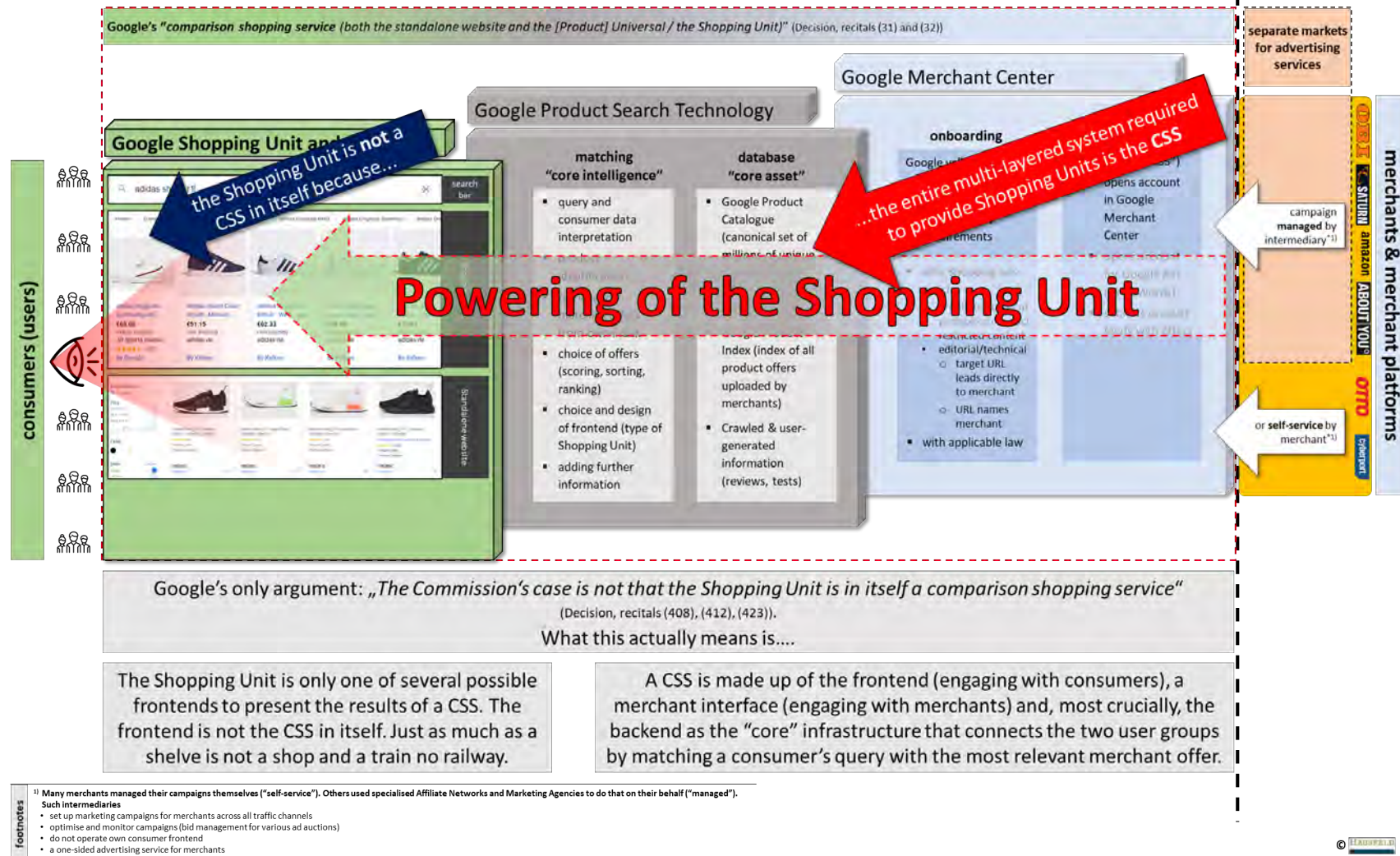


Illustration 12: Google's only defence: "the Shopping Unit is not a CSS in itself"

Comments on Illustration 12:

Illustration 12 explains why the only legal argument that Google puts forward in defence of its CM has no merit. Google refers to a sentence in the Decision according to which the “*Commission’s case is not that the Shopping Unit in itself is a comparison shopping service*”. However, this only means that a frontend alone does not yet constitute a CSS (see *Illustration 1*). Hence, it is not the Shopping Unit (as the frontend to present the result) but the underlying infrastructure that forms the CSS. There is not a single, viable argument in Google’s defence.

13a The established infringement (situation until 2017)



Illustration 13a: The established infringement (situation until 2017)

13b The situation as of today - the abusive favouring of Google's own CSS continues

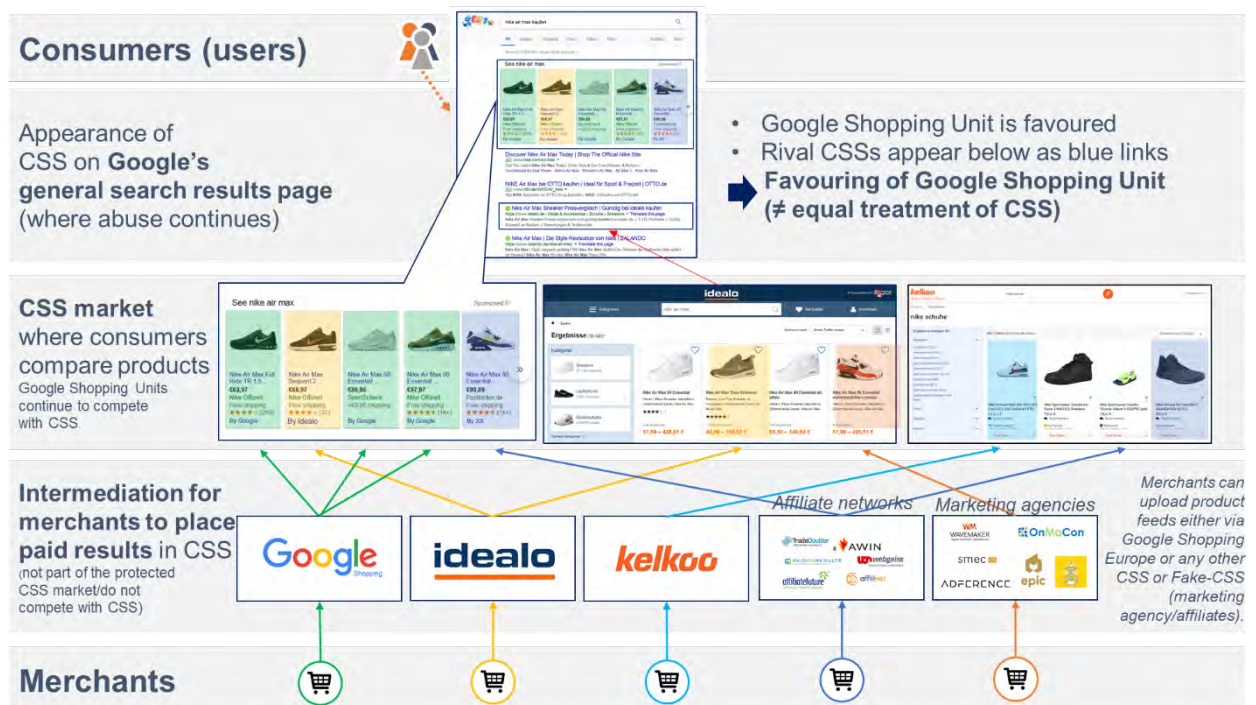


Illustration 13b: The situation as of today – the abusive favouring of Google's own CSS continues

Comments on Illustration 13:

Illustrations 13 outlines the abusive conduct as identified in the Decision (*Illustration 13a* at the top) and following the introduction of the CM (*Illustration 13b* at the bottom)

Google continues to position its own CSS more prominently on its general search results pages as compared to rival CSSs. No other CSS may compile a similar box or grouping of results sourced with product offers from its own product database on the basis of its own specialised search services and display it directly within Google's general search results pages. They only appear, minimally, as blue links in generic search results or Google text ads. This is clearly not "equal treatment". While users may engage with Google's on-SERP-CSS right away, they arrive at a competing CSS only if they first find the blue link (if Google displays any) and then actually click on it. However, Google's entire idea behind Shopping Units is that users do not do that; rather, they (are incentivised and guided to) compare products and prices directly within Google's Shopping Units, with no need to click any further.

To conclude, contrary to Article 3 para. 1 of the Decision, Google's CM neither brought the identified abusive conduct nor its anti-competitive effects to an end. Contrary to Article 3 para. 2, in any case, Google's CM has an object and effect equivalent to that of the infringement. Having an obligation to bring the established infringement effectively to an end and to protect European consumers, merchants and CSSs from further irreversible damage, the Commission must initiate non-compliance proceedings against Google without further delay.

MAIN ANALYSIS

Chapter 1: Google Search (Shopping) Decision

A. Introduction

1. Overview: decision – remedy – compliance mechanism – monitoring

- 41 Following a seven-year-long investigation, on 27 June 2017, the Commission issued its prohibition decision (the “**Decision**”) against Google concerning the favouring of its CSS, Google Shopping, in its general search results pages.⁶³ In the Decision the

⁶³ Commission Decision in Case AT.39740, *Google Search (Shopping)*. The Decision has led to a large number of reactions, opinions and comments, see for example: *Abbott*, “The European Commission’s Regrettable June 27 Google Antitrust Decision – and Its Broader Implications”, Truth on the Market Blog, 28 June 2017, <https://bit.ly/2HrghXt>; *Akman*, “A Preliminary Assessment of the European Commission’s Google Android Decision”, Competition Policy International, 17 December 2018, <https://bit.ly/3mKJnrM>; *Amelio* and others, “Recent Developments at DG Competition: 2017/2018”, (2018) 53 Review of Industrial Organization, 653; *Banasevic, Marques and Portuese*, “The Google Shopping Decision”, Concurrences N° 2-2018, 25; *Bergkamp*, “The European Commission’s Google Shopping decision: Could bias have anything to do with it?”, (2019) 26 Maastricht Journal of European and Comparative Law, 524; *Brauneck*, GRUR Int. 2018, 103; *Buttà*, “Google Search (Shopping): an Overview of the European Commission’s Antitrust Case”, 2018 (5) Italian Antitrust Review, 45; Competition Actually Blog, “Google Search. Shopping for an appropriate abuse standard”, 9 November 2017, <https://bit.ly/2ZZy7Og>; *Critchlow*, “The EU is Wrong, but Google is Still in Trouble”, distilled Blog, 28 June 2017, <https://bit.ly/3mKKilK>; *Daly*, “Beyond ‘Hipster Antitrust’: A Critical Perspective on the European Commission’s Google Decision”, (2017) 1 European Competition and Regulation Law Review, 188; *Dolmans and Pesch*, “Should we disrupt antitrust law?”, 2019 (5) Competition Law & Policy Debate, 71; *Eben*, “Fining Google: a missed opportunity for legal certainty?”, (2018) 14 European Competition Journal, 129; *Fumagalli*, A Note on the Google (comparison shopping) case, 30 October 2017, <https://bit.ly/2FJVhBF>; *Graf and Mostyn*, in: E-Commerce Competition Enforcement Guide, “Access to Online Platforms and Competition Law”, 2019; *Haucap*, “Why the European Commission’s decision against Google is in many respects dubious, at best”, D’Kart Antitrust Blog, 29 June 2017, <https://bit.ly/3mTtejZ>; *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020; *Holzweber*, MR-Int 2018, 76; *Höppner*, European Competition and Regulatory Review 2017, 208; *Kersting*, “Five first thoughts on the Google decision”, D’Kart Antitrust Blog, 29 June 2017, <https://bit.ly/3mTtejZ>; *Körber*, NZKart 2018, 105; *Kucharczyk*, CoRe 2017, 193; *Kuenzler*, “Promoting Quality Competition in Big Data Markets: What the European Commission’s Decision in Google Search (Shopping) Achieves”, 13 August 2019, <https://bit.ly/2HkUK9r>; *Lamadrid/Colomo*, “Google Shopping Decision – First Urgent Comments”, Chillin’Competition blog, 27 June 2017, <https://bit.ly/301p8wg>; *Lamadrid/Colomo*, “Self-Preferencing: Yet Another Epithet in Need of Limiting Principles”, Chillin’Competition Blog, 24 April 2019, <https://bit.ly/36dRGXp>; *Lohse*, ZHR 2018, 321; *Marsden*, “Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (an How to Fix it)”, Journal of European Competition Law and Practice, 17 September 2020; *Podszun*, “Five first thoughts on the Google decision”, D’Kart Antitrust Blog, 29 June 2017, <https://bit.ly/3mTtejZ>; *Portuese*, CoRe 2017, 198; *Reiffen*, “How the EU fine will ruin Google Shopping for the consumer”, Search Engine Land, 28 June 2017, <https://bit.ly/2HrtITt>; *Reyna and Martin*, CoRe 2017, 204; *Thompson*, “End, Means, and Antitrust”, Stratechery, 28 June 2017, <https://bit.ly/2G2zKUx>; *Strader*, IIC 2019, 559; *Valdivia*,

Commission found that Google had infringed Article 102 TFEU by abusing its dominant position on the national markets for general search services. The Commission considered it an abuse of dominance that Google favoured its own CSS, Google Shopping, on the results pages of its general search service. This favouring was found to have harmed competition on the market for CSSs which is distinct but nevertheless related to the neighbouring market for general search services.

- 42 In order to bring the infringement to an end, the Decision imposed a remedy on Google. Pursuant to Article 3, Google shall “*bring effectively to an end the infringement*” and refrain from repeating any equivalent act or any act “*having the same or equivalent object or effect*” (so-called “cease-and-desist”). As there is more than one technical way of bringing the infringement effectively to an end, the Commission left it “*for Google and Alphabet to choose between the various ways*” (recital (698)). However, recitals (699) and (700) contain a list of requirements that must be fulfilled by any measure that Google chooses in implementing the Decision. In essence, the Decision obliges Google to “*ensure that Google treats competing shopping services no less favourably than its own comparison shopping service within its general results pages*” (recital (699)). In addition, Google shall “*subject Google’s own comparison shopping service to the same underlying processes and methods for the positioning and display in Google’s general search results pages as those used for competing comparison shopping services.*” Moreover, the measures “*should not lead to competing comparison shopping services*

“The Scope of the ‘Special Responsibility’ upon Vertically Integrated Dominant Firms after the Google Shopping Case”, (2018) 41 World Competition, 43; White, “Google’s Antitrust Woes and Google Shopping”, 23 November 2018, <https://bit.ly/362h6XS>; Zingales, “Google Shopping: beware of ‘self-favouring’ in a world of algorithmic nudging”, Competition Policy International, 13 February 2018, <https://bit.ly/2RQhMY3>. The Commission’s proceedings and the allegations of abuse against Google have already been intensively discussed beforehand, see for example: Akman, “The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law”, (2017) 2 Journal of Law, Technology and Policy, 301; Broos and Ramos, “Competing Business Models and Two-Sidedness: An Application to the Google Shopping Case”, The Antitrust Bulletin, 22 May 2017; Budzinski, WuW 2015, 219; Chirita, “Google’s Anti-Competitive and Unfair Practices in Digital Leisure Markets” (2015) 11 The Competition Law Review, 109; Jaeger, WuW 2015, 702; Kokkoris, “The Google Case in the EU: Is There a Case?”, The Antitrust Bulletin, 22 May 2017; Körber, NZKart 2015, 415; Nazzini, (2015) 6 Journal of European Competition Law & Practice, 301; Petit, “Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf”, 29 April 2015, <https://bit.ly/32Vm1b9>; Sensburg, EuZW 2015, 369; Surblyté, EuCML 2015, 170; Vesterdorf, “Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?”, (2015) 1 Competition Law & Policy Debate, 4; Wagner-von Papp, “Should Google’s secret sauce be organic?”, (2015) 16 Melbourne Journal of International Law, 609.

being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established" in the Decision (recital (700)(c) and (d)).

- 43 The Decision gave Google 90 days from the date of the notification of the Decision to implement measures that bring the infringement effectively to an end (Article 3). In addition, Google was obliged to notify the Commission, within 60 days of notification, of the intended measures. In addition, Google must provide the Commission with periodic reports on the manner in which they are complying with this Decision (Article 4).
- 44 In order to implement the remedy, as of 27 September 2017 Google introduced a new mechanism for the compilation of the grouping of links in which it presents special results for queries that relate to comparison shopping on Google's general results pages, so-called "Shopping Units". In particular, this CM chosen by Google changed the manner with which merchants are able to bid for product ads that Google may include in its Shopping Units. In March 2019 Google "voluntarily" tested an additional feature to implement the Decision, in particular a new type of ad, so-called "Comparison Listing Ads" (CLAs), which Google commenced displaying in a fraction of Shopping Units in some countries.
- 45 From the very beginning, several market participants criticised the mechanism chosen by Google and doubted its suitability in bringing the infringement to an end (see below at ¶¶47 et seq.).
- 46 As of September 2020, the Commission has never approved Google's chosen CM. While some staff members expressed that progress was made,⁶⁴ the Commission repeatedly pointed out that the mechanism does not appear to let any viable traffic through to the websites of competing CSSs⁶⁵ and that those taking part in it offer

⁶⁴ See *Laitenberger*, quoted in "Google Shopping remedies have been 'positive' so far", MLex, 15 May 2019, <https://bit.ly/33QIZ3l>, saying that there has been "*very extensive factfinding on the effects of the remedy, that so far has been positive*". Note that the focus is on the positive fact-finding, not on the effects. Similarly, when *Margarethe Vestager* said on 2 May 2019 that "*we do not have a non-compliance case but at the same time also [...] keep monitoring monthly developments*", this only meant that no "case", i.e. an investigation, had been launched. She did not say that there was no non-compliance "issue" or "concern" – just no pending case; *Chee*, "EU sees no compliance issue in Google shopping, rivals disagree", Reuters, 22 May 2019, <https://reut.rs/3iUviS7>. *Guersent*, speech 17 September 2020, ICN 2020, Virtual Annual Conference, Unilateral Conduct Working Group, <https://bit.ly/32Pi1ZF>, reporting that according to Google's latest report, 47% of clicks go to ads placed by other firms than GSE.

⁶⁵ Commissioner Margrethe Vestager as quoted by *Chee*, "EU's Vestager says Google's antitrust proposal not helping shopping rivals", 7 November 2019, <https://reut.rs/3kylYXs>: "*we still do not see much traffic for viable competitors when it comes to shopping comparison*".

advertising rather than CSS services.⁶⁶ The Commission therefore emphasised that it would continue to monitor the CM in order to determine whether or not it is compliant with the remedy imposed.⁶⁷ The final decision on the Commission's response is pending.

2. Industry concerns regarding the inefficiency of Google's Compliance Mechanism

47 Market participants have raised several reasons as to why Google's CM still fails to comply with the Decision and the imposed obligation of equal treatment. According to them, amongst others, the following factors are not in line with the imposed remedy:

- the auction mechanism, because the resulting fees are not economically sustainable for competing CSSs and thus have an effect equivalent to the prohibited favouring;
- the failure to reverse/address the abusive demotions;
- the fact that the CM forces established CSSs that wish to take part in the CM to change their business model into one that is inconsistent with the core nature of a CSS and hence to leave the market for CSSs;
- the preferential access to search-related data that *Google Shopping Europe* enjoys as compared to competing CSSs and resulting advantages in the auction for Shopping Units;
- the fact that the CM does not let any viable traffic through to the websites of rival CSSs; and
- the fact that there is still a toolbar-linked "Shopping" tab on Google's general search results pages that exclusively leads to Google Shopping Europe.

⁶⁶ See Margrethe Vestager quoted as follows: "‘These are [advertising] agencies’ creating the sites, ‘they are not doing shopping comparison,’ Vestager said. ‘Advertising is their main mission in their business life and now they are here, so what is this?’, she asked. ‘Of course we are following up with Google to say well shopping comparison is shopping comparison and it is not advertising as such,’ she said.", "EU turns eye to ‘fake’ Google shopping rivals", Euractiv, 23 November 2018, <https://bit.ly/2HdsNQU>.

⁶⁷ Cf. Vestager, 11 March 2020, Answer given on behalf of the European Commission to a question of the European Parliament: "The Commission assesses compliance issues on an ongoing basis and as a matter of priority [...].", <https://bit.ly/2Eu9To1>; Vestager, Web Summit Lisbon, 7 November 2019: "We still do not see much traffic for rival competitors when it comes to shopping comparison.", <https://bit.ly/33PO4YJ> and <https://bit.ly/33YexmT>; Banasevic, 27 March 2019, "Panel Discussion: International Norms for Antitrust Proceedings", American Bar Association Antitrust Spring Meeting 2019.

- 48 Google in turn is actively trying to draw all the attention to the issues “within” the CM only. In particular, it is focusing on the question as to whether the introduced auction mechanism to bid for particular *Shopping Ads* allows all competing CSSs “equal access” to a Shopping Unit as compared to (what is now called) GSE.
- 49 This study will show that Google’s focus needs to be seen as a dangerous attempt to distract from the much more fundamental question. This study is neither calling for more traffic to competing CSSs, let alone any free clicks, nor does it challenge Google’s right to auction off inventory on its website. Instead, this study focuses on the most fundamental question: May Google reserve the right to its itself, to its own CSS, to provide a box (Shopping Unit) that provides a CSS directly on its general search results pages, while all competing CSSs are limited to bidding for individual product ads (*Shopping Ads*) of their merchant customers to appear in this space?
- 50 This is a fundamental question because the Decision clearly rejected Google’s theory that the case concerned a refusal to grant access to Google’s general search results pages, let alone access to the Shopping Unit or *Shopping Ads*.⁶⁸ Accordingly, when it comes to compliance with the Decision, the legal question is not whether all CSSs have such equal access to *Shopping Ads* or Shopping Units. The Decision requires an equal treatment of all CSSs regarding their positioning and display “*within Google’s general results pages*” (recital (699)). The issue therefore turns on whether, all competing CSSs receive similar units in the event that Google decides to display a Shopping Unit on its site which is provided by its own CSS. Equality within a Shopping Unit in and of itself does not ensure equality within Google’s general search results pages.

⁶⁸ Decision, recital (650): “*the Conduct does not concern a passive refusal by Google to give competing comparison shopping services access to a portion of its general search results pages, but active behaviour relating to the more favourable positioning and display by Google, in its general results pages, of its own comparison shopping services.*”.

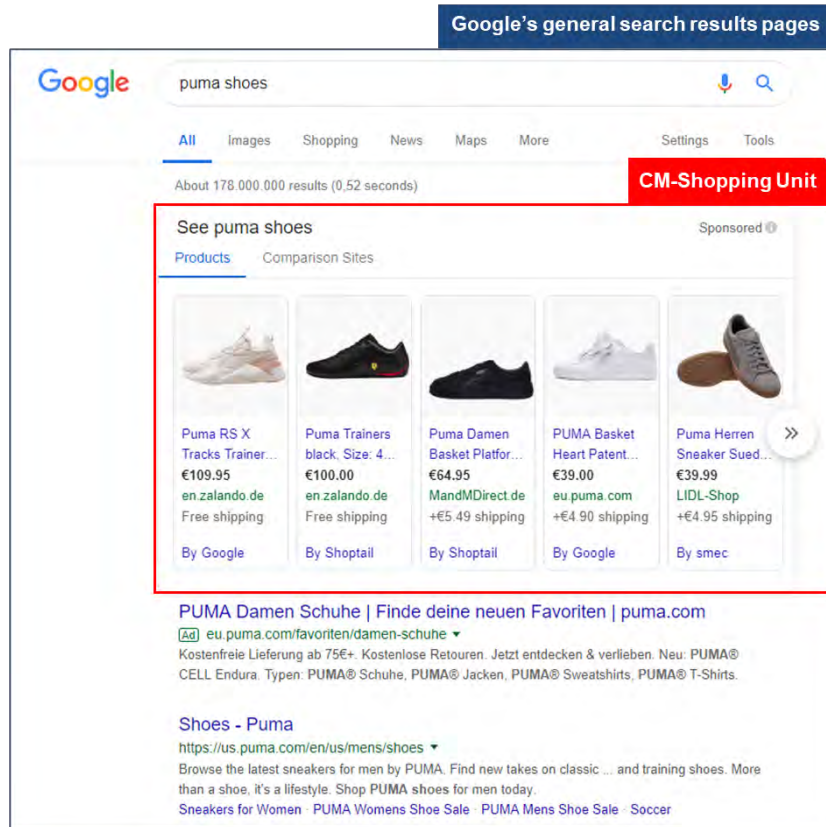


Illustration 14: Difference between Google's general search results pages and CM-Shopping Unit (for further screenshots and illustrations of CM-Shopping Units see ANNEX 1.)

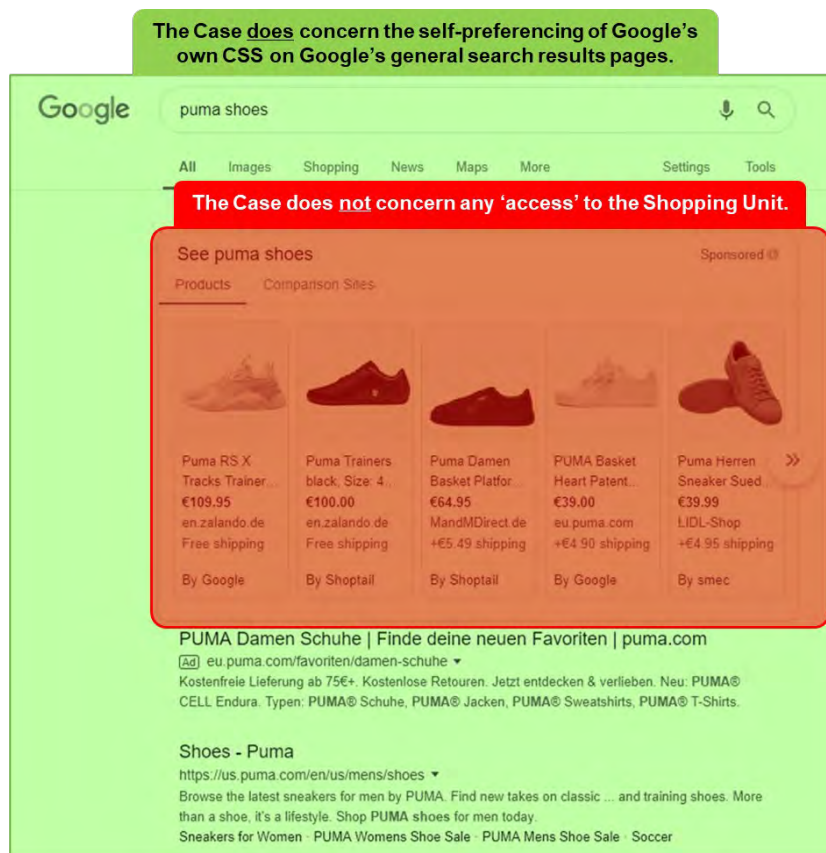


Illustration 15: The Case does not concern any 'access' to the Shopping Unit (coloured emphasis added)

B. Interplay of abuse, remedy and compliance in competition law**1. Requirements for an effective remedy in digital markets**

- 51 Pursuant to Article 7(1) Regulation 1/2003, the purpose of a remedy is to effectively bring the identified infringement(s) to an end. Following the ECJ's *Ufex*-decision,⁶⁹ this means that the effects of the infringement(s) on the market must be brought to an end.⁷⁰ The ECJ has explicitly recognised that, for such purpose, the Commission has the power not only to prohibit *"the continuation of certain action, practices or situations which are contrary to the Treaty"*, but also to *"include an order to do certain acts or provide certain advantages which have been wrongfully withheld"*.⁷¹ In other words, the Commission may order that the infringing conduct or omission must be discontinued; as well as ordering that the on-going competitive consequences must be undone. As former Director General DG Comp, now a Judge presiding at the General Court, *Johannes Laitenberger* put it:

*"An effective remedy must eliminate the consequence of the infringement. This applies to both 'cease and desist' orders and specific remedies. An effective remedy should create new realistic commercial opportunities. It shall restore the competitive process."*⁷²

- 52 If the market on which one's favoured own service is active is subject to strong positive network effects, any abusive self-preferencing will already have caused damage to the competitive structure of the market⁷³. An effective remedy needs to annul such negative effects⁷⁴. For this to occur, the remedy needs to be pro-active. If the market has already "tipped" towards the favoured subsidiary, the remedy must even be "restorative" in the sense that it actively initiates measures that will restore competition. The undertaking must be obliged to actively re-establish material equality.

⁶⁹ Case C-119/97 P, *Ufex v Commission*, ECLI:EU:C:1999:116, paras. 93-94.

⁷⁰ *Marsden*, "Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (an How to Fix it)", *Journal of European Competition Law & Practice*, 17 September 2020, p. 1 (*"The standard [...] expected when assessing whether a remedy resolves an infringement [...] is whether an infringement has been brought to an end effectively."*).

⁷¹ Joint Cases 6/73 and 7/73, *Commercial Solvents v Commission*, ECLI:EU:C:1974:18, para. 45.

⁷² *Laitenberger*, "Competition enforcement in digital markets: using our tools well and a look at the future", GCLC conference, 31 January 2019, p. 5, <https://bit.ly/3kFwk97>.

⁷³ Cf. Court of First Instance, Case T-201/04, ECLI:EU:T:2007:289, *Microsoft*, paras. 983, 1054, 1061.

⁷⁴ Commission, Decision of 24 March 2004, Case AT.37792 – *Microsoft*, para. 996; *Ritter*, "How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?", *Journal of European Competition Law & Practice*, 2016, p. 3; *Maier-Rigaud*, "Quo Vadis Antitrust Remedies" in Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2007*, p. 207.

- **Where self-preferencing exacerbated user biases, the remedy must be “debiasing”.** A pro-active remedy implies, *inter alia*, that where the self-preferencing has caused or exacerbated any user biases (*i.e.*, irrational behaviour⁷⁵), the remedy must oblige the undertaking to counter such biases. In other words, user habits that lead to irrational decisions need to be effectively counter-balanced. This may require some active “debiasing”. In particular, in the important and many cases of a strong salience bias⁷⁶, there is a need to ensure that, at least for an initial phase, competing services are actively displayed more prominently than the incumbent’s services, so that searchers actually become aware of the (new) options. Similarly, in the case of a status quo bias⁷⁷ or a default bias⁷⁸, it is not enough if the remedy only technically enables users to change the current setting. The remedy must include active measures to stimulate the user to consciously weigh his or her options in light of all relevant information and to make a rationale decision on the basis of such information. This can only be achieved if the users are first sufficiently made aware and informed of their choices, the relevance of such choices and the merits of the available options. The users must then be incentivised, or even obliged, to make a rationale, contemplated choice on the basis of all provided information⁷⁹.
- **Where the self-preferencing has created unjustified network effects or data advantages, the remedy needs to neutralise them.** Typically, abusive self-preferencing has increased the positive network effects of the favoured service. In particular, by promoting a downstream service more consumers are diverted to such

⁷⁵ In economics, user biases explain the phenomenon that consumers and companies do not always act rationally but are subject to systemic patterns of deviation from norm or rationality in judgment – which commercial providers can take advantage off.

⁷⁶ Salience bias (also known as “perceptual salience”) describes the fact that individuals are more likely to focus on items or information that are more prominent and ignore those that are less so – even if they are in fact more relevant; see The Decision Lab, “Why do we focus on more prominent things and ignore those that are less so? The Salience bias, explained”, <https://bit.ly/33WfeNo>, with reference to *Kahneman/Slovic* and *Tversky*, “Judgment under uncertainty: Heuristics and biases”, 1982, Cambridge Univ. Press; *Bordalo/Gennaioli* and *Shleifer*, “Salience theory of choice under risk”, 2012, *The Quarterly Journal of Economics* 127(3) 1243–1285.

⁷⁷ *Status quo* bias refers to the phenomenon that people tend to stick to the state of affairs they perceive as the status quo rather than opting for an alternative one, see *Zamir and Teichman*, *Behavioral Law and Economics*, 2018, p. 48.

⁷⁸ *Default bias* relates to the phenomenon that people tend to stick to the option that has been given to them by default, *i.e.* where the person does not have to make an active decision.

⁷⁹ This mechanism was used in the “choice screen” solution in the *Microsoft* browser case and explains its success.

service, which in turn will have attracted more content providers or advertisers to the platform. If the preferencing stops, the technical consumer diversion may cease. However, the content and advertisers that have been attracted to the platform in the meantime will remain in place and their (status quo) habits continue. Equally, any additional transaction data that the undertaking will have gained as a result of the favouring will remain in place. An effective remedy needs to counter-balance such unjust advantages. Possible tools that an authority may impose are an obligation to temporarily promote competing downstream services (such as through a preferential ranking or choice screen position) or to share all gained data with the relevant rivals.

- 53 Where several remedies exist for bringing an infringement to an end, it is not for the Commission to impose upon the undertaking its own choice from among all the various potential courses of action which are in conformity with the Treaty.⁸⁰
- 54 Taking this into consideration, remedies established by the Commission to bring an abuse to an end must achieve all of the following goals:
- to bring an end to the conduct and its anti-competitive effects which together form the identified infringement of Article 102 TFEU;
 - to re-establish the competitive process and create new commercial opportunities;⁸¹
 - to restore a level playing field for all parties affected by the infringement(s);
 - to benefit affected parties equally;⁸²
 - to avoid creating any new competitive conflicts amongst the affected parties; and
 - not to unreasonably restrain Google's business freedoms where several options exist or burden the administering by the Commission.

⁸⁰ Case T-24/90, *Automec II*, ECLI:EU:T:1992:97, para. 52.

⁸¹ See *Guersent*, speech 17 September 2020, ICN 2020, Virtual Annual Conference, Unilateral Conduct Working Group, <https://bit.ly/32Pi1ZF>: “When you assess the effectiveness of a remedy, you need first to consider: what are the objectives of the remedy and for us the objective of the remedy, of any remedy, is to re-establish the competitive process and it should create new commercial opportunities.”

⁸² See *Hellström, Maier-Rigaud and Bulst*, “Remedies in European Antitrust Law”, (2009) 76 *Antitrust Law Journal*, 43, 50 et seq.

55 In summary, the purpose of a remedy is to stop the abusive conduct, prevent its recurrence, and thereby restore competition.⁸³

2. Compliance in the framework of the remedy imposed

56 A company's compliance with a Commission decision needs to be assessed against the remedy actually imposed and the framework of the Decision underlying such remedy.

57 Based on the principles for effective remedies described above, following the finding of abuse, the Commission could (have) require(d) Google to actively take certain measures to neutralise the consequences of its practices and restore competition to a position where competition would have developed *but for* the anti-competitive conduct.⁸⁴

58 However, to do so, the Commission needs to describe the restorative remedy in a sufficiently detailed manner and explain such a remedy is necessary and proportionate.⁸⁵ It can do so either in the prohibition decision or, if it finds that the remedy imposed in the decision is insufficient to bring the abuse to an end, in a subsequent order. For reasons of proportionality, an authority may impose a mere cease-and desist order without far-reaching pro-active remedies first and observe its effects, before considering whether in fact more invasive measures are needed to cease the abuse.

59 In section C.2. below (¶¶72 et seq.) , we will see that in the interest of Google, the remedy imposed in the Decision was lenient. It is limited to a cease-and-desist. It does not include a requirement to restore a past competitive situation,⁸⁶ even though the

⁸³ Restorative remedies are also recognised in European case law, see Case C-62/96, *Commission v Greece*, ECLI:EU:C:1997:565, paras. 155, 157; Case T-338/94, *Finnboard v Commission*, ECLI:EU:T:1998:99, para. 242 (“to restore compliance with the rules infringed”); Joint Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, ECLI:EU:C:1995:98 para. 93 (“reestablishment of compliance with the rules infringed”); Case T-76/89, *ITP v Commission*, ECLI:EU:T:1991:41, para. 80; Case C-119/97 P, *Ufex v Commission*, ECLI:EU:C:1999:116, para. 94 (“If anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent [...] to act with a view to eliminating or neutralising them”).

⁸⁴ *Hellström, Maier-Rigaud and Bulst*, “Remedies in European Antitrust Law” (2009) 76 *Antitrust Law Journal*, 43, 46, 48; *Crémer, de Montjoye and Schweitzer*, “Competition policy for the digital era”, 2019, pp. 7, 68; *Lianos*, in: *Handbook on European competition law*, 2013, “Competition law remedies in Europe”, pp. 362, 434 et seq.; *Lianos*, “Competition Law Remedies: In search for a Theory”, April 2011, pp. 23 et seq.; see also *Ritter*, (2016) 7 *Journal of European Competition Law & Practice*, 587; OECD, “Remedies and Sanctions in Abuse of Dominance Case”, 2006, p. 9 (“structural remedies”).

⁸⁵ Case T-395/94 *Atlantic Container Line* EU:T:2002:49, para. 418.

⁸⁶ Cf. *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, pp. 1, 7.

Commission could have imposed such measures. However, in line with the main requirement for any remedy, the Decision obliged Google to not just refrain from the favouring conduct but also to bring its anti-competitive effects to an end, see Article 1 para. 1.

- 60 This study will show that Google's chosen CM does not even comply with the lenient remedy that the Decision imposed on Google.
- 61 Google's chosen CM fails to achieve any of the parameters mentioned above at ¶54 that an effective remedy shall achieve. Google's CM neither brings the identified abusive conduct, nor its effects to an end. It did not create any new commercial opportunities for competitors and failed to re-establish a competitive process, let alone restore a level playing field for all CSSs affected by the infringement. Moreover, the CM creates additional competition concerns as it further strengthens Google's position on the relevant markets for CSSs. Crucially, Google's CM does not achieve these parameters because Google misinterpreted the remedy that the Decision imposes. It is this non-compliance with the remedy imposed that led to the CM missing all policy objectives.
- 62 If an undertaking fails to comply with a Decision, it is the Commission's duty to react and enforce compliance. Any failure to do so may give rise to actions against the Commission itself, in particular under Articles 263 and 265 TFEU.⁸⁷ Therefore, where the Commission orders an undertaking to effectively end an infringement, the Commission must ensure that the method that the undertaking identifies for such purpose actually succeeds in ending the infringement.

C. The Google Search (Shopping) decision

1. The identified abuse

- 63 Article 1 of the operative part of the Decision found that "*by positioning and displaying more favourably, in Google Inc.'s general search results pages, Google Inc.'s own comparison shopping service compared to competing comparison shopping services, the undertaking [...] has infringed Article 102 [TFEU]*".
- 64 The Decision defines Google's "*general search results page*" as the entire web page that Google Search produces response to a particular search query. The pages

⁸⁷ Marsden, "Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (an How to Fix it)", Journal of European Competition Law & Practice, 17 September 2020, p. 6.

encompass all “categories of search results, including generic search results [...] specialised search results [...] and online search advertisements”.⁸⁸

- 65 The Decision defines “comparison shopping services” (“CSS”) as “specialised services that: (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers [...] and merchant platforms [...]; and (ii) provide links that lead (directly or via [...] successive intermediary pages) to the websites of such online retailers or merchant platforms”.⁸⁹
- 66 Accordingly, the Decision defines “Google’s own comparison shopping service” as “both”: (i) the operation of a standalone website for comparing products along with the operation of so-called “Product Universals” (used between 2007 and 2012); and (ii) “Shopping Units” (used since 2012) that comprise specialised product search results (= product offers from merchants) and that Google displays directly within general search results pages of Google Search.⁹⁰
- 67 The Decision defines the prohibited “more favourable positioning and displaying in Google’s general search results pages” as “the more favourable positioning and display of (i) links to Google’s own comparison shopping service [...] and/or (ii) parts or all of Google’s own comparison shopping service” in “Google’s general search results pages”.⁹¹ For “parts or all” of Google’s own CSS, the Decision referred to Product Universals and Shopping Units, i.e., to the interfaces (boxes) that directly compare product and prices as opposed to containing simple links to pages that contain such comparisons.⁹² In the countries where Google operated both a standalone website as well as Shopping Units, the latter were (only) a “part” of Google Shopping. Accordingly, in six affected countries where Google launched the Shopping Units in 2013, but where a standalone Google Shopping website only followed three years later in 2016,⁹³ the Decision considers the powering of the Shopping Units as constituting “all of” Google’s own CSS.

⁸⁸ Decision, recital (10).

⁸⁹ Decision, recital (191).

⁹⁰ Decision, section 2.2.5., recitals (31), (32).

⁹¹ Decision, footnote 3.

⁹² Decision, footnote 3 in conjunction with recital (32) and recital (421).

⁹³ The Decision found that in Austria, Belgium, Denmark, Norway, Poland and Sweden, Google started displaying Shopping Units in November 2013, while a corresponding standalone website was only launched in September 2016; Decision, recitals (34), (744).

68 The Decision found that Google favoured its own CSS (standalone website and/or Shopping Units) in its general search results pages in two ways:

- **Algorithmic demotion of rivals:** *“First, Google’s own [CSS] is not subject to the same ranking mechanisms as competing [CSS], including adjustment algorithms such as [...] Panda. This is despite the fact that Google’s own [CSS] exhibits several of the characteristics that make competing [CSS] prone to being demoted by the [...] Panda algorithms”.*⁹⁴ Such selective development and use of algorithms to systematically push down rival CSSs in general search results pages is referred to as “demotion”.⁹⁵
- **Promotion of its own CSS via higher ranking and richer formats:** *“Second, since the launch of Product Universals until today, Google has positioned results from its own [CSS] on its first general search results page either: (i) above all generic search results; or (ii) within or at the level of the first generic search results”.*⁹⁶ Moreover, these *“specialised search results from Google’s [CSS] are displayed with richer graphical features, including pictures and dynamic information”.*⁹⁷ The Shopping Units (previously Product Universals) were positioned and the individual product ads in the Shopping Units powered by Google Shopping. Product ads were included in Shopping Units only to the extent that the ads led searchers directly to a website where the searcher could purchase the product (the so-called “buy page condition”). The CSS business model does not typically allow CSSs to sell products directly on their own site, something which merchants often prohibit.⁹⁸ Therefore, the Commission found that CSSs would have to “change their business model” to bid for such product ads and that as a result, the “buy page condition” was tantamount to excluding rival CSSs from Shopping Units.⁹⁹

69 The Commission found an infringement of competition law because the favouring of Google Shopping (the “Conduct”) had *“anti-competitive effects”*. This was concluded from the fact that the Conduct *“decreased traffic from Google’s general results pages to*

⁹⁴ Decision, recital (380).

⁹⁵ Decision, recitals (348) et sub.

⁹⁶ Decision, recital (385).

⁹⁷ Decision, recital (387).

⁹⁸ This is one of the central differences between CSSs and merchant platforms; Decision, recital (218).

⁹⁹ Decision, recital (220)(2) in conjunction with recital (241) and recital (439); Commission, Defence in Case T-612/17, paras. 150 et seq.

competing [CSS] and increased traffic from Google's general search results pages to Google's own [CSS]". This in turn was likely to: (i) "foreclose competing [CSSs], which may lead to higher fees for merchants [and] higher prices for consumers"; (ii) "reduce [CSSs] incentives to innovate"; and (iii) "reduce the ability of consumers to access the most relevant [CSS]", despite the 'sponsored' label of Shopping Units.¹⁰⁰

- 70 The Commission concluded that, in each national market it investigated, *"the infringement started [...] from the moment Google launched the Product Universal [...] or [...] the Shopping Unit in that market"*. In accordance with the Commission's approach that the provision of Shopping Units may constitute *"all of Google's own CSS"*, in the six countries where Google launched the Shopping Unit in November 2013 and a standalone website only in September 2016, the infringement commenced in 2013, i.e., with the displaying of Shopping Units in Google's general search results pages. In other words, the Decision found an abusive favouring of Google's own CSS also in those markets where such CSS only consisted of the provision of Shopping Units on Google's general search results pages while Google's CSS did not provide any other consumer-facing frontend, in particular no separate Google Shopping standalone website. Similarly, in countries where Google just applied demotion algorithms, but did not show Shopping Units, no infringement was found.¹⁰¹
- 71 **Google appealed the Decision.** Google's central argument is that the case was concerned with Google refusing competing CSSs access to its *'infrastructure'*, namely the Google general search results page, the Shopping Unit or product ads in such units.¹⁰² Google therefore argues that the Commission should have applied the so-called *Bronner*-criteria¹⁰³ for a refusal to deal, which did not feature in the Decision itself. In the Decision and before the General Court of the European Union ("General Court"), the Commission rejected this argument because, *inter alia*, Google had always ranked and displayed rival CSSs in its general results pages. Thus, if anything, the case is only

¹⁰⁰ Decision, recitals (591), (593), (595), (597).

¹⁰¹ Bulgaria, Croatia, Hungary, Ireland, Iceland, Finland, Estonia, Greece, Latvia, Liechtenstein, Lithuania, Portugal, Romania, Slovakia and Slovenia.

¹⁰² Google, Application in Case T-612/17, Fifth Plea, pp. 93 et seq. The alleged object of such access changed over the years. In its latest statements Google states the case was about *"equal access to Shopping Units"*. This in turn is understood as *"giving rival CSSs the same ability to place product ads"* that *"link to their merchant partners"*, see Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p.1, 7.

¹⁰³ See Case C-7/97, *Bronner*, ECLI:EU:C:1998:569.

concerned about the conditions of such access, and hence an “implicit refusal of access”. In that situation, the *Bronner* criteria would not apply.¹⁰⁴

2. The imposed remedy

- 72 Pursuant to Article 7(1) Regulation 1/2003, once an infringement has been identified, the imposed remedy must effectively bring the identified infringement to an end (see above at B., ¶¶51 et seq.) - in this case Google’s more prominent positioning and displaying of its own CSS as compared to competing CSSs in general search results pages.¹⁰⁵
- 73 In line with this legal requirements, the Commission obliged Google to “*bring effectively to an end the infringement*” identified in the Decision and to “*refrain from repeating any act or conduct [...] having the same or an equivalent object or effect*”.¹⁰⁶
- 74 Since “*there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end*”, the Commission left it to Google “*to choose between those various ways*”. However, the Commission clarified that Google should “*ensure that Google treats competing [CSS] no less favourably than its own [CSS] within its general search results pages*” and that this applies “*irrespective of whether Google chooses to display a Shopping Unit*” or not.¹⁰⁷
- 75 Given that the identified infringement was Google’s more favourable positioning and display of “*links*” or “*parts or all*” of a Google-owned CSS within Google’s general search results pages, the remedy obliges Google to “*treat competing CSS no less favourably*”¹⁰⁸ whenever Google displays mere “*links to*” or full “*parts or all*” of Google’s own CSS (such as Shopping Units).

¹⁰⁴ See below at Chapter 4, A 2.3.3. (¶¶598 et seq.) on this point.

¹⁰⁵ Decision, recital (371): “*Competing comparison shopping services can be displayed only as generic search results in Google’s general search results pages. They cannot therefore be displayed in rich format, with pictures and additional information on the products and prices*”.

¹⁰⁶ Decision, Article 3.

¹⁰⁷ Decision, recital (700).

¹⁰⁸ Decision, recital (699).

- 76 Following the Decision, it is incumbent upon the Commission to ensure the effective implementation of the remedy and to examine whether any compliance measures taken by Google conform with the Decision.¹⁰⁹
- 77 To this end, the Commission needs to assess, whether Google:
1. brought effectively to an end the conduct and its effects (together “infringement”) referred to in Article 1 of the Decision,
 2. refrained from repeating any act or conduct described in Article 1; and
 3. refrained from repeating any act or conduct having the same or an equivalent object or effect.

¹⁰⁹ Cf. Commission Decision of 10 November 2005, COMP/C-3/37.792 – *Microsoft*, para. 6 imposing a periodic penalty payment on Microsoft Corporation.

Chapter 2: Google's Compliance Mechanism

- 78 Google interpreted the remedy imposed by the Commission as solely meaning that *“when Google shows a Shopping Unit, Google must give aggregators the same access to the Shopping Unit as it gives the Google CSS, using the same mechanisms (processes and methods) to allocate access”*.¹¹⁰ This is in line with Google's overall argument that the case solely concerned Google refusing to grant competing CSSs access to its infrastructure, in particular its Shopping Units.¹¹¹
- 79 Based upon this interpretation, Google:
- has neither changed nor removed any of the existing demotion algorithms for its generic search results;¹¹² and
 - has not stopped the preferential positioning and display of Shopping Units.
- 80 Instead, the only change that Google implemented was to invite competing CSSs to upload product inventory (i.e., product offerings) from the CSSs' merchant customers to Google's product database (i.e., product index). This allowed them to bid for the inclusion of product ads using the inventory in the Shopping Units that Google may decide to display in response to a search query. To this end, Google took two steps. First, on 28 September 2017, Google introduced a new mechanism for the placement of paid product results (hereinafter *“Shopping Ads”*) within the Shopping Units that it displays on Google's general search results pages on behalf of merchants (see A.). Second, as of March 2019, Google voluntarily¹¹³, introduced *“Comparison Listing Ads”* (CLAs) in some Member States (see B.).¹¹⁴

¹¹⁰ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.4.

¹¹¹ Cf. Google, Application in Case T-612/17, Fifth Plea: *“Because the Decision's case is about aggregator access to Google, the Decision should have applied the legal test for a duty to supply.”* (pp. 94 et seq.).

¹¹² Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.9: *“Google has not changed or removed demotion algorithms for its generic results to comply with the Decision”*.

¹¹³ Google claims that the Commission did not require it to introduce CLAs.

¹¹⁴ In the context of the CM, Google also removed the header of the Shopping Unit (such as *“shop for canon 70d on Google”* in the screenshot below). Such headers led users to the separate Google shopping website. However, *“in practice they were largely without significance because the user typically clicked on the product ad that led to the website of the respective merchant”*, Google, Defence in Case *Idealo Internet ./. Google LLC/Google Ireland Limited*, 29 May 2020, footnote 16.

A. Shopping Ads

1. The new design and features of the CM-Shopping Units

- 81 According to the CM, in return of product-related search queries, Google continues to display Shopping Units with paid product results at an attractive position on its general search results pages (hereinafter referred to as “**CM-Shopping Units**”). Such CM-Shopping Units continue to contain all the visually attractive features that the Product Universals and Shopping Units contained during the infringement period. They even contain some additional features.
- 82 CM-Shopping Units come in various designs, forms and sizes, and have various functions. All CM-Shopping Units contain *Shopping Ads* (also called “*Product Listing Ads*”) with images of products along with price and product information. Similar to the Shopping Units used during the infringement period, all product items shown with such *Shopping Ads* link directly to the merchant's website whose offer is displayed. For standard desktop searches, the only difference to the previous Shopping Units - in visual terms – is that Google displays a small “By CSS” link at the bottom of a *Shopping Ad* and sometimes at the far end of a carousel that, when clicked, leads the searcher to a website of a CSS.

Shopping Unit before the Decision

The screenshot shows a Google search for 'canon 70d'. The results are organized into several sections:

- Shopping Unit with individual Shopping Ads (Red box):** This section displays five product listings for Canon EOS 70D cameras. Each listing includes a product image, the product name, and the price. The products are: Canon EOS 70D body (899,00 €), Reflexcamera Canon EOS 70D (919,00 €), Canon EOS 700D + (479,00 €), Canon EOS 70D Body + (1.079,00 €), and Canon EOS 70D (799,00 €). The prices are listed in French Francs (€).
- Product information (Pink box):** This section provides additional details about the Canon EOS 70D, including the official Canon store link (store.canon.be/70D) and a list of features such as 'Qualité d'image et vidéos Full HD', 'Livraison et retour gratuits', and 'Suivre Votre Commande'.
- AdWords (Text Ads) (Yellow box):** This section displays text-based advertisements for Canon EOS 70D, including the official Canon store link and a list of features.
- Generic search results (Green box):** This section displays generic search results for Canon EOS 70D, including the official Canon store link and a list of features.

Illustration 16: Shopping Unit on desktop before the Decision

CM-Shopping Unit after the Decision

The screenshot shows a Google search for "samsung kamera". The search results are organized into several units:

- CM-Shopping Unit with individual Shopping Ads:** A red box highlights a unit titled "See samsung kamera" containing five product cards. Each card shows a product image, name, price, and retailer.

Product	Price	Retailer
SAMSUNG EK-GC 100 ..	€349	MediaMarkt
Samsung Galaxy S8 midnight bl...	€29,90	min. 24 x €44/m. Tund1.de
Samsung G975F Galaxy S10 Pl...	€1.299,99	reBuy.de
Samsung Galaxy S10 Smartpho...	€794,99	Amazon.de
Samsung A920FD Galax...	€359,99	reBuy.de
- Product information and "By CSS" link:** A pink box points to the "By CSS" link at the bottom of each product card.
- Image search results:** A yellow box highlights a unit titled "Images for samsung kamera" showing five product images and a "More images for samsung kamera" link.
- Generic search results:** A green box highlights a unit showing search results from Amazon.de and Samsung Service DE.

Illustration 17: Shopping Units on desktop after the Decision

1.1 New "Product View of Shopping Unit" for price comparison

- 83 Since the launch of the CM, Google has introduced new types of boxes that are similar to the original Shopping Unit but which contain a different design as well as different features. In particular, in 2018, Google introduced what it calls "**Product View of Shopping Unit**".

CHAPTER 2: GOOGLE'S COMPLIANCE MECHANISM

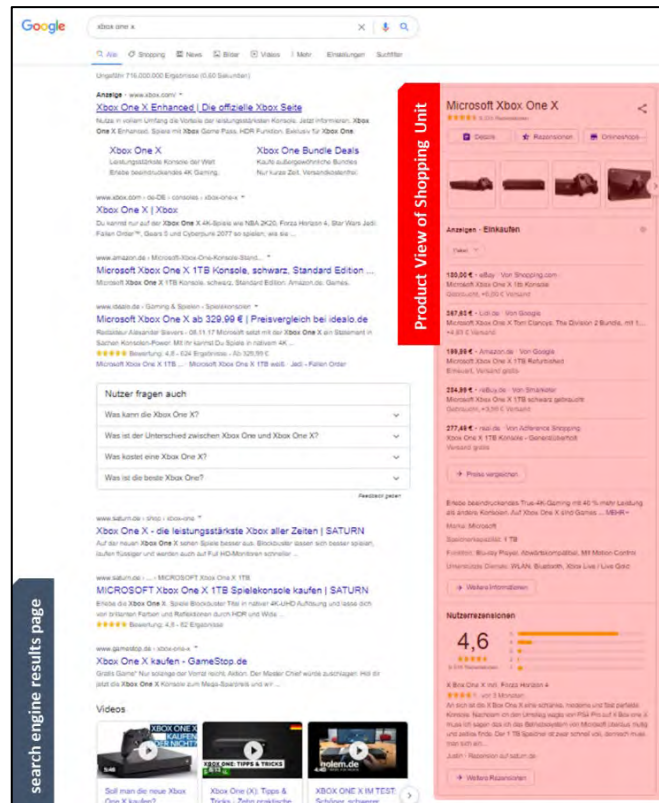


Illustration 18: Product View of Shopping Unit – Desktop View

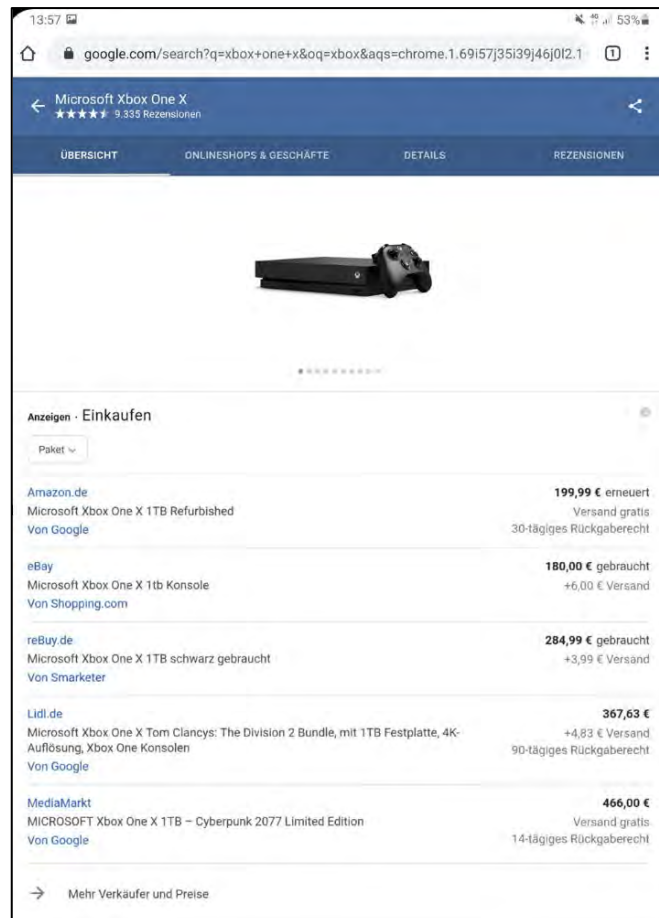


Illustration 19: Product View of Shopping Unit – Mobile View (upper part)

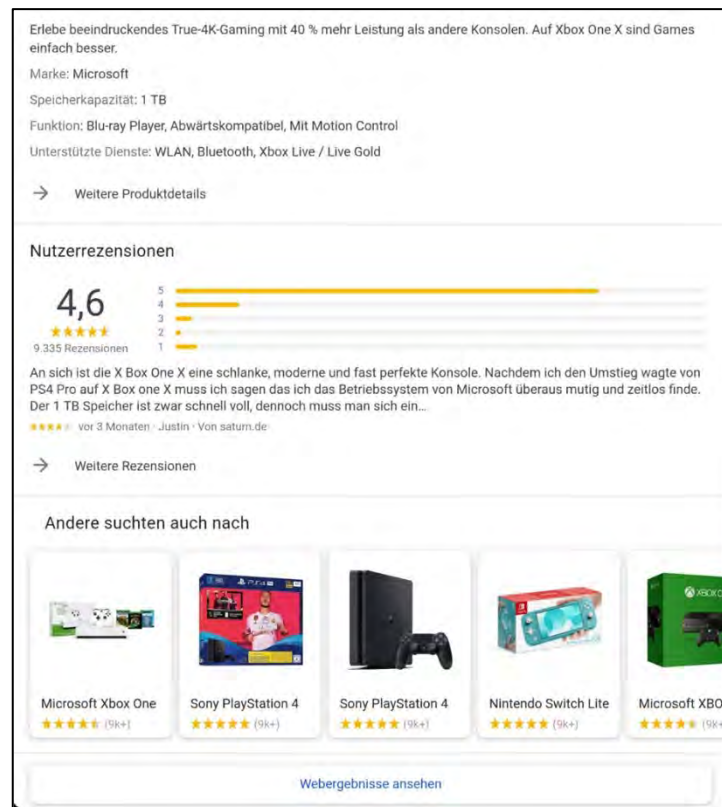


Illustration 20: Product View of Shopping Unit – Mobile View (lower part)

- 84 Google confirmed that the “Product View of Shopping Unit” and the original Shopping Unit share the same technical infrastructure¹¹⁵ (backend and merchant interface of the CSS). In order for the “Product View of Shopping Unit” to appear in the results page, the relevant ad must exceed all of Google’s quality thresholds and prevail against the text ads in all page biddings, as is the case with original Shopping Unit.¹¹⁶ Consequently, it is specified that it is not a separate service from the original Shopping Unit. Likewise, the requirements and pricing model for the “Product View of Shopping Unit” are said to be the same as those for the original Shopping Unit.
- 85 Whether the “Product View of Shopping Unit” or the original Shopping Unit is displayed to the user depends upon the query the user types in the search bar. The “Product View of Shopping Unit” will appear when a specific query is entered for the product search, and the original Shopping Unit results will appear when a broader query is entered for the product search.¹¹⁷ As a result, the “Product View of Shopping Unit” provides a price comparison towards the end of a consumer’s shopping journey, while the original

¹¹⁵ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, <https://bit.ly/300mKpz>, para. 106.

¹¹⁶ *Ibid.*, para. 106.

¹¹⁷ *Ibid.*, para. 107.

Shopping Units provide more of a product comparison at the initial stage of the user's decision making process.

- 86 Due to the same underlying technology and functionalities, there is consequently no difference between the original Shopping Unit and the "Product View of Shopping Unit".¹¹⁸ When referring to "Shopping Units", this study therefore includes both designs.

1.2 New "Showcase View of Shopping Unit" for grouped offers

- 87 While the "Product View of Shopping Unit" caters to search queries indicating the end of a consumer's journey, Google introduced a new design in 2018 to answer more general search queries at a very early stage of the journey (for example, for "winter jacket" or "vacuum cleaner"). This new design is labelled by Google as *Showcase Shopping Ads* and referred to as "**Showcase View of Shopping Unit**". It offers users a special carousel of several merchants (in screenshot below: eleven merchants for "Samsung tv"). Google describes the ads appearing in such boxes as follows:

*"A type of Shopping ads with information about several related products. These ads are more likely to show when people search for more general terms rather than for a specific product. So **you** might use these to advertise a specific brand or to introduce your business with a special selection of products."*¹¹⁹

- 88 If a user clicks on any of such boxes within the CM-Shopping Unit, a new Shopping Unit opens – containing 10 product items of the relevant merchant. Pursuant to this, up to 200 product items 'fit' into one Shopping Unit.
- 89 Merchants (which Google's description quoted above addresses as "*you*") can set up such *Showcase Shopping Ads* for their shop either through *Google Shopping* or a competing CSS. However, on the first interface/page of the CM-Shopping Unit containing such new ads, Google only lists the name of the merchant. A CSS, having set up the *Showcase Shopping Ad*, is only visible on the second page as a small link (here: *shopping24*). At the bottom of each page, instead of any reference to the CSS, Google refers again to the merchant ("View all at Otto"):

¹¹⁸ Ibid., para. 108.

¹¹⁹ Google Ads Help, "*Showcase Shopping Ad: Definition*", <https://bit.ly/32Qxusl> (emphasis added).

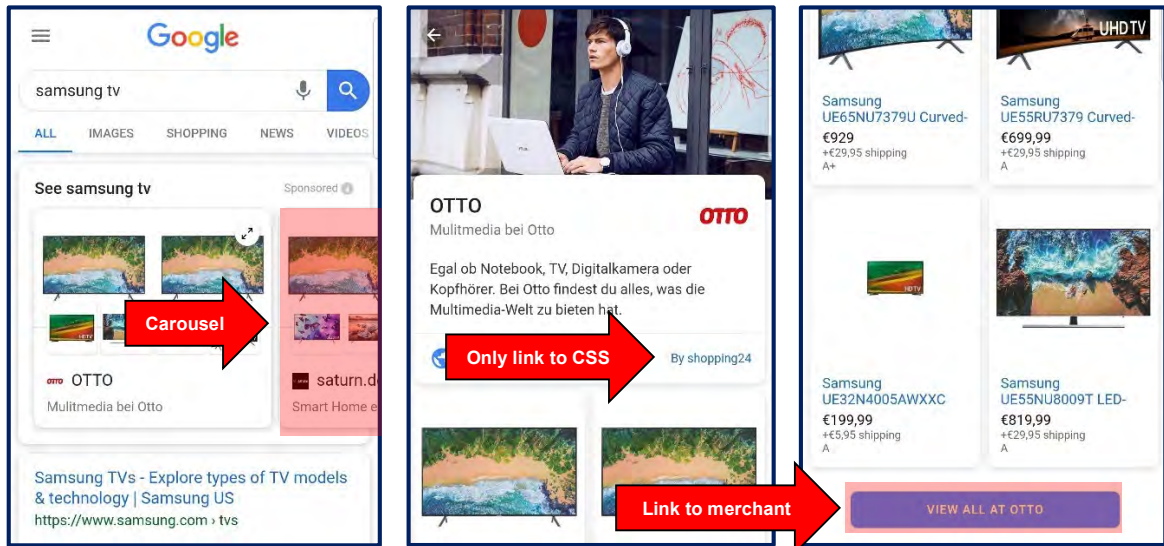


Illustration 21: "New" Showcase Shopping ad – organised by merchant

- 90 However, apart from the new design of “*Showcase Shopping Ads*”, the design, positioning and display of the CM-Shopping Units has not fundamentally changed when compared to the Shopping Units used during the infringement period – they are still at the top of the results page.
- 91 It therefore seems that, like the “Product View of Shopping Units”, the “Showcase View of Shopping Unit” shares the same infrastructure as original Shopping Units. On that basis, this study will treat them as well as variations of Google’s original Shopping Units (“CM-Shopping Units”).

2. The new auction mechanism for Shopping Ads in Google’s CM-Shopping Units

- 92 Given the similar layout, the only difference to the system used by Google prior to the Decision, is the manner in which the CM-Shopping Units are ‘filled’, *i.e.* the way the *Shopping Ads* within the CM-Shopping Units are auctioned off.
- 93 During the identified infringement, merchants or agencies acting on their behalf wishing to bid for the display of a *Shopping Ad* for their product offers in an available slot of a Shopping Unit had to do so via *Google Shopping*.



Illustration 22: How merchants could place Shopping Ads before the CM

- 94 Following the CM, merchants may also offer CSSs the ability to upload their product offers to Google’s database and participate in auctions for available slots in Google’s

Shopping Units for the display of *Shopping Ads*. They do not have to engage what is now *Google Shopping Europe* to bid for such *Shopping Ads*.



Illustration 23: How merchants can place Shopping Ads under the CM

- 95 Google's CM means that the Shopping Units contain Shopping Ads that were uploaded by merchants to Google's product index either through *Google Shopping Europe* or through another CSS. An auction mechanism developed and controlled by Google decides which *Shopping Ad* will be included in any available slot in a Shopping Unit which Google decides to display. The CSS through which the *Shopping Ad* was uploaded (either *Google Shopping Europe* or another CSS) is indicated by a "By CSS" link below the ad leading to such CSS's website.
- 96 Apart from these modifications, Google did not introduce any other changes.¹²⁰ In particular, no other CSS may display its own boxes. They also do not receive a slot in Google's box themselves. As was previously the case, the slots are reserved for *Shopping Ads* of merchants and lead the user directly to a merchant's website – and not to the results page of a CSS. In addition, to 'serve' such Shopping Units, competing CSSs have to pay Google based upon an auction model. Apart from the "By CSS" link, they do not enjoy any visibility. The "By CSS" link in turn only receives 1% of the clicks.¹²¹ Since such a link is a fixed annex to the *Shopping Ad* of a merchant, and its display depends upon the success of a merchant's offer in the auction. It is not linked to the relevance and quality of the CSS placing the bid in relation to the entered search query. As a result, not even the most relevant CSS for the search query entered on Google has the opportunity to, at least, place simple links in the units.
- 97 Google describes the above in the following terms:

"Comparison Shopping Services can now bid to place Shopping ads on Google general search results pages on behalf of merchants they represent. Google Shopping bids on behalf of merchants it represents in the same way acting like any other CSS.

This means that as a merchant, you can choose to participate in Shopping ads on the Google general search results page in various ways: you can provide

¹²⁰ So explicitly Google, Defence in Case *Idealo Internet ./. Google LLC/Google Ireland Limited*, 29 May 2020, para. 16.

¹²¹ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, footnote 73.

your product data to any CSS, including Google Shopping, and you can also use multiple CSSs at the same time.”¹²²

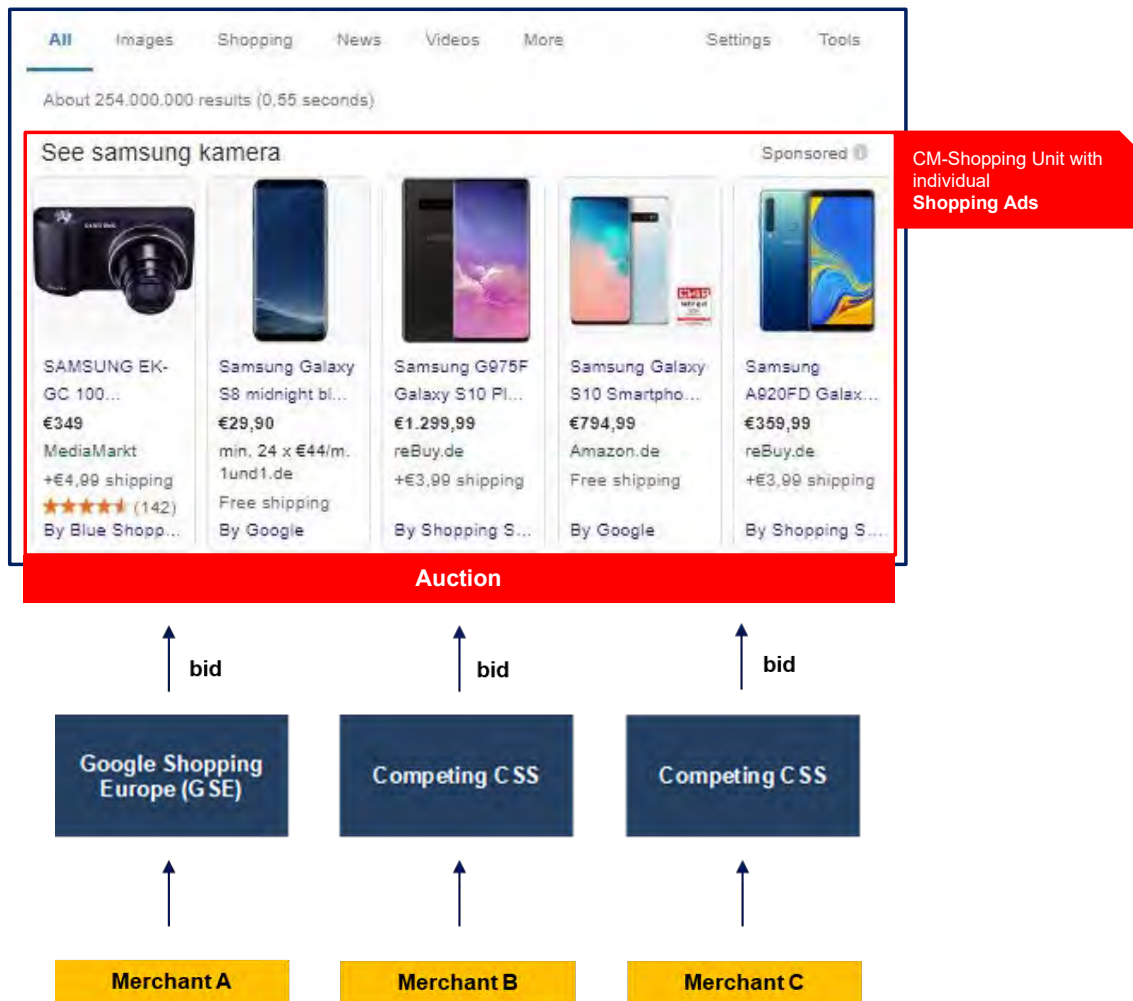


Illustration 24: Auction mechanism for Shopping Ads

98 Merchants may only place *Shopping Ads* through a CSS. However, there are three *de facto* options from which a merchant may choose. The merchant may:

1. steer its campaign in a more or less independent and autonomous manner directly through *Google Shopping* (now renamed *Google Shopping Europe* "GSE");
2. engage another CSS to assume the tasks of uploading product feeds and steer the campaign on behalf of the merchant; or

¹²² Google Merchant Center Help, "About advertising with Comparison Shopping Services", <https://bit.ly/3iL6vnz>.

3. collaborate with another CSS to allow the merchant to (continue to) directly steer the campaign. In this case, the CSS only sets up an account in the name of the merchant.

99 Google openly advertises the third model, as can be deduced from the following description of CSSs that may take part in the CM:

“Comparison Shopping Services

*In countries that are part of the European Economic Area (EEA) and in Switzerland, merchants participate in Shopping ads through one or several Comparison Shopping Services (CSSs) of their choice. **Some CSSs manage product data and campaigns on behalf of the merchant, while others **provide tools allowing merchants to manage their setup themselves.****”¹²³*

“Different ways to work with Comparison Shopping Services

*[...] There are many CSSs in Europe, including Google Shopping. [...]. Some manage feeds and campaigns for you, while others **provide tools for you [i.e. the merchant] to manage your product data and bidding strategies yourself.***”¹²⁴

- 100 In practice, this option for merchants to manage their product data and bidding themselves has led to merchants to request that CSSs participate in the CM and to set up an account on their behalf, but to then ‘rent’ out this account to the merchants. This is so that merchants may manage their biddings and their overall advertising campaign on an independent basis (see below at ¶¶110 et seq.).
- 101 If a merchant decides to pursue its bidding directly through GSE, then nothing changes for the merchant.¹²⁵ However, if a merchant decides to let another CSS do the bidding on its behalf, then it may have to conclude a contract and provide a product feed to the CSS, which then provides it to Google in accordance with the technical requirements set by Google.

¹²³ Google Merchant Center Help, “Comparison Shopping Services”, <https://bit.ly/3kFAP3D> (emphasis added).

¹²⁴ Google Merchant Center Help, “Different ways to work with Comparison Shopping Services”, <https://bit.ly/3ckiuGj> (emphasis added).

¹²⁵ As Google emphasises itself on its Google Ads Blog, see Heckmann, “Changes to Google Shopping in Europe”, Google Ads & Commerce Blog, 27 September 2017, <https://bit.ly/3kC5WNi>.

3. The bidding of Google Shopping Europe (GSE) and competing CSSs for Shopping Ads

102 The CSSs that are eligible to bid for the inclusion of a merchant's *Shopping Ad* in any CM-Shopping Unit displayed by Google will participate in an auction.

103 Google describes this mechanism as follows:

*"The placement of the ad depends on a few factors. Ads need to follow the same basic rules designed to make them helpful to users. Each CSS bids in an auction how much they would be willing to pay to place a Shopping Ad on your [i.e. the merchant's] behalf. Who wins the auction depends on both the bid, quality and relevance of the ad."*¹²⁶

104 CSSs may not bid on particular keywords (i.e., words entered within a search query on Google). Rather, they may only bid on the particular product offers that they upload to Google on behalf of merchants. These bids are made in advance, i.e. for future searches where Google decides to respond to a query with the display of such particular product in a Shopping Unit.

105 If several CSSs bid for the same product offer, Google – as the auctioneer – will decide which merchant offer obtains a slot in a CM-Shopping Unit. As part of its CM, and when placing a *Shopping Ad* on behalf of a merchant in any CM-Shopping Unit, Google has committed to treat bids made by merchants directly via GSE equally to bids made via competing CSSs. The auction mechanism that selects the winning Shopping Ads shall thus be 'blind' as to whether the ad was placed from GSE or a rival CSS.¹²⁷ Thus, at least in theory, every CSS has the same chance to secure a *Shopping Ad* for any of its merchants within any CM-Shopping Unit.

106 Given that CSSs may only bid on product offers and not on the specific products they contain or the actual keywords entered in the Google search bar, CSSs have no influence on when Google displays their merchant's *Shopping Ads*; i.e., in response to which search query the product offers uploaded on behalf of merchants and their bidding actually become relevant. The decision as to whether a query implies an interest in a particular range of products or particular products, along with the subsequent decision

¹²⁶ See Google's description of the CM, "How the Shopping Ad Auctions Work (EEA+CH)", <https://bit.ly/33LlaHX>.

¹²⁷ See *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, pp. 1, 4.

as to which product offer and additional product information is relevant to the query, is reserved entirely to Google.

107 Google's specific product search algorithms alone determine

- which search query of which consumer triggers the display of any CM-Shopping Unit;
- which type of CM-Shopping Unit is displayed ("Product View of Shopping Unit" vs "Showcase View of Shopping Unit" vs traditional "Shopping Unit" or any other form);
- the shape, size and design of the chosen CM-Shopping Unit; the general format and the number of items that can be included (e.g., number of merchants, carousel with several product items, price comparison box with just one product but different price offers – see different designs in ANNEX 1);
- which products (out of Google's product catalogue) are displayed in the CM-Shopping Unit;
- what information is given regarding the selected product (price, image, review, shipping information etc.); and which additional information given (e.g., similar products, test results, etc.);
- which product offer of which merchant(s) are displayed to present the product in the form of a *Shopping Ad*; i.e., which merchant wins an auction for such slot in a Shopping Unit. For this purpose, Google stipulates
 - which factors determine the "quality score" of any *Shopping Ad*;
 - what the "quality score" of a particular merchant's ad is;
 - what makes an ad "relevant" for the particular search query;
 - how "relevant" a particular merchant's ad is;
 - which merchant provided the highest bid;
- where the CM-Shopping Unit is positioned within the general search results pages;
- which filters and sorting functionalities the CM-Shopping Unit contains; and
- which additional filter and sorting functionalities are included around the CM-Shopping Unit for further convenience (e.g., within the images search box or as a separate box, see illustrations 80-85, below at ¶¶548 et seq.).

108 The relevant steps set out above determine whether a Shopping Unit will be displayed at all and also whether a particular *Shopping Ad* will be included in it, and if so at which

position. This demonstrates the lack of impact that competing CSSs have regarding the positioning of any of their merchant customers on Google's general search results page. The bidding of CSSs for a particular *Shopping Ad* (which is what Google's CM entirely concerns) only becomes relevant once Google, in return of a particular search query, decides to display a CM-Shopping Unit and that such unit will include the particular product for which the CSS has provided a bid (without the CSSs ever knowing the keyword which prompted Google to display it).

- 109 Irrespective of whether a merchant steers its bidding directly through *GSE* or through a competing CSS, apart from the small "By CSS" link at the bottom (and sometimes at the far end of a carousel), all links within the CM-Shopping Unit lead the consumer directly to the merchant's website. Each click on such a link generates a fee payable to Google by the CSS that carried out the bidding on behalf of the merchant, *i.e.*, either by *GSE* or the respective competing CSS. The price is determined by the next highest bid that was made for the *Shopping Ad*. It is then the task of the CSS to recoup this fee from the merchant that it represented. This is based upon the individual agreement between the CSS and the merchant.

4. Discounts and free support for merchants that use CSSs other than GSE – the combination of "SpendMatch", "self-service" and account "waiver"

- 110 For reasons described further below, until March 2018, hardly any competing CSSs participated in the CM and could be found in the Shopping Units. In order to give the impression that the CM in fact makes a difference, in the summer of 2018, Google launched a campaign to recruit more merchants to set up and engage (what could be presented to the Commission as) competing CSSs instead of *GSE* for placing ads. This, it was hoped, would increase their share of *Shopping Ads* within the CM-Shopping Units, so that it appeared as though competition were taking place.
- 111 At the heart of the campaign was Google's launch of a *CSS Partner Program*.¹²⁸ The program involves an incentive scheme for merchants (so-called "**SpendMatch**") to place *Shopping Ads* via competing CSSs (rather than directly via *GSE*).
- 112 While the *CSS Partner Program* is still running today, in December 2018, Google ceased the SpendMatch discount scheme. However, by then the incentive scheme had already served its purpose for Google; *i.e.*, it resulted in an artificial increase of

¹²⁸ See Google Comparison Shopping Partners, "Grow your business with Google's CSS Partner program", <https://bit.ly/3mMIQxy>.

competing CSSs placing *Shopping Ads* in Google CM-Shopping Units. With the help of the incentive scheme Google had tried (and partially succeeded¹²⁹) to give the false impression that the CM was triggering market entries. Google's argument was essentially the following: if that many new CSSs are taking part, then the mechanism must be working.¹³⁰

4.1 How Google described the CSS Partner Program and the SpendMatch discount scheme

113 On its website, Google described the CSS Partner Program as follows:

"As a Comparison Shopping Partner, you can:

- Gain access to a brand new CSS incentive program for new and existing merchants running Shopping ads [until December 2018];*
- Attract new retailers by listing your business in the Comparison Shopping Partner directory*
- Get the latest online Shopping ads stats, facts and insights*
- Hone your Shopping ads skills with customised certifications*
- Get the CSS Partner badge to show that you are recognised Google CSS Partner*
- Attend tailor-made training and VIP Partner events"*¹³¹

114 Until December 2018, the core of the CSS Partner Program was the "*incentive program for new and existing merchants*" (= SpendMatch discount scheme) which Google described as follows:

"Promotional incentives through CSS Partners

Our goal is to help merchants discover the benefits offered by CSS Partners in the Shopping environment. We hope to encourage new and existing merchants to find and team up with CSS Partners.

Partnership Incentives

Under the CSS Partner program, we are currently offering SpendMatch discounts to merchants using CSS Partners:*

New Merchant SpendMatch

¹²⁹ See below at Chapter 4, B.1.1, ¶¶640 et seq.

¹³⁰ See *Graf and Mostyn, Henry*: "Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives", *Journal of European Competition Law & Practice*, 18 September 2020, p. 5: "*Today, more than 600 CSSs participate in the remedy [...] CSSs have praised the benefit of the remedy in their public statements. They have published articles, white papers, and case studies noting the 'huge opportunity' of the remedy. And while taking part in the remedy, CSSs have expanded into new geographies, built dedicated teams, expanded their customer bases, and hired new employees*".

¹³¹ See Google's description of the CSS Partner Program, "Let's partner up", <https://bit.ly/3chTVty>.

New merchant domains onboarding with a given CSS get full spend match for spend on Shopping ads for 30 days up to €500 as long as the CSS spends more than €10 in those 30 days for that merchant, the SpendMatch starts with the 11th Euro spent.

Existing Merchant SpendMatch

For all existing merchants, Google will provide ad credits after each 30-day period. The amount of ad credits will be based on a percentage of a partner CSS's spend on shopping ads for a given merchant during that 30-day period:

Any merchant with spend in a 30 day period between €500 – €2,500 gets 20% of the spend credited to that merchant's account.

Any merchant with spend in a 30 day period between €2,500 – €10,000 gets 25%.

Any merchant with spend in a 30 day period above €10,000 gets 30%, capped at €32,000 credit per 30 days.

Note: If a New Merchant would receive a greater ad credit if it were considered an Existing Merchant, Google will apply whichever classification is most beneficial for that merchant.

**These programs may change at any time at Google's sole discretion.*¹³²*

- 115 Note that in the description above, Google advertised the incentive scheme as one for merchants (“we are currently offering SpendMatch discounts to merchants”) – not for CSSs. This is quite remarkable.
- 116 First, Google was technically granting the discount to competing CSSs (by deducting them from the CSSs’ monthly invoice), not to their merchants.
- 117 Second, the Decision does not require the favouring of other CSSs vis-à-vis GSE. Google only needs to treat all CSSs equally. Yet, with the CSS *Partner Program*, Google voluntarily offered merchants a discount if they migrated to a competing CSS (instead of GSE) for the process of uploading feeds and placing bids. In other words, for no legal reason whatsoever, Google was apparently actively putting GSE at a commercial disadvantage by promoting competition against it. This should make anyone suspicious.
- 118 Third, if “access to Shopping Units” was genuinely a means to ensure an equal level playing field between competing CSSs and Google’s own CSS, one would expect Google to advertise such access to CSSs only, instead of marketing it to all merchants (as the paying end customers for which its CSS should compete). If such “access” under the CM truly benefited competing CSSs to the detriment of Google’s GSE, why (absent any legal basis) would Google actively suggest and advertise this CM to merchants?

¹³² See Google’s description of the incentive program, “Promotional incentives through CSS Partners”, https://comparisonshoppingpartners.withgoogle.com/incentive_program/ (emphasis added, link no longer available).

4.2 How the market understood the CSS Partner Program and SpendMatch – rise of agencies acting as 'CSSs' with pretence frontend and no backend

- 119 During the summer of 2018, the *CSS Partner Program* and, in particular, its *SpendMatch* discount scheme led to the rise of what can be referred to as 'fake CSSs' or at least CSSs of inferior quality. Marketing agencies, affiliate networks and other ad tech companies were able to qualify as 'CSSs' by operating largely irrelevant, and technically inferior 'CSS' websites. They established such sites only to be able to bid for the inclusion of *Shopping Ads* in available slots in Shopping Units as 'CSSs' on behalf of merchants. As at September 2020, such 'fake CSSs' still represent the majority of the 'CSSs' participating in the CM.¹³³ A study by *Searchmetrics* from November 2019 found that "35.1% of all [*Shopping*] ads are currently from marketing agencies and only 13.8% come from genuine comparison shopping services that can be considered real rivals to *Google Shopping*".¹³⁴
- 120 For many years, marketing agencies have been assisting merchants (in particular smaller merchants) in setting up and managing their Google advertising campaigns, including those for *Shopping Ads*. This is a long-established business practice to reflect the fact that many shops simply do not have the expertise, time or personnel to manage complex online advertising campaigns on Google. Marketing agencies/networks have taken responsibility of such tasks on their behalf. As the Decision mentions in recital (439), marketing agencies were "*acting as intermediaries for placing merchants' paid product results in the Shopping Unit*" without being a CSS or a merchant themselves. Some examples were ByBuyBye and SHOParade.
- 121 Following the *SpendMatch*, those very intermediaries realised that they may get a discount of up to 30%, which they could then share with merchants (to make their own offerings more attractive and allow merchants to serve more ads for the same costs) if, instead of acting in the merchant's name, the agency represents the same merchants as a CSS – thereby qualifying under Google's *CSS Partner Program*. They merely had to act as a CSS (rather than manage a campaign directly on a merchant's behalf).

¹³³ See **ANNEX 2** comparing such 'fake CSSs' with genuine CSSs, see also illustration 43, below at ¶248; see further Searchmetrics, "Neue Studie: Mehr Wettbewerb bei Google Shopping, trotzdem drohen neue Probleme mit der EU-Wettbewerbsbehörde", 26 November 2019, <https://bit.ly/3iPVcud> (for an English version see: <https://bit.ly/2ZUtlbt>).

¹³⁴ Searchmetrics, *ibid.* A previous study came to same conclusions: Searchmetrics, "Searchmetrics-Studie zu Google Shopping zeigt "Fake"-Wettbewerb um Anzeigenplätze", 5 December 2018, <https://bit.ly/3mEUKBw>.

Unsurprisingly, over the summer of 2018, many 'Fake CSSs' appeared out of nowhere.¹³⁵ To qualify for the *CSS Partner Program*, they quickly set up a number of more or less empty websites that they claimed would constitute a CSS, even though they were not backed up by any own product catalogue, index or matching intelligence (i.e., no backend).¹³⁶

- 122 To arrive at a better understanding as to how Google communicated and presented the *CSS Partner Program* – and how it was perceived by the market, the following advertisement of “*just another agency jumping on the CSS-train*”,¹³⁷ namely the newly set up (Fake) CSS called ByBuyBye (that now appears heavily in Shopping Units), is quite revealing:

“The Shopping Landscape

Back in June last year, the European Commission found Google to be in breach of the EU's antitrust rules. Ever since then Google have been allowing other Comparison Shopping Services (CSS's) to be able to serve ads in the Google SERP as you'll see below. We have now set up our own CSS bybuybye.eu and can now run our award-winning Shopping campaigns across both Google Shopping and our own CSS, and there are certain benefits to running on a CSS.

Tell Me More

Google have confirmed that running Shopping activity via a CSS is 20% cheaper than running through Google Shopping. For example, a £1 bid through a CSS is worth £1 in the auction, whilst a £1 bid through Google Shopping is only worth 80p. In theory, you could reduce your CPC's by 20% and still achieve the same share of search in the SERP.

But I already run Google shopping, how will it be affected?

You can run both at the same time! You will never be 2nd priced against yourself in the same auction i.e. running both will not drive up costs. Run them in conjunction and the most efficient will win the auction. Shopping through a CSS runs through a GMC [Google Merchant Center] and an AdWords account just like normal and requires little to no setup to get started.

To better understand kickback ad credits

Spend in a 30-day period between €500 – €2,500 gets 20%

Spend in a 30-day period between €2,500 – €10,000 gets 25%

¹³⁵ See Major, CEO of RedBrain (a 'CSS' in Shopping Units): “*It is definitely the case that lots of 'fake' CSSs have appeared recently to take advantage of the CSS credit program*” in: “Google Complainants flag rise of 'fake' comparison sites to EC in Shopping case remedy”, PaRR, 2 October 2018, <https://bit.ly/32QsUuc>.

¹³⁶ Regarding the relevance of the backend in the value chain of CSSs see illustration 1 (p. 35).

¹³⁷ Bauer, shareholder of dooshop GmbH (a 'CSS' in Shopping Units), in: “Google Complainants flag rise of 'fake' comparison sites to EC in Shopping case remedy”, PaRR, 2 October 2018, <https://bit.ly/32QsUuc>.

Spend in a 30-day period above €10,000 gets 30%"

123 In other words, ByBuyBye clearly understood what the *CSS Partner Program* was until December 2018 – a scheme providing discounts for merchants if, instead of placing their *Shopping Ads* (directly) through GSE, they let a competing CSS do the bidding on their behalf. Moreover, the above ad proves that, from a merchant's perspective, the CM does not change anything. The only difference was that if they did their bidding for *Shopping Ads* through another CSS rather than directly through the Google Merchant Center, they received a discount of up to 30%.

124 There were similar campaigns¹³⁸ of other marketing agencies – with the same key message: Merchants could easily save up to 30% of their spending on *Shopping Ads* if, instead of going directly through the Google Merchant Center, they requested this respective (Fake) CSS to place the *Shopping Ads* on their behalf.

125 One further telling example is that of Adference. Long before the Decision, Adference has been active as a marketing agency that "*manages and optimises [...] bids for Google Shopping and Text Ads*".¹³⁹ In an invitation to a webinar in September 2018, it announced that it now operates a CSS. The headline for the invitation read as follows:

*"Brand new: all information on Adference CSS for Google in our webinar".*¹⁴⁰

126 This headline ("*CSS for Google*") says it all – the Adference CSS is designed not for any particular consumer, but simply as a tool for merchants to benefit from Google's discount scheme. The Adference CSS does not seek to compete with GSE or any genuine CSS for consumers with its own consumer-facing frontend on the market for CSSs.¹⁴¹ Accordingly, Adference further advertises

"You have heard of the enormous saving potentials in Google Shopping [sic], which are possible through Comparison Shopping Services (CSS) – but do not have an agenda how to become a [sic] Adference Shopping Partner and to

¹³⁸ See for instance, the CSS PriceJoy, which Google sells as one of its "success stories" (Google, Success Stories, <https://bit.ly/2ZU1SA6>). PriceJoy makes no secret about its fake purpose (see <https://bit.ly/3cpRtkW>). Another example is Productcaster.

¹³⁹ See Adference description of its own service, "*Adference manages and optimizes your bids for Google Shopping and Text Ads. We achieve the maximum number of conversions or the maximum return on the basis of your desired average Cost Per Acquisition (CPA) or your Return On Investment (ROI / CRR). Self-learning algorithms comprise the core of our bid management technology: the less information on a keyword or product, the stronger the influence of external data sources on the bid.*", <https://bit.ly/33K3ldz>.

¹⁴⁰ See e-mail invitation from Adference dated 26 September 2018.

¹⁴¹ See *Illustration 1* (p. 35) for the particularities of the value chain of CSSs.

benefit from Google's Incentives? Find out more about the reduced click prices and the Ad Spend kickback of up to 32.000 € – enter with us into the subject Google CSS”.

- 127 The wording suggests that the marketing expert Adference, is unable to see any difference between *Google Shopping* (as it was operated until the CM) and Google's current powering of Shopping Units. Adference refers to the latter as “*Google CSS*” (we refer to it as “*Google's on-SERP-CSS*”).
- 128 Another prominent example of such ‘Fake CSSs’ is *SHOParade*. It is “prominent” only because Google proudly presents *SHOParade* as a *CSS Partner* and one of its “*success stories*”¹⁴² for how “*Shopping Ads have helped CSSs and their merchants to reach the shoppers*”.¹⁴³
- 129 According to the website's legal notice, *Shoparade.de* is operated by the *Native Shopping Media UG (haftungsbeschränkt)*, a very small company with a nominal capital (“*Stammkapital*”) of just €3,000. The company is run by one of the CEOs of *SearchFusion GmbH* and has connections with such company, which in turn is a traditional advertising agency for placing *Shopping Ads* for merchants.¹⁴⁴ Therefore, like Adference, *SHOParade* is a traditional advertising agency (which had always been acting as an intermediary for placing paid aids for merchants). The CM motivated both companies to create Fake CSSs in order to continue what they had always been doing for merchants – but at that point at a discount granted by Google, in its effort to sell the CM as creating competition amongst CSSs to the Commission.
- 130 A look at *Shoparade.de*'s legal notice only confirms the impression of a Fake CSS by clarifying, *inter alia*, that “*At Shoparade.de you cannot find information on products or producers*”.¹⁴⁵ As at September 2020, *Shoparade.de*'s landing page appears as follows (with no changes for many years and hardly any content):

¹⁴² See Google Shopping Partners, Success Stories, “With Shopping Ads through CSS, Neckermann's conversions grow by 32%”, <https://bit.ly/2FTGBzq>.

¹⁴³ See below at ¶272.

¹⁴⁴ See information available on North Data, <https://bit.ly/3iWqDU0>.

¹⁴⁵ “*Bei Shoparade.de können Sie keine Informationen über Produkte oder Hersteller in Erfahrung bringen.*“, <https://bit.ly/3iPQyww>.

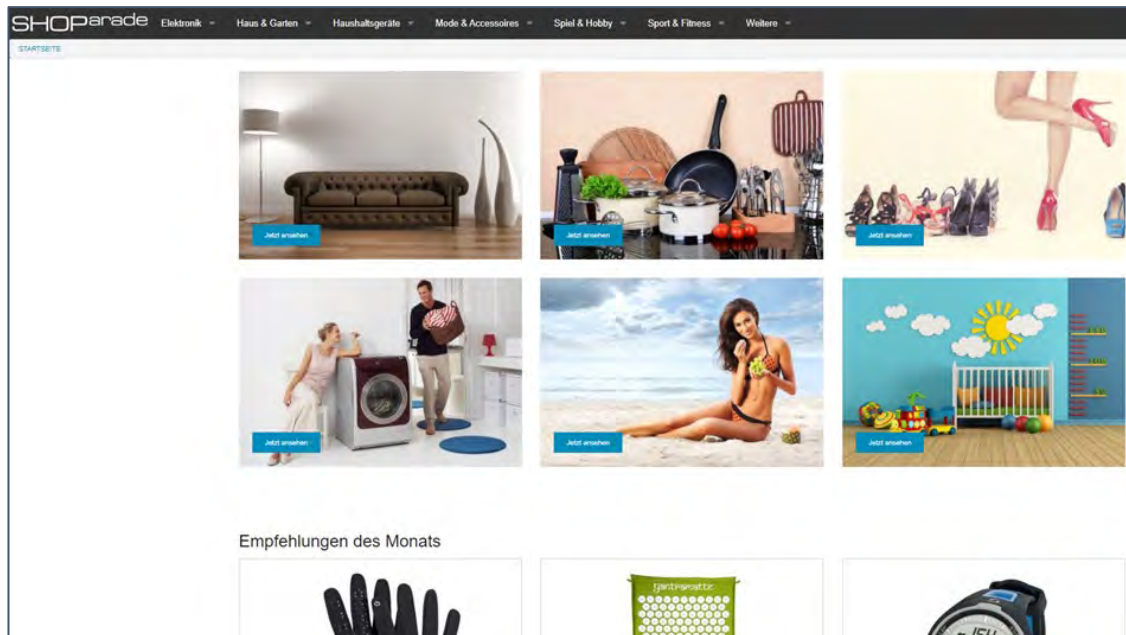


Illustration 25: Screenshot of website of Shoparade.de

- 131 On the website, individual product categories may be selected (e.g., “electronics”). However, the products are then displayed randomly, such that the user is unable to navigate through the different products in a useful way.

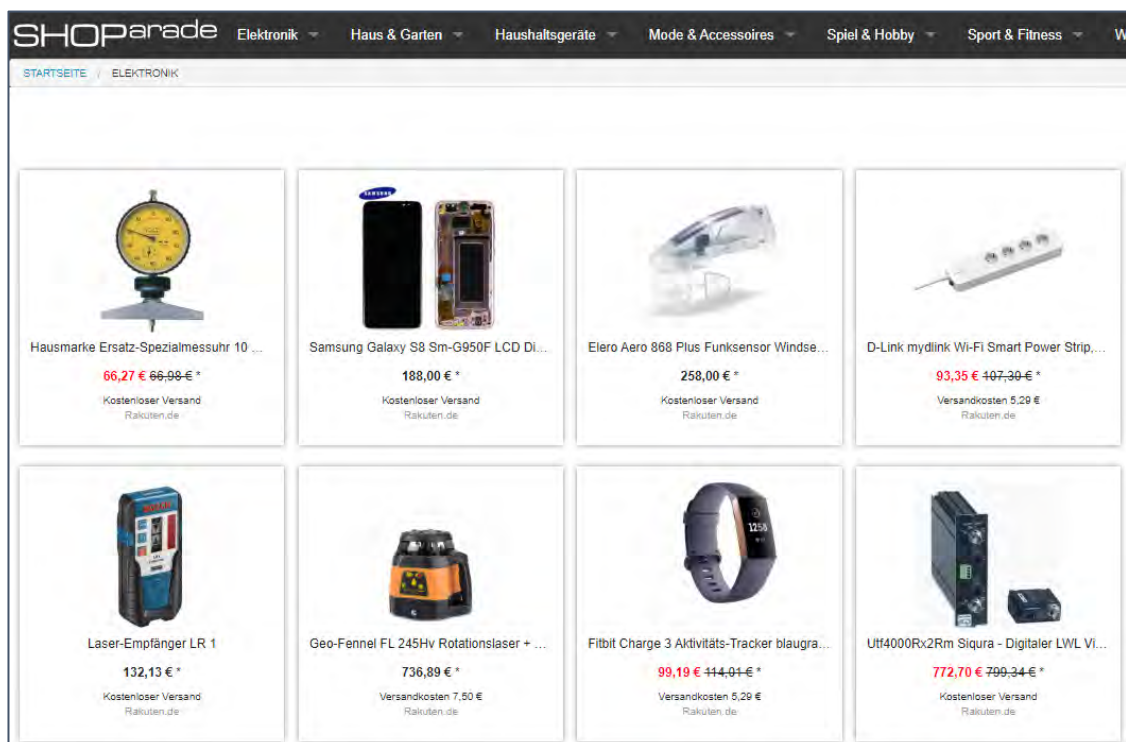


Illustration 26: Screenshot of website of Shoparade.de, product category “electronic”

- 132 It is not surprising that Shoparade.de thus far had no commercial success on the market for CSSs. The monitoring service SimilarWeb that records the traffic to commercial websites, does not even list Shoparade.de's website in the category of ‘price-

comparison'. In only appears in the category of 'home and garden' where in August 2020, it received 0.02% of the total traffic to websites in this category in Germany.¹⁴⁶ This site simply gets no visits because it was only designed to fulfil Google's low requirements to qualify as a 'CSS'.

- 133 Nevertheless, due to Google's new auction mechanisms, Google's CM-Shopping Unit often suggests *Shoparade.de* as first choice and the most relevant "CSS" to find more:

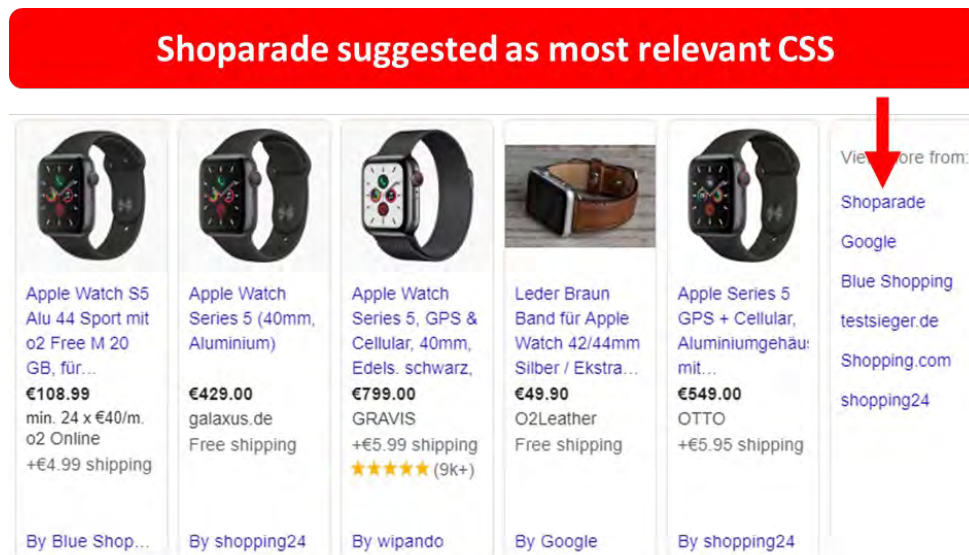


Illustration 27: Google CM-Shopping Unit suggests Shoparade as most relevant CSS

- 134 'CSSs' such as Shoparade are not genuine CSSs, rather they are advertising platforms. As pointed out in the Decision, searchers perceive CSSs as "a service to them" (recital (198)) but not as advertising platforms. Accordingly, by design, CSSs aim at (and are dependent upon) being visible in generic search results as their most important source of traffic. Yet, the visibility index¹⁴⁷, for example of Sistrix, shows that all the "CSSs" listed at the right-hand side of Google's Shopping Unit displayed above have a visibility of close to zero in Google's generic search results. In other words, outside of Google's CM-Shopping Units, Google's relevance-based algorithms do not consider any of these 'CSSs' to be competitive. These sites are *de facto* non-existent.
- 135 Those companies also do not appear in the ComScore-Report of Unique Monthly Visitors for CSSs in Germany or Europe as of September 2020. Such companies simply

¹⁴⁶ According to SimilarWeb, in the entire period of August 2020 the website shoparade.de received (globally) 84.262 visits, which corresponds to 0.02% of the visits in the category "home and garden" in which the service is listed. To compare: idealo received 46.110.640 visits (x547) to its website in the same period of time in Germany; Geizhals 5.212.405 (x62).

¹⁴⁷ The visibility index shows how often a website appears in Google's purely relevance-based generic search results. A high visibility reflects a high relevance of the respective website.

do not provide a genuine CSS service as defined by the Decision (rather than by Google).

4.3 Rise of white label 'CSSs' for merchants' "self-service"

- 136 Encouraged by Google's CM, some fake CSSs even offer merchants the possibility of a "white label CSS". *Productcaster* describes this concept as follows:

*"Our fully supported Software As A Service (SAAS) white label CSS solution for agencies **will enable you to become a Google CSS partner fast without the significant time and financial investment required to build your own comparison site** from scratch and become accredited. You also benefit from our ongoing technical roadmap of improvement. Furthermore, you'll have the reassurance of full maintenance and support running 24/7, 365 days a year.*

*We manage the full end to end partner approval process, working closely with the Google team, to meet the requirements for becoming an official Google partner fast and efficiently. Uniquely, our white label solution enables you to tailor the branding requirements and domain name for your comparison shopping site, **allowing you to market the CSS opportunity** to your existing clients and new clients without having to reference any association with Productcaster*

*Using our white label CSS solution, **we can get you and your clients up and running in two weeks.**"¹⁴⁸*

- 137 It has become clear that marketing agencies and software companies are taking advantage of the CM to support merchants and online retailers in the optimal placing of *Shopping Ads* in Google Shopping Units. The concept of a "white label CSS" is a cautionary example that the CM is not working and continues to fail.
- 138 This is also supported by the fact that Google has enabled and encouraged some CSSs to allow their merchant customers to control campaigns directly through an interface they provide ("self-service", see above at ¶¶110 et seq.). Google itself advertises for this option.¹⁴⁹ If merchants completely manage their campaigns themselves, CSSs lose all function and meaning. Merchants could just as well control their campaigns without the existence of a CSS. Under the CM one could get the false impression that CSSs are always somehow involved in the placement of product offers. In fact, they often serve as a mere 'front', while the merchant pulls the strings in the background and controls its campaigns itself. In this situation, the 'CSS' simply provides no added value.

¹⁴⁸ Productcaster, "Productcaster CSS solution for Agencies - Become a CSS partner for your clients", <https://bit.ly/2RL7Ui3>.

¹⁴⁹ Google Merchant Center Help, "About advertising with Comparison Shopping Services, What if I don't want a specific CSS to advertise for my products?", <https://bit.ly/2Ejrxur>.

4.4 Google granting free customer support to merchants that switch to another CSS signing a "waiver" to reactivate the GSE account

- 139 In addition to the SpendMatch programme, by means of what it calls a "waiver", Google further accelerated the sham that merchants would be switching to competing "CSSs".
- 140 On Google's blog post, merchants had asked Google if they would lose the cost-free support that previously GSE had provided them regarding the management of their campaign if a merchant were to switch to another CSS. Google's answer was both surprising and resounding: 'no!':

Q: "Will I lose my support via Google if I switch to a Google CSS partner?"

A: *"This is something you should pay attention to. This concerns what was agreed to between the CSS partner and Google. If nothing has been agreed to, then Google support staff and account managers no longer have access to your campaigns. **If there is an agreement in place in which it has been agreed to that Google may provide access and service, then Google can continue to provide support.** For larger advertisers, who are used to receiving assistance and support from a Google account manager, it may be that the account manager will place the (especially the strategic) assistance on a somewhat lower level. In such a case, it is good to be affiliated with a Premium CSS Partner. These receive much more assistance from their Google team and these short lines of communication make it possible to continue receiving strategic support from Google."*¹⁵⁰

*"It should be noted that after a changeover to an external CSS, your Google contact no longer has direct access to your account. However, **there is now also a technical solution here: With a so-called "waiver", this access is reactivated again.**"*¹⁵¹

- 141 Marketing agencies understood this message very well. This is how two of the most active marketing agencies – turned Google CSS Partners – interpreted and communicated Google's waiver to its merchant (advertising) customers:
- 142 Adference, one of the agencies taking part in the CM wrote to its customers:

*"Who will be your contact person for Google Shopping after the migration depends on whether your CSS agreed on the so-called "waiver". **The waiver gives your Google Account Manager access to your accounts after the migration. In this case, they can also assist you.**"*¹⁵²

¹⁵⁰ Producthero, "Google CSS Partners: The Ultimate Guide", "About Advertising via a Google CSS Partner", <https://bit.ly/3hLgFmJ> (emphasis added).

¹⁵¹ Trusted Shops, 15 April 2019, "Google CSS: Why Your Online Shop Needs to Participate to Stay Competitive", <https://bit.ly/3ciuuYH> (emphasis added).

¹⁵² Adference, 18 September 2019, "The Ultimate Google Shopping CSS Guide: Best Practices from more than 400 Migrations", <https://bit.ly/3kBAOxE> (emphasis added).

143 *Smec*, another marketing agency, comments:

*"We signed a "Waiver" that ensures a frictionless continuation of your Google support because **your Google Account managers are still able to access your campaigns without problems.**"*¹⁵³

144 What this means is that, even though the merchant has decided to use a 'Google CSS Partner', Google is still the party that provides the relevant services to that merchant. The two agency 'CSSs' do not provide any service to the merchant (let alone a consumer), apart from uploading their feeds to Google's database. Google, and not the agencies, provide the customer relations support to the merchants. The agencies do not (even) set up and manage merchants' campaigns. Rather, they concede access to merchant accounts to Google once they have uploaded the product feeds to Google. All of these elements of the digital value chain are instead provided by Google.

145 In addition to Google's *SpendMatch* program and the "self-managed" option, Google's "*waiver*" provides more evidence in support of the fact that Google is attempting to fool the Commission. Google intended to make it as easy as possible for marketing agencies to pretend to be genuine CSSs and for merchant customers of GSE to 'switch' their uploading of feeds to such fake CSSs (while continuing to reserve all actual value-added to Google). All of this only for Google to be able to pretend to the Commission that the CM has had some impact on the market by leading to market entries. Yet, marketing agencies that do not even invest in the simplest forms of customer support are certainly not CSSs.

146 Moreover, the fact that Google continues to provide such support services directly to merchants at no extra charge clearly confirms that Google makes its money elsewhere – with the clicks on product ads powered by its on-SERP-CSS, irrespective of who uploaded the product offers.

4.5 Google's broadest possible definition(s) of a 'CSS' to gloss over the statistics

147 As part of the CM, Google has set out the "*minimum requirements*" that companies need to fulfil in order to be accepted as CSSs for the bidding of *Shopping Ads*. Since January 2019, they are as follows:

"These are the requirements you'll need to meet as a CSS to show ads for products of merchants you represent.

¹⁵³ smec, "Europe's most innovative Shopping solution", <https://bit.ly/2ZY11AZ> (emphasis added).

- *You must operate a Comparison Shopping Service website meeting the following requirements:*
 - *The site shows all offers you submit to Google and allows users to search for and compare different products and different offers for the same product from different merchants.*
 - *The site shows offers from 50 distinct merchant domains for every country that they target with Shopping ads. These must be merchants that deliver products of the respective country, meaning consumers in the country can buy from them.*
 - *The site shows product offers that lead users to a page where they can buy the listed product.*
 - *The site offers a search box for queries and provides search functionality based primarily on a dynamic and automated process and that is not substantially based on search technology licensed or syndicated from Google.*
 - *The CSS website offers sorting or filtering options for product search results by price and at least one other dimension relevant for consumers (for example, brand, merchant, shipping time).*
 - *The site is accessible to everyone without sign-up.*
- *Your business must have a registration in at least one EEA country and show a business address corresponding to your registration on your website.*
- *Ads must comply with all Shopping ads policies and Product Data specifications. [...]*¹⁵⁴

148 Note that ultimately, the most relevant criterion appears to be that the company operates a standalone website allowing users to search for and compare different products and different offers for the same product. This is surprising in two respects:

149 First, the Decision does not require a standalone website in order to fulfil the criteria as a CSS (see below at ¶¶346 et seq.). It is likely that Google has only set up this requirement in an attempt to illustrate that its own powering of CM-Shopping Units constitutes a CSS – even without a standalone website.

150 Second, until January 2019, Google did not set up any minimum criteria regarding the quality of the standalone website. There was no need for any filtering or sorting option at all. As a result, for 15 months from the CM being implemented, any odd website, which uploaded product feeds and in one way or another made them available to consumers, constituted a “CSS” under Google’s definition. Thus, the rise of Fake CSSs and CSSs with inferior quality did not come as a surprise.

¹⁵⁴ See Google Merchant Center Help, “Sign up as a Comparison Shopping Service”, <https://bit.ly/3hQbemP>.

B. Comparison Listing Ads

- 151 In March 2019, Google commenced the voluntary testing of a new format for Shopping Units, namely so-called "Comparison Listing Ads" ("CLAs"). Such CLAs are reserved to CSSs and link directly to their websites. In Google's words, the format of a CLA is

"a new ad format which shows a selection of products that are available on a CSS's website in a single ad. In addition to the carousel of Shopping ads that shows on Google's general search results pages, a second carousel of Comparison Listing ads may also appear. [...]"

*"When enough relevant Comparison listing ads are available for a given search, the Shopping unit will show two tabs, the "Products" tab and the "Comparison sites" tab. You can switch between the "Products" view, which shows Shopping ads, and the "Comparison sites" view, which shows Comparison Listing ads. After clicking a Comparison Listing ad, a shopper is taken to a landing page on the CSS's website where they can compare related products from several merchants."*¹⁵⁵

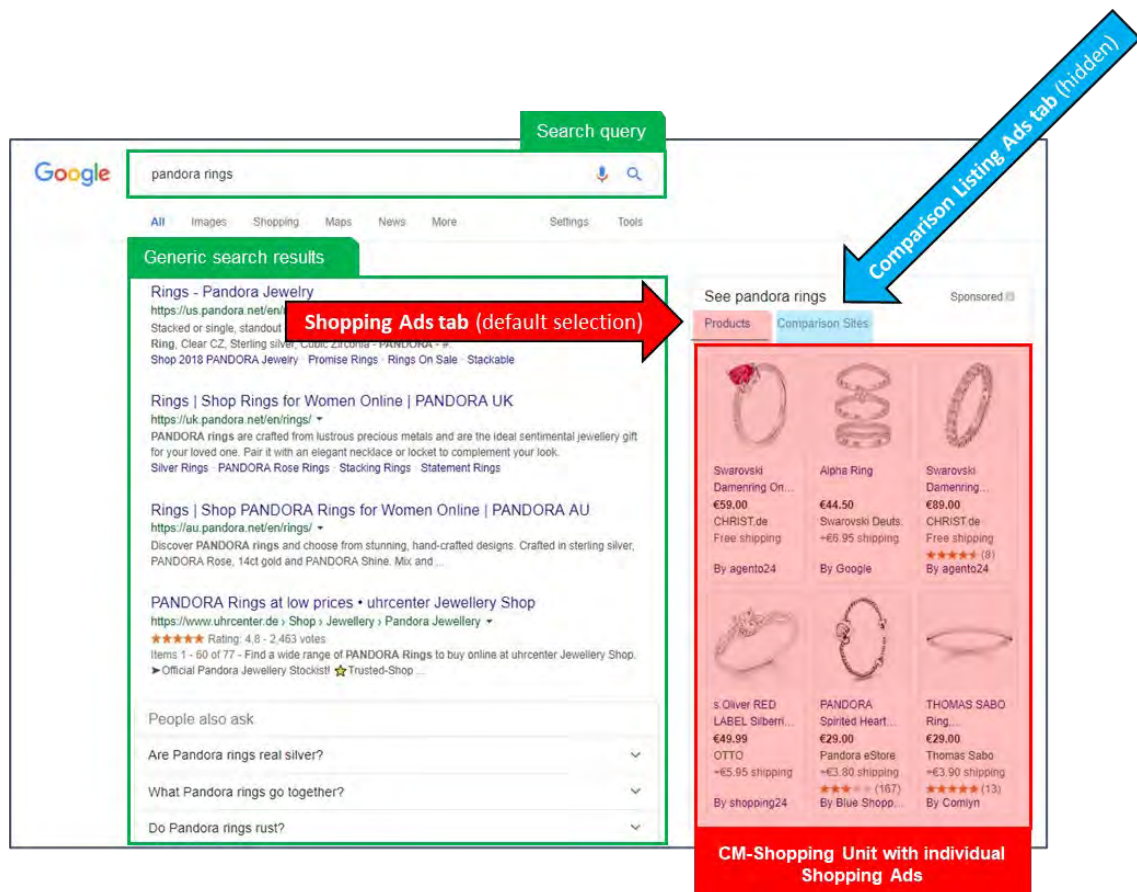


Illustration 28: Default Shopping Ads tab with Comparison Listing Ads tab in background

¹⁵⁵ Google Merchant Center Help, "Comparison Listing ads for Comparison Shopping Services", <https://bit.ly/2ZWbOJu>.

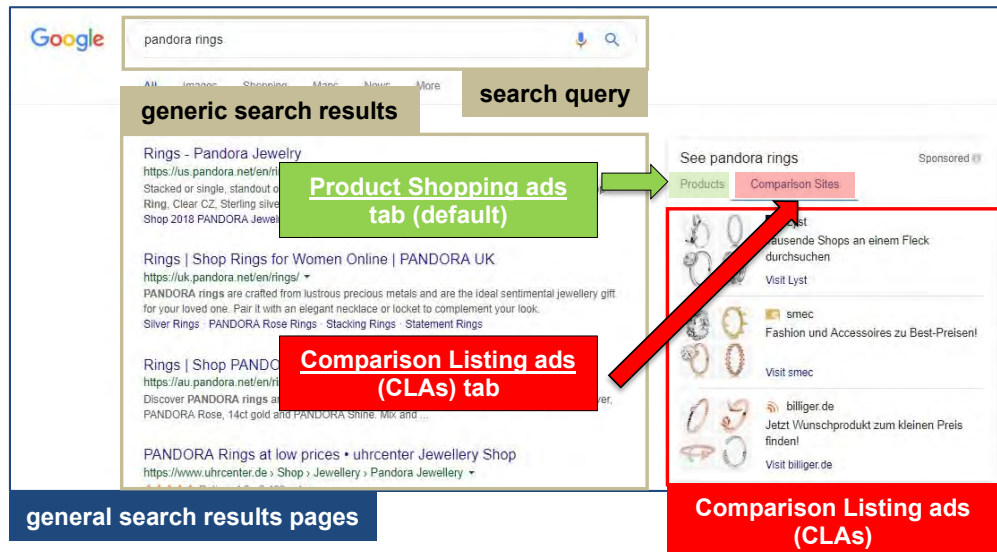


Illustration 29: Comparison Listing Ads after a click on the 'Comparison Sites' tab

- 152 Akin to *Shopping Ads*, CLAs ads use maximum CPC (cost-per-click) bidding. This means that the merchant needs to

"set the highest amount that [he is] willing to pay for a click to [his] website".¹⁵⁶

- 153 Bids are not set for individual product offers, but only for a group of products. The auction for CLAs in the tab "Comparison sites" runs independently from the auction for *Shopping Ads* in the "Products" tab. Therefore, CSSs may in theory make two bids for the same Shopping Unit – one for *Shopping Ads* and one for CLAs.
- 154 The CLA do not appear directly on the general search results page. Thus, they do not act as substitutes for *Shopping Ads* in Shopping Units. Rather, CLAs are only displayed if a user clicks on a link (tab) to the "Comparison Sites" section, which Google displays at the top of some Shopping Units.
- 155 Google asserts that it started testing CLAs as "*a voluntary measure, outside the remedy*"¹⁵⁷, without any pressure from the Commission. Google also stated that it only tested them in a "*fraction*" of Shopping Units in a few countries, that "*only few*" users clicked on the CSS button¹⁵⁸ and only "*a small share of CSSs participate in CLA*

¹⁵⁶ Google Ads Help, "About Comparison Listing ads", <https://bit.ly/35WJevw>.

¹⁵⁷ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, pp. 1, 5.

¹⁵⁸ Google, Response to the Court's Questions for answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.14.

campaigns and there is little CLA ad inventory"¹⁵⁹. However, this did not stop Google from (falsely) presenting CLAs as a significant improvement of the CM to relevant policy stakeholders. It appears that, at some point, even the Commission believed that CLAs could make a difference.¹⁶⁰ Therefore, the following assessment takes CLAs into account. It demonstrates that displaying CLAs in the way Google tested them would likewise not lead to Google's compliance, not least because they are hidden by default and would rarely be seen or clicked on by users (see below at Chapter 4, B.2., ¶¶674 et seq.).

¹⁵⁹ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, pp. 1, 5.

¹⁶⁰ European Commission, "Report on Competition Policy 2019", 9 July 2020, p. 55, <https://bit.ly/33UhV2f> *"Another important issue with the compliance mechanism raised by market participants was that it did not give sufficient prominence to the comparison function of comparison shopping services. As the most prominent links in the Shopping Unit lead directly to the websites of merchants, rival comparison shopping services had difficulties to show their main benefit to users. To address this, and preserve the incentives of merchants to work with rivals, Google introduced a comparison shopping toggle in the Shopping Unit, which allows switching between links going to websites of merchants and links going to websites of rival comparison shopping services."*

Chapter 3: Economic impact of Google's Compliance Mechanism

- 156 This chapter assesses the economic impact of Google's chosen CM on the markets affected by the identified abuse. To this end, the study first presents the outcome of a comprehensive economic analysis of traffic and revenue data shared by a panel of 25 CSSs, out of which 17 participate in Google's CM, operating across 21 European markets (see A.).
- 157 Based upon this data analysis, the impact of the CM on competition on the markets for CSS is assessed (see B.). The assessment concludes that Google's CM is continuing and exacerbating the anti-competitive effects of the identified abuse: it fails to improve the situation for competing CSSs, while it further strengthens and monopolises Google's position on the markets for comparison shopping services.

A. Results of a representative traffic and revenue data analysis of 25 CSSs from across Europe

- 158 The Commission has been monitoring Google's chosen CM since the very beginning. As far as can be seen to date, this monitoring relied until now entirely on the data provided by Google to the Commission. Competing CSSs have not been requested to provide their data to the Commission. Google's data, in turn, has not been shared with third parties, including any CSSs, for any re-assessment effort. Applications of affected CSSs for access to the file to examine such data themselves have been rejected.¹⁶¹ Thus, as at today, the Commission's monitoring is more or less a "black box".
- 159 In order to shed more light on the CM's impact, several CSSs affected by it across Europe decided to fill the data void. They commissioned an independent economic consultancy to gather all relevant data from the panel of CSSs in a competition law-compliant and confidential manner, with a view to calculating average key performance parameters. Such parameters include, in particular, the development of traffic coming through the various types of Google's search results to CSSs, and the respective quality in terms of profitability of such traffic.
- 160 The results of the analysis leave little doubt – Google's chosen CM fails in every respect to achieve what it was supposed to have achieved under the remedy imposed.

¹⁶¹ See Applications of 8 April 2020 requesting access to documents relating to case AT.39740 – Google Search (Shopping) – GestDem registration references: 2020/2008, 2020/2009, 2020/2010, 2020/2011, 2020/2012, 2020/2013 (pending).

1. Methodology of the data analysis

- 161 The analysis was carried out by the economic consultancy firm of *Lademann & Associates*¹⁶² (the “Economist”) between March and August 2020. Such analysis was based upon empirical traffic and revenue data provided by a panel of 17 CSSs,¹⁶³ run by 10 separate undertakings,¹⁶⁴ operating across 21 European markets.¹⁶⁵ The undertakings sent their data individually and in a confidential manner directly to the Economist. The Economist analysed the data and provided anonymised average figures for various key performance parameters.¹⁶⁶
- 162 The study is further supported by the insights and data input provided by eight additional established CSSs that share the findings described here.¹⁶⁷ However, these companies did not take part in Google’s CM. That is why their data was not taken into consideration for determining the CM’s impact. This ensures that the data analysed reflects the market conditions of those CSSs that take part in it. Altogether, the panel of effectively 25 CSSs represent the (genuine) CSSs landscape in Europe, thus rendering the analysis as being representative for the CSS still operating in the industry.
- 163 In the past, Google tried to downplay the arguments forwarded by the CSSs participating in this study by belittling them and claiming that they would “*not be representative of the general CSS ecosystem participating in the remedy*” because they would account “*for just 8 per cent of active groups participating in the remedy and 8 per cent of ad spent.*”¹⁶⁸

¹⁶² The analysis was carried out by *Niels Frank, Steffen Sirries and Jan-Michael Kreis*, Lademann & Associates, An der Alster 63, 20099 Hamburg, Germany, <https://bit.ly/3chciyE>.

¹⁶³ In alphabetic order: Ceneo.pl, Choozen, Ciao, Guentstiger.de, idealo, Kelkoo, Koopkeus, LeGuide, Nextag.de, PriceRunner, Preis.de, Preis.info, Preissuchmaschine.de, Testberichte.de, Trovaprezzi, Ladenzeile.de/Shopalike.com, x24factory_Moebel24.

¹⁶⁴ In alphabetic order: Ceneo, Heise Group, idealo, Kelkoo/LeGuide, PriceRunner, Preis.de, Testberichte, Trovaprezzi, Visual Meta, x24factory.

¹⁶⁵ Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom.

¹⁶⁶ No data was shared amongst participating CSSs. The Economist operated on an independent basis. The author of the study was not involved in the data gathering and analysis process.

¹⁶⁷ In alphabetic order: Bianco, Compare Group, FAVI, Geizhals, Glami, Heureka, Kuantokusta, LionsHome,

¹⁶⁸ *Graf and Mostyn* (representing Google in the case and thanking 7 lawyers of Google’s antitrust team for their “invaluable comments and help”), “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, pp. 1, 5-6; see below Chapter 4, B.2.3.3.1, ¶¶598 et seq.

However, looking at the leading market positions of the participating CSSs¹⁶⁹ as compared to the (nowhere to be seen) market positions of the 'fake CSSs' that make up the vast majority¹⁷⁰ of the 600 companies allegedly¹⁷¹ taking part in Google's CM,¹⁷² it is pretty clear which group is representative for CSSs as defined in the Decision. The fact that the CSSs taking part in this study only make up 8% of the ad spent for product ads in Shopping Units only confirms the high number of 'fake CSSs' enrolled in the CM.

164 The data analysis covered the period between 1 January 2016 up until 30 April 2020. This allows a comparison of 17 months before the Decision as against 21 months after the Decision, also taking account of the high cyclicity of the business due to seasonal effects.

165 The data basis consists of various traffic and revenue measures for all markets in which Google operates the CM and across all devices (desktop and mobile). The analysis is based upon 400 MB raw data, assessing a total of 10.5 billion clicks on Google (5.9 billion clicks on generic search results, 1.3 billion clicks to merchants ("leadouts") and

¹⁶⁹ First, in recital (613) the Decision lists "*the most important comparison shopping services in the EEA [...] That sample includes: Axel Springer [idealo], Beslist, Kelkoo, LeGuide, Nextag, Shopping.com, Solute, Twenga, Preisvergleich, IdealPrice (ASAP Compare), Pricerunner, Shopstyle (Popsugar), Supaprice (Digital Assets), and Schibsted (PriceSpy)". Of these fourteen groups, seven participate in this study (underlined).*

Second, based on the traffic monitoring service SimilarWeb, as of 25 September 2020, this study includes the leading CSSs in seven of the thirteen countries with the highest e-commerce volume for price-comparison services in Europe (Germany (idealo); Poland (Ceneo.pl); Czech Republic (Heureka.cz); Hungary (Arukereso.hu – Heureka Group); Italy (Trovaprezzi); France (idealo); Slovakia (Heureka)). Five other participants are amongst the top 3 in these countries (Germany (Geizhals); Greece & Italy (idealo); Sweden (PriceRunner).

Third, at least one of the participants is amongst the top 3 CSSs in twelve of the thirteen countries with the highest e-commerce volume for CSSs (in the thirteen's, it is at top 6).

Fourth, the participants also include some market leaders in particular product categories such as furniture (LionsHome, Moebel24) and fashion (Glami, Ladenzeile).

¹⁷⁰ According to a study of *Searchmetrics*, in November 2019, of those Shopping Ads in Shopping Units that were not sourced from *Google Shopping Europe*, 71% of the ads were sourced from marketing agencies and only 29% were sourced from viable CSSs. Searchmetrics, 26 November 2019, "Neue Studie: Mehr Wettbewerb bei Google Shopping, trotzdem drohen neue Probleme mit der EU-Wettbewerbsbehörde", <https://bit.ly/3iPVcud>.

¹⁷¹ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, pp. 1, 7.

¹⁷² Apart from the genuine CSSs (represented in the study) no new participants in the CM have any visibility in Google's generic search results or gained market share. This is true, in particular not those 'CSSs' that Google quotes as 'success stories' for its CSS, see ANNEX 2, and below at ¶¶271 et seq.

3.3 billion clicks on Google text ads (formerly *AdWords*). This relating to over 1 billion in total revenues.¹⁷³

Traffic by Dimension

Dimension	Incoming Traffic	Outgoing Traffic	Total
Generic Traffic	4.0 bn	1.9 bn	5.9 bn
Shopping Ads*	0.6 bn	0.6 bn	1.3 bn
Adwords	2.2 bn	1.1 bn	3.3 bn
Total	6.8 bn	3.7 bn	10.5 bn

Source: Lademann & Associates based on CSS data.

*Please note that for Shopping Ads incoming Traffic equals outgoing Traffic.

Illustration 30: Calculation – Overview of assessed traffic data

- 166 Unless otherwise specified, all data shown was collected on a daily basis. For example, the statistical graphs contain the absolute number of daily visits to a CSS website originating from clicks on specific types of search results in Google's general search results pages. Nevertheless, even one year later, in November 2019 a study by *Searchmetrics* found that, of those Shopping Ads in Shopping Units that were not sourced from *Google Shopping Europe*, 71% of the ads were sourced from marketing agencies and only 29% were sourced from viable CSSs.¹⁷⁴
- 167 For most of the figures provided, the absolute number was aggregated over all available CSSs, countries and devices. For some measures, the average (rather than absolute numbers) over all CSSs and countries is depicted.¹⁷⁵

2. Results of the data analysis

- 168 The outcome of the data analysis may be summarised as follows:

¹⁷³ To put this in perspective, according to *Graf* and *Mostyn* (above), over the entire period of the CM (up until September 2020), there were 16 bn clicks on product ads in Shopping Units. The 1.1 bn clicks of the participants of the study were counted only until April 2020. Even if one takes the entire period into account, the 1.1 bn would equate to around 12% of the total clicks on product ads in Shopping Units. Thus, the empirical data is representative.

¹⁷⁴ Searchmetrics, 26 November 2019, "Neue Studie: Mehr Wettbewerb bei Google Shopping, trotzdem drohen neue Probleme mit der EU-Wettbewerbsbehörde", <https://bit.ly/3iPVcud> (for an English version see: <https://bit.ly/2ZUtlbt>).

¹⁷⁵ For further background information on the methodology please contact the economic consultants *Niels Frank, Steffen Sirries, Jan-Michael Kreis*, Lademann & Associates, An der Alster 63, 20099 Hamburg, Germany, <https://bit.ly/3chciyE>.

2.1 Despite growing e-commerce, the CM has not led to any increase in generic search traffic from Google's general search service to competing CSSs

- 169 The Decision highlights the importance of the level of generic search traffic to CSS websites resulting from clicks on generic results within Google's general search results pages.¹⁷⁶ The abusive conduct had *"led to a decrease in generic search traffic from Google's general search results pages on a lasting basis to almost all competing [CSS]"*.¹⁷⁷ As such, one would assume that, at the very least, implementing an effective remedy would lead to an increase in generic search traffic to rival CSSs. However, this did not happen:

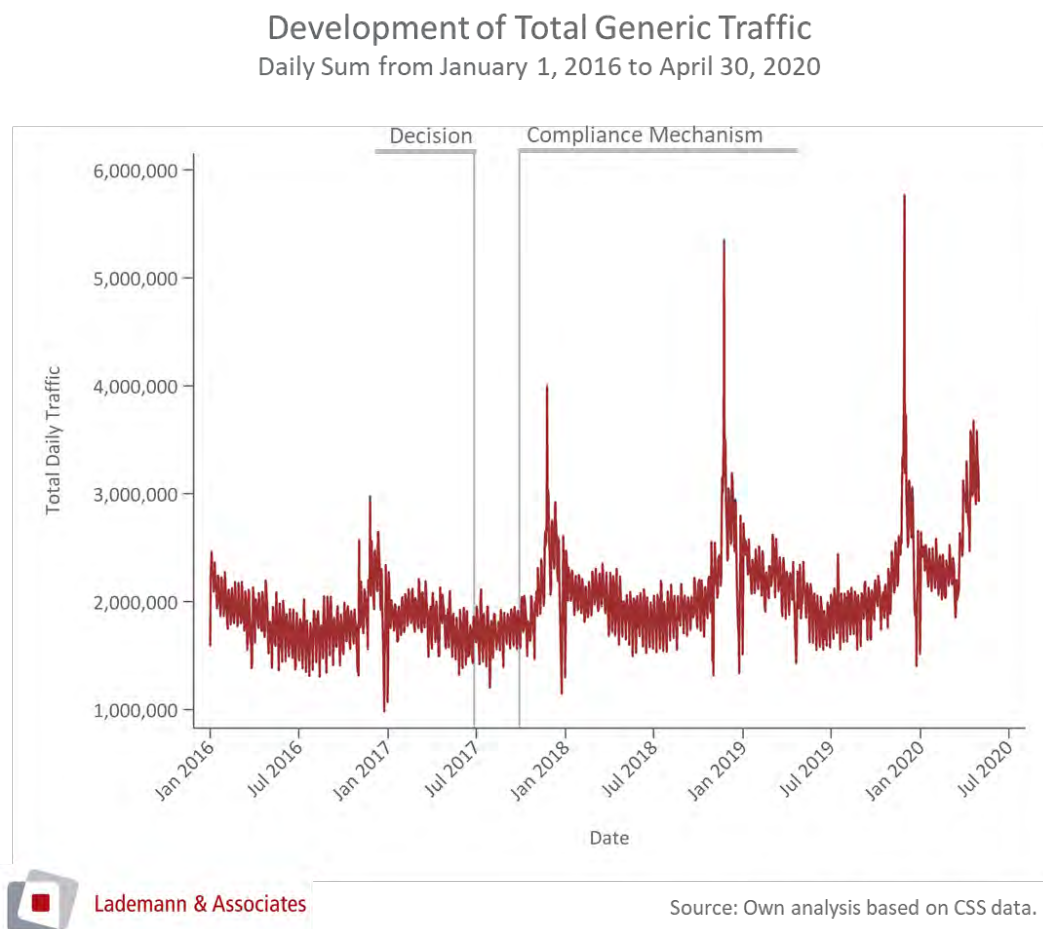


Illustration 31: Calculation – Development of total generic search traffic¹⁷⁸

¹⁷⁶ See Decision, sections 7.2.3.2., 7.2.4.

¹⁷⁷ Decision, recital (462).

¹⁷⁸ Notes: Traffic is defined as the daily clicks to CSS. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentstiger.de, idealo, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preisssuchmaschine.de, PriceRunner, Testberichte.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany,

- 170 The graph shows the total number of daily visits ("leads") to a CSS website originating from a click on a generic search result on Google's general results pages before and after the introduction of the CM. The graph shows that, aside from increasing outbreaks before Christmas (consistent with the usual seasonal increase in traffic), the level of generic search traffic remained constant. There was no significant overall increase. On desktop devices, the average generic search traffic from Google to CSSs' websites even declined by 1.5% since the launch of the CM.

Development of Total Generic Desktop Traffic

Daily Sum from January 1, 2016 to April 30, 2020

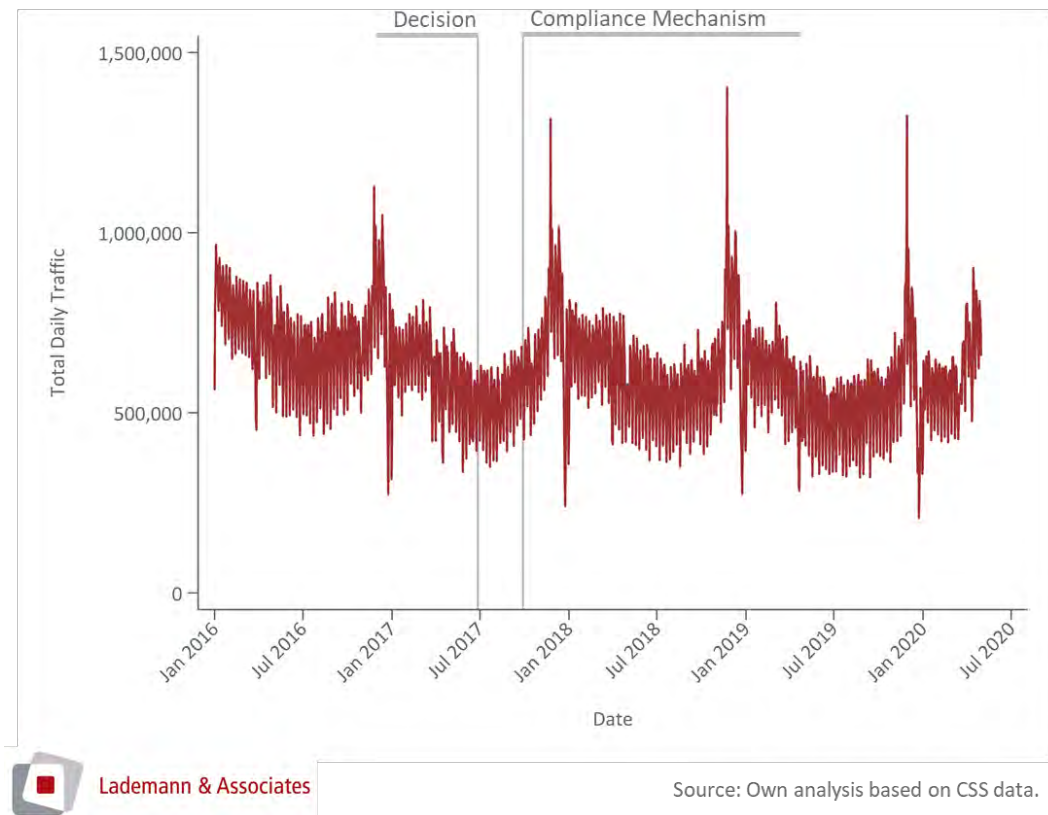


Illustration 32: Calculation – Development of total generic search traffic – desktop¹⁷⁹

Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

¹⁷⁹ Notes: Traffic is defined as the daily clicks to CSS. Included CSSs: Ceneo.pl, Choozen, Ciao, Kelkoo, Koopkeus, LeGuide, Preis.de, PriceRunner, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

171 This development must be viewed against the background of a growth of the European e-commerce sector in terms of revenue by 29% between 2017 and 2019.¹⁸⁰ Considering this growth in demand for online purchasing and corresponding comparison services, the stagnation in generic search traffic actually equates to a significant decline. Rival CSSs did not manage to benefit from the growing demand for comparison services.

2.2 The value of generic search traffic decreased as its bounce rate increased due to a lower propensity to buy of those users let through to competing CSSs by the CM

172 The commercial success of a CSS does not depend, *per se*, on the number of visits it attracts to its website. A CSS only generates revenues if a searcher actually uses its service and clicks on a product offer of a particular merchant. For this to happen, the searcher must engage with the CSS's website. Therefore, it is an important observation that the stagnating generic search traffic since the launch of the CM occurred along with an increasing bounce rate¹⁸¹ for this source of traffic and a corresponding decrease of the click-through rate¹⁸² to the merchant:

¹⁸⁰ Between 2017 and 2020 the total revenue with e-commerce grew from € 492 billion in 2017 to € 636 billion in 2020, Ecommerce News, July 2020, <https://bit.ly/3j8gfbz>.

¹⁸¹ The bounce rate is defined as the average number of clicks to a CSS that do not lead to a click-out (lead) to a merchant. In other words, the user leaves the CSS's website (typically 'back' to Google's results page) without clicking on any product offer on the CSS's site.

¹⁸² The click-through rate defines the number of visits to a site that lead to a further click-through to the merchant customer, i.e. the percentage of visits that ultimately triggered a payment.

Development of Bounce Rate for Generic Traffic

Daily Average of Bounce Rates from January 1, 2016 to April 30, 2020

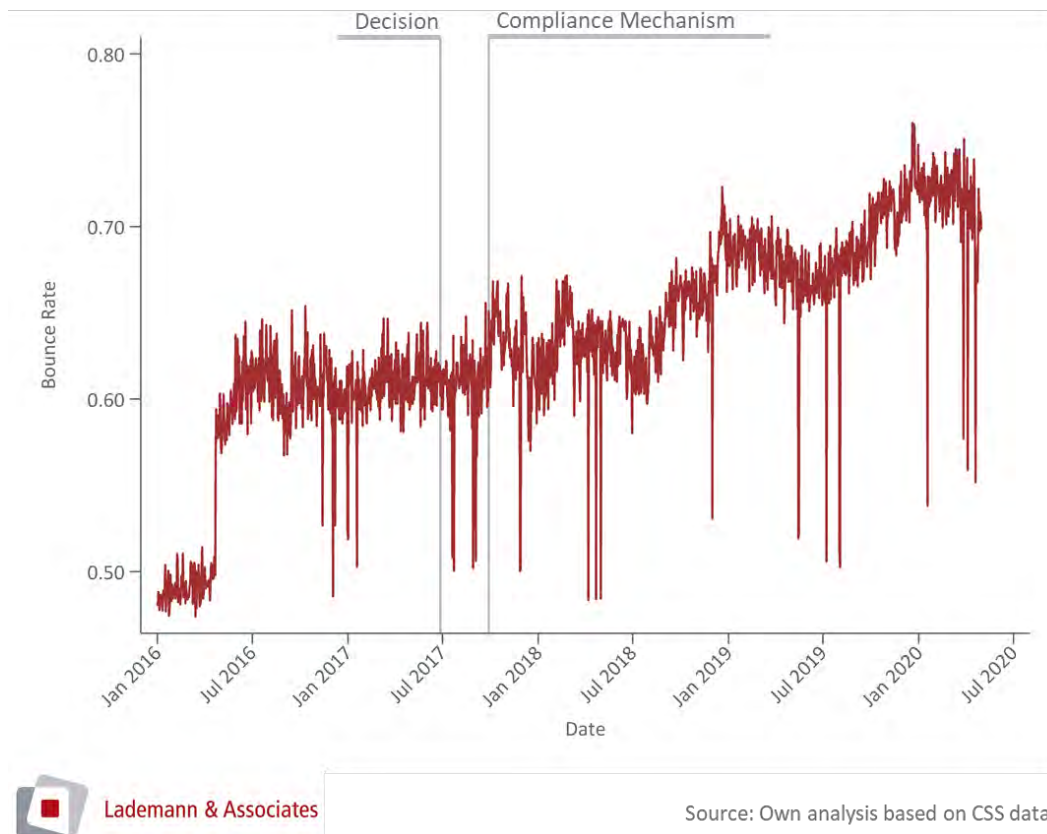


Illustration 33: Calculation – Development of bounce rate for generic search traffic¹⁸³

- 173 The increasing bounce rate cannot be explained by the possible decreasing in quality of the respective CSSs. Otherwise, such CSSs' offerings would not have appeared in Google's top generic search results and been clicked on. In addition, the bounce rate for Google text ads (formerly *AdWords*) for the same services remained steady over the same period, even though they are also subject to a quality score.

¹⁸³ Notes: Bounce Rate is defined as the average daily number of clicks to CSS that do not lead to a lead to a merchant. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, idealo, Kelkoo, Koopkeus, LeGuide, nextag.de, Preis.info, Preis.de, Preisssuchmaschine.de, PriceRunner Testberichte.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

Development of Bounce Rate for Generic and Adwords Traffic

Daily Average of Bounce Rates from January 1, 2016 to April 30, 2020

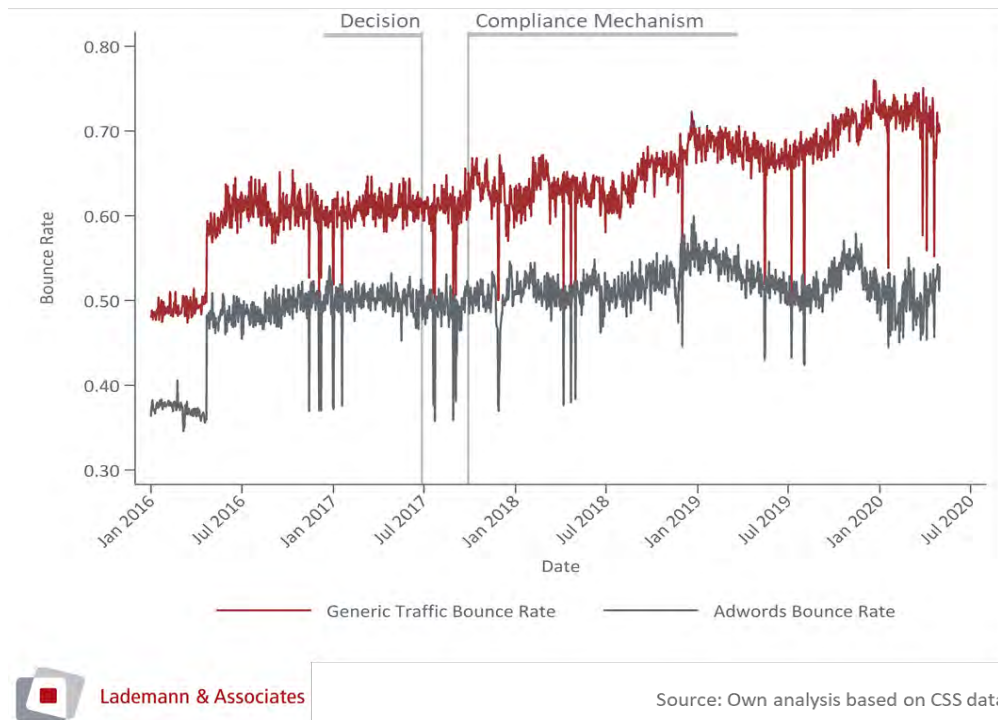


Illustration 34: Calculation – Development of bounce rate for generic SEO traffic and AdWords traffic¹⁸⁴

- 174 The increasing bounce rate for generic search results suggests that those (increasingly fewer) searchers that still see and click on generic search results of a competing CSS are those with an increasingly lower propensity to compare and buy. This was to be expected given the ever-increasing complexity and resulting attractiveness of Google's CM-Shopping Units – i.e., the CM provided Google with additional product offers and information from various CSSs. This allowed Google to trigger Shopping Units more often. Google could match more and more rare and long-tail queries for niche products with a (presentable) Shopping Unit, with the inclusion of a sufficient number of corresponding offers. In addition, Google added further filter and sorting functionalities. All of this made Google's Shopping Units even more attractive for users in demand of a comparison service. This is particularly true for those searchers with the strongest immediate intention to compare products and prices based upon high incentive to buy. After entering a query, Google's Shopping Units present them with the 'answers' right

¹⁸⁴ Notes: Bounce Rate is defined as the average daily number of clicks to CSS that do not lead to a lead to a merchant. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, idealo, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.info, Preis.de, Preisssuchmaschine.de, PriceRunner, Testberichte.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom., Unbalanced Panel Data.

in front on them 'for the taking'. In contrast, all other CSSs who could present equivalent answers are displayed with blue links only, which do not allow any product comparison, and are, compared to the Shopping Unit, out of sight for the user.

- 175 Those users with the highest immediate intention to compare and buy are most attracted to the direct results provided by Shopping Units. In contrast, less determined users at an earlier stage of their customer journey will be more inclined to also browse other generic results below the Shopping Units. However, due to their lower propensity to compare and buy, such share of users is commercially less relevant for a CSS than users with an immediate intention to compare offers and conclude a sale, because it is less likely that they click through to a merchant and that such click converts into a sale.
- 176 The fact that the bounce rate for generic search results increased while the bounce rate for Google text ads remained constant suggests that Shopping Units primarily attract the attention of those that would otherwise have clicked on generic search results. In other words, Shopping Units (are designed to) divert more attention away from generic search results as compared to Google text ads and thereby cannibalise the former more than the latter. This reflects Google's overall strategy to replace free, purely relevance-based search results with paid-for search results in order to maximise revenues.¹⁸⁵
- 177 CM-Shopping Units become increasingly attractive to quickly compare products and prices. As a result, searchers with the highest propensity to buy, and hence the strongest demand for a CSS, were increasingly engaging with Google's CM-Shopping Units first. Such users compared products and prices directly in CM-Shopping Units. Generic results below the unit are considered less and less. An increasing share of those that were not captured by the Unit but still clicked on a generic result to a competing CSS did not have a strong immediate intention to buy in the first place. Therefore, the bounce rate for such searchers increased. Such searchers, however, are of less commercial relevance to a CSS than those with the highest propensity to buy – which are increasingly served by Google's CM-Shopping Units exclusively.

¹⁸⁵ See *Fishkin*, "Less than Half of Google Searches Now Result in a Click", SparkToro Blog, 13 August 2019, <https://bit.ly/33O1V1G>, finding that "We've passed a milestone in Google's evolution from search engine to walled-garden. In June of 2019, for the first time, a majority of all browser-based searches on Google.com resulted in zero-clicks." Of those 50% of users that still clicked on (as their information demand was not directly satisfied by Google's results page), 12% clicked on a link to a Google property YouTube, Maps, Verticals, etc.); see also *Nguyen*, "Now, more than 50% of Google searches end without a click to other content, study finds", Search Engine Land, 14 August 2019, <https://bit.ly/362oUJ0>.

178 In commercial terms, this means that the stagnating generic search traffic is continually declining in profitability for competing CSSs. Google's CM is increasingly only 'letting through' those searchers to competing CSSs with the lowest likelihood to generate a click that triggers revenues. In short: the CM continues to ensure that Google is retaining the most valuable users for itself, and that the users it does allow to find rival services have lower and lower value. The empirical data regarding the profitability of generic search traffic confirms this:

2.3 Profitability of generic search traffic has declined significantly since the CM

179 It is not enough for a CSS to generate traffic to its site. This traffic must lead to clicks that generate revenues. In this regard, a staggering decline in the profitability of the (stagnating) generic search traffic coming from Google is observed:

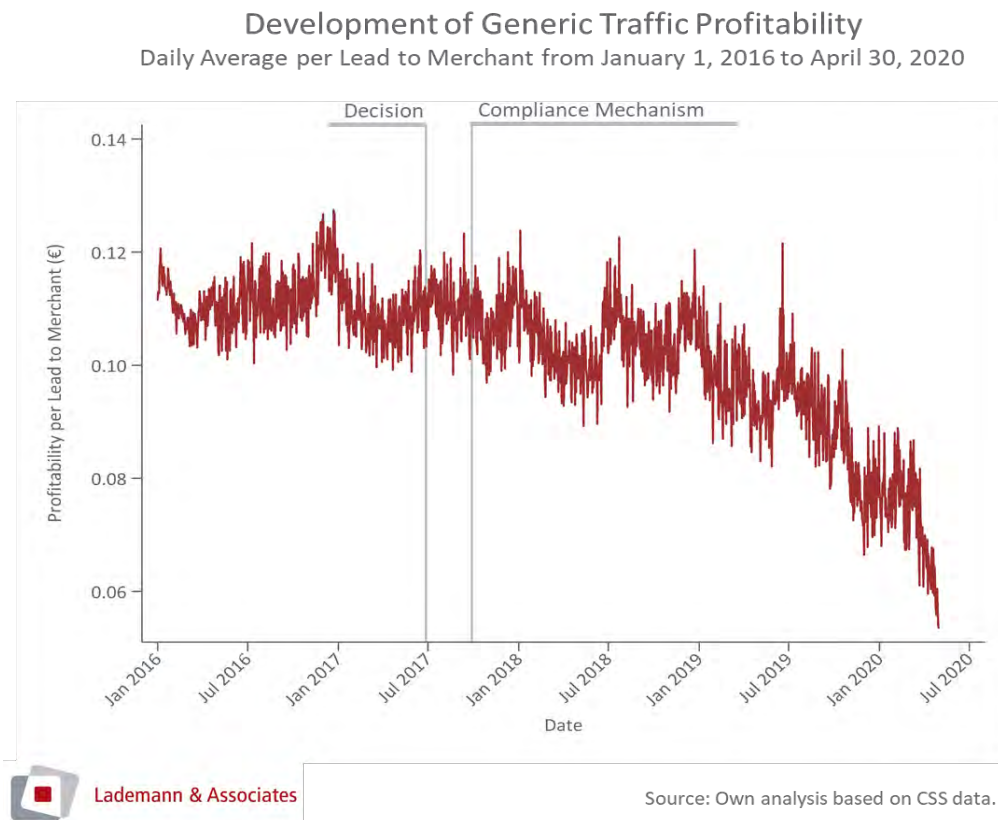


Illustration 35: Development of generic search profitability¹⁸⁶

¹⁸⁶ Notes: Profitability is defined as the average of the daily revenue minus daily cost divided by the number of leads to merchants at that day. Revenue is the payment received by CSS from merchants for leads. Costs are the spending of CSS for SEO activity according to recital (560) of the Decision. Included CSSs: Ceneo.pl, Choozen, Ciao, Guenstiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland,

180 The graph shows the average profitability generated by a CSS with generic search traffic. In contrast to the constant generic search traffic development, here we see a clear general downward trend. The data corresponds with the increasing bounce rate observed above. Less generic search traffic converts into clicks to merchants that trigger a payment to the CSS.

181 Since the costs for generic search traffic remain the same,¹⁸⁷ this in turn means that generic search traffic – despite being stagnant – generates fewer revenues for CSSs. (Even) during the infringement period, on average across all CSSs, a click on a generic search result generated revenue of €0.11. In April 2020, this number halved to less than €0.05 per visit. The coronavirus crisis does not explain the drop in profitability, as the downward trend already commenced in 2019. In fact, if anything, the pandemic would have been expected to increase the propensity of users to buy online and has seen well publicised increases in profitability for many in the e-commerce sector.

2.4 The only links in a Shopping Unit that lead users to a website of a CSS, the “By CSS” and “view more” links, account for less than 1% of traffic

182 If it is right that generic search traffic has not increased from the CM, then one could argue that the CM must allow for an increase of some other viable substitute in order to be effective. Such a viable alternative would have to allow users to see rival CSSs and use their tools in the same way that they do with Google's CSS tools (presented on the SERP). However, the only material change brought about by the CM was Google's voluntary introduction of “By CSS” and “view more” links below product ads (see above at ¶¶82 et seq.). However, the click data shows that, since the launch of the CM, such links were hardly ever clicked on. In relation to the number of clicks on generic search results, they comprise less than 1% of the traffic and may therefore be disregarded. This figure is in line with a Google statement of February 2020 that such links account for 1% of all clicks on the Shopping Unit.¹⁸⁸

France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

¹⁸⁷ Costs of generic search traffic (namely for Search Engine Optimisation) were calculated with €0.15 per visit, i.e. with the figure provided in Decision, recital (560).

¹⁸⁸ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, footnote 73.

Development of By-CSS Importance
Daily Average Ratio of By-CSS Button and Generic Clickouts from January 1, 2016 to April 30, 2020

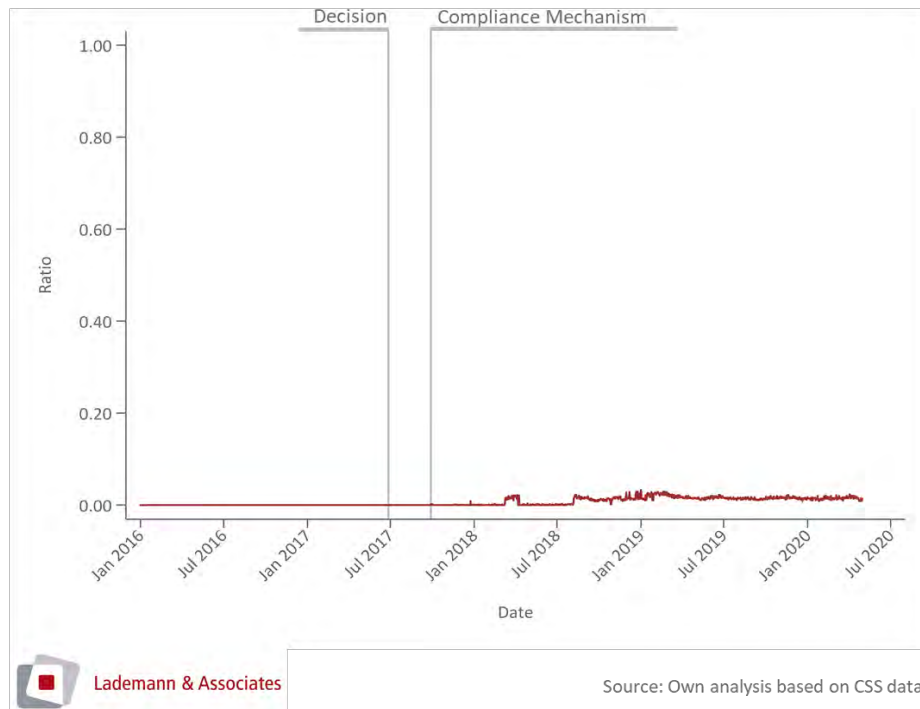


Illustration 36: Development of clicks on “By CSS” links¹⁸⁹

2.5 Leadouts to merchants via clicks on Shopping Ads are not profitable for CSSs

183 The loss in profits from generic search results since the launch of the CM and the lack of any alternative opportunity for users to engage with rival CSSs, cannot be outweighed by any revenues ‘generated’ from bidding on *Shopping Ads* for a display in available slots of Shopping Units on behalf of merchants. Clicks on such ads are not traffic for the CSS that uploaded the feed and, in case of a “managed” service,¹⁹⁰ also undertook the bidding (see below at ¶¶660 et seq.). While CSSs may generate commission for providing an intermediary service, such commission is not earned as a CSS (i.e., as reward of the matching of a consumer product query). Rather, it is earned on a separate market, namely for online advertising intermediation services (i.e., as reward for a technical and/or strategic marketing service) (see illustration 1, above at p. 35).

¹⁸⁹ Notes: Included CSSs: Ceneo.pl, Guentstiger.de, Nextag.de, Preis.de, Preis.info, Preisssuchmaschine.de Visual Meta x24factory_Moebel24. Included Countries: Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Netherlands, Poland, Slovakia, Spain, Sweden. Unbalanced Panel Data.

¹⁹⁰ In case of a “self-serviced” campaign, the merchant steers the campaign itself, that is, it sets up and maintains the bidding itself, see above at Chapter 2, A.4 (¶¶110 et seq.).

184 However, even if one were prepared to take the revenues from serving *Shopping Ads* on behalf of merchants into consideration, they would not outweigh the losses incurred by the decrease in generic search traffic (or a viable alternative) caused by the favouring of Google-powered Shopping Units in general search results pages. This may be concluded from the graphs below:

2.5.1 Leadouts to merchants via clicks on Shopping Ads have increased

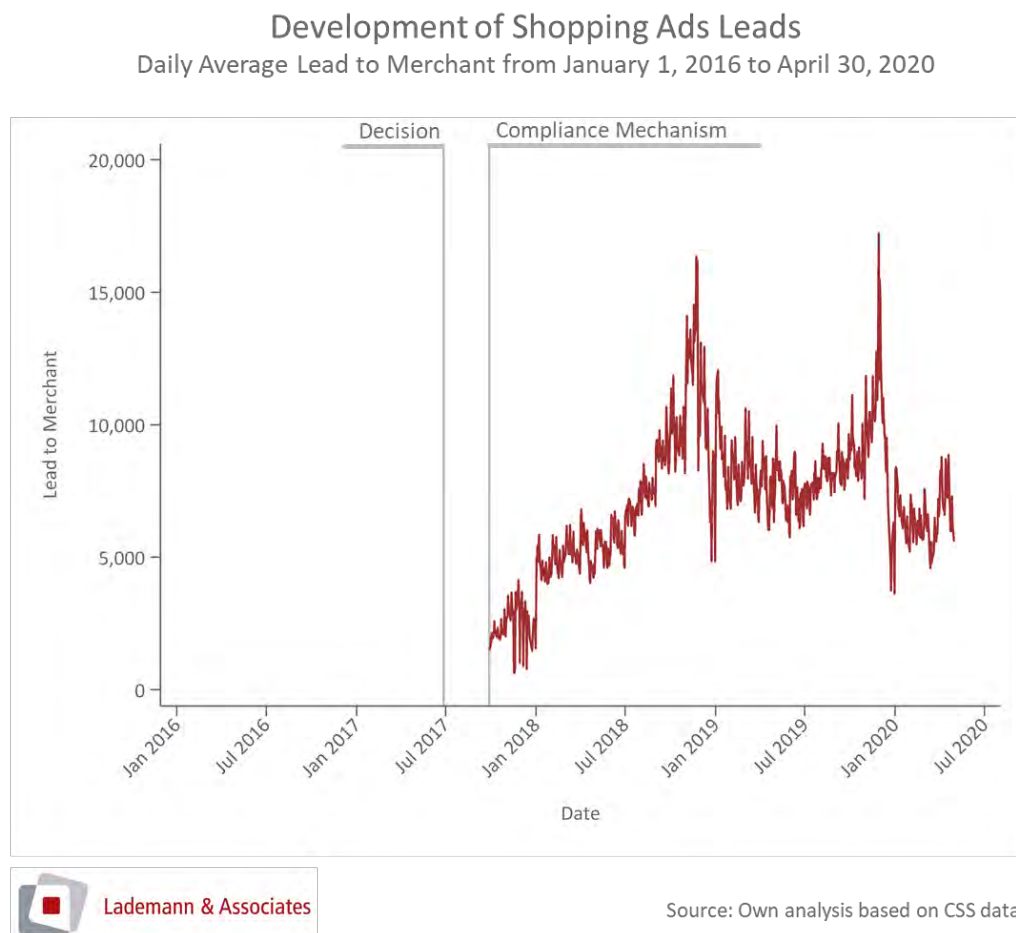


Illustration 37: Calculation – Development of Shopping Ads leads¹⁹¹

185 This graph shows the development of the total number of clicks on *Shopping Ads* leading directly to merchants. A CSS that placed a bid for the respective *Shopping Ad* on behalf of a merchant may refer to such clicks as leadouts to the merchants and thus charge the

¹⁹¹ Notes: Adspend is defined as the costs associated with a listing in the Shopping Unit. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preisssuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

merchant commission. The CSS's profit is the difference between the commission it charges per lead and the cost it bears for paying Google for the click on the ad.

- 186 This graph shows that since the launch of the CM, the overall number of clicks on Shopping Units increased. This was to be expected, as the CM allows Google to trigger Shopping Units more often. Considering the stagnating generic search traffic (above) in a growing overall market, the figures suggest that more and more users are also engaging with the Shopping Units and comparing products and prices directly there. In other words, the increase in leadouts to merchants via Shopping Units shows how crucial such Units are for merchants, and consequently confirms their competitive relevance for CSSs.
- 187 However, under the CM, the CSSs bidding on *Shopping Ads* to be displayed in the Unit do not benefit from this success of the Unit. This can be concluded from an assessment of the profitability of the (increasing) leadouts from clicks on *Shopping Ads* for a CSS:

2.5.2 Due to increasing auction costs, profits for CSSs from bidding for Shopping Ads are low and stagnating as Google expropriates competing CSS's surplus



Lademann & Associates

Illustration 38: Calculation – Development of Profitability – Shopping Ads¹⁹²

¹⁹² Notes: Profitability is defined as the average of the daily revenue minus daily cost divided by the number of leads to merchants at that day. Revenue is the payment received by CSS from

- 188 The graph shows the average daily profitability for a CSS to serve *Shopping Ads* in Shopping Units on behalf of merchants. Profitability is calculated by deducting the costs for serving such ads (i.e., payment to Google) from the revenues received from merchants. The graph shows that, up until approximately February 2018, profitability fluctuated significantly. This is likely due to the initial problems that Google had in onboarding merchants (i.e. to get their product feeds into Google's system) and setting up campaigns. Reflecting a strong reluctance against the CM, several of the CSSs that provided data did not participate in the CM right away, and only joined the CM at a later stage. Only two CSSs participated from the start. Such early participants in the CM automatically benefited from a low number of bidders in auctions, which kept costs low and profitability high. However, once a higher number of CSSs had set up accounts for merchants and started bidding against each other, the auction prices and corresponding costs went up and profitability stagnated at approximately €0.06 per click.
- 189 This is remarkable in several respects. First, it shows that, since the launch of the CM, CSSs could not increase profits by serving (more) *Shopping Ads* for merchants. The profitability of this (marketing) business activity stagnated. It does not allow existing, and genuine, CSSs to grow. Nor does it incentivise them to develop and innovate their CSS functions. Even less so does the profitability allow marketing agencies, affiliate networks or other ad tech companies to become genuine CSSs.¹⁹³ Economically, the reason for the low overall profitability of serving *Shopping Ads* is simple: Google's auction mechanism for serving such ads expropriates the profit margin to the extent that no growth potential remains for the bidders or the intermediaries acting on their behalf. Google's auction is designed to create a 'prisoners' dilemma' where no CSS commits to not bid for a top position in the sponsored Shopping Unit, but ultimately all CSSs are worse off by doing so because the auctioneer – Google – expropriates the CSSs' surplus.¹⁹⁴ In addition, Google's CM does not allow the intermediaries to perform the valuable economic functions of a CSS which would justify their retaining a greater share

merchants for leads. Costs are the spending of CSS for *Shopping Ads*. Included CSSs: Ceneo.pl, Choozen, Ciao, Guenstiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

¹⁹³ See below at Chapter 3, B.1.1.5 (¶¶237 et seq.) in greater detail.

¹⁹⁴ Cf. on the economic background Krämer and Schnurr, "Is there a need for platform neutrality regulation in the EU?", (2018) 42 Telecommunications Policy, 514, 525.

of the value. In order for their client's ads to simply appear at all, they have to bid their margins away.

- 190 Second, it may be observed that, even during typical peak periods (in particular before Christmas, where CSSs historically operate most profitably),¹⁹⁵ CSSs could not increase their revenues by serving product ads in Shopping Units.
- 191 Third, the profitability of approximately €0.06 per click indicates that CSSs are unable to recover losses from declining generic search traffic from Google's general search results pages (due to Google's self-preferencing) by simply increasing their (or rather their merchant customers') spending on product ads in Shopping Units. Any such attempt would not appear as an economically viable solution. As clicks on product ads lead users directly to merchants, the only possible benefit a CSS may derive is the commission it may receive for the leadout from a merchant. Yet, a profit margin of €0.06 per click will be insufficient in covering the costs of a genuine CSS with its own backend infrastructure. In this context, the Decision clarified that Google text ads (formerly *AdWords*) were not a viable alternative to generic search traffic because of the high auction-driven costs they incur.¹⁹⁶ In contrast to Google text ads, *Shopping Ads* do not even lead the user to a CSS's website first. Accordingly, they are even less of an alternative to generic search traffic.

2.6 Revenues for CSSs from bidding for Shopping Units do not provide compensation for the losses from declining generic search traffic profitability

- 192 Google's CM is based upon the premise that competing CSSs would somewhat benefit from being allowed to bid for Google's *Shopping Ads* on merchant's behalf. The presumption is that this creates a revenue stream that allows competing CSSs to compete with Google's CSS. Yet, this is a false premise.
- 193 Clicks on *Shopping Ads* increase for the costs of clicks on generic search results (SEO) or a viable alternative. The more users click on *Shopping Ads*, the less users arrive at Google's rivals. The following graph illustrate this correlation:

¹⁹⁵ See illustration 34 (¶173) on generic search traffic profitability above.

¹⁹⁶ Decision, recitals (559) to (567).

Development of Generic Traffic and Shopping Ads Leads

Daily Average Lead to Merchant from January 1, 2016 to April 30, 2020

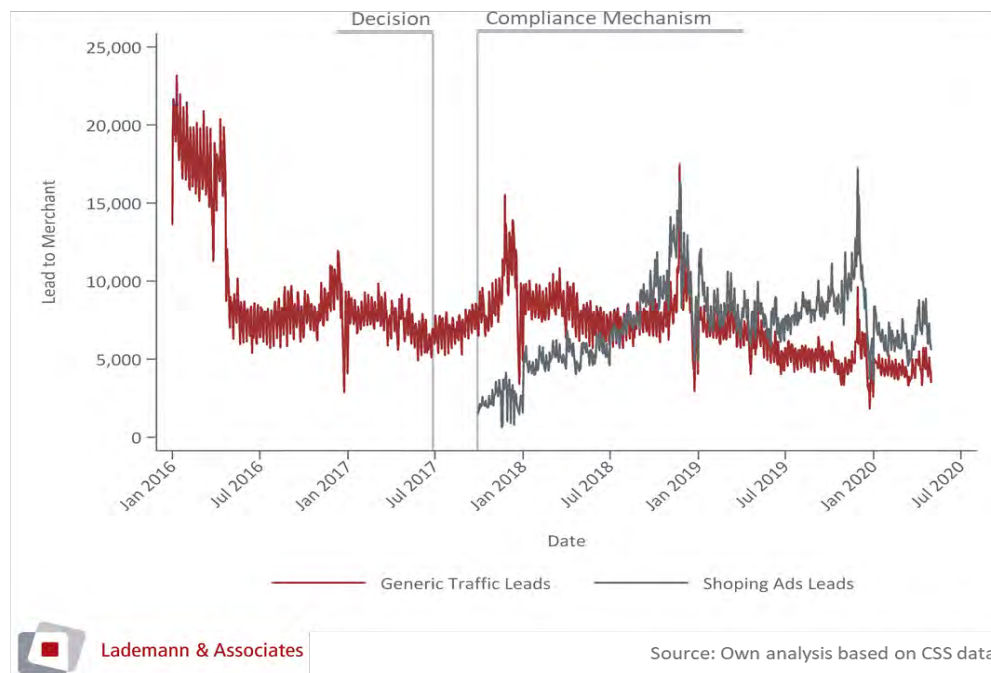


Illustration 39: Calculation – Development of leads – generic search traffic and Shopping Ads¹⁹⁷

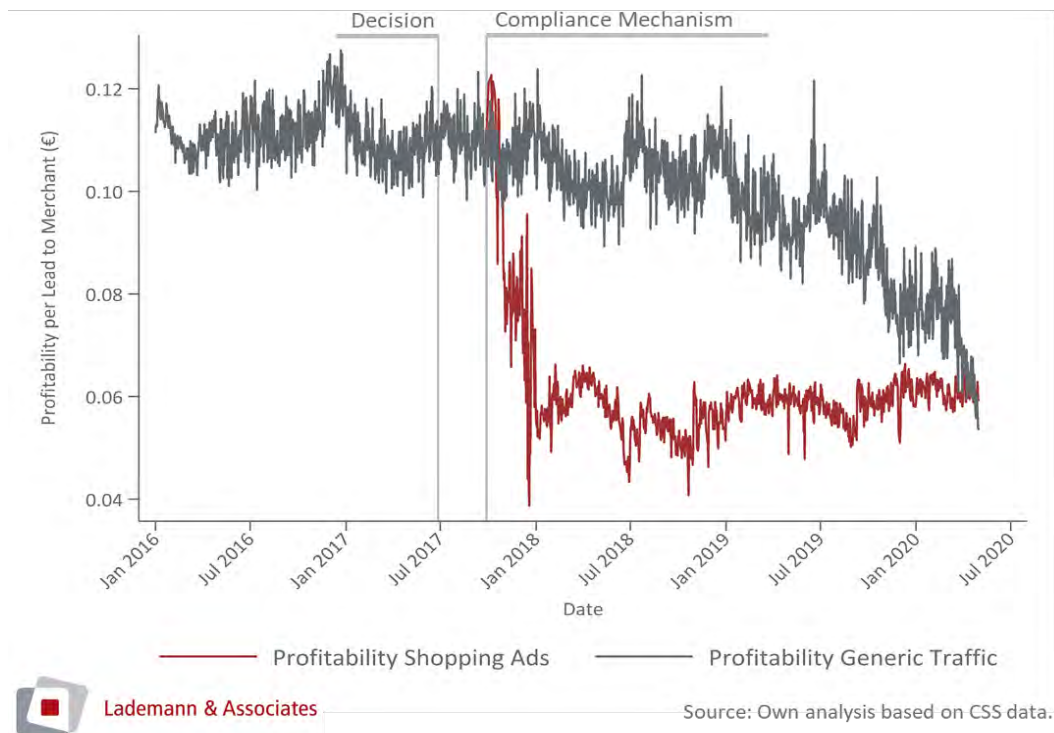
194 While the total number of “leads” remains rather consistent, this shift from (free) generic search traffic to (paid) clicks on *Shopping Ads* is pushing genuine CSSs out of the market. *Shopping Ads* are less than half as profitable for CSSs than generic results. This means that the growth of *Shopping Ads* goes hand-in-hand with a declining profitability for CSSs.

195 The statistic below illustrates this point.

¹⁹⁷ Notes: A lead is defined as outgoing traffic from a CSS to a merchant. Included CSSs: Ceneo.pl, Choozen, Ciao, Guenstiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech, Republic Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

Development of Profitability - Generic Traffic and Shopping Ads

Daily Average per Lead to Merchant from January 1, 2016 to April 30, 2020

Illustration 40: Calculation – Development of profitability – generic search traffic and Shopping Ads¹⁹⁸

- 196 The graph compares the development of the profitability of clicks on generic search results with the development of the profitability of clicks on *Shopping Ads*. While profitability of generic search traffic was halved, the profitability of *Shopping Ads* remained constant. Yet, because generic search traffic is declining as more users click on *Shopping Ads* instead, this means that overall profitability is decreasing. Three years after the launch of the CM, overall traffic profitability from Google's general search results pages is lower than it was during the infringement period.

¹⁹⁸ Notes: Profitability is defined as the average of the daily revenue minus daily cost divided by the number of leads to merchants at that day. Revenue is the payment received by CSS from merchants for leads. Costs are either the spending of CSS for *Shopping Ads* or spending for SEO activity according to recital (560) of the Decision. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentstiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preissuchmaschine.de, Visual Meta, x24factory_Moebel24.

Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

2.7 Since the launch of the CM, the overall profitability of traffic coming from Google has declined significantly

- 197 The graph below shows the average overall profitability of traffic from generic search results and leads generated through Shopping Ads in Shopping Units.

Development of Profitability - Generic Traffic and Shopping Ads Combined
Daily Average per Lead to Merchant from January 1, 2016 to April 30, 2020

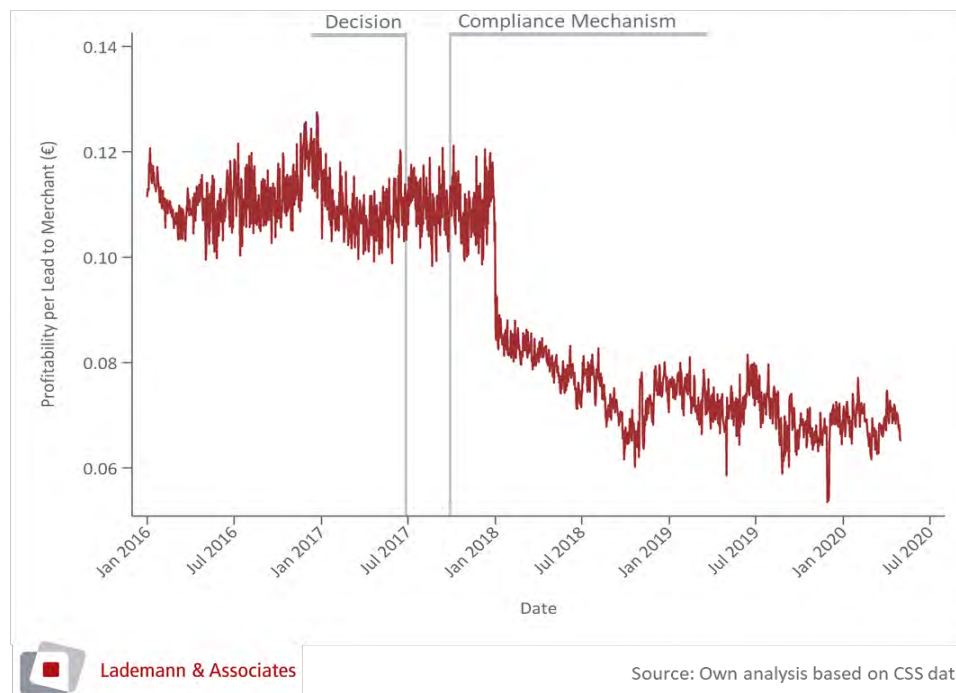


Illustration 41: Calculation – Development of profitability – generic search traffic and Shopping Ads combined¹⁹⁹

- 198 CSSs receive payment per click (lead) that they generate to the website of a merchant customer. The graph illustrates the development of the average profitability of such leads when combining leads from generic search results and leads from *Shopping Ads*. The graph shows that since the CM the average overall profitability of leads generated via Google has dropped by approximately 40% from €0.11 to €0.07 per click. To be clear: The profitability is 40% worse than during the abuse, in a time when it should have significantly improved.

¹⁹⁹ Notes: Profitability is defined as the average of the daily revenue minus daily cost divided by the number of leads to merchants at that day. Revenue is the payment received by CSS from merchants for leads for both SEO and *Shopping Ads* leads. Costs are the spending of a CSS for PLAs and spending for SEO activity according to recital (560) of the Decision. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.info, Preisssuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

199 This has significant implications. Google argues that (i) clicks on *Shopping Ads* are “traffic” for the CSS placing such ads on a merchant’s behalf (rather than traffic for Google’s on-SERP-CSS); and (ii) this traffic would somewhat provide compensation for the corresponding loss of generic search traffic. Yet, even if one were prepared to follow this (flawed)²⁰⁰ logic, the CM is still non-compliant, as it continues to destroy the economic foundation for CSSs. Serving *Shopping Ads* is not an ‘alternative’, as it is only half as profitable as the deprived generic search traffic while simultaneously reducing more profitable generic search traffic. Serving such ads can never cover the overall costs of (genuine) CSSs.

200 Second, the decreasing profitability of leadouts for CSSs goes hand-in-hand with an increasing profitability of such traffic to Google. This can be concluded from the fact that the overall search volume for such ads (leadouts) increased, but profitability for the CSSs decreased. This decrease is due to rising costs due to the increase of auction prices. The graph below on the daily average spending amounts of CSSs on *Shopping Ads* outlines such rising costs. Increasing auction prices means a higher profit for Google as the auctioneer, selling space in its own on-SERP-CSS, and increasing costs for its on-SERP-CSS rivals. Needless to say that Google’s on-SERP-CSS does not have to pay anything to Google to be prominently displayed within general results pages.

²⁰⁰ See below Chapter 4 B 1.2.

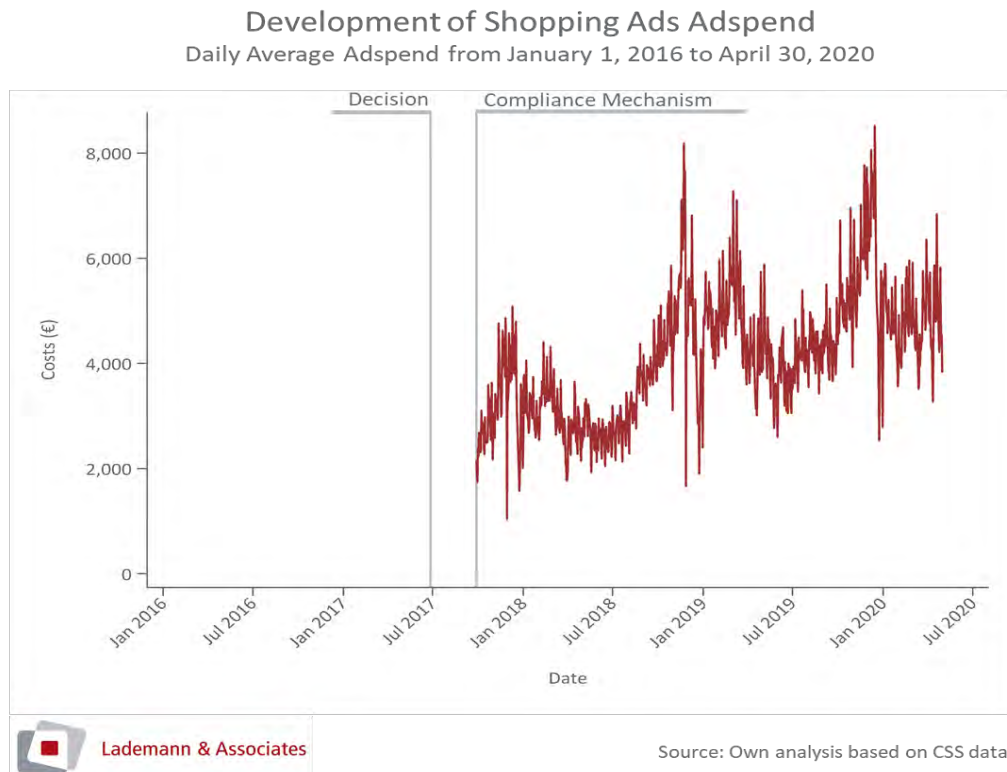


Illustration 42: Calculation - Development of average Shopping Ads ad spend²⁰¹

B. Assessment of the Compliance Mechanism's economic impact

1. The CM further weakens (genuine) competing CSSs

²⁰¹ The data analysis outlined above made it apparent that the CM does not benefit (genuine) CSSs on the relevant market. This was to be expected. The CM ignores the market definition and the underlying value chain of CSSs (below at 1.1). It does not enhance competition on the market for CSS; if anything, it might enhance competition amongst online advertising intermediaries on their separate markets. The low profitability of the CM makes it impossible, however, for such intermediaries to become genuine CSSs, even if they wanted to do so. As a result, they pose no competitive threat to Google's CSS (below at 1.2). The only economic beneficiary of the CM is Google's (on-SERP-)CSS (below at 2). If accepted, the CM will lead to a monopolisation of the entire value chain of CSSs in the hands of Google, to the detriment of consumers and merchants alike (below at 3.).

²⁰¹ Notes: Adspend is defined as the costs associated with a listing in the Shopping Unit. Included CSSs: Ceneo.pl, Choozen, Ciao, Guentiger.de, Kelkoo, Koopkeus, LeGuide, Nextag.de, Preis.de, Preis.info, Preisssuchmaschine.de, Visual Meta, x24factory_Moebel24. Included Countries: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, United Kingdom. Unbalanced Panel Data.

1.1 The business of a CSS – what constitutes the relevant product market?

- 202 To assess the impact of the CM, one needs to consider the particularities of the relevant market for comparison shopping services.
- 203 The Decision defines specialised search services as such services that (i) allow users to search for products and compare their prices and characteristics across the offers of several online merchants and merchant platforms and (ii) provide links that lead to the websites of such merchants or merchant platforms.²⁰² While acknowledging the two-sided nature of CSSs, the Decision thus defines the market affected by the abuse from the demand perspective of consumers. It is described as a service for them, rather than advertising merchants.²⁰³
- 204 This Decision distinguishes the market for CSSs from the market for general search services (such as Google Search), in particular by pointing to the different consumer demand and the different technologies employed.²⁰⁴ The Decision further distinguishes the CSS market from online search advertising platforms that display search-based advertising²⁰⁵ and from providers of arbitrage intermediation services that merely buy, sell or redistribute traffic for a profit.²⁰⁶ Such online intermediation services are not seen as a service to consumers, but as a one-sided service to advertisers.
- 205 The Decision's market definition and delineation neatly reflects the value chain of CSSs as compared to the value chain of, in particular, online advertising intermediation services:

²⁰² Decision, recital (191).

²⁰³ See Decision, recital (198): “*users perceive [CSS] as a service to them*”.

²⁰⁴ Decision, section 5.2.1.2.2.

²⁰⁵ Decision, section 5.2.2.2.

²⁰⁶ Decision, recital 604 (i): “*the majority of the 361 SO Response Aggregators do not provide comparison shopping services but instead arbitrate traffic between comparison shopping services and paid search traffic*” or (ii) “*redistribute traffic from other established comparison shopping services or merchant platforms*”; corresponding footnote 720: “*Traffic arbitrage consist of buying and selling paid traffic for a profit*”.

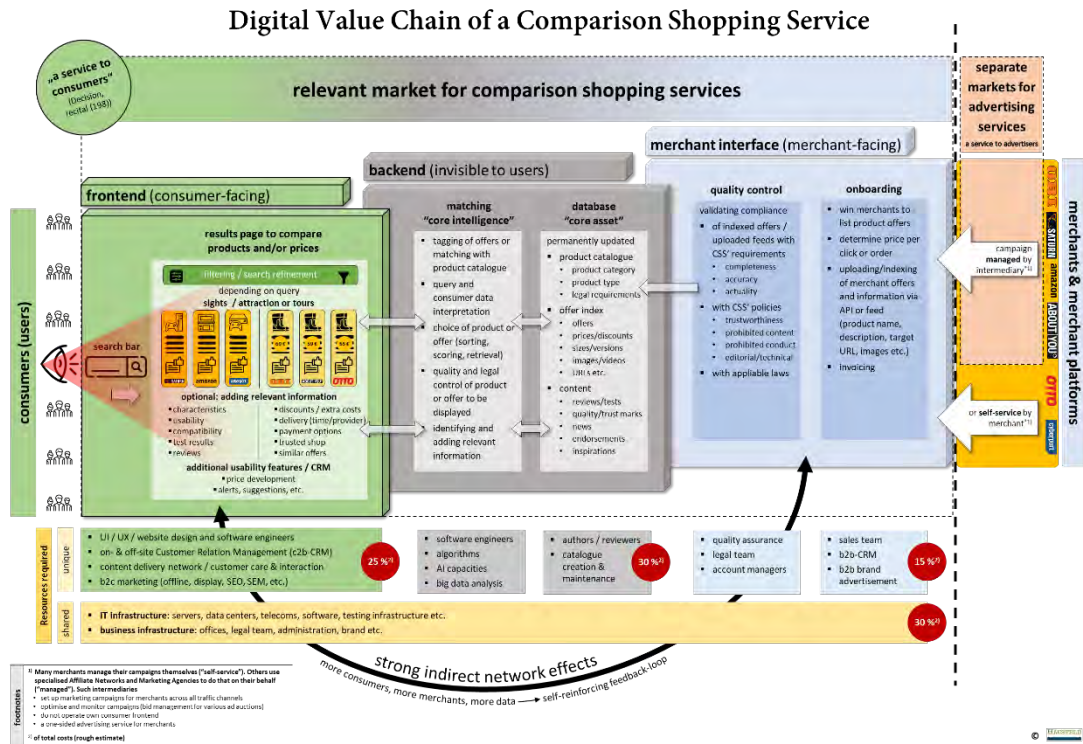


Illustration 1: Digital value chain of comparison shopping service (see p. 36 for full resolution)

206 Illustration 1 shows the digital value chain of a CSS. As a classic two-sided platform, it encompasses a frontend to engage with consumers (users) and an interface to engage with merchant customers. Both user groups, consumers and merchants, need to be “on board” for the platform to work. At the heart of the service is the backend that caters to the matching of these two user groups by means of a comprehensive database and intelligent matching algorithms and processes.

1.1.1 Consumer-facing frontend to engage with consumers

207 The frontend of a CSS is what consumers see and engage with. Consumers navigate – either directly or mostly through a general search service – to such frontends of a CSS in order to search for a product and receive specialised search results.²⁰⁷ For this purpose, users require: (i) a space to enter a product search query and (ii) a space to look at the search results to compare the products and prices. Both spaces do not need to be provided by the same operator (website). Many CSSs co-operate with third-party websites (such as news publishers) that have integrated a search toolbar on their sites, but do not have a specialised product search functionality. Whenever a user enters a product related query, CSSs provide corresponding groups of product results that

²⁰⁷ Decision, recital (198).

appear in a separate box on the publisher's website, so-called "Product Listing Units".²⁰⁸ Such Product Listing Units then provide the space for the user to compare products and prices in return of his or her query (see illustration 53, Chapter 4, A.1.2.4.2, ¶368).

- 208 Typically, the frontend provides the user with options to refine his or her search. Built-in auto-complete functions (showing a list of possible variations while typing in a product name), separate filters or sorting functionalities serve this purpose. Such options can be integrated into either the space containing the search toolbar or the space containing the corresponding product results.
- 209 The CSSs may provide further information to facilitate a particular user's product or price comparison. High-quality CSSs, for instance, provide users with information regarding delivery details (delivery time, costs, provider, total costs, nearest access point) and various quality parameters regarding the product (tests, reviews, permissions) and/or the merchant (trust marks, certificates etc.), along with available payment options (accepted systems, extra costs, etc.).²⁰⁹
- 210 In addition, the frontend may provide users with further customer services such as a price alert system that informs them about a particular deal or an option to monitor the price development of particular products over a certain period of time. The frontend may also show suggestions for alternative or complementary purchases and offer customer care services such as assistance in case of delivery issues or conflicts with particular merchants.
- 211 Finally, the frontend also serves as crucial tool to gather relevant information regarding the user's intentions and product interests. Data is central for the self-learning algorithms. Every interaction with the frontend, even just hovering over certain products, may provide relevant insights into what matters to the searcher and which products therefore may best match his or her individual interests.
- 212 Overall, the standalone average costs of a fully-fledged frontend with a customer-care unit makes up approximately 25% of the overall costs of a CSS.

1.1.2 Merchant-interface to engage with merchants

- 213 A comparison that a CSS provides to a consumer can only ever be as good as the product offers it can return to a query. Accordingly, on 'the other side' of the platform, a

²⁰⁸ See below ¶¶349 et seq. and Decision, recital (613)(a)(3) and (4).

²⁰⁹ See illustration 1 at p. 35.

CSS requires an interface to engage with merchants that wish to have their product offers included in the database of the CSS. This merchant interface consists of a sales unit that tries to recruit as many diverse merchants as possible and to convince them to list the broadest possible range of product offers on the platform. Due to strong indirect network effects between the user side and the merchant side of a CSS, the more established a CSS is, the less effort it takes to convince a merchant to upload its products (as well). The strongest 'selling point' in this regard, is a unique customer base, that is, in economic terms, single-homing²¹⁰ consumers that primarily or exclusively use the frontend of the respective CSS to compare products and prices. That is because, as a result of such single-homing, a merchant will ever only be able to reach these consumers via the platform of the CSS. This in turn creates a strong incentive to co-operate with the CSS and to make as many product offers available as possible.

- 214 Once a merchant has decided to co-operate with a CSS, it needs to decide the terms and conditions (in particular prices) it wishes to offer its products available via this platform. The merchant therefore needs to develop a suitable marketing strategy for its products and then upload corresponding product feeds to the CSS. The product feed includes all relevant information regarding product offers such as the product category, a product description, the price, availability and extra costs.
- 215 Many large merchants manage their co-operations with CSSs themselves (so-called "self-service"). This means that their own team determines the product pricing strategy that will maximise sales, and their own team will directly upload and upgrade their product feeds accordingly. However, many other merchants (in particular, smaller companies with no large marketing team) use specialised ad tech companies (in particular, marketing agencies or affiliate networks as service providers for managing their sales campaigns). Such intermediaries set up suitable marketing strategies for the respective merchant across the various distribution channels available (including, for instance, merchant platforms) and assist them in monitoring such campaigns (so-called "managed" service). Accordingly, it is typical for a CSS to co-operate with marketing agencies and affiliates that act on behalf of merchants to upload and update product feeds. Some CSSs have diversified and offer such services themselves.²¹¹ Such

²¹⁰ In economics of multi-sided platforms one important factor is the extent to which each user side may use more than platform. If a user joins only one platform, they are said to be 'single-homing'. If a user joins more than one platform, it is 'multi-homing'.

²¹¹ Notable examples are Twenga and Kelkoo, see Commission, Defence in Case T-612/17, para. 151 ("*acting as intermediaries for placing merchant results in Shopping Units*").

companies then also advise merchants on how to improve the performance of their campaign, for instance, by modifying their product prices and purchase conditions.

- 216 Once a merchant (either by “self-service” or “managed” service by an intermediary) has uploaded its product feed to a CSS via its respective interface, the CSS needs to ensure that the products fulfil all policy and legal requirements. Such “quality control” encompasses a validation of the product feeds and the offered products as such, in terms of compliance with the CSS’s own policies (regarding permissible content, etc.) and the applicable laws in the respective market. Many products require specific permissions and/or information in order to be sold. For instance, pharmaceuticals or medical products can only be offered under strict conditions.
- 217 Once the merchant and its uploaded product feeds have passed the validation process, the content is uploaded to the CSS’s central database, which is part of the backend of every CSS (see illustration 1, p. 35).
- 218 The merchant interface also serves as a touchpoint for maintaining the customer relationship with the merchants, including invoicing.
- 219 Overall, the standalone costs for the merchant interface are approximately 15%. The more established the CSS, the smaller the share of the costs for the sales team, as merchants need less convincing to join the platform and provide and upgrade high-quality feeds. In contrast, a CSS with no own (single-homing) user base, will have no option but to incur much higher costs in order to attract merchant customers to its site.

1.1.3 Core: backend to best match consumer query and merchants’ offers

- 220 The core of every CSS is its backend for the matching of a search query (entered via the frontend) with a product offer (uploaded via the merchant interface). This is because the quality of a CSS, and hence its attractiveness to consumers, depends upon its ability to best match a consumer’s product search query with the most relevant product offer available on the market. This in turn requires a complex infrastructure consisting of various interacting hardware and software components.

1.1.3.1 Product and content database

- 221 One of the main components is the CSS’s database. The database typically consists of three main elements: a product catalogue, a product index and additional own content.

- 222 The product catalogue categorises and sorts all available unique products that are offered on the market and can potentially be matched against particular offers of particular merchants.
- 223 The product index contains all individual offers for particular products of all merchants that have uploaded product feeds. The index contains all relevant information regarding the currently available product offers, such as its prices, images, the various versions and sizes along with URLs (links) to the landing web-page of a merchant where the offer can be found if clicked by the user.
- 224 In addition, a (quality) CSS gathers relevant information regarding products and prices from several other sources (rather than the product feeds of merchants). Some may provide users with helpful reviews, test reports or studies, such content is gathered and assessed from diverse media. Some larger CSSs even employ their own editorial team and journalists or engage with user communities that test and review products and comment on them. An internal editorial team may also re-assess any third-party reviews or tests.
- 225 The entire database is constantly updated, as all product offers (in particular their prices) must be kept up-to-date.
- 226 The size, accuracy and temporality of a CSS's database constitutes the core 'asset' of a CSS. However, what ultimately determines the quality of the matching is the intelligent part of the backbone – the software-based algorithms that determine which product offer and additional information best matches any query entered at the frontend of the CSS.

1.1.3.2 Algorithm-driven intelligence for matching query and offers / content

- 227 A CSS can only be as good as its specialised product search algorithms. The algorithms are designed to interpret any and every user query – for example, which product is the user potentially interested in? Which model? Which version? etc. Within this context, a CSS considers all information that the user provides as well as average consumer behaviour and interest. Algorithms are a self-learning mechanism. They constantly adapt priorities according to new data that they receive. Every single interaction of a user with the frontend may reveal more about his or her actual intentions. For the final ranking, multiple factors and sources of information may be taken into consideration. For instance, previous purchases or clicks on particular products, an adjusted search query, the ignorance of particular offers, the hovering over certain products, the clicks

on reviews for particular brands, etc. may all indicate which product offers may best suit the specific interests of the user running a search.

- 228 Taking all relevant factors into account, the CSS's algorithm will first determine which product or products from within its comprehensive product catalogue²¹² that the user is likely to be interested in. Once this decision has been made, the algorithm will then focus on finding the most relevant product offers from the CSS's product index²¹³ to match such interest.
- 229 CSSs typically sort offers primarily on the basis of their prices and relevance to the query. The most relevant offer from the merchant with the best price will usually therefore have top ranking. With the notable exception of Google's CSS, established CSSs do not base their ranking upon any payment that a merchant offers them (paid inclusions). CSSs are generally remunerated on a cost-per-click (CPC-) model. This fee is usually set according to a rate card agreed between the merchant and the CSS, covering different products and categories. The CSS earns this fee with each visitor sent to a merchant's website.²¹⁴ Therefore, it is in the interest of the CSS to present the most relevant offers to a user. This maximises the likelihood that the users find what they are looking for and click on the link to visit the merchant's website.
- 230 The more relevant the search results are for consumers in terms of the offers they can find, the more consumers the CSS will attract and the more transactions it will generate. In turn, the more transactions a CSS generates, the more merchants wish to have ever more of its product offers present on the platform and benefit from it. In a virtuous cycle, this increases the comprehensiveness of the CSS and improves its offerings to users. Finally, the more users and merchants on the platform, the more development the CSS can carry out on its matching technology, further improving its results and the utility of its offering to users and merchants.
- 231 If a merchant finds that, based upon a CSS's mechanism of ranking offers primarily by price, the merchant is not performing as well as it had hoped, the merchant will (be forced to) adjust its own product offering. The merchant cannot simply pay the CSS for a better ranking by increasing the cost-per-click price they agreed to (as they do in the case of Google Shopping). This means that, if a merchant wishes to be ranked higher

²¹² See above at ¶222.

²¹³ See above at ¶223.

²¹⁴ Decision, recital (226).

in a CSS's search results page, it will have to improve its product offer (in particular by lowering the price), because this will increase the offer's relevance as determined by the CSS's relevance-based algorithms.

- 232 The relevance and price of an offer are the single most important factors insofar as the ranking is concerned. However, the algorithms of CSSs will typically take many other aspects of an offer into account. For instance, if low prices come at the expense of delivery time and/or payment services, the CSS may grant that offer a lower ranking score as compared to those of offers that provide more for the same price.
- 233 Once the CSS has identified the most relevant offers to match a query, it will assess the way in which such particular offer may be displayed. As previously mentioned, different products require different information that needs to be provided to the consumer (e.g., warnings, price details, etc.).
- 234 In addition, the CSS will decide which further information may be useful for the consumer to compare the products and prices and make a well-informed purchase decision. The more content a CSS has gathered and assessed in its database, the more such relevant extra information it may provide to the consumer as added value.
- 235 Overall, this backbone of the CSS represents 30% on average, and thus the largest part, of standalone costs. It also requires the largest portion of shared costs, which make up a further 30% of total costs.

1.1.4 How CSSs compete – and why investments in the backend matter

- 236 CSSs compete on the basis of the quality of their results;²¹⁵ that is, the quality of the matching of the search query entered and the product offers available. In simple terms, the CSS that enables the best comparison of products and prices and returns the most relevant results attracts the most consumers, which in turn will provide more relevant data and attract even more merchants to the platform, etc. For such platform matching to work, however, a CSS requires having all crucial elements of the value chain in place – a strong frontend, a powerful backend and a well-functioning merchant interface with as many product offers as possible. If any of those elements are missing, the crucial matching of search query and product offers will not work. Therefore (genuine) CSSs

²¹⁵ Decision, recital (657).

must constantly invest in the infrastructure underlying their business, in particular in the product catalogue and product index.

1.1.5 The role of online intermediaries (marketing agencies, affiliate networks and ad tech companies) on the separate markets for digital advertising services

- 237 As outlined above (¶¶119 et seq.), many merchants engage specialised intermediaries to assist them in setting up, optimising, monitoring and co-ordinating online advertising campaigns across the various channels that merchants use to reach consumers. Such channels include marketplaces, general search services, social networks, affiliate sites and CSSs.
- 238 Such intermediaries do not usually operate and market their own frontend nor their own websites, which users may navigate to in order to receive the company's (advertising) service. They also do not operate websites to attract and redirect users to merchants. Their business is not a service to consumers; rather, it is a service only to the advertising merchants. Since the business only serves one user group, it is not subject to the same particular economics of two-sided platforms. In particular, the indirect network effects between the two user groups of consumers, which are at the heart of a CSS business, play no role. Instead of attracting users to their own frontend, intermediaries fully focus on integration of merchant's offers with those distribution channels that do operate consumer-facing frontends, including CSSs.
- 239 Typically, such intermediaries focus on managing the complete advertising campaign for their respective merchant customers. That means they will try to maximise sales for them via all available distribution channels, of which Google and other CSSs are just two. Due to their full-service approach, marketing agencies in particular tend to have far less merchant customers than a CSSs. Agencies do address the entire supply market (all merchants), but to individual merchant customers, for which they provide a broad range of advertising services. While CSSs co-operate with thousands of merchants, even some of the larger agencies may just have a few merchants amongst their customers, for which they provide all sorts of advertising services.
- 240 In light of all these differences, they operate on a market that is separate to that of CSSs.²¹⁶

²¹⁶ Decision, recitals (198), (604).

1.2 CSSs do not benefit from the CM, as it only affects the business of online intermediaries operating on a separate market

1.2.1 CSSs do not benefit and do not participate in the CM because, at best, it only allows them intermediation activities outside of their CSS market

241 As evidenced by the data analysis provided above, CSSs do not benefit in a commercial sense from the CM. Google's CM allows competition between CSSs only for a very narrow set of market activities. However, such market activities, for which competition is enabled, do not fall into market for CSSs, but into separate advertising markets. Accordingly, it makes no difference if rival CSSs are now able to compete on 'equal terms' with Google Shopping Europe for such activities outside of their CSS market.

242 As Google itself emphasised during the investigation, *"search services compete by showing their results, not results from other services"*.²¹⁷ However, under the CM, the results in Shopping Units are not the results of the CSSs that uploaded the product feeds. Rather, they are the results of Google's on-SERP-CSS. Competing CSSs are not involved in any element of the matching of the query entered on Google and the product offers displayed in the Shopping Units. The CM does not create any direct contact between consumers and competing CSSs. Their frontends remain invisible to consumers because 99% of the users are sent directly from Google's Shopping Units to merchants' websites. CSSs' backends also do not have any influence on the matching of a query. The product offers in the Shopping Units are neither sourced from their database, nor are their specialised product search algorithms in any way involved in determining which of the available product offers is selected and displayed in return of a query.

243 Instead, the CM reduces the role of competing CSSs to a minimum. They may now open up and provide Google Merchant Center accounts to their merchant customers and, in some cases, upload product feeds and manage advertising campaigns based on those feeds. However, this is not part of the value chain of the market for CSSs. It is part of the value chain of online advertising services. In other words, in order to participate in the CM and carry out any activity that is left for them to do, the CSSs in fact have to leave their market and enter that of online advertising services (see also illustrations 3, 5, 6, 7, 12 and 13b, pp. 39 et seq. on this).

244 Finally, from the outset, Google's CM is only available to a CSS in respect of those of its merchant customers that are willing to pay Google for ads. A competing CSS may

²¹⁷ Decision, recital (657).

only appear in a Shopping Unit if a merchant is prepared to pay for *Shopping Ads* in Google's CM-Shopping Units. CSSs that do not wish to take on the role of a *Shopping Ads* intermediation service (to onboard their customers to their rival) are unable to participate in the mechanism. The same applies to CSSs whose merchants have no interest in paying for *Shopping Ads* in CM-Shopping Units, for instance because they offer the best prices and therefore, in terms of a genuine CSS, should appear in the comparison shopping results boxes in any event.

- 245 Google designed the CM to make sure that 99% of the clicks on the Shopping Unit are clicks on a *Shopping Ad*, resulting in profits accumulating only to Google.
- 246 It is understandable that this 'offer' was unattractive to CSSs, and that consequently, instead of taking part in the CM, many CSSs stayed away from it and almost all criticised it from the very beginning.²¹⁸

1.2.2 Google (needed to) incentivise intermediaries to set up fake 'CSSs', so that they could be presented as 'success stories' of the CM

- 247 In early 2018, Google noticed the lack of progress with its CM that was open only to genuine CSSs. In order to demonstrate progress to the Commission, Google decided to invite the advertisers to masquerade as CSSs instead (and write positive "success stories" for their "partner" Google).
- 248 Several measures taken by Google had only served one and the same purpose – to incentivise pure online intermediaries to set up fake CSS websites, so that Google could pretend that there were new market entries on the CSS market:
- **SpendMatch discount:** Merchants that used intermediaries instead of GSE to bid for *Shopping Ads* received a short-term rebate of up to 30% on their ad spending. In other words, Google sacrificed short-term profits for the long-term objective of getting intermediaries to sign up as Google CSS Partners.²¹⁹
 - **Self-service:** Merchants that felt no need to engage intermediaries or questioned their capabilities for steering a Google Shopping campaign could simply ask the

²¹⁸ See above at ¶47.

²¹⁹ See above at ¶¶111 et seq.

intermediary to set up an account for the merchant and then leave the rest to the merchant.²²⁰

- **White label solutions:** Google supported software companies in setting up white label CSSs for agencies, so that they could qualify as a 'CSS' within two weeks, without any major investment whatsoever and without their own development work.²²¹ Such white label CSSs did not even have to reveal that they were powered by another CSS.²²²
- **Waiver:** In contrast to CSSs, intermediaries typically lack a customer care team. As a solution, Google simply offered merchants that migrated from GSE to an intermediary (acting as "CSSs") the continued provision of customer care for free. If such intermediary signed a waiver, the merchant's previous GSE account manager would continue to provide customer care. The intermediary did not need to do anything.²²³
- **Definition of a CSS:** In order to qualify as a 'CSS' under the CM (and thus to enter the market albeit under false pretences), an intermediary only needed to set up the following:

Required:

- a website that shows offers from **50 merchants** (whereas genuine CSSs have thousands of merchants on their platform);²²⁴
- the site must show product offers that lead users to a page where they may purchase the listed product. However, that is clearly not a 'requirement'; where else should a CSS site lead users to? (i.e., this is why Shopping Units lead directly to merchants);
- **a search box** for queries: though every website may easily integrate a search box;

²²⁰ See above at ¶¶110 et seq.

²²¹ See above at ¶¶136 et seq.

²²² See *Productcaster*, "CSS solution for Agencies, Option 2 – White Label CSS Solution", <https://bit.ly/3cuokVr>.

²²³ See above at ¶¶140 et seq.

²²⁴ For instance: billiger.de (22.500); idealo.de (50.000), see c't Magazin für Computertechnik, issue 18/2020 of 15th August 2020, „Schnäppchenfahnder: Preisvergleichsdienste im Überblick“ (= comparison of CSSs), p. 95.

- a **search functionality** based primarily on a dynamic and automated process and that is not substantially based upon search technology licensed or syndicated from Google. This does not describe a state-of-the-art search technology as it allows the most basic, simplistic 'string-match' functionality. In addition, Google allows a company to pretend being a CSS by obtaining a licence for 'out-of-the-box' solutions from third parties at nearly no own costs. Thus, any website may put in place such search functionality; the matching will just not be of any high quality, let alone individual; and
- **sorting or filtering option by price and one other dimension** (for example, brand, merchant or shipping time). A CSS is not able to be a CSS if it does not sort products by prices. Thus, such a filter should come without saying. This means, in turn, that Google is actually just requiring *either* one additional filter or one additional sorting dimension. Genuine CSSs, however, have many more sorting and filter options (see illustration 43 below, next page). Google's own on-SERP-CSS provides far more filter and sorting options (see illustrations 82-87, ¶¶553 et seq.).

Not required: It is more telling what Google does not require to qualify as a "CSS:"

- any indication as regards the quality of the frontend (such as visibility in generic search results, minimum volume of clicks on website, amount of direct traffic, minimum number of unique monthly users, significant number of filter and sorting functionalities, etc.);
- any customer care service for consumers or merchants;
- any proprietary (own) intelligent backend (specialised search algorithm, etc.); any proprietary product catalogue or product database at all (instead of, for instance, uploading product feeds from third parties via an API);
- a minimum number of merchants that do not just upload a couple of product offers but a significant amount of product offers;
- a minimum number of products in a product catalogue;
- a minimum number of product offers of a minimum number of different merchants for a minimum number of different products in a product index;
- any form of quality control mechanism.

search and comparison functionalities	market standard amongst genuine CSSs ²²⁵			Google's on-SERP-CSS	"CSS" as defined by Google's conditions to participate in CM (not/required)
	Billiger.de	Geizhals.de	idealo.de	Google.de	
CSS backbone assets					
N° of merchants	>22,500	>153,000	>50,000	>30.000	50
N° of products	> 2 million	> 2.3 million	>2.5 million	?	not required
N° of monthly users	3 million	5 million	25 million	?	not required
N° of total offers	70 million	290 million	420 million	?	not required
Merchant list	✓	✓	✓	✗	not required
Product catalogue	✓	✓	✓	✓	not required
Product index	✓	✓	✓	✓	not required
Own search algorithm	✓	✓	✓	✓	not required ²²⁶
Search related filter and sorting functionalities (selection)					sorting or filter option by price and one other dimension
Filter and sorting option	✓	✓	✓	✓	only one option required
Price	✓	✓	✓	✗	✓
Product features	✓ detailed	✓ very detailed	✓ very detailed	✓ basic	not required
Relevance	✓	✓	✓	✓	not required
Brand	✓	✓	✓	✓	not required
Availability	✓	✓	✓	✗	not required
Delivery Time	✓	✓	✗	✗	not required
Shipping costs	✓	✓	✓	✓	not required
Product rating	✓	✓	✓	✗	not required
Payment method	✓	✓ ²²⁷	✗	✗	not required
Price reductions	✓	✓	✓	✗	not required
Local availability	✗	✓	✓	✗	not required
Buyer protection	✓	✗	✗	✗	not required
Product rating	✗	✓	✗	✗	not required
Product and merchant related Information (selection)					
Product details	✓	✓	✓	✓	not required
Product comparison	✓	✓	✓	✓	not required
Product variants	✓	✓	✓	✓	not required
Price alert	✓	✓	✓	✗	not required
Price history	✓	✓	✓	✗	not required
Product reviews	✓	✓	✓	✓	not required
Merchant reviews	✓	✓	✓	✗	not required
Top-lists	✓	✓	✓	✗	not required
Sale/special offers	✓	✓	✓	✗	not required
App-support (Android/iOS)	✓	✓	✓	✓	not required
Payment methods	✓	✓	✓	✗	not required

Illustration 43: Comparing the infrastructure and functionalities of established CSSs with Google's on-SERP-CSSs and fake 'CSSs'

²²⁵ Own illustration based on the data published in c't Magazin für Computertechnik, issue 18/2020 of 15th August 2020, „Schnäppchenfahnder: Preisvergleichsdienste im Überblick“ (= comparison of CSSs), pp. 90-96 as well as data provided by the CSSs; the number of merchants on Google's on-SERP-CSS was taken from *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 5.

- 249 All of the measures above have the same common goal: that is to give the illusion of CSS market entry by reducing the functions of a 'CSS' such that they provide no real functions at all. Today, software companies are offering agencies their services in building a 'CSS' that qualifies as a Google Partner 'CSS' "within two weeks".²²⁸ In order to fulfil the requirement that a 'CSS' must show 50 merchants on its site, in practice, fake 'CSS' co-operate with one another. They build joint pools of merchants that agree to appear a couple of product offers on their websites (which is sufficient). This does not mean that such 'CSSs' are then also bidding on behalf of such 50 merchants for Shopping Ads. Nor does this mean that such 'CSSs' have all the product offers of such merchants on their site, in any structured way. None of this is required by Google. As a result, marketing agencies or affiliates can set up a new 'CSSs' as broadly defined by Google with low effort and without engaging in any genuine activity within the value chain of a CSS as defined in the Decision. ANNEX 2 illustrates the differences between genuine and fake 'CSSs' and counts how many companies currently participating in Google's CM fall in which category.
- 250 For marketing agencies, turning themselves into 'CSSs' as broadly defined by Google was lucrative enough. Google committed itself to keeping a profit margin of 20% to GSE. Accordingly, "[a]ny competing third party Shopping service provider could be confident that it would be able to outbid Google's affiliated business provided it were prepared to accept a margin of less than 20% of associated revenues and provided that it could be profitable whilst bidding on this basis."²²⁹ For marketing agencies this appeared lucrative enough because they had to bear no additional costs. Plus, the temporary rebate of up to 30% granted by Google under the SpendMatch program, allowed them to increase the profit margin for their respective (few) merchants and themselves even further. An increase in profitability of up to 30% is huge. It came as no surprise that, according to Google, over 600 intermediaries throughout Europe popped up as fictitious

²²⁶ Google requires that a CSS must have (any) "search functionality based primarily on a dynamic and automated process and that is not substantially based on search technology licenced or syndicated from Google". In other words, it is sufficient if the CSS licenses any search functionality from a third-party (see "white label" solutions ¶¶137 et seq.). They do not have to have a proprietary software.

²²⁷ Combined with shopping costs.

²²⁸ See Productcaster, "Productcaster CSS solution for Agencies - Become a CSS partner for your clients", <https://bit.ly/2RL7Ui3>: "Using our white label CSS solution we can get you and your clients up and running in two weeks", see above at ¶¶136 et seq.

²²⁹ Feasey and Krämer, "Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms", 2019, <https://bit.ly/3j7ToNq>, p. 44.

CSSs,²³⁰ in order to participate in the CM. However, most of them are fake 'CSSs' (see ANNEX 2) and their activities do not create any competition on the markets for CSSs. Plus, it appears that this number has not increased significantly since November 2018, when the discount under the SpendMatch program was reduced to 5%.²³¹

1.2.3 The economics of the CM do neither incentivise nor enable online intermediaries to sufficiently invest in the infrastructure required to become genuine CSSs

- 251 Intermediaries that have invested just a few working days in setting up websites that pretend to be the frontend of genuine CSSs do not create competition on the market for CSSs.
- 252 As at today, none of the newly created 'CSSs' has gained any market share on the markets for CSSs. Outside of Google's Shopping Units, they are simply non-existent. Their websites are invisible, users do not use them and no revenues are generated on these sites. Such intermediaries-turned-CSSs only generate revenues with placing ads in Google's Shopping Units.
- 253 Most of the intermediaries that participate in the CM only just accumulated the required number of 50 merchants to qualify as a CSS in order to then obtain the discount of up to 30% for their long-established (but few) merchant advertising customers by placing *Shopping Ads* in Shopping Units. In practice, several such 'CSSs' just serve *Shopping Ads* for one single merchant. This, in itself, shows that they are not a genuine CSS. This is because, as per definition, a CSS compares the offers of several different merchants.²³²
- 254 The fake 'CSSs' that were established to fill up Shopping Units do not invest in any added value for the consumer journey whatsoever. They have no long-term interest, incentives or capabilities in investing in comparison shopping sites or any service for searchers. They merely enjoy a few short-term benefits from the discount margin offered by Google of up to 30%, without incurring any significant additional costs. For them, the Shopping Unit is just an additional distribution channel to place ads for their selective

²³⁰ *Manthorpe*, "Google retreats on controversial 'fake' price comparison site scheme", Sky News, 12 November 2018, <https://bit.ly/2Hlrz6n>; *Graf and Mostyn*, *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 5.

²³¹ The number of 600 has been around since early 2019 and still is in September 2020, see previous footnote.

²³² See Decision, recital (191).

few customers – without changing anything else in their business model. Unlike genuine CSSs, their hollow frontends are more of a nuisance to users than a genuine service. Since the CM never directs users to them, they do not need to invest in the consumer-facing frontend, let alone the backend, which is the core infrastructure that determines the quality of a CSS (see above ¶¶220 et seq.).

255 The fact that, as at today, such intermediaries have not created any competition on the CSS market is evidenced by the following facts:

- They do not rank amongst the first (pages of) generic search results, which according to Google present the most relevant websites.
- They have not accumulated a significant amount of product offers from different merchants. Even all together only accumulated 30.000.²³³
- They do not appear as CSSs in the rankings of CSSs by SimilarWeb or ComScore.
- They attract no direct traffic to their websites and have no unique monthly users.
- They generate all revenues with placing *Shopping Ads*, but no revenues with clicks on their website.
- They do not promote their service / website to consumers or invest in consumer-facing frontends.
- *De facto*, these CSSs only exist within Google's Shopping Units – as annexes to the *Shopping Ads* they placed for their merchant customers.

256 The Commission appears to be aware of this. In November 2018 Commissioner *Margrethe Vestager* was asked how Google encouraged ad firms to build comparison sites, giving the illusion of a thriving marketplace. *Vestager* said it appeared that these sites were being misidentified: “*These are [advertising] agencies [...] they are not doing shopping comparison [...] Advertising is their main mission in their business life and now they are here, so what is this? [...] Of course we are following up with Google to say well **shopping comparison is shopping comparison and it is not advertising as such***”.²³⁴

²³³ *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, p. 5:

²³⁴ “EU turns eye to ‘fake’ Google shopping rivals”, *Euracity*, 23 November 2018, <https://bit.ly/2HdsNQU> (emphasis added).

- 257 Nevertheless, even one year later, in November 2019 a study by *Searchmetrics* found that, of those Shopping Ads in Shopping Units that were not sourced from *Google Shopping Europe*, 71% of the ads were sourced from marketing agencies and only 29% were sourced from viable CSSs.²³⁵
- 258 It is economically unlikely that such players will ever become valid competitors on the market, even if they wanted to be. The CM simply makes it impossible for them to realistically enter the market for CSSs. For that, at the very least, they would require a credible portfolio of product offers that allows consumers to actually compare products and prices. Instead of just listing the offers of a few core merchant advertising clients, a CSS needs to represent and make available the full supply spectrum of a market. Yet, a CSS may only attract such a broad range of merchants to its platform if the CSS has to offer something valuable in return: a unique customer base (i.e., single-homing customers than can only be reached via the CSS's platform).²³⁶ Such a customer base, however, may only be established with a strong, proprietary own front- and backend, and not with third-party 'out-of-the-box' solutions without any individual add-ons. Crucially, the CM does not provide any visibility to the frontends and fully replaces the backends of the 'CSSs' that take part in the CM.²³⁷ Neither is it possible for such CSSs to establish a successful frontend (that attracts merchants in turn) by relying upon other traffic channels (other than the Shopping Unit). In particular, as long as the favouring of Shopping Units on general search results pages continues, they will not be able to receive any traffic through generic results.
- 259 The only remaining option left to establish a strong frontend would be advertising outside of Google. However, as the data analysis showed (see above at A.), due to Google's auction mechanism for *Shopping Ads*, the profits from managing *Shopping Ad* campaigns will be insufficient in financing such marketing, let alone the frontend, backend and merchant interface infrastructure that a genuine CSSs requires to compete effectively. Even the CEO of RedBrain, one of the most successful bidders for *Shopping*

²³⁵ Searchmetrics, 26 November 2019, "Neue Studie: Mehr Wettbewerb bei Google Shopping, trotzdem drohen neue Probleme mit der EU-Wettbewerbsbehörde", <https://bit.ly/3iPVcud> (for an English version see: <https://bit.ly/2ZUtlbt>).

²³⁶ See above at ¶213.

²³⁷ 99% of clicks in the Shopping Unit lead users directly to a merchant's website. All results in the Shopping Unit are selected by Google's own CSS. Bidding CSS's have no influence on the matching.

Ads, admitted “that RedBrain does not make money from the CSS Partner Program”.²³⁸

It is inherent in Google's CM auction mechanism, that it expropriates the CSSs' surplus.²³⁹ Without revenue, there likewise cannot be any investments which could turn such services into viable CSSs that could possibly challenge Google's CSS.

- 260 Google's CM has created invisible 'lap-dog CSSs' that are happy to feed offers into Google's service at their lowest possible profit margin, but that will never be able to bite.

2. The CM only benefits Google's own (on-SERP) CSS

- 261 While the CM does not benefit any CSS competing with Google, it significantly strengthens Google's own position on the CSS market. Google is the single beneficiary of its chosen CM.

- 262 Google was prepared to grant discounts of up to 30% and free support services to merchants solely to make the Commission believe that the CM is a success, because Google knows that, on the whole, the CM is commercially the most attractive solution for Google. This is because it, *de facto*, maintains the previous abusive model of solely having its one and only CSS on Google's general results pages. Google advertises the CM to all merchants (rather than CSSs),²⁴⁰ as it is aware that, regardless of the intermediary through which a merchant ultimately runs its account, the profits will be made in the auction for *Shopping Ads*, and Google will be the only commercial beneficiary.²⁴¹

2.1 The CM turns CSSs from competitors into paying customers and cost-free sales teams to recruit and onboard new merchants to Google's CSS

- 263 As outlined above, Google's CM limits competing CSSs to create accounts on Google's Merchant Center and upload product feeds to Google's database on behalf of their merchant customers. Instead of competing with Google's on-SERP-CSS, they are 'allowed' to hand over their bundled content (merchants' product feeds) to their rival and

²³⁸ *Major* in: K. Vasant, PaRR, 2 October 2018, “Google complainants flag rise of ‘fake’ comparison sites to EC in Shopping Case remedy”.

²³⁹ *Krämer and Schnurr*, “Is there a need for platform neutrality regulation in the EU?”, (2018) 42 Telecommunications Policy, 514, 525.

²⁴⁰ See below at ¶¶266 et seq.

²⁴¹ See also *Marsden*, “Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (an How to Fix it)”, *Journal of European Competition Law & Practice*, 17 September 2020, p. 4: “Google's auction mechanism ensures that it takes the vast majority of the revenue generated by the clicks”.

pay for the 'privilege' of serving ads on its site; these are ads that do not even lead to their websites, but lead to those of merchants. In other words, Google's CM turns competing CSSs into paying customers.

- 264 A closer look reveals that Google did not design the CM with a view to allowing CSSs to compete fairly. Rather, the CM appears to be designed in such a way as to allow Google to use participants to drive even more merchants to bid even higher and spend even more money on *Shopping Ads* within Google's upgraded CM-Shopping Units. The CM exploits genuine and fake CSSs into making a new on-SERP-CSS operated by Google itself (the powering of CM-Shopping Units, see below at ¶¶275 et seq.) even more attractive and profitable for Google than its previous iteration.

2.1.1 Google presents the CM as a service to merchants – not to CSSs

- 265 Google's entire public marketing of the CM supports this finding. Google's descriptions of the CM are drafted like advertisements addressed *to merchants* to convince them of the CM and to spend more on *Shopping Ads*. Google itself singles out the merchants as the (purported) beneficiaries of the CM – and not the competing CSSs or, most importantly, the consumers they would serve.
- 266 This follows first from Google's description of the "*CSS incentive scheme for new and existing merchants*",²⁴² which clearly points to the merchants as the beneficiaries, see above at ¶¶111 et seq.
- 267 See also Google's definition of a CSS within its Google Merchant Center Help page:

"In countries that are part of the European Economic Area (EEA) and in Switzerland, you participate in Shopping ads through one or several Comparison Shopping Services of your choice. Some CSSs manage your product data and your campaigns on your behalf, while others provide tools allowing you to manage your setup yourself."

Learn more about CSSs here."²⁴³

- 268 Note the wording "*you [i.e. merchants] participate in Shopping ads*" – not "CSSs". Also note the indication that the CM does not prevent merchants from themselves managing their campaigns' setups; i.e., that even merchants using competing CSSs may continue

²⁴² See Google's description of the CSS Partner Program, "Let's partner up", <https://bit.ly/3chTVty>, bullet 2.

²⁴³ See Google Ads Help, "About Shopping campaigns and Shopping ads", <https://bit.ly/2ZXwXmC> (emphasis added).

(as previously with *Google Shopping*) to have full control over their campaigns (see above at ¶¶110 et seq.).

- 269 Google uses the same rhetoric in several other descriptions of the CM.²⁴⁴ In a YouTube video describing the CM, Google explicitly highlights the “*positive results*” of the CM for merchants who can now “*combine the strength of several CSSs*”.²⁴⁵ The message is clear – *Shopping Ads* are for merchants – regardless of which CSS undertakes the bidding for them.²⁴⁶

²⁴⁴ Google Merchant Center Help, “About advertising with Comparison Shopping Services”, <https://bit.ly/3iL6vnz>: “*Comparison Shopping Services (CSSs) can place Shopping ads on Google on behalf of merchants in countries that are part of the European Economic Area (EEA) [...] How it works: Comparison Shopping Services can now bid to place Shopping ads on Google general search results pages on behalf of merchants they represent. Google Shopping bids on behalf of merchants it represents in the same way acting like any other CSS. This means that as a merchant, you can choose to participate in Shopping ads on the Google general search results page in various ways: you can provide your product data to any CSS, including Google Shopping, and you can also use multiple CSSs at the same time.*” Note that Google directly addresses the merchants with this description. The entire description concerns the advantages for merchants if they now advertise with *Shopping Ads* via a CSS. A similar description can be found here: Google Comparison Shopping Partners, “Grow your business with Google’s CSS Partner program”, <https://bit.ly/2FZj4gl>: “*What is the Comparison Shopping Partners program? The CSS Partner program helps Comparison Shopping Services (CSSs) and merchants to connect more effectively with shoppers through Shopping Ads. After completing an in-depth training, CSS Partners can help to maximise the potential of Shopping Ads, making access to Shopping ads seamless for merchants. What is a CSS? A Comparison Shopping Service (CSS) is a website that collects product offers from online retailers and then sends users to the retailers’ websites to make a purchase. Merchants need to work with at least one CSS to begin placing Shopping Ads.*” Google’s YouTube video “Shopping ads – Advertising with Comparison Shopping Services” uses similar language: “*When shoppers search for products on Google they can see relevant Shopping Ads for offers from many stores. In the European Economic Area and in Switzerland your store can only participate in Shopping Ads by using one or several Comparison Shopping Services or CSSs. There are many to choose from. CSSs place ads on behalf of merchants and bid for slots in Google’s ad options. [...] All CSSs compete equally for ad spaces on Google’s general search results pages and they all have access to the same Google features. [...] You can work with one CSS or several CSSs at the same time. Combining the strength of several CSSs may improve your overall performance on Shopping Ads. Merchants are already enjoying positive results with more clicks at reduced cost. [...]*” Google, “Shopping Ads – Advertising with Comparison Shopping Services”, <https://bit.ly/3cgaJBg>.

²⁴⁵ Google, “Shopping Ads – Advertising with Comparison Shopping Services”, <https://bit.ly/3cgaJBg>.

²⁴⁶ In another video explaining the CM, Google explicitly clarifies that the CM helps merchants: “*Use shopping ads to increase your client’s click volumes, help them reach new customers and to lower their costs. [...]*” Google, “Participating in Shopping ads as a CSS (EEA+CH)”, <https://bit.ly/3iQ8NSH>.

270 Accordingly, all answers on Google's website on "*frequently asked questions*"²⁴⁷ relate to potential questions of merchants. Among other things, Google reassures merchants that they will not "*end up paying more for Shopping ads if more than one CSS advertises on [their] behalf*". Again, advertising on behalf of a merchant is the business of an agency or other ad tech intermediary, not of a genuine CSS.

2.1.2 Google's published 'success stories' only show the advantages of Shopping Ads for merchants – no growth of competing CSSs

271 Equally, nearly all of the "Success Stories"²⁴⁸ that Google presents on its website to demonstrate the advantages of the CM point to advantages of *Shopping Ads* for merchants – yet hardly any advantages are included for CSSs. Such stories are nothing more than advertisements for *Shopping Ads*, regardless of who is placing them – even to the detriment of GSE (but for the benefit of the overall commercial success of Google).

272 By way of example, one of Google's "success stories" relates to *SHOParade*, the intermediary-turned-fake CSS described above at ¶¶129 et seq. This "success story" solely concerns the *merchant's* growth in conversions:

"With Shopping Ads through CSS, Neckermann's conversions grow by 32% [...]."

'Shopping Ads through CSS allow us to significantly increase our volume of clicks and conversions, without raising our maximum CPC.' – Daniel Spellbrink, Head of Marketing, neckermann.de"²⁴⁹

273 Leaving aside that *SHOParade* is not a genuine CSS by any definition (other than Google's own), this "success story" once again merely repeats the well-known advantages of *Shopping Ads* if they are included in a CM-Shopping Unit that, in turn, is placed at the top of Google's general search results page. Given the favourable positioning and display of the CM-Shopping Unit, such ads will naturally receive more attention than other search results. Consequently, searchers click on them more frequently. However, such advantages (as sold by Google as "success stories") are not the result of the CM allowing CSSs, other than GSE, to bid for *Shopping Ads*. Such advantages are the very result of the abusive favouring of Shopping Units in the first place – as the Decision explains in great detail in section 7.2.1.2.

²⁴⁷ Google Merchant Center Help, "About advertising with Comparison Shopping Services" <https://bit.ly/3iL6vnz>.

²⁴⁸ Google Comparison Shopping Partners, "Success Stories", <https://bit.ly/2ZU1SA6>.

²⁴⁹ Google Shopping Partners, Success Stories, "With Shopping Ads through CSS, Neckermann's conversions grow by 32%", <https://bit.ly/2FTGBzq>.

274 The same is true for almost all of the remaining “success stories”. They do not prove that the CM benefits (genuine) CSSs.

2.2 Google makes its profits with the newly formed on-SERP-CSS, not with the standalone website left to the subordinated Google Shopping Europe (GSE)

2.2.1 How Google split up the former *Google Shopping* into a highly profitable on-SERP-CSS and an advertising intermediary called GSE

275 Google made a big effort in disguising the actual nature of the CM. Google reiterates the notion that the *Google Shopping* service, which according to the Decision was abusively favoured, would be treated equally with all competing CSSs. However, to arrive at such claim, Google first fundamentally reduced the scope of the business that *Google Shopping* now operates: In the course of the CM, Google split its original CSS, *Google Shopping*, into two new businesses.

- **GSE:** The service previously known as Google Shopping is now referred to by Google as GSE. However, Google Shopping previously operated both a Google Shopping standalone website and the Shopping Units. Now GSE (purportedly) has no impact on the compilation, design and content of CM-Shopping Units.²⁵⁰ GSE likewise does not share in the revenues generated with CM-Shopping Units. Given the low relevance of the standalone website, the CM instead reduced GSE's role primarily to that of a mere feed provider, through which merchants may bid to be included in a CM-Shopping Unit. At this point, GSE merely allows merchants to upload their product feeds and perform the bidding for *Shopping Ads* on their behalf. The service joined the group of advertising intermediaries.

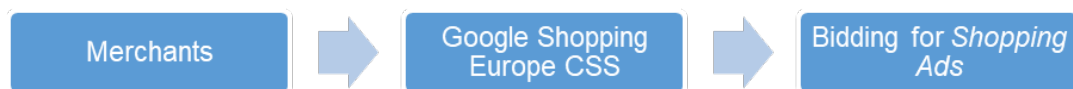


Illustration 44: Google Shopping Europe (GSE) allowing merchants to upload their product feeds and to perform the bidding for *Shopping Ads*

- **Powering of CM-Shopping Units – Google's on-SERP-CSS:** While Google split the standalone website and the mere bidding for *Shopping Ads* and left this to GSE, all other infrastructure previously included in Google Shopping and that is required to provide Shopping Units remained with Google. This encompasses, in particular, the entire backend and the entire Merchant Interface – neither are now part of GSE. Yet, Google still provides a CSS via Shopping Units. However, it is clear that following the extraction of the GSE intermediation activities, a new Google business

²⁵⁰ See above at Chapter 2, A.2. (¶¶192 et seq.).

unit for the provision of CM-Shopping Units emerged. This new business unit exclusively operates the Shopping Units that are displayed on general search results pages and that were the cornerstone of the infringement. It is now this unit alone that operates the product catalogue and collects all product feeds (from CSSs acting on behalf of merchants) into its product feeds, performs the matching of search query and product and carries out the auction mechanism in order to determine which product offer is included in a CM-Shopping Unit that it selects. In order to disguise its existence, Google has not given this unit a separate name. This study refers to it as “Google’s on-SERP-CSS”.

276 **Illustrations 2 and 3** outline this metamorphosis (for full resolution, see pp. 38 and 40). They show that Google’s on-SERP-CSS contains all of the infrastructure that was previously allocated to *Google Shopping*.

Google’s Comparison Shopping Service before the Decision

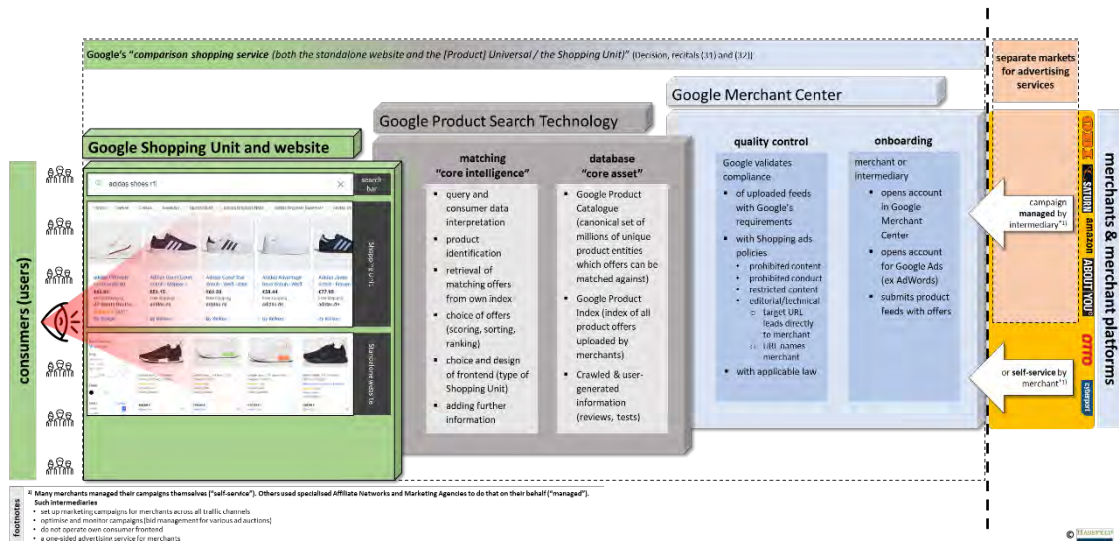


Illustration 2: Google's CSS before the Commission's Shopping Decision (for full resolution see p. 38)

Google's (On-SERP) Comparison Shopping Service after the Decision

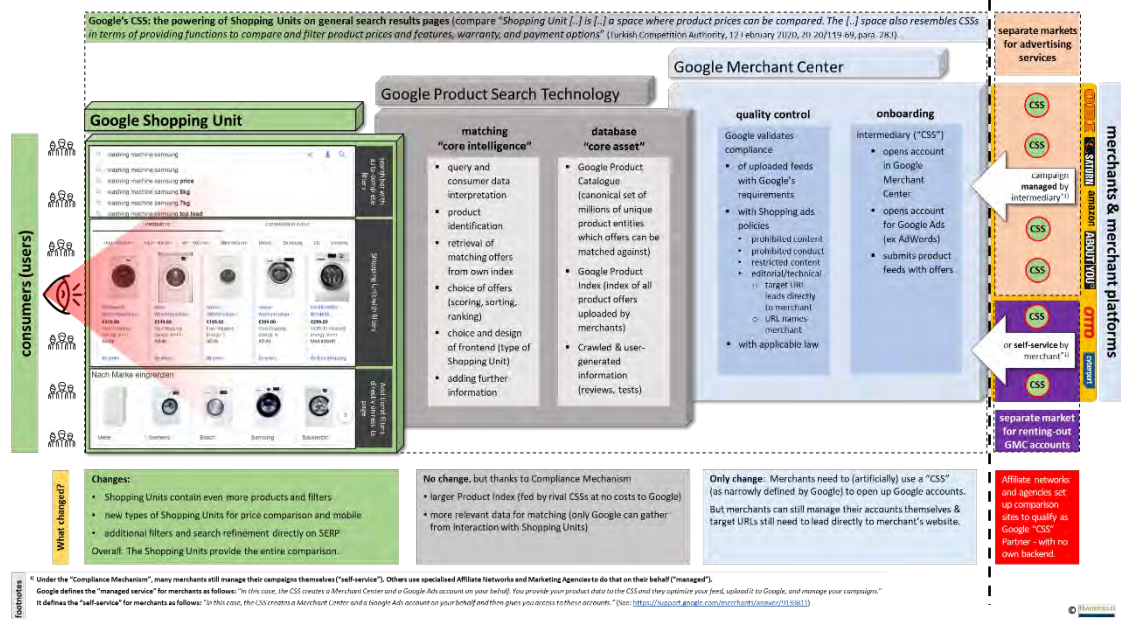


Illustration 3: Google's (on-SERP) CSS service after the Commission's Shopping Decision (for full resolution see p. 40)

2.2.2 At its best, the CM allows for equal treatment with the intermediary GSE but not with Google's on-SERP-CSS

- 277 At this point, Google's 'trick' is to focus all attention on the fact that under the CM, GSE is treated equally with competing CSSs. This is because all CSSs have to traverse the same bidding process to place a particular *Shopping Ad* in a CM-Shopping Unit.
- 278 However, this ignores the fact that the bidding for *Shopping Ads* is not even a characteristic part of the CSS market, because, unlike Google, CSSs that are committed to providing the best consumer service rank results based upon their merits, in particular the price, and not on the basis of any bids by merchants. At best, uploading feeds and setting bids comprise a small fraction of a CSS's activity. Google's focus on the bidding process elides the fact that GSE now engages in only a fraction of its previous activities. In addition, the CM provides for 'equal treatment' only for such fraction. The core business of Google's original CSS, in contrast, the powering of Shopping Units (which made the CSS so profitable), is no longer operated by GSE – but by a newly created unit within Google, Google's on-SERP-CSS. Also, in relation to this CSS, the CM does not provide for equal treatment.



Illustration 45: How merchants bid for ads on Google's 'on-SERP-CSS'

279 This becomes particularly evident in those countries where Google has already rolled out its new Shopping Unit formats of “*Product View for Shopping Units*” and “*Showcase Shopping Unit*” (see above at ¶¶83 et seq.). A quick look at such units leaves no doubt that they compare products and prices of different merchants and thereby provide a traditional CSS. They are now displayed in return of many search queries that previously triggered ‘traditional’ CM-Shopping Units.

Zoom on the Google CM-Shopping Unit

Different designs and functions, depending on search query and device



*Illustration 4: Zoom on the Google CM-Shopping Unit
(for full resolution see p. 42)*

280 Crucially, it is not GSE that powers such new units. Rather, it is what is left of Google Shopping – following the removal of GSE – that now operates all groupings of rich product results on Google’s general results pages. Accordingly, merchants may set up a (*Showcase*) *Shopping Ad* either through GSE or a competing CSS. However, it is solely Google that determines: (i) when such ads are displayed on its general search results; (ii) what such units look like; (iii) which merchants are included; (iv) how many products they can display; and (v) how much information per product is provided, etc. This means that it is Google itself (not GSE) that operates these new CSS features. Such units are now the two key products operated by Google’s new CSS – the Google on-SERP-CSS. It is, of course, Google’s prerogative to launch even more CSS products under this design.

281 As Google now generates its profits with the powering of Shopping Units, it makes no difference to Google that the downsized *GSE* must now bid to be included in the CM-Shopping Units – like other CSSs. Regardless of which CSS wins an auction for *Shopping Ads*, it will always be the auctioneer – Google – that expropriates the surplus and renders the highest profit. In order to simulate compliance, Google has *de facto* accepted the fact that the service that was previously called *Google Shopping* – and is now called *GSE* – will generate lower profits (due to the auction mechanism). Google does not suffer any disadvantage from making this sacrifice, because the profits are made elsewhere – namely with Google's on-SERP-CSS for the powering of CM-Shopping Units. Google's public focus on the equal treatment of *GSE* is merely a red herring, with the purpose of hiding the continued favouring of Google's core CSS and the powering of CM-Shopping Units under the CM.

2.3 (Only) Google's on-SERP-CSS provides the entire CSS value chain

282 As outlined above, the CM does not enable competing CSSs to provide any element of the value chain of CSSs (see above at ¶¶243 et seq.). This is because, under the CM, Google's on-SERP-CSS provides the entire value chain itself:

- **The only frontend with which users engage:** Google's service provides the only CSS frontend that consumers will see and engage with prior to concluding a sale on a merchant's website.
- **The only backend involved:** Google's backend does all of the matching of the consumer's query with the available product offers. Google sources all results in Shopping Units only from its own product database and only based upon its own specialised search algorithms.
- **The only meta merchant interface:** Google alone undertakes the quality checks to ensure that product feeds comply with the law and may be displayed in a certain way. Likewise, Google alone operates the central merchant interface (Google's Merchant Center) to onboard all merchants (via their 'CSS' intermediaries).

283 Google alone provides all such services to consumer and merchants, irrespective of which CSS a merchant has selected to do its bidding and irrespective of which offer a consumer clicks.

2.4 The CM significantly strengthens Google's on-SERP-CSS

284 While the CM does nothing for competing CSSs, it economically strengthens Google's on-SERP-CSS in several ways. To understand the full scope, one must recall the economics of two-sided matching platforms and the particularities of CSSs. As described above at ¶¶236 et seq., the success of a CSS depends on the quantity and quality of the matching of its two independent user groups (consumers and merchants) via its intelligent backend. There are strong indirect positive network effects at play. More merchant offers allow a broader and more relevant choice of products, which attracts more users. More users in turn attract more merchants to the platform and increase their willingness to provide even more product offers at a higher quality and/or timeliness. More merchants and more users actively engaging with the platform provides more relevant data (consumer interests, more up-to-date product information). In turn, more data boosts the algorithm-based self-learning matching process of the backend of the CSS. The better the matching, the more consumers return (directly) and attract even more merchants. Speeding up this cycle is what CSSs do for a living.

285 Google's CM strengthens Google's own CSS in several ways; to mention just a few advantages:

- **Direct provision of service – no need to be found and clicked at:** Google's CSS can offer a comparison shopping service directly via Shopping Units. In contrast, competing CSSs are only able to offer an equivalent service when a user finds and clicks a Google Ad or a generic search result located below the Shopping Unit. So while Google's CSS is able to provide its service without requiring consumers to click a link, rivals first need to pass this hurdle.²⁵¹
- **Only CSS matching query and offerings:** Google's CSS can compare all offers of merchants, including those uploaded by rival CSS and select those it feels best suit the query. Competing CSSs, in contrast, can be listed in Shopping Units only with one or a limited number of offers and have no influence on their appearance, position or design.²⁵²
- **More merchant customers:** The CM requires competing CSSs to create accounts for their merchants with Google before they may provide any product feeds. Merchants need an account in the Google Merchant Center along with a Google

²⁵¹ TCA, Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 513.

²⁵² Ibid.

Ads account. Hence, every merchant customer of a competing CSS first needs to become a Google customer. Once 'on board', Google may suggest to the merchant that it also serve other ads on Google, such as standard text ads or ads in other Google properties (e.g. YouTube).

- **At least multi-homing and increasing single-homing with Google:** As a result, the CM forces all merchants to – at least – also use Google's service, i.e., to 'multi-home' – even if the merchants were previously uninterested in serving *Shopping Ads* at all. The more merchants engage with Google's CSS and the more it grows, the more they will use only this service, i.e., single-home (see illustrations 46 and 47 on this below, ¶¶289 et seq.).
- **Increasing auction prices raise Google's profits:** The more merchants that bid for the same products on Google and the more of them (being dependent) use only this platform ('single-home'), the more each one of them will have to bid to win in auctions. Higher bids correspond to higher profits for Google's CSS.
- **More merchant product offers allow higher trigger rates even for niche products:** The more CSSs 'hand over' their merchant customers to Google, the more product offers such merchants upload to Google's product index. The more product offers this index encompasses, the more often Google will be capable of matching specific search queries with a broad portfolio of available offers. Thus, the CM allows Google to provide its CSS more frequently by displaying Shopping Units in return of a broader range of search queries.
- **Less competition from CSSs appearing only in generic search results or Google text ads:** The higher trigger rate and the more sophisticated design of Shopping Units following the CM leads more consumers into the box and away from competing CSSs displayed (only) in generic search results or Google text ads. Accordingly, the CM exacerbates the anti-competitive traffic diversion effects identified in the Decision.²⁵³
- **Lower costs of merchant acquisition and onboarding:** 'Normally', a CSS must bear costs of engaging with merchants with a view to getting them 'on board'. Such customer care of the sales team makes up 15% of the overall costs.²⁵⁴ Google's CM, however, spares Google's own CSS such costs: it delegates the acquisition

²⁵³ See Decision, 7.2.3.1.

²⁵⁴ See illustration 1 above at p. 35.

costs to the 'CSSs', which need to onboard merchants in accordance with Google's guidelines and requirements. Thus, Google does not bear any costs.

- **Standardisation of structured data in accordance with Google's system:** The CM requires CSSs to strictly follow Google's technical requirements and standards regarding the product feeds they wish to upload. As a result, the technical standards of Google's CSS become the *de facto* market standard.
- **Single-sourcing of consumer data allows better matching:** The CM allows consumers to engage with only one CSS frontend – Google's Shopping Units, embedded in Google's general search results pages. Consumers do not see any other frontend prior to a purchase of a product on a merchant's site. With consumers that do not immediately find a suitable product, the CM trains them: (i) to scroll along the entire carousel of product offers; (ii) to click on "more products"; (iii) to fine-tune their search query via Google's toolbar; (iv) to use the filters provided in the Shopping Unit or accompanying boxes; or (v) to click back and forth between the merchant's sites and the Shopping Unit.²⁵⁵ Crucially, Google records every such activity of a consumer in real time. Every hovering of the mouse, every click, every fine-tuning is sent to Google's servers and feeds its algorithms.²⁵⁶ This feeds the self-learning mechanisms that make up the backbone of Google's CSS, thereby enabling a permanent improvement of the quality of the service. None of this data is available to any rival CSS. Yet, such data is decisive in the long run. Google relates its own success to the fact that "[w]e don't have better algorithms than anyone else; we just have more data".²⁵⁷
- **Reducing consumers' incentives to venture outside Google's ecosystem:** The CM incentivises consumers to stay within Google's platform to also consumer comparison shopping services. The CM reduces consumers' incentives to venture

²⁵⁵ See on this below at ¶¶546 et seq.

²⁵⁶ Regarding this, see four videos: Streamable, "Google Shopping - How the traffic flows - 01 - Interaction with Shopping Unit creates learning effects, but only for Google", 9 June 2020, <https://bit.ly/32ZKX16>; Streamable, "Google Shopping - How the traffic flows - 02 - Every product result in a SU links to a Google server", 9. June 2020, <https://bit.ly/2G4yKz8>; Streamable, "Google Shopping - How the traffic flows - 03 - Every click on a product result in a SU leads to a Google server, which refers the user to the merchant", 9 June 2020, <https://bit.ly/368jEn1>; Streamable, "Google Shopping - How the traffic flows - 04 - How a click on a product result in a SU creates traffic for Google and the merchant", 9 June 2020, <https://bit.ly/3i6R4F4>.

²⁵⁷ Quote of Google Chief Scientist, *Peter Norvig*, cf. *Cleland*, "Google's 'Infringnovation' Secrets", *Forbes*, 3 October 2011, <https://bit.ly/2HaPHID>.

outside of Google's ecosystem, increasing the lock-in effect and further strengthening Google's position in general search and ancillary search services.²⁵⁸

- **One-stop shop branding effect:** The CM teaches consumers (and as result merchants as well) that Google's Shopping Units are 'the' one-stop shop for comparing products and prices. Since such boxes include links with the company names of other CSSs, consumers believe that all relevant CSSs may be found within Google's Shopping Units and that they thus encompass 'the crème de la crème'. Yet, they will not associate the Shopping Units with any of the fluctuating names below individual product offers, but with the website where they found them – that is, Google. They will dedicate any positive experience not to the bidding CSSs, but to Google's on-SERP-CSS.

286 Overall, Google's chosen CM leaves only one beneficiary – Google itself. Google's profits since the launch of the CM confirms this. In stark contrast to the negative development of other genuine CSSs, Google's advertising revenues have continued to surge – despite, or likely owing to, the CM.

287 In Q2-2018, the "*Google properties advertising revenues*"²⁵⁹ increased by over 26% compared to Q2-2017²⁶⁰. In Q2-2019, such revenues increased by over 16% compared to Q2-2018²⁶¹. Considering that there were no significant changes to *AdWords*, it is believed that the main revenue driver was – once again – the powering of CM-Shopping Units. The figures for Q1-2020 confirm this trend: Google has increased its revenues by over 8% compared to Q1-2019.²⁶²

3. Consequences: The CM monopolises the entire value chain for Google's own CSS to the detriment of consumers and merchants alike

288 If Google's CM is accepted, this will likely lead to a full monopolisation of the markets for CSSs by Google's own service. Due to the economics of two-sided platforms

²⁵⁸ See BEREC, Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR (20) 138, September 2020, p. 13: "*For users, interrelated services may reduce transaction costs, but potentially also the incentive to venture outside the ecosystem (lock-in effect). These aspects may strengthen the [Digital Platform's] intermediation power*".

²⁵⁹ Google properties revenues: advertising revenues that are generated on Google search properties, which includes revenues from traffic generated by search distribution partners who use Google.com as their default search in browsers, toolbars, etc., <https://bit.ly/3mHvRoE>.

²⁶⁰ See Alphabet's Form 10-Q of 23 July 2018, <https://bit.ly/3kzqWnY>, p. 34.

²⁶¹ See Alphabet's Form 10-Q of 25 July 2019, <https://bit.ly/2ElkLo9>, p. 33.

²⁶² See Alphabet's Form 10-Q of 28 April 2020, <https://bit.ly/3cqu4ji>, p. 32 et seq.

described above, consumers will increasingly turn to Google to compare products and prices and hence to Google's on-SERP-CSS. This takes place in tandem with a decline of profitable SEO traffic to competing CSSs, since consumers will no longer find and click on them below the overpowering Shopping Units.²⁶³ Conversely, merchants will become more dependent on Google to reach customers and therefore focus their activities on this platform rather than on competing CSSs.

3.1 Consumers and merchants increasingly single-home with Google's on-SERP-CSS

289 The increasing single-homing of consumers and merchants as result of Google's continuing self-preferencing can be illustrated as follows:

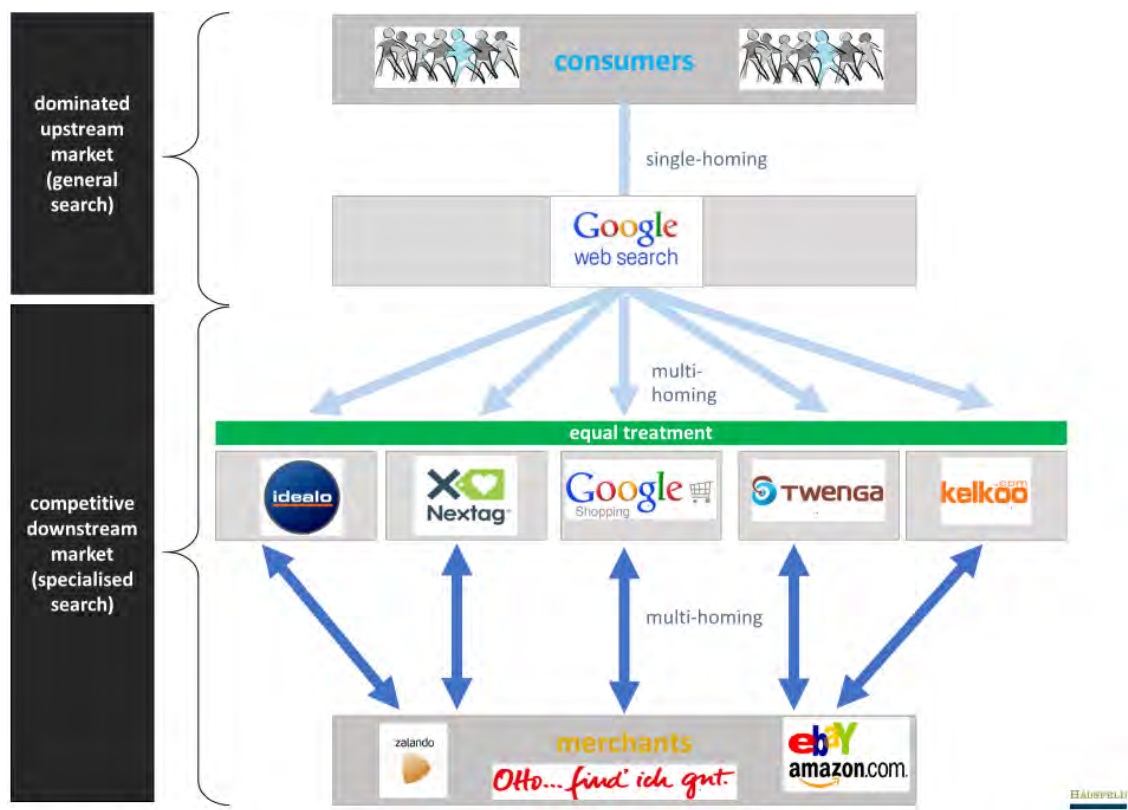


Illustration 46: Effects of equal treatment on single- vs. multi-homing of consumers and merchants

290 Illustration 46 shows the situation the Decision's 'equal treatment' remedy envisaged: If Google treats all CSSs equally within its general results pages, consumer will multi-home amongst CSS, according to their respective relevance to the search query. Because multi-homing consumers are using several CSSs, dependent on the respective search query, merchants will be incentivised as well to multi-home, i.e. to upload their

²⁶³ See the data analysis above at A. (¶¶158 et seq.) as evidence for this development.

product offers to several CSSs. Otherwise they risk losing business, if they are not present on all CSSs. Competition between CSSs can strive.

- 291 The economic situation changes drastically once Google commences to favour its own CSS in general search results pages, as we have observed it for many years now:

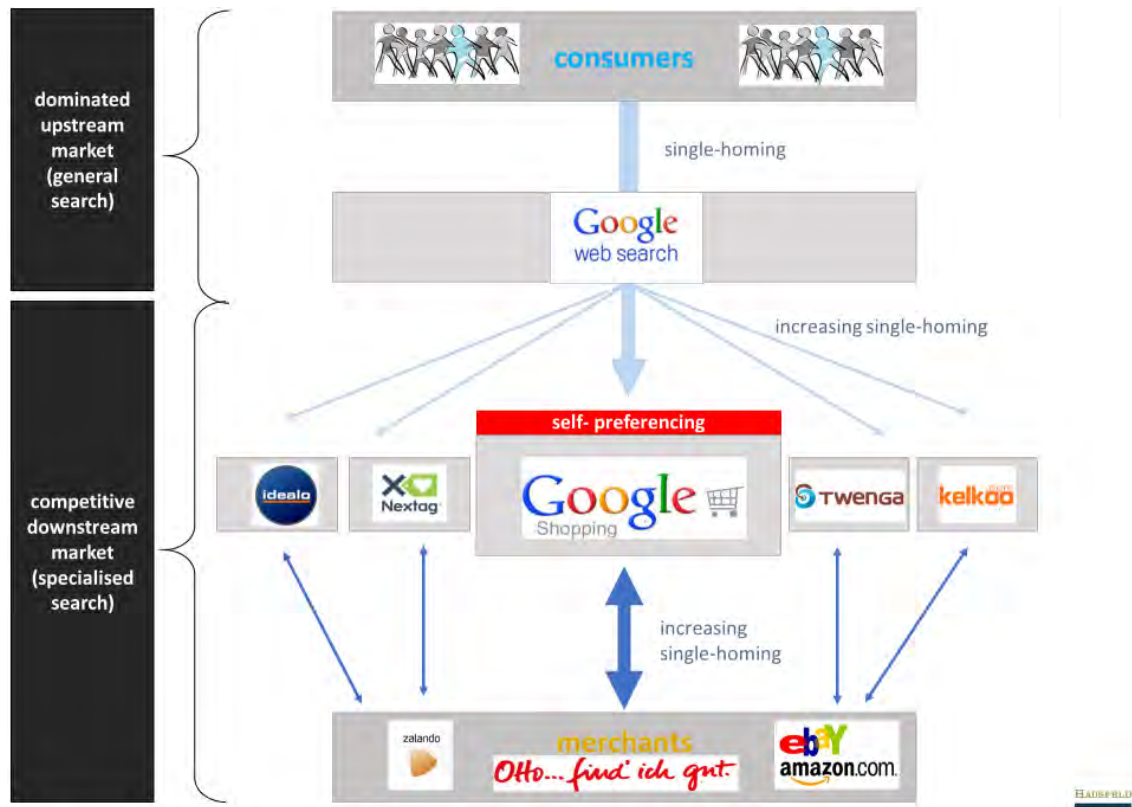


Illustration 47: Effects of self-preferencing on single- and multi-homing of consumers and merchants

- 292 Google's preferencing of its own CSS in general search results pages trains consumers to engage with this on-SERP-CSS more frequently, i.e. to increasingly single-home. If they can compare products and prices directly within Google's general search results pages, there is no need for them to go anywhere else. As a result of consumers' increasing single-homing with Google's CSS, it becomes less attractive and relevant for merchants to upload and update their product offers with other CSSs. Their incentive to multi-home is replaced with an incentive to fully focus on Google's on-SERP-CSS as this provides access to the broadest single-homing consumer base. Consequently, also merchants will increasingly single-home with Google and put all their efforts in this platform. This will, in turn, assist Google's CSS to better match product queries. Due to the strong indirect network effects at play, merchants' increasing single-homing will hence attract even more consumers to Google's CSS and so on and so forth. Competition between CSSs comes to an end.

3.2 The CM monopolises the entire value chain for Google's on-SERP-CSS

293 The decline of competing CSSs and the rise of Google's on-SERP-CSS will have the following repercussions for the e-commerce sector. Ultimately, in all relevant markets, there will be:

- **Just one product catalogue globally:** Established CSSs currently operate their own product catalogue to categorise products. With Google's CM, there will be only one globally used reference product catalogue – Google's.
- **Just one product index:** Established CSSs currently have their own product index. However, since, under the CM, all CSSs need to feed merchant offers into Google's product index, after their decline, there will only be one left – i.e., Google's.
- **Just one quality control system:** With the rise of Google's on-SERP-CSS, merchants will entirely depend upon Google's policies regarding which merchants, products and prices are accepted and which are not. Google will be the single referee.
- **Just one option for comparing products and prices:** Google's CM standardises the entire matching process of query and product offers into one Google system. Comparison shopping will be tantamount to Google's auction-based system, with no alternative tools for consumers forged through competition.
- **Just one specialised product search algorithm:** With the surge of Google's on-SERP-CSS and the decline of rival CSSs, there will be just one specialised product search algorithm left, i.e., Google's.
- **Just one platform to compare:** The more consumers (that are left with no choice but to) use Google's on-SERP-CSS, then the more this will become the central CSS platform online.
- **All in one hand – Google:** All of the above monopolised elements will lie within Google's hands. Overall, the 'invisible hand of competition' regulating supply and demand will turn into the 'invisible hand of Google' regulating supply and demand. Google's system will determine which product offers are displayed to consumers, and on which conditions.

294 The illustration below outlines this monopolisation of the CSS market by Google's own CSS:

Sections of the CSS Digital Value Chain that the CM

- reserves to Google's own CSS vs.
- opens up to competition from rival CSSs

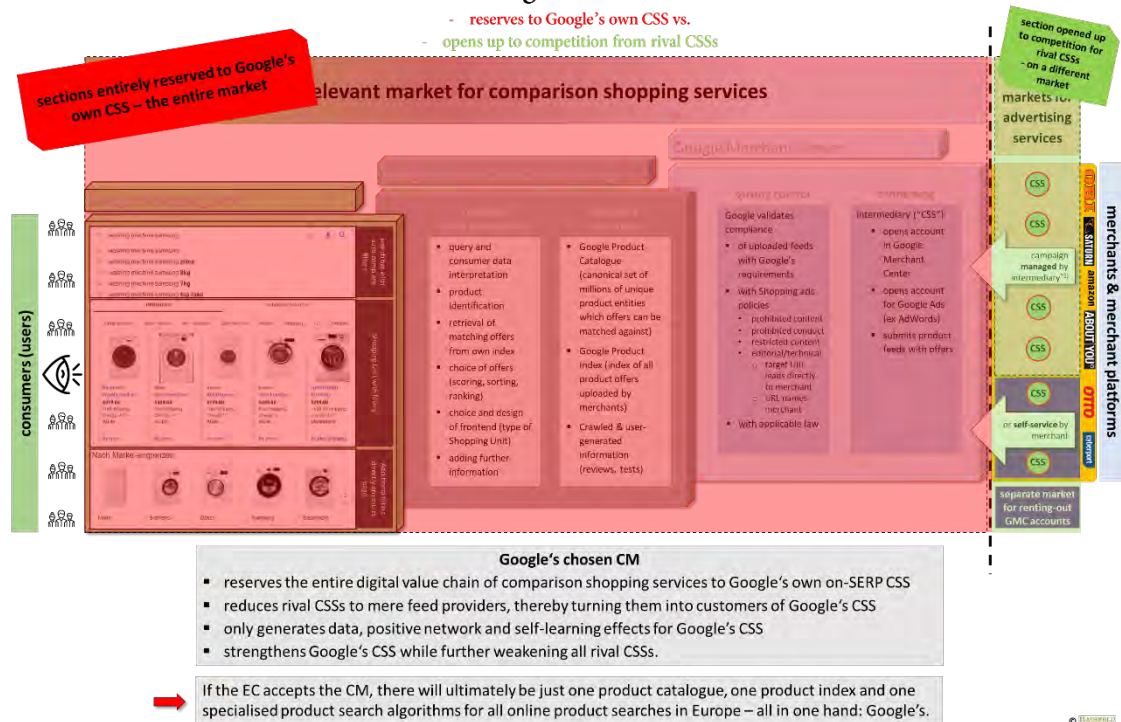


Illustration 7: Sections of the CSS digital value chain that the “Compliance Mechanism” (1) reserves to Google’s own CSS vs. (2) opens up to competition from rival CSSs (for full resolution see p. 48)

3.3 Google's CM harms consumers

295 It is largely accepted today, that “[p]ure self-favouring generates static welfare loss by making rival business users’ services less attractive as well as dynamic loss by inducing the exit of rivals or by weakening their incentives to invest”.²⁶⁴

296 The welfare losses increase with the market power of the platform, in particular the
share of single-homing users. That is because, the stronger the market position, the
more consumers single-home, the less likely it is that a significant share of consumers
will react to quality losses by switching to a competing platform. This in turn, creates
incentives and opportunities for the dominant platform to engage in even more
aggressive self-favouring practices, causing even more welfare losses.²⁶⁵

297 With market shares above 90% across Europe and equally high share of single-homing,
the welfare losses of Google's favouring of its on-SERP-CSS are particularly striking.

²⁶⁴ Expert Group for the Observatory on the Online Platform Economy, Progress Report - Work stream on Differentiated treatment, July 2020, p. 24, <https://bit.ly/3j4GJul>.

²⁶⁵ Cf. Expert Group, *ibid.*, p. 24.

While the significant disadvantages for consumers have been well documented in the Decision,²⁶⁶ regarding Google's on-SERP-CSS they can be summarised as follows:

- **Increasing prices:** Genuine CSSs allow for the ranking of product offers according to their product prices and typically display far more offers to the user in response to the query. This increased offer visibility increases competition between merchants and incentivise merchants to keep prices low, which saves money for consumers. In contrast, acting as a gatekeeper to consumers, without any competition, Google's auction model for serving *Shopping Ads* leads to higher product prices. The monopoly auction model increases transaction costs by forcing merchants to bid higher and higher in order to be found, and those costs need to be passed on to consumers. In addition, since the merchants with the highest profit margins may bid the highest amount, the Shopping Units inherently bias recommendations towards high margin products²⁶⁷ by displaying more expensive products than users would find on other CSSs which rank offers purely on the basis of their prices and relevance. According to one study, on average products suggested in Shopping Units are 13.7% more expensive than would be found on competing CSSs.²⁶⁸ Due to the economics of auctions, the further rise of Google's on-SERP-CSS will only accelerate this price-increasing feedback-loop to the detriment of consumers.
- **Less choice:** Due to Google's CM, consumers will find increasingly fewer alternative CSSs. Google presents its service as a 'one-stop shop' that includes the offerings of all CSSs. With the further decline of competition on the market, users lose the consumer-friendly services of genuine CSSs. Unlike Google's CSS many of those rank results purely on the basis of their prices, with no option for merchants to 'bid their way up' in the results pages. Such unbiased intermediation by genuine CSSs is particularly useful for consumers and therefore merits protection.
- **Less innovation:** The CM reduces the incentives for both Google and competing CSSs to invest in new search functionalities to compare products and prices. In particular, the self-favouring reduces rival CSS's incentives to invest in their services to improve their quality²⁶⁹ as they will realise that such investments will not increase

²⁶⁶ Decision, section 7.3.

²⁶⁷ Cf. Expert Group, *ibid.*, p. 21-22.

²⁶⁸ GrantThornton, "Google shopping EU benchmark – Data analysis study", 12 April 2019, p. 4, <https://politi.co/3csexPT>.

²⁶⁹ Cf. Expert Group for the Observatory on the Online Platform Economy, Progress Report - Work stream on Differentiated treatment, July 2020, p. 25, <https://bit.ly/3j4GJul>.

their visibility on Google's gatekeeper platform because such quality does not matter for appearing in Google's Shopping Units.²⁷⁰ On the contrary, Google's CM encourages to downsize services. That is because the ranking of CSSs on Google now depends on the purchase of product ads in Google's on-SERP service and in the corresponding auction those 'CSSs' with the lowest costs can bid the highest price and hence win most ads and become most visible. Another negative effect on innovation is the fact that Google's CM standardises the entire comparison process to Google's system. Competing CSSs are left to feed this standardised system.²⁷¹

- **Lower quality:** Google presents its Shopping Units as the single most important frontend to compare products and prices. However, compared to what competing, established CSSs are offering (even after suffering years of abuse), Google's service is still inferior.²⁷² According to Google's advisers, the alleged 600 'CSSs' participating in Google's CM have contributed over 30.000 merchants to Google's product index. However, leading CSSs bundle even more merchants and more product offers.²⁷³ Moreover, while in some countries, Google has recently introduced many new filter and sorting functionalities into its Shopping Units, such functionalities still do not match those of other well-established CSSs. Google's CM cuts off consumers from such more specialised and relevant CSSs. The resulting paradox was well observed by the Turkish Competition Authority ("TCA") in its 2020 Shopping Decision:

*"consumers prefer to use [the] Shopping Unit and tend to use it more and more, although it is indicated to be ad space. Therefore, as a result of the information obtained within the scope of the file and searches on competing sites, it is assessed that the presentation of Google Shopping [= Shopping Unit], which offers less options and content at first glance than its competitors, with the above mentioned display shape and location, may artificially emit consumers' preferences and lead to a decrease in consumer welfare."*²⁷⁴

- 298 All of these harms together far outweigh any possible benefit for consumers resulting from the bundling of Google's services into one. While it saves consumers time to be

²⁷⁰ See above at Chapter 2, A.2. (¶¶92 et seq.)

²⁷¹ See above at Chapter 3, B.3.2 (¶293).

²⁷² Cf. the *illustration* 43 above at ¶249; see also TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 186: "It is understood that competitors operating in the market for comparison shopping services offer more options to the user compared to the number of filters, number of products, historical price information, and the options offered to users by Google Shopping."

²⁷³ See above, *illustration* 43 (¶248).

²⁷⁴ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 189.

able to compare products and prices directly on Google's general search results pages,²⁷⁵ this does not benefit consumers (or merchants) if the results they find there are not the most relevant results because Google's on-SERP-CSS is inferior to competing CSSs. Crucially, the same time saving benefit could be achieved – without the anti-competitive harm observed – if all competing CSS's were given the opportunity to provide Shopping Units on Google's general search results pages.

299 Similarly, it cannot be argued that the harm to consumers could be somewhat outweighed by the benefit that derives to them from the images, product information and ratings that Google's Shopping Units provide.²⁷⁶ That is because, all of these benefits to consumers could also be achieved if Google implemented the equal treatment remedy. Whenever Google assumes that such features are beneficial to consumers, it can allow all competing CSSs to provide Shopping Units that contain such features. By allowing the most relevant CSS, as determined by Google on a non-discriminatory basis, to compile and display a Shopping Unit in return of a search query with all the relevant information that Google considers helpful, Google would ensure full equal treatment of CSSs without reducing any possible benefits deriving for consumers from richer information directly on general results pages.

3.4 Google's CM harms merchants

300 CSSs provide an important distribution channel for merchants to reach consumers. As CSSs do not tend to offer check-out facilities or to take over any additional fulfilment services (such as delivery, invoicing, etc.), CSSs are particularly attractive to merchants that wish to acquire and maintain a direct relationship with their customers (instead of outsourcing customer relationships to merchant platforms). In this respect, CSS serve

²⁷⁵ This argument is repeatedly used by Google, see *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 7: "*Having product ads in Shopping Units go directly to pages of merchants where users can buy the identified item is procompetitive: it ensures an efficient and beneficial experience for both users and merchants. It reduces the amount of time spent clicking and increases the effectiveness of the ads being placed by merchants.*" Note that all these alleged advantages could also be realised, but with a better overall outcome, if Google allowed the most relevant CSS to compile and display its own Shopping Units with product results leading directly to merchants.

²⁷⁶ Such argument was made by *Feasey and Krämer*, "Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms", November 2019, p. 41. However, the authors do not assess alternative solutions that achieve the same consumer benefits on the upstream market without restricting competition on the downstream market. In particular, they do not consider that allowing competing downstream services to provide the relevant benefits on the upstream market may be the best compromise to align static and dynamic competition objectives.

an important role for merchants that wish to broaden their reach without having to accept the strict conditions that merchant platforms impose on sellers for selling their products there.²⁷⁷ Consequently, the CM harms merchants at the very least in the following ways:

- **Less choice:** The more CSSs that leave the market following Google's CM, the less options merchants have to reach out to consumers. To compensate for this, merchants will be increasingly forced to either invest in their own consumer-facing frontend or to co-operate with merchant platforms, social networks or other distribution channels, even though their terms and conditions may not comply with the merchant's business strategy. Merchants will be deprived of the distribution channel that CSSs currently offer. This is particularly harmful to merchants that focus on offering the lowest prices, since they tend to rank high in CSSs but low on other platforms, in particular with paid rankings (including Shopping Units), as they cannot match the auction prices for ads on such platforms.
- **Increasing dependence on one distribution channel:** The decreasing choice of CSSs will go hand-in-hand with an increasing commercial dependence on Google. The monopolisation of the CSSs market towards Google's on-SERP-CSS automatically means that merchants have even less of a choice but to accept any terms and conditions that Google imposes on them for placing ads, including ever increasing auction prices. To reach their customers, merchants will be at the mercy of the primarily self-serving, profit-maximising matching infrastructure that Google has developed. The stronger Google's position *vis-à-vis* merchants, the more Google will be able to exploit them.
- **Higher transaction costs:** The increasing focus on Google's Shopping Units will automatically lead to higher auction prices for *Shopping Ads*, which merchants will have to bear. Thus, the costs of reaching their customer base will increase.
- **Lower quality and ROI:** While Google's Account Managers try to provide a customer service to merchants, the individual service that specialised CSSs provide is often superior. More importantly, traffic from established CSSs tends to convert better than traffic coming via Google's Shopping Units.²⁷⁸ This means that despite

²⁷⁷ On the differences between CSSs and merchant platforms see below Chapter 4, A 1.3.6.3 (¶¶529 et seq.).

²⁷⁸ This is the outcome of a study carried out by a CSS that also operates its own shop (= retailer website). This shop engaged *GSE* and a competing CSS on exactly the same terms and conditions to bid for *Shopping Ads*, setting up exactly the same campaign (same products, same

increasing advertising costs, the merchant's return on investment²⁷⁹ may decrease when compared to using alternative CSSs.

C. Summary: the new structure of the comparison shopping value chain

301 The following two illustrations summarise the impact that the CM has (or does not have) on the structure of the market and Google's own CSS.

The established infringement (situation until 2017)

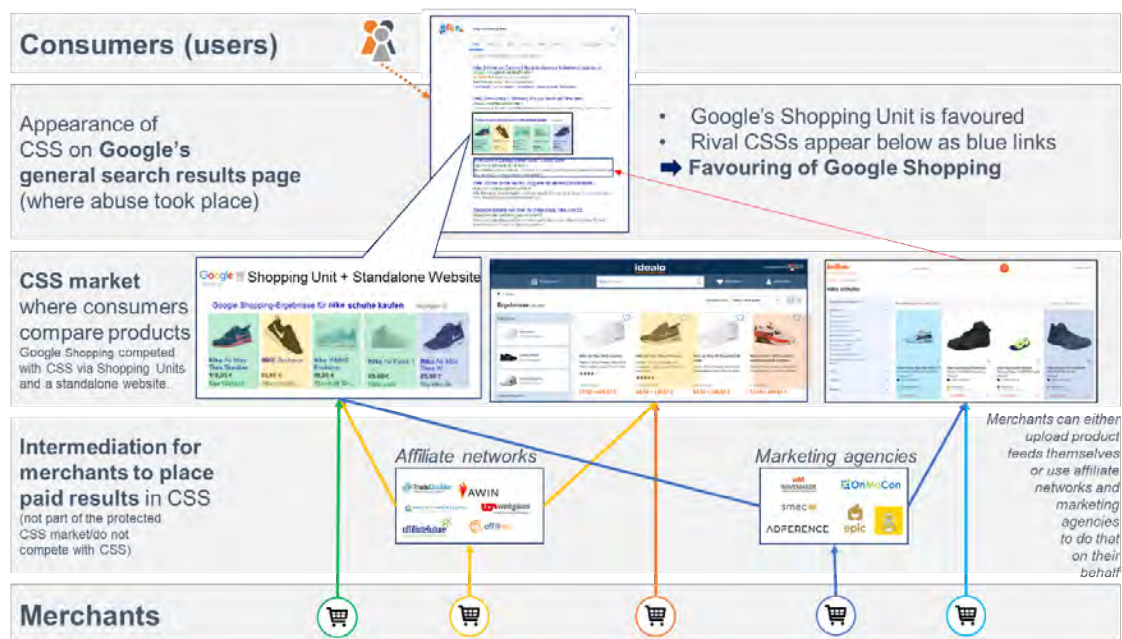


Illustration 13a: The established infringement (situation until 2017)

302 As a service to consumers, CSSs compete with one another through the infrastructure that powers the frontends they provide to consumers. During the period of the identified infringement, *Google Shopping* competed through the powering of two such interfaces – the *Shopping Units* that were displayed on general search results pages and, to a

offers, same prices etc.). It turned out that the campaign run via GSE returned better converting traffic, increasing the shop's Return on Investments. Given the identical bidding parameters, this suggests a superior access to consumer data enjoyed by GSE. GSE had the data to assess which consumer has the highest likeliness to buy. Such data allowed GSE to only bid (higher) for those consumers with the highest likeliness of a conversion. This in turn meant that, while proportionally the *Shopping Ads* that GSE had bid for appeared less often in Shopping Units, if they appeared, it was in return of the most profitable search queries. This illustrates that it is simply not enough to look at how often GSE or competing CSSs appear in Shopping Units. What matters is, how often users actually click on their results and how such clicks convert on the CSS's and/or merchant's website.

²⁷⁹ In advertising, the Return on Investment ("ROI") refers to the ratio between net profit (over a period) and cost of investment (resulting from an investment of some resources at a point in time), see Wikipedia, "Return on investment", <https://bit.ly/33T9qEk>.

lesser extent, the *Google Shopping* standalone website. While Google's standalone website was not particularly competitive (recitals (490) to (492) of the Decision), the Shopping Units generated the large bulk of traffic and revenue for *Google Shopping*. This also explains why Google rolled out the Shopping Units in six countries three years before it rolled out a Google standalone website (recital (35) of the Decision).

- 303 Both *Google Shopping* and competing CSSs already co-operated with advertising agencies who – with regards to *Google Shopping* – also acted as intermediaries for merchants to place paid results in CSSs (see recital (439) of the Decision). Regarding inclusion in *Google Shopping*, merchants always had a choice – they could either steer a campaign directly (through the Google Merchant Center) or engage an advertising agency to do so on their behalf. The identified abuse was Google's favouring of Shopping Units (as part of *Google Shopping*) on its general search results page. No other CSS could place similar boxes to present their most relevant offers for the respective search query.

The situation as of today - the abusive favouring of Google's own CSS continues



Illustration 13b: The situation as of today – the abusive favouring of Google's own CSS continues

- 304 The illustration above shows the situation since the implementation of the CM. The situation has only changed in two respects.
- 305 First, merchants could only previously place *Shopping Ads* either directly via the Google Merchant Center (*Google Shopping*) or via advertising agencies that manage their

campaigns. Following the CM, merchants *must* engage 'CSSs' (as broadly defined by Google) for the intermediation service of placing bids on their behalf. This, however, does not help genuine CSSs, as such *Shopping Ads* do not generate any traffic to their sites – rather, they generate traffic for merchants' sites.

- 306 Second, below the *Shopping Ads* in the Shopping Units, there is now a "By CSS" link. Sometimes there are also "view more" links to other CSSs at the far-right end of a Shopping Unit carousel. Both links lead users to the website of the CSSs that have bid for the *Shopping Ad* on behalf of a merchant. According to Google, even in February 2020, two and a half years after the launch of the CM, clicks on the "By CSS" and "view more" links account for less than 1% of all clicks in the Shopping Unit.²⁸⁰ The analysis of click data confirms this. Thus, such links may be disregarded.
- 307 On the whole, this means that, in economic terms, the CM has not changed the situation from that prior to the Decision. On the contrary, the CM has further diverted traffic from Google's general search results pages away from the most relevant CSS to Google's inferior on-SERP-CSS, and to the detriment of consumers and merchants alike.
- 308 If accepted, this will mean that - in the medium-term to long-term, Google will be the only CSS in Europe that carries out the entire matching process between each product-related search query that is entered on Google's *de facto* monopoly general search service and the respective offers of any merchant that has uploaded a product feed via a CSS to Google. In other words, Google's CM further monopolises the entire market for CSSs in favour of Google's on-SERP-CSS.

²⁸⁰ Google, Response to the Court's Questions for written answer of 19 December 2019 in Case T-612/17, 22 January 2020, footnote 73.

Chapter 4: Legal assessment of Google's Compliance Mechanism

310 The following legal assessment will demonstrate that Google has failed to fulfil the obligations under Article 3 of the operative part of the Decision.

311 Article 3 of the operative part of the Decision reads:

“The undertaking referred to in Article 1 shall, within 90 days from the date of notification of this Decision, bring effectively to an end the infringement referred to in that Article, in so far as it has not already done so.

The undertaking referred to in Article 1 shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or an equivalent object or effect.”

312 It is settled case law that the operative part of a decision should be interpreted in light of its non-operative part. In this regard, recitals (697) to (700) of the Decision are particularly noteworthy when describing Google's obligations under Article 3.

313 Based upon such obligations, Google fails to comply with the Decision for three main reasons:

1. Contrary to Article 3 paras. 1 and 2, Google failed to bring the conduct identified in Article 1 of the Decision to an end (see at A.).
2. Contrary to Article 3 para. 1, Google failed to bring the anti-competitive effects to an end that make up the “infringement” referred to in Article 1 and described in section 7.3. of the Decision (see at B.).
3. Contrary to Article 3 para. 2 alternative 2, Google failed to refrain from any act or conduct having the same or an equivalent object or effect (see at C.).

A. Google's failure to bring the conduct identified in Article 1 of the Decision to an end

314 Google's non-compliance arises from the fact that the undertaking has not yet ceased the conduct that led to the infringement.

315 The powering of CM-Shopping Units constitutes a CSS that Google continues to favour on its SERP over competing services (see at A.1.).

316 To participate in the CM, Google continues to require the same conditions from competing CSSs that, even prior to the Decision, would have forced them to (partially) change their business model (see at A.2.).

1. The provision of CM-Shopping Units constitutes a CSS in itself (on-SERP-CSS) that Google favours on its general search results pages over competing CSSs

317 Google has not remedied the prohibited conduct because CM-Shopping Units constitute a CSS that Google continues to favour on its general search results pages.²⁸¹

- The Decision prohibits the favourable positioning and display of “parts or all” of any CSS operated by Google on its general search results pages (see at 1.1).
- The Decision describes the provision of Shopping Units as a CSS (see at 1.2).
- The provision of CM-Shopping Units constitutes an ‘on-SERP-CSS’ (see at 1.3).
- Google continues to favour this on-SERP-CSS by displaying it more prominently in its general search results pages, while all competing CSSs are limited to generic search results or feed providers for Google’s on-SERP-CSS (see at 2.)

1.1 The Decision’s central prohibition of the favourable positioning and display of “parts or all” of any CSS operated by Google

1.1.1 The definition of “favourable positioning and display” in footnote 3

318 Footnote 3 of the Decision provides the central definition of the Decision namely in terms of what constitutes a “*more favourable positioning and display in Google’s general search results pages of Google’s own comparison shopping service*” that is prohibited by Article 1 and 3 :

“Throughout this decision, whenever the Commission refers to the more favourable positioning and display in Google’s general search results pages of Google’s own comparison shopping service compared to competing comparison shopping service, the Commission means the more favourable positioning and display of:

- (i) *links to Google’s own comparison shopping service (see section 2.2.5, recital (29), and section 7.2.1.3, recitals (408) to (411); and/or*

²⁸¹ See also Marsden, “Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (an How to Fix it)”, Journal of European Competition Law & Practice, 17 September 2020, p. 3 et seq.: “*the unit performs the functions of a CSS: gathering, sorting and indexing the product offers, selecting which offers to display in response to a search, providing the interface to the user performing the search and directing the user to the merchant. The Google PLA module is, therefore, acting as a CSS in this context.*”.

- (ii) *parts or all of Google's own comparison shopping service (see section 2.2.5., recital (32), and section 7.2.1.3, recitals (412) to (423)).*"

1.1.2 Distinction between favouring of "links to" and "parts or all" of Google's own CSS

319 According to footnote 3, the abuse covers both the favouring of "links to" and the favouring of "parts or all" of Google's own CSS. To define what "links to" Google's own CSS means, footnote 3 refers to recital (29), which states as follows:

"The Product Universal comprised specialised search results from Google Shopping Search, accompanied by one or several images and additional information such as the price of the relevant items. The results within the Product Universal, including the clickable images, in most cases led the user to the standalone Google Product Search websites. There was also a header link to the main website of Google Product Search."

320 **Recitals (408) to (411)** further describe how Product Universals generated traffic for Google. One key aspect was that:

*"[...] the majority of clicks on links within Product Universals (including header links) led users to the standalone Google Product Search website."*²⁸²

321 This shows that, with "links to" Google's CSS, the Decision means all links within a Product Universal (irrespective of whether the link is underlying an image, a trademark or the header). This context is important in understanding what the Decision means by "part or all" of Google's own CSS – as opposed to "links to" it.

1.2 The Decision's assessment of the provision of Shopping Units

322 According to footnote 3 alternative (ii), the favouring of "parts or all" of Google's own CSS is also covered by the abuse and the imposed remedy. While alternative (i) is supposed to cover "links" within a box of search results, alternative (ii) is supposed to cover the box as such – which is seen as a "part" or even "all" of Google's CSS. This follows from recitals (32) and (412) to (423), to which the definition of "part or all" of Google's CSS in footnote 3 explicitly refers:

323 According to **recital (32)**:

*"In the same way as the Product Universal comprises specialised search results from Google Product Search, the **Shopping Unit** comprises specialised search results from Google Shopping, as illustrated by the screenshot below. Those results are commercially named "Product Listing Ads" – PLAs. Unlike for the Product Universal, however, **the results within the Shopping Unit generally***

²⁸² Decision, recital (411).

lead users directly to the pages of Google's merchant partners on which the user can purchase the relevant item." (emphasis added)

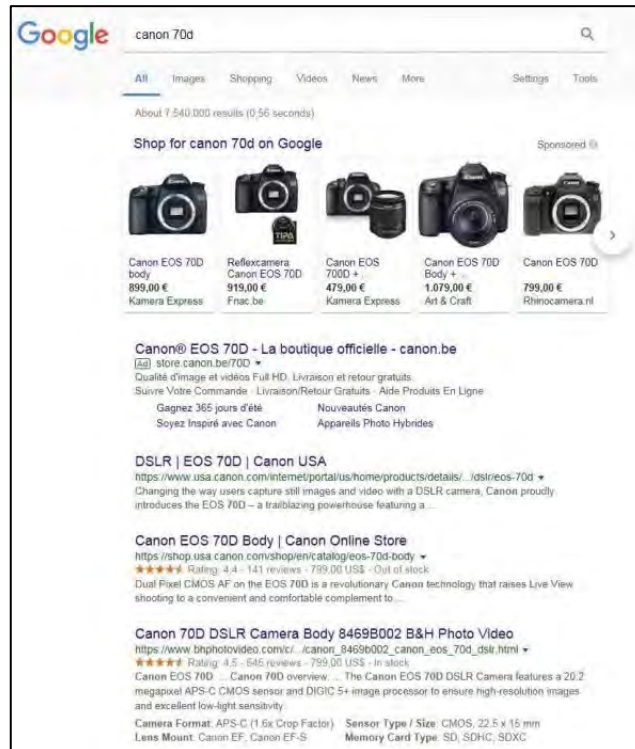


Illustration 48: Screenshot of a Shopping Unit at recital (32) of the Decision

1.2.1 The Decision defines the provision of Shopping Units in and of itself as “part” or “all” of Google’s own CSS

- 324 When defining Google’s CSS, recital (32) does not mention a standalone website of a CSS operated by Google. Recital (32) exclusively describes Shopping Units as such. There is also no reference in the provided screenshot to a standalone website of a CSS operated by Google. In the provided screenshot, the Shopping Unit is labelled as “sponsored” and bears the neutral headline “Shop for canon 70d on Google”. There is no mention of *Google Shopping* or any previous version of this service. In addition, apart from the header link (which plays a minor role), all links in the box lead users directly to merchants.
- 325 Recital (32) only describes standalone Shopping Units. Consequently, if the legal definition of “parts or all of Google’s comparison shopping service” in footnote 3, alternative (ii) refers to recital (32), it follows that the Decision considers the powering of Shopping Units in and of itself as a “part” or even “all” of Google’s own CSS.

1.2.2 The Decision defines the provision of Shopping Units within general search results pages as “all” of Google’s own CSS when there is no corresponding standalone website

1.2.2.1 The provision of Shopping Units is a “part” of Google’s own CSS where there is a corresponding standalone CSS website

326 According to the Decision, whether the powering of Shopping Units is merely a “*part*” or even “*all*” of Google’s own CSS depends on whether there is an associated standalone website. In six of the thirteen investigated countries, Google launched Shopping Units at the same time as a standalone *Google Shopping* website and operated both in parallel. The Decision therefore considers Google’s “*comparison shopping service (both the standalone website and the Universal)*”²⁸³ (which in 2012 was relabelled to *Shopping Unit*) as consisting of the following two elements: (i) the operation of a standalone website and (ii) the operation or provision of Shopping Units. The Decision describes in detail why the provision of Shopping Units fulfils the same economic function as the provision of a standalone website.

327 Therefore, wherever Google operated both a standalone website and Shopping Units, the Decision refers to the powering of Shopping Units as a “*part*” of Google’s CSS. Consequently, the favouring of mere Shopping Units on Google’s general search results pages is referred to in footnote 3 as the “*more favourable positioning and display of [...] (ii) parts or all of Google’s own comparison shopping service*”.



Illustration 49: Product Universals / Shopping Units are a “part of” Google’s own CSS, where a corresponding shopping website exists

1.2.2.2 The provision of Shopping Units is “all” of Google’s own CSS where there is no corresponding standalone CSS website

328 In contrast, the Decision defines the powering of Shopping Units as “*all*” of Google’s own CSS whenever there is no associated standalone Google Shopping website.²⁸⁴

²⁸³ Decision, recital (31).

²⁸⁴ Hoppner/Schaper and Westerhoff, “Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs”, *Journal of European Competition Law & Practice* 2018, p. 627, 629.

329 According to recital (34):

“the Shopping Unit was launched on Google’s domains in the EEA as follows: [...] (ii) in November 2013 in Austria, Belgium, Norway, Poland and Sweden. Google also started running a Shopping Unit experiment in Ireland in September 2016”.

330 According to recital (35):

“[A]s for the standalone Google Shopping website, it was launched [...] (ii) in September 2016 in Austria, Belgium, Denmark, Norway, Poland and Sweden; and (iii) in Ireland in January 2017”.

331 In other words:

“during an initial period, Google Shopping existed only in the form of the Shopping Unit without an associated standalone website in six of the thirteen EEA countries in which the Conduct takes place (Austria, Belgium, Denmark, Norway, Poland and Sweden).”²⁸⁵

332 According to recital (744):

“[t]he Commission concludes that the infringement started in each of the thirteen national markets for general search services from the moment Google launched the Product Universal [...] or, if the Product Universal was never launched in that market, from the moment it launched the Shopping Unit in that market, namely [...] – November 2013 in Austria, Belgium, Denmark, Norway, Poland and Sweden.”



Illustration 50: Product Universals / Shopping Units are “all of” Google’s own CSS, where no corresponding website exists

1.2.2.3 The Decision defines the provision of Shopping Units as a standalone CSS operated by Google

333 It is crucial to note that, in those six countries in which Google first launched the Shopping Unit and only three years later a standalone Google Shopping website, the infringement started with the launch of the Shopping Unit.²⁸⁶ It follows that the Decision considers the powering of Shopping Units as a CSS operated by Google.

²⁸⁵ Decision, recital (422).

²⁸⁶ Decision, recital (744).

334 First, the identified infringement is

“the more favourable positioning and display, in Google’s general search results pages, of Google’s own comparison shopping service compared to competing comparison shopping services.” (section 7.2.)

335 Second, the Decision finds that, in those six countries in which the Shopping Unit was launched three years prior to any Google Shopping standalone website, the infringement started with the launch of the Shopping Unit. In terms of the relevant geographic markets for CSSs, the Decision concluded that they are national in scope:

“First, even though [CSSs] can be accessed by users anywhere in the world, the main [CSS] offer localises sites in different countries and in a variety of language versions [...] Second, language is a particularly important aspect of [CSSs]”.²⁸⁷

336 Thus, every country constitutes a separate market for CSSs. For those very reasons, the fact that, in theory:

“during that transitional period, users in those six EEA countries [without a standalone Google Shopping website] could [have] visit[ed] the standalone websites in the other seven EEA countries”²⁸⁸

cannot have played a role in the Decision’s finding of a CSS. The standalone websites offered in those other seven countries were not part of the six relevant national markets without a website and thus cannot have contributed to forming a Google CSS in the latter six countries.

337 This leaves no other interpretation than the following:

- The isolated powering of Shopping Units on Google’s general search results pages was *“Google’s own comparison shopping service”*. This is because, in those six countries in the respective three years, Google did nothing, other than power Shopping Units in its general search results pages. This was the entire service.
- The favourable positioning and display on general search results pages of those very Shopping Units that constituted Google’s own CSS constituted the abusive favouring in such six countries.

338 These findings are confirmed by the fact that, conversely, in countries in which Google only demoted competing CSSs, but did not show Shopping Units, the Decision did not

²⁸⁷ Decision, recitals (257) and (258).

²⁸⁸ Decision, recital (422), last sentence.

find any infringement.²⁸⁹ In other words, the provision of Shopping Units was the decisive element of Google's own CSS.

339 Between September 2013 and September 2016 in six of the thirteen investigated countries the identified abuse of dominance was Google's favourable positioning and display of Shopping Units on its general search results pages. This is a crucial fact for the interpretation of the Decision, its remedy and Google's according compliance.

340 This is because, in these six countries, the Commission found an abuse of dominance despite the following circumstances:

- Google did not operate any standalone *Google Shopping* website.
- The Shopping Units were only displayed on Google's general search results pages.
- The Shopping Units did not link to any standalone *Google Shopping* website.
- The Shopping Units contained only up to eight product items of different merchants.
- The *Shopping Ads* in the Shopping Unit were auctioned off.
- All search queries were entered in the general search bar of *Google Search*. There was no separate toolbar to enter shopping-related queries.

341 The current situation does not differ significantly from the situation in those six countries between 2013 and 2016. Like in such countries, Google's main CSS activity today is the provision of Shopping Units, irrespective of any standalone shopping website. Google uses this frontend to provide its two-sided service to consumers and merchants.

1.2.3 The provision of Shopping Units is treated as a CSS throughout the entire Decision

342 The above interpretation is consistent with the reasoning throughout the Decision. In all relevant aspects, the Decision treated the powering of OneBoxes as, at least, an inherent part of *Google Shopping* and consequently their favouring on general search results pages as an abuse of dominance.

²⁸⁹ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, footnote 49: "*the Decision identified an infringement only in countries where Google showed Shopping Units. In countries where Google's demotion algorithms applied in the normal way, but Google did not show Shopping Units, there was no infringement*".

1.2.3.1 The definition of “favouring” of its own CSS refers to Shopping Units

343 As outlined above, footnote 3, alternative (ii) defines “favouring” to mean the favourable positioning and display of “*parts or all of Google’s own CSS*”. In addition to recital (29) (describing Shopping Units), footnote 3 also refers to recitals (412) to (423) to define “*part or all*” of Google’s own CSS. Those recitals confirm the above finding, as they lay down the similarities and commercial overlaps between Shopping Units and a standalone *Google Shopping* website. In particular, such recitals explain that the Shopping Units are based upon the same underlying infrastructure (databases,²⁹⁰ algorithms, etc.²⁹¹) used for compiling results on the standalone Google Shopping website. Crucially, while in such sections the Decision outlines the links between the infrastructure required to provide Shopping Units, on the one hand, and a standalone website, on the other, such links were not decisive for the finding of an abuse. Such links may not have been decisive because the Decision found an abuse also in six countries in which Google did not operate any corresponding standalone Google Shopping website at all.²⁹² In such countries, Google only operated an infrastructure that powers Shopping Units, with no links to a separate frontend service.

1.2.3.2 The definition of Google’s CSS explicitly covers Shopping Units

344 In the definition of “*Google’s comparison shopping service*” in section 2.2.5., recitals (28) to (32) describe Product Universals and Shopping Units in great detail as part of Google’s CSS.

345 Among other things, the Decision explains the following:

- “*Google [...] launched along the standalone ‘Google Product Search’ website a dedicated ‘Universal’ or ‘OneBox’*”.²⁹³
- “*In May 2012, Google [...] revamped the Product Universal which was renamed first ‘Commercial Unit’ and then ‘Shopping Unit’. At the same time, Google also changed*

²⁹⁰ Decision, recital (414): “*the Shopping Unit is based on the same database of products and merchants as the standalone Google Shopping website*”.

²⁹¹ Decision, recital (415)(i): “*the selection of paid product results displayed in the Shopping Unit presents many common technological features and mechanisms with the selection of results and the standalone Google Shopping website*”.

²⁹² See above at 1.2.2.3 (¶¶333 et seq.).

²⁹³ Decision, recital (28).

the business model of its comparison shopping service (both the standalone website and the Universal)", i.e. later Shopping Unit.²⁹⁴

- The only screenshot to illustrate Google's CSS is the screenshot of a Shopping Unit in recital (32) (see above at ¶323); there is no image of the standalone website.

1.2.3.3 The definition of a "comparison shopping service" does not require a standalone website

346 Recital (191) defines "*comparison shopping services*" as

"specialised search services that (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers [...] and merchant platforms [...]; and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms".

347 There is no reference in this definition to a standalone website. It also does not require a standalone service, *i.e.*, a service that is not integrated into another service or uses the search toolbar from another service for its own purposes. According to the definition, it is sufficient that the service has an interface towards consumers that provides links to lead consumers to merchants. There is no requirement that this interface leads "*via one or more successive pages*" to the merchant. The interface may also lead there "*directly*". Consequently, it appears that any interface within any website that directly compares products and their prices and leads consumers to merchants or merchant platforms may constitute a CSS. It does not have to be a standalone service, let alone operate a standalone website.

348 It is Google alone who asserts that a CSS would require a standalone website. However, this requirement is not based upon any stipulation in the Decision,²⁹⁵ but is merely an attempt by Google to distract from its continuing abuse.

1.2.4 The Decision also identifies the standalone provision of equivalent Product Listing Units by other search services as a standalone CSS

349 The fact that the powering of Shopping Units may constitute an independent CSS, irrespective of any corresponding standalone comparison website, is confirmed by the list of services that the Decision identifies and considers to constitute a "CSS".

²⁹⁴ Decision, recital (31).

²⁹⁵ In fact, the Decision clearly and consistently distinguishes between the terms „service“ and „website“. For example see recitals (27), (31), (259), (420), (422), (433), (453), (475), (636); footnotes 95, 99, 125, 581, 607, 743.

350 For the analysis of anti-competitive effects of the conduct for CSSs, the Commission calculated how much traffic Google Shopping, as compared to competing CSSs, received from Google's general search results pages. For the analysis of the traffic to competing CSSs, the Commission first had to identify competitors at issue. According to recital (613), the Decision:

“take[s] into account the approximately 380 services that Google has identified as competing with Google Shopping, namely:

(a) the following comparison shopping services:

(1) the sample of the most important comparison shopping services in the EEA including [...] That sample includes: Axel Springer, Beslist, Kelkoo, LeGuide [...].

(2) the other “aggregators” listed by Google in Annex 3 [...]

(3) the product listing units displayed on the general search results pages of Ask, Bing, T-Online, and Yahoo,

(4) the product listing units displayed on third party websites by Kelkoo, LeGuide, Idealo (Axel Springer), and Sanoma (Kieskeurig), when these units are displayed in reply to a query.”

351 This list of “*identified comparison shopping services*” within the meaning of the Decision is telling because (3) and (4) above include services that – like Google's on-SERP-CSS – consist solely of the provision of a grouping of product results (ads) within the website of another service (general search service / third-party website) in return for a query entered on this website with links that lead directly to merchants' websites:

1.2.4.1 The Decision identifies the provision of Product Listing Units by general search services, including Bing, as a separate CSS

352 In the SO and SSO, the Commission had calculated the traffic share from Google's general search results pages to Google Shopping and its competitors, respectively.

353 Google did not consider this calculation to be accurate and thus argued as follows:

“The SSO ignores clicks on shopping units on other general search services, and it disregards clicks on aggregator product ads on third-party pages. Other general search services, such as Bing, Yahoo!, Qwant, Seznam, Ask, and DuckDuckGo, show the same kind of units with product ads for product queries as Google (as illustrated below for Bing): [Fn. 296: blackened]”



*But the SSO does not count clicks on these units towards competitor's shares, even though it counts clicks on Google's Shopping Units towards Google's share. In the UK, Bing (together with Yahoo!) accounts for 20.5% of general search traffic, according to Microsoft.[Fn. 297: ...] Assuming that Bing's product ads have similar trigger and click-through rates as Google's product ads, this would represent more than [...] clicks annually."*²⁹⁶

- 354 Accordingly, Google demanded that the Commission should include these services, in particular Bing's on-SERP-comparison service, in the list of CSSs competing with *Google Shopping* and to count all clicks on such boxes as traffic for competing CSS. In the Letter of Facts, the Commission took up this request and added the product listing units displayed on other general search results pages "*to a sample of competing comparison shopping services*".²⁹⁷
- 355 With recital (613)(a)(3) (and footnote 581), the Decision finally included this reasoning as well, thereby incorporating it within the decisive framework of the Decision. Note that Google referred to the boxes on other general search services as "*shopping units*". This reflects the name that Bing calls its service ("*Bing Shopping*") and the ads included in the boxes ("*Bing product ads*"). Google described the Shopping Units used by Bing as "*the same*" as its own Shopping Units. In its application to the General Court in case T-612/17, Google highlighted the similarities further by explaining that

"the Commission pointed to the way Bing shows product ads and to a remedy proposal from Kelkoo as an approach to end the alleged infringement (LoF, 51b and 51c). Yet both of these approaches correspond to what Google already does. They involve aggregators participating in product ads by placing ads linking to their merchants partners in the same ways as they are able to do now.[Footnote 188: Like Google's product ads, Bing's product ads must link to pages where users can purchase the offer. As Bing's policies make clear, "when an ad implies that a product is for sale, the landing page must allow the purchase of that product". See Microsoft, Bing Ads: Relevance and quality policies, Annex A.79.]. [...]

²⁹⁶ Google, SSO Response in Case AT.39740, para. 275-276 (emphasis added).

²⁹⁷ Commission, LoF in Case AT.39740, para. 27.

*The Commission identified nothing that distinguishes Google's approach from that of Bing".*²⁹⁸

356 Indeed, the Decision does not question the similarities between Google's Shopping Units and Bing's equivalents. The Decision merely chose a different name for Bing's version: "*product listing units*". This term presumably is to align the terminology with recital (32), according to which "*specialised search results from Google Shopping [...] are commercially named "Product Listing Ads"*". The term "product listing unit" can thus be understood as a generic term for product results placed in any box or equivalent grouping of specialised product results outside of Google's website.

1.2.4.1.1 Bing's Shopping Units work "the same" as Google's Shopping Units

357 To grasp the significance of recital (613)(a)(3), which defines Bing's service to provide "Product Listing Units" as a CSS, it is worth looking at the functionalities of the service. This is because Bing's solution to provide its Shopping Units within its general search results pages is nearly identical to Google's current on-SERP solution.

358 Bing set up its Shopping Units in August 2013 in an attempt to play 'catch up' with Google's success in the area of specialised product search. Bing's primary target was to get merchants to run parallel shopping campaigns on Bing. Such multi-homing required low switching costs for merchants. To ensure low switching costs, instead of creating a different system, Bing copied the same feeds-based mechanism and functionalities that Google used and also copied all other major graphical, technical and commercial features.²⁹⁹ Even Google's terminology was adopted.³⁰⁰

359 Accordingly, in order to list products, a merchant needed to open up a "Bing Merchant Account", a "Bing Ads Account", a "Bing Merchant Center Store" and a "Store Catalog". Following a review by Bing's "Merchant Review Team", the merchant may then upload product feeds, configure the catalogue settings and set bids for product ads called "Bing ads" to appear in Bing's Shopping Units. To make parallel campaigns easier for merchants, Bing also adopted the requirements for the structure of the links from Google. In particular, the product URL needs to be a direct link to the website where the product can be purchased ("buy page condition").³⁰¹

²⁹⁸ Google, Application in Case T-612/17, paras. 202, 203.

²⁹⁹ See Bing Merchant Center Integration Guide, 23 August 2013.

³⁰⁰ See Bing Merchant Center Integration Guide, 23 August 2013.

³⁰¹ All information taken from "Bing Merchant Center Integration Guide", 23 August 2013.

360 Moreover, the entire “backend” – the matching of search query and available product offers – is identical to that of Google’s Shopping Units. In return of a search query entered on Bing’s general search service, Bing compiles and displays Shopping Units with product offers extracted from its own product database and in accordance with its own specialised product search algorithm. The various designs of the boxes are copied from Google.³⁰² Some current examples can be found below:

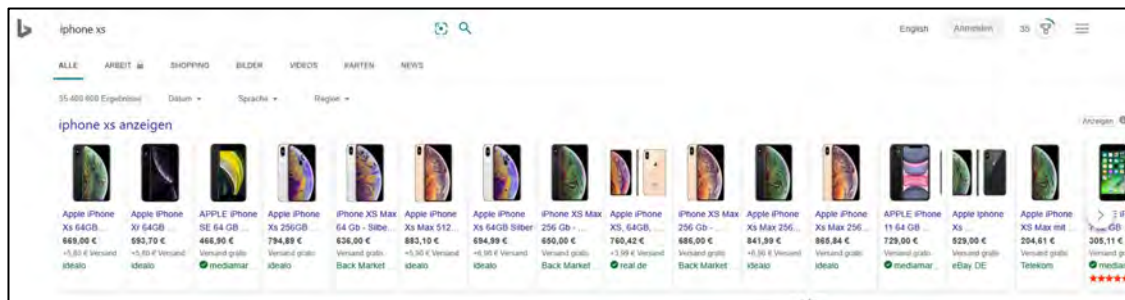


Illustration 51: Screenshot of Bing Product Listing Unit - desktop

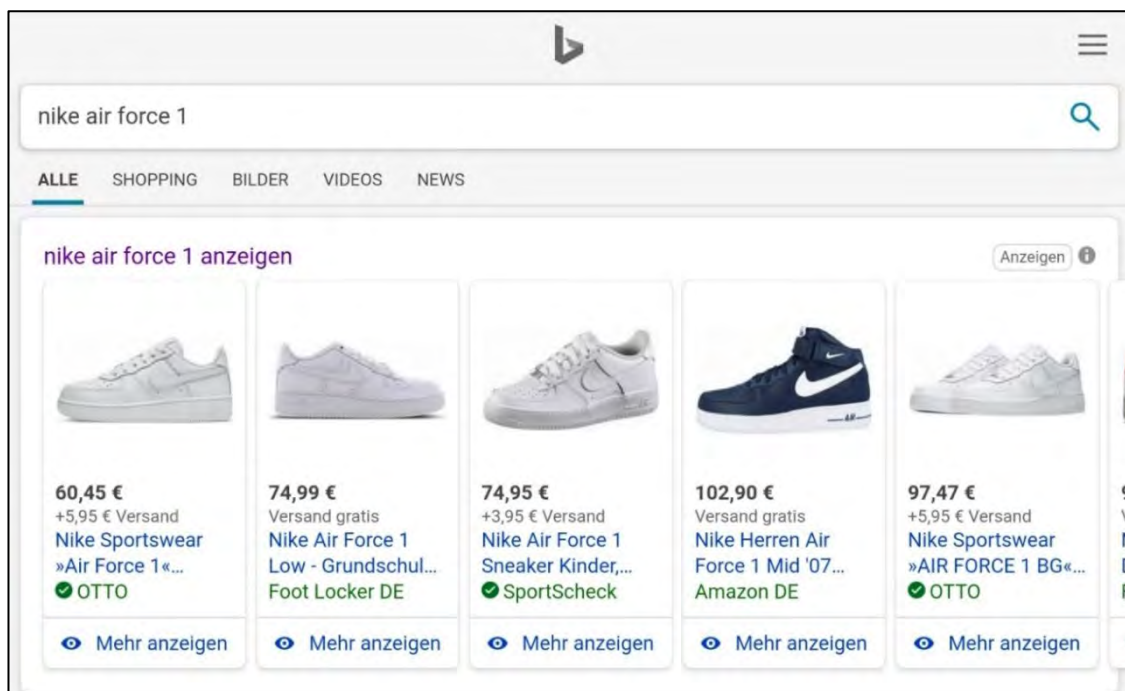


Illustration 52: Bing Product Listing Unit – mobile devices

361 Bing and Google also pursued the same overall approach regarding which company qualifies to create an account to upload product feeds – and under which conditions.

³⁰² See Google, Application in Case T-612/17, para. 54, comparing Bing’s product ads and Google’s product ads.

362 Google had always allowed marketing agencies and affiliate networks to place offers on behalf of merchants.³⁰³ The same is true for Bing Shopping. From the very beginning, i.e., in August 2013, Bing had openly invited “aggregators”, including CSSs, to upload feeds to Bing Shopping. In its guidelines, Bing defines “aggregators” as follows:

“Aggregators are third party sites that consolidate items to Bing on behalf of individual merchants. In the catalog that an aggregator submits, the link attribute must be a direct link to the seller’s product page and the seller-name attribute is required. Adding items submitted on behalf of the merchant must comply with our policies and Terms of Service.”³⁰⁴

363 Put differently, regarding the product feeds, the following requirements apply to aggregators:

“Seller Name: the direct advertiser’s name that is displayed in the SERP

Link: requirement is that the direct advertiser’s landing page is used, not the aggregator’s landing page that an end user has to click to get to the final product page.”³⁰⁵

364 Thus, marketing agencies and affiliate networks (but also CSSs) could upload feeds of merchant customers, under the familiar condition that the product ads which Bing would ultimately include in its Shopping Units do not link to the aggregator’s website, but directly to the shop on whose behalf it uploaded the feed and whose name appears in the ad.

365 More specifically, the

“ProductURL restrictions apply to both direct merchants and aggregators: For direct merchants, ProductURL must be path under store’s Destination URL. For aggregators, ProductURL must be a direct link to Seller’s product page.”³⁰⁶

366 In other words, while “aggregators” were entitled to upload feeds, they did not appear in the Shopping Units themselves, that is, with their own name and/or link to their website. They were limited to acting as agents for merchants or – if they operate their own shop with a check-out/buy-functionality directly on the page – as a merchant site. In neither case did they appear as a CSS.

³⁰³ Decision, recitals (405), (439); Commission, Defence in Case T-612/17, para. 151.

³⁰⁴ Microsoft Advertising, “Manage Ads – How is the feed file organized? – Optional Fields – Bing Attributes”, <https://bit.ly/3cic5ve>.

³⁰⁵ Microsoft Helpdesk, “Manage Ads – How is the feed file organized?”, 2020, <https://bit.ly/3cic5ve>.

³⁰⁶ Bing Merchant Center Integration Guide, 23 August 2013, p. 24.

- 367 Such conditions are identical to those imposed by Google for intermediaries, including CSSs, to upload feeds to Google's Shopping Units (see Decision at recital (439)). In the course of 2016, Google had even started copying, to a certain degree, Bing's more proactive engagement with intermediaries by introducing a new "*Google PLA Agency program*". This program was especially designed for marketing "*agencies to onboard merchants on the PLA [Product Listing Ads] program Ads and to manage PLA campaigns on their behalf*".³⁰⁷ Google expected such agencies "*to bring new small & medium merchants to its PLA program, while Google will keep the direct relationship with Tier1 merchants*".³⁰⁸
- 368 In any case, due to the requirements imposed by Bing for placing product ads, Bing's Shopping Units (just like Google's) included product offers that were actually uploaded by aggregators, including (at least in theory) also by CSSs, without the consumer ever noticing it (because the result only named the merchant and led directly to it).



Illustration 53: Merchants and aggregators feeding Product Ads into Bing Product Listing Unit

³⁰⁷ Submission of Kelkoo of 9 December 2016, p. 32, referred to by Google, Application in Case T-612/17, para. 202 (Annex B.13 thereto).

³⁰⁸ Ibid., p. 32.

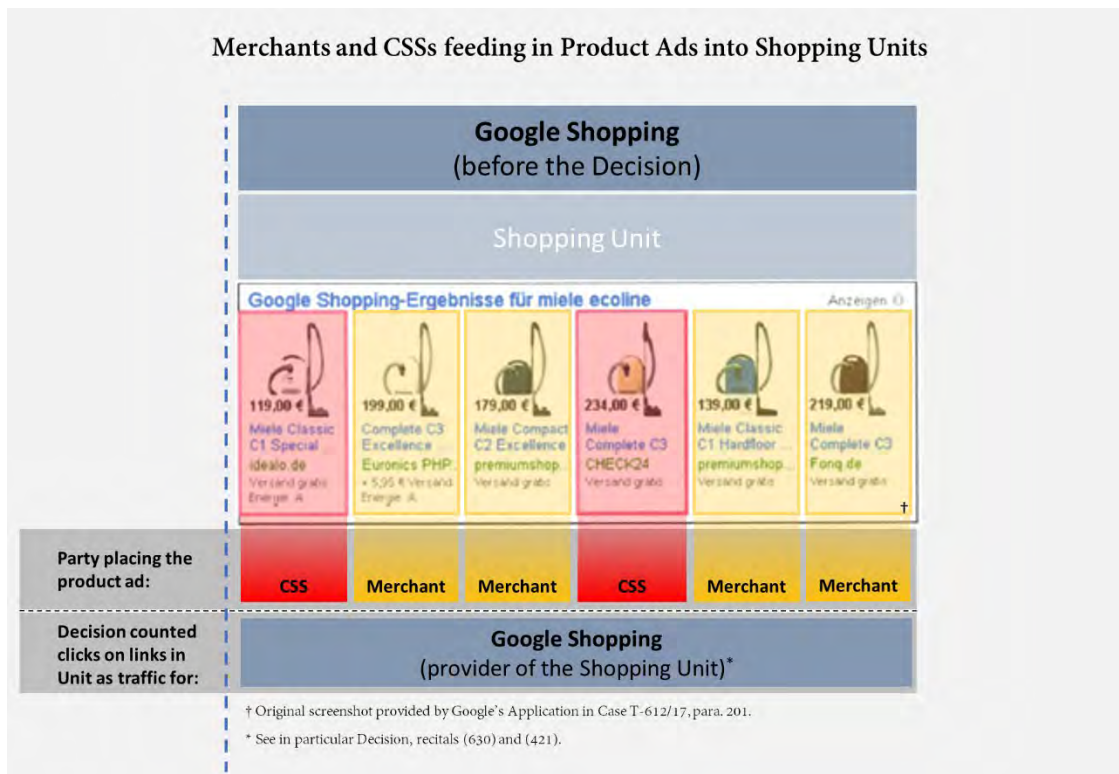


Illustration 54: Merchants and CSSs feeding Product Ads into Google Shopping Units

369 There was – and still is today – just one difference between the way Bing and Google treated intermediaries. Since 2013, Bing has allowed aggregators to upload all product feeds of all its merchant customers in *one* single feed. In contrast, in the case of Google, the intermediary must upload separate feeds for each individual merchant. In addition, it appears that (at least) in the case of Bing, intermediaries may upload product feeds from merchants and commence bidding on their behalf even without their knowledge. If a merchant disapproved of this, for example if it wanted to do the bidding itself, then the merchant may actively choose to “*block aggregators*”:

“If enabled, ‘block aggregators’ will prevent unauthorized resellers from including your product offers in their ads. For example, if there is an advertiser on Bing selling your products, as well as other unrelated items, such as pillows and dog food from different businesses, Bing will flag that advertiser and prevent their ads from showing.”³⁰⁹

370 Note that the explanation equates an “aggregator” with an “advertiser”. This once again illustrates the role that “aggregators” played in this system i.e., they were providing an online advertising intermediation service (no CSS) (see Decision, recital (439)).

371 Despite that Bing reduced the costs by allowing aggregators to upload a single feed for all its merchants, in practice, Bing’s ‘offer’ to aggregators never truly bore fruit. For the

³⁰⁹ Caranta, “Bing Shopping Set Up”, MetricTheory, 5 July 2016, <https://bit.ly/2ZWrxlF>.

same reasons that genuine CSSs do not use Google's CM today, they were hesitant to participate in Bing Shopping and to upload product feeds on behalf of their merchant customers. Accordingly, while many marketing agencies and affiliate networks uploaded feeds to Bing Shopping, CSSs did not tend to participate. This is still the case today.³¹⁰

- 372 The fact that Bing's powering of Shopping Units is a replicate of Google's system is confirmed by several market experts that explain the similarities between the two systems.³¹¹
- 373 Overall, Bing's powering of Shopping / Product Listing Units may be illustrated as follows (see next page 188). If you compare this with Google's system to power Shopping Units (before and after the Decision), no difference can be identified (see pages 189 and 190).

³¹⁰ Out of the CSSs that contributed to this study, only five place ads in Bing Shopping on behalf of merchants. These are less participants than in Google's CM. The five participants also provide marketing services along their core CSS activities, that is, they take part in Bing Shopping as a marketing agency, not as a 'CSS'.

³¹¹ See, for instance, (1) commenting on the introduction on desktops in 2013, in a blog post *Marvin* summarised: "Very similar to Google Product Listing Ads, Bing Product pull from merchant's product feeds to show product images, prices and other details on search results pages", *Marvin*, "Adobe First To Announce Support For Bing Product Ads", Search Engine Land, 24 July 2013, <https://bit.ly/3iNyVxf>; (2) commenting on the introduction on mobile devices in 2014, *Marvin* explained that "Like AdWords Product Listing Ads (PLA), Bing's version is powered by merchant product feeds. [...] Also similar to the Google process, advertisers first set up Bing Merchant Center Store accounts and upload their product catalogs.", *Marvin*, "Bing Ads Launches Product Ads in U.S., Mobile Version Now In Beta", Search Engine Land, 26 March 2014, <https://bit.ly/32OXiVE>; (3) in an article entitled "Bing Product Ads: Bing's Answer to Google PLA's", *Miller* described why Bing's "new ad format [is] Bing's version of Google Product Listing Ads", *Miller*, "Meet Bing Product Ads: Bing's Answer to Google PLA's", WordStream, 26 March 2014, <https://bit.ly/35YusEb>; (4) in a blog post marketing experts Feedonomics explain "Bing Shopping is a great feed based channel to advertise your products. The mechanics are exactly the same as with Google Shopping Feed Management", Feedonomics, Bing Shopping Feed Management, "About Bing Shopping", <https://bit.ly/3clQYYV>; (5) another expert outlines that "if you already have Product Ads running in Google Ads, you can save time and effort by importing those directly to your Bing Shopping Ads". *Culpin*, "The 7 Best Price Comparison Websites to Increase Your Online Sales", WakeupData-Blog, 12 November 2018, <https://bit.ly/3kDEr6e>.

Bing's Product Listing Units (2013) – a CSS according to the Decision

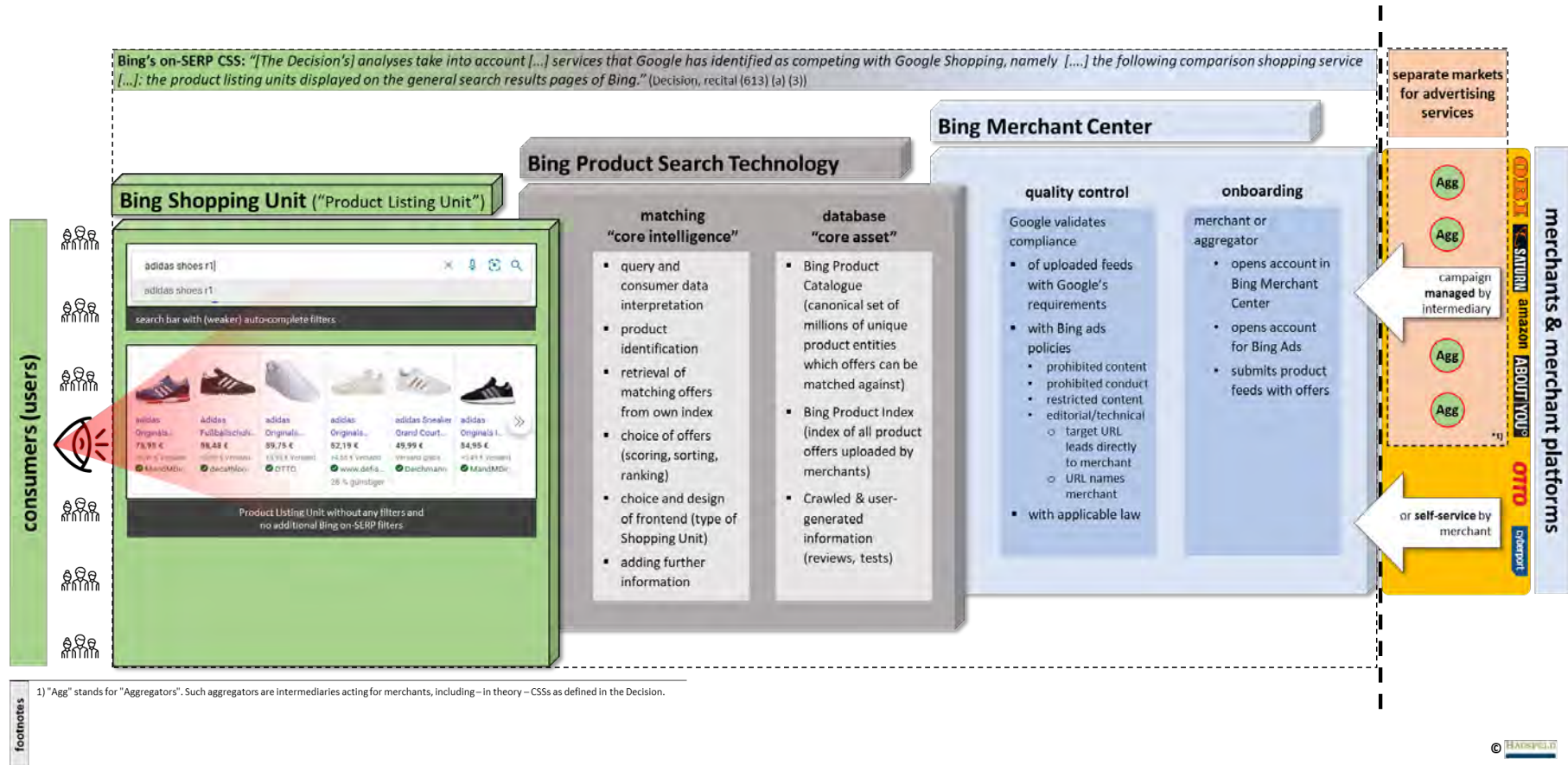


Illustration 55: Bing's Product Listing Units (2013) – a CSS according to Google and the Decision

Google's Comparison Shopping Service before the Decision

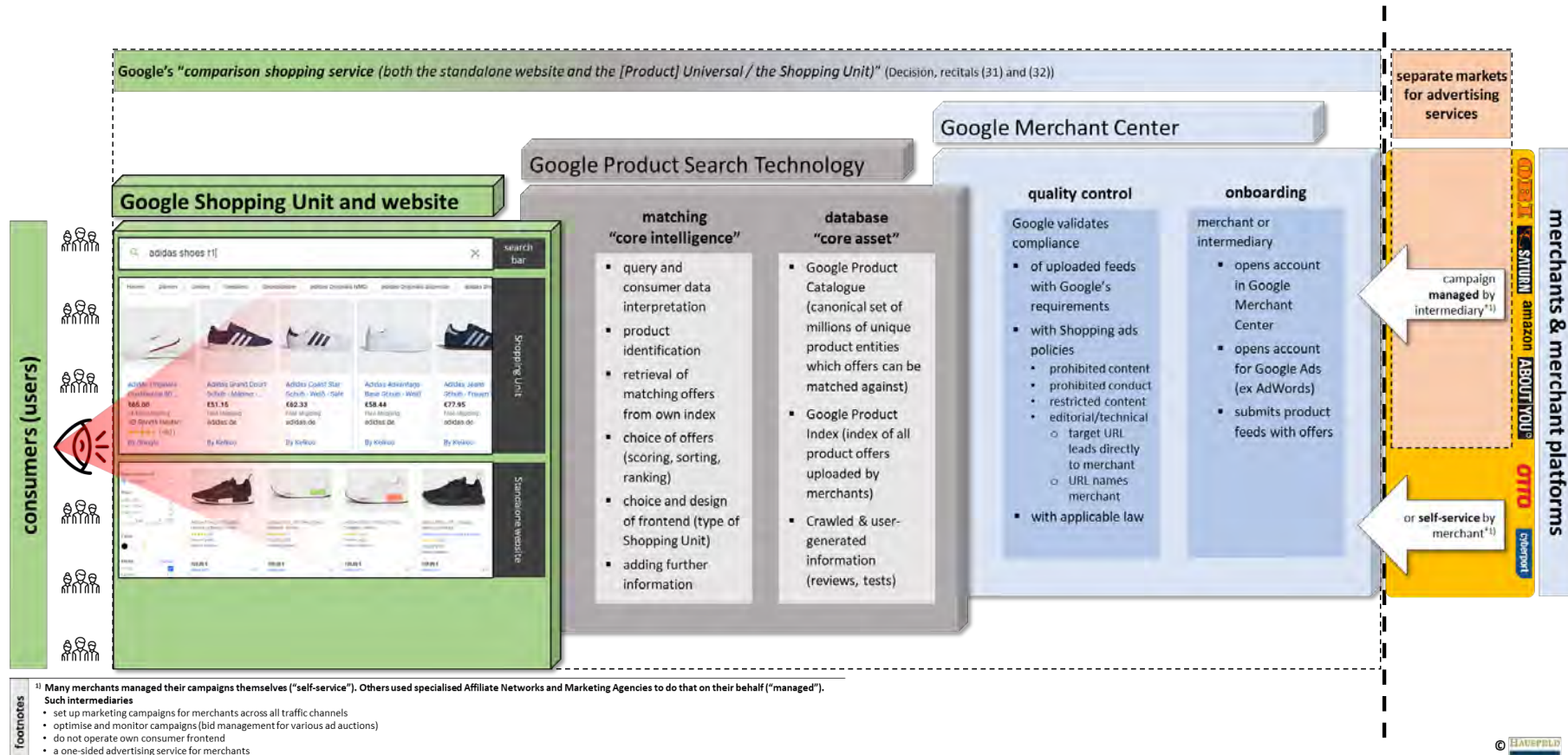
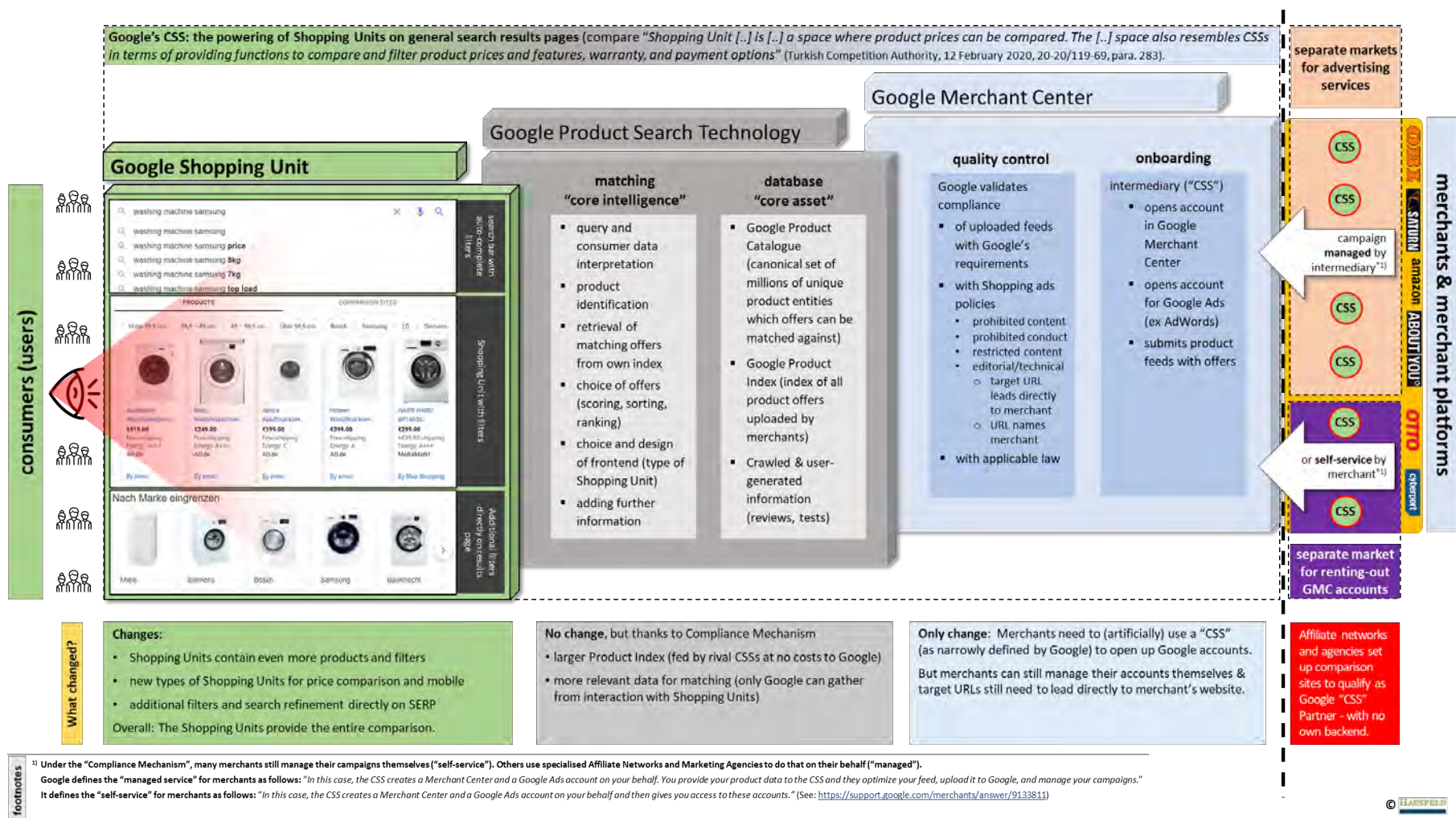


Illustration 2: Google's CSS before the Commission's Shopping Decision

Google's (On-SERP) Comparison Shopping Service after the Decision

Illustration 3: Google's (on-SERP) CSS after the Decision

1.2.4.1.2 Google and the Decision call the provision of Bing's Product Listing Units a CSS

374 Three years following the introduction of Bing Shopping Units, Google argued in November 2016 that Bing's Shopping Units (referred to as "product listing units" in the Decision) constitute a CSS, see above at ¶352 et seq. At that juncture, Google was fully aware of the fact that such units work in the same way as its Shopping Units. Google's view, however, only reflected the general market perception that (the powering of) Bing Shopping Units constituted a separate CSS.³¹²

375 Now that the Decision adopted this argument and explicitly identifies this particular Bing service as a CSS in recital (613)(a)(3) and footnote 581, Google (and the Commission) is no longer in a position to argue that the isolated powering of a grouping of specialised search results (in particular of Google's Shopping Units) does not constitute a CSS. This would contradict Google's own argumentation during the investigation and the Decision's findings of a binding nature for the framework of the remedy.

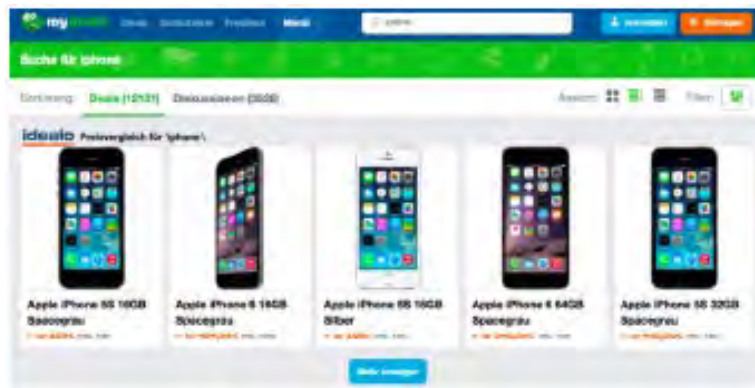
1.2.4.2 The Decision identifies the provision of Product Listing Units on third-party websites as a CSS

376 In recital (613)(a)(4), the Decision also identifies the provision of Product Listing Units by Kelkoo, LeGuide and idealo on third-party websites as a CSS, if they are displayed in return of a search query.

377 As with Bing Shopping Units, this clarification was requested by Google itself, namely in response to the SSO. Commenting on the calculation of traffic in the SSO, Google had argued:

"Aggregators also show the same kind of units on pages of third-party partner sites. For example, in a presentation to the Commission, Kelkoo explained that it serves product ads to "1000s of publisher sites".[Fn. 299: ...] Other aggregators display similar units on third party pages too; but the SSO does not count clicks on these units either. The screenshot below shows syndicated product ads from Idealo appearing on the mydealz website:[Fn. 300: ...]"

³¹² See, for instance, *Culpin*, "The 7 Best Price Comparison Websites to Increase Your Online Sales", 12 November 2018, <https://bit.ly/3kDEr6e>, placing Bing Shopping behind Google Shopping and ahead of ShopZilla, ShopaAlike, PrisJakt and PriceRunner; See also *Shopify* explaining that "Bing shopping is the fastest growing comparison shopping engine behind Google with less competition", <https://bit.ly/2RRaGSS>.



"313

378 The Commission followed Google's request. It added such services to the list of competing CSSs and counted traffic generated via these boxes as traffic to rival CSSs.³¹⁴

1.2.4.2.1 Product Listing Units displayed on third-party websites work "the same" as Google's Shopping Units

379 Several points regarding the functioning of Product Listing Units are worth noting:

- Product Listing Units displayed on the general search results pages of Ask, Bing or Yahoo are compiled by those services themselves. Such services may, or may not, let competing CSSs bid for product results within those units. In contrast, the Product Listing Units displayed by Kelkoo, LeGuide and idealo on third-party websites are powered by Kelkoo, LeGuide and idealo themselves. They determine which product offers are included in the boxes in return of which search query. A co-operating third-party website merely forwards the search query entered on its site to the respective CSS, which then compiles the entire boxes to be displayed with product offers from its own database according to its own specialised search services. It is not the third-party website, but Kelkoo, LeGuide and idealo that operate the units and hence the CSS. Accordingly, the Decision uses the wording that Kelkoo, LeGuide and idealo (not the third-party website) "display" and "provide" the Product Listing Unit.³¹⁵ Using the example of the third-party website mydealz, which Google had endorsed to outline why idealo's boxes displayed on mydealz constitute a CSS³¹⁶ the functioning of such "product listing units" can be illustrated as below:

³¹³ Google, SSO Response in Case AT.39740, paras. 277-278.

³¹⁴ Decision, recital (613)(a)(4) and footnote 581. For the procedural background see Commission, LoF in Case AT.39740, para. 37.

³¹⁵ See Decision, footnote 581: "*displayed on third party websites by Kelkoo [...]*"; "*data on product listing units displayed on third party websites by Ceneo. [...] Ceneo indicated that the product listing units it provides are not query-based*".

³¹⁶ Google, SSO Response in Case AT.39740, paras. 277-278.

idealo's Product Listing Units displayed on third-party site (mydealz) – a CSS according to the Decision

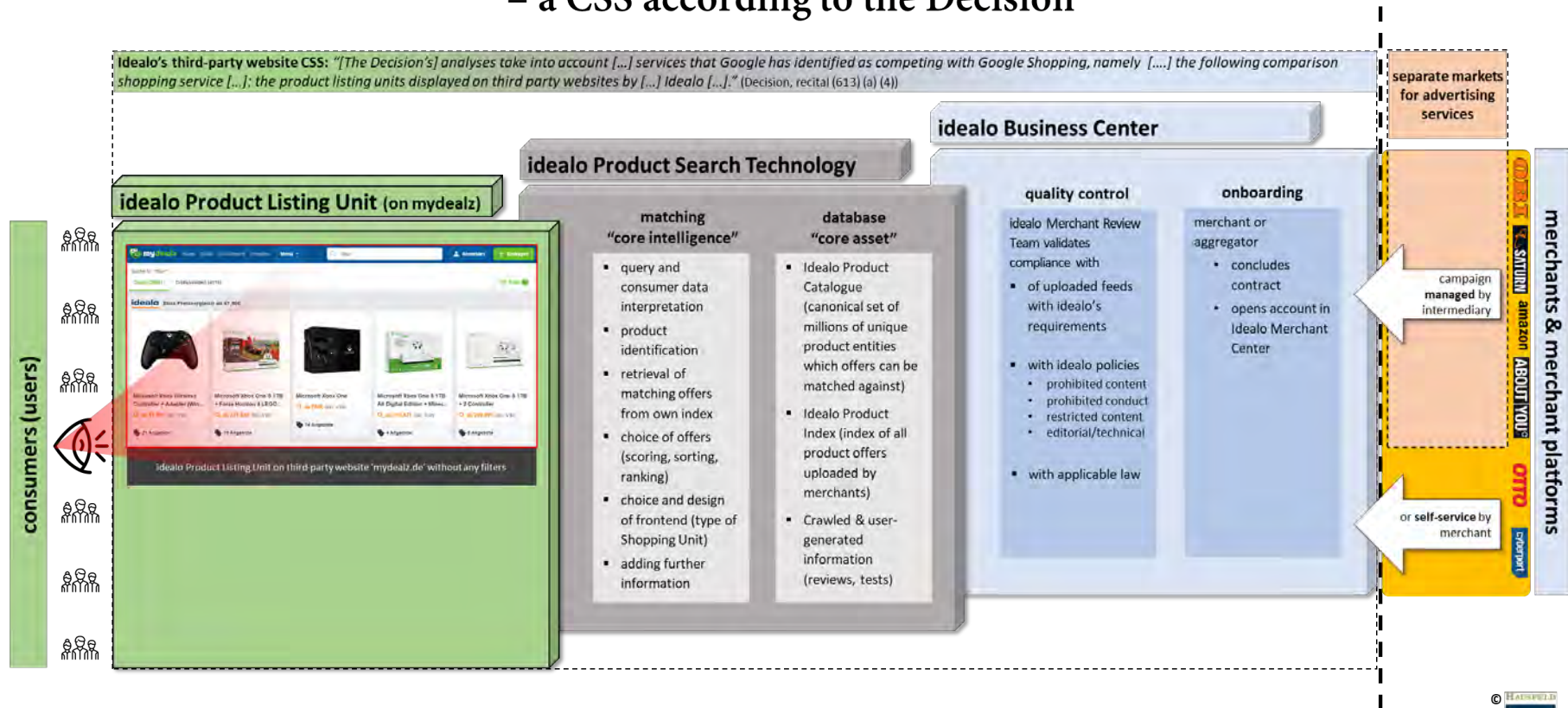


Illustration 56: idealo's Product Listing Units displayed on third-party site (mydealz) – a CSS according to Google and the Decision

- The Decision insists that to be considered as a CSS, the display of Product Listing Units must be “*displayed in reply to a query*”.³¹⁷ Services that only provide pre-set or automatically generated units, i.e., non-query based interfaces, were not considered as independent comparison shopping services. This condition reflects the Decision’s definition of a CSS in recital (191). First, it clarifies that there needs to be a “search”, i.e. a query to begin with. Second, it reflects that a CSS must (itself) match this query with corresponding product results. It is not sufficient to merely provide product feeds to another entity, which then itself puts together a grouping of results in return of a search query.
- Recital (613)(a)(4) explicitly lists Kelkoo, LeGuide and idealo as providers of a CSS in the form of the powering of Product Listing Units. This is despite the fact that (1) of this recital already mentions and considers the very same companies in the category of the most important CSSs in the EEA. The Decision did not double-count the traffic to such companies. Instead, the Commission distinguished between the traffic to the standalone websites of such companies, on the one hand, and the traffic via the “product listing units” displayed on third-party websites, on the other. As a result, the Decision confirms that the powering of a grouping of specialised search results that are embedded into the website of another service may be seen as a distinct CSS, irrespective of any accompanying standalone website. This reflects and thereby confirms the Decision’s overall distinction between the powering of Shopping Units and the operation of a standalone website as two possible, but independent forms of operating a CSS.

380 The Decision’s methodology for calculating the traffic to the different types of a CSS further confirms this fundamental distinction (see below at ¶¶650 et seq.).

1.2.4.2.2 Google and the Decision call the provider of Product Listing Units a CSS, not the third-party host website

381 The Decision adopted Google’s argument that (even) the isolated powering of product listing units on third-party websites constitutes a CSS (recital (613)(a)(3), footnote 581). Against this background, it may no longer be argued that the isolated powering of a grouping of specialised search results, in particular of Google’s Shopping Units, does not constitute a CSS in itself. Google’s Shopping Units contain many more functionalities than any of the product listing units Google and the Decision identified as belonging to a CSS. It does not appear possible to first argue that Bing Shopping Units

³¹⁷ Decision, recital (613)(a)(4), footnote 581.

and product listing units powered by Kelkoo and others are a separate CSS, but to then deny that status to Google's Shopping Units, even though they contain more search functionalities.

1.2.5 The description of the “abusive conduct” treats the provision of Shopping Units as a separate CSS, not least because >80% of the diverted traffic led users directly from the Unit to merchants, not to the Google standalone website

382 In the description of the abusive conduct in section 7.2., the Decision treats Google's favourable positioning and display of Shopping Units in the same way as it treats the favouring of *Google Shopping's* standalone website:

383 As outlined above, in recitals (408) to (424), the Decision describes how Shopping Units have the same commercial purpose and effect as *Google Shopping's* standalone website.

384 In section 7.2.3.3., regarding the “*Impact of the Conduct on traffic to Google's own comparison shopping service*”, the Commission considered both the traffic from Shopping Units and the traffic from the standalone *Google Shopping* website as traffic from Google's CSS:

*“Traffic to Google Shopping is based on the sum of the clicks on: (i) both links that lead the user to the standalone Google Shopping website [...] and links that lead the user directly to the website of one of the merchants whose offer is displayed in the Shopping Units.”*³¹⁸

*“[E]ach individual click on a link within the Shopping Unit should be counted as a separate visit to Google Shopping.”*³¹⁹

385 The Commission counted clicks on product ads in Shopping Units that link directly to a merchant as traffic for Google Shopping (see also footnotes 604, 606, 607 and recital (614) (b) of the Decision). This is despite the fact that, during the entire investigation, Google argued that product results in Shopping Units are simply ads, and not part of Google's CSS. By counting such clicks (but not, for instance, clicks on Google text ads linking to merchants) as traffic for Google Shopping, the Decision did not just reject Google's argument. The Decision also clarified that the provision of Shopping Units constitutes the central element of Google's CSS. This follows from the percentage of traffic that was generated via this frontend as compared to the standalone Google Shopping website.

³¹⁸ Decision, footnote 603 (emphasis added).

³¹⁹ Decision, recital (631).

386 Google Shopping (covering both frontends, the standalone website and the Shopping Units) generated the vast majority of its profits from *Shopping Ads* in Shopping Units. To be precise,

*"[c]licks on product ads that went to third-party merchants account for the vast majority (more than 80 per cent) of the traffic increase that the Decision attributes to Google's CSS from the display of Shopping Units."*³²⁰

387 The Shopping Unit generated more than 80% of the traffic for Google Shopping because the standalone Google Shopping website "*receive[d] little direct traffic*" (recital (517) and therefore only "*represent[ed] a small percentage of their total traffic*" (recital (581)).

388 The Decision demonstrates in great detail that due to the abusive self-preferencing, "*traffic to Google's own comparison shopping service has increased on a lasting basis*."³²¹ This was the core competitive advantage that the self-preferencing confers to Google's CSS. Put together, this means that 80% of the anti-competitive effects that the Decision identified (= traffic increase for Google's CSS) relates to clicks on product ads in Shopping Units that led users directly to the merchant's site. Users that clicked on such ad never saw the Google Shopping standalone website, as the link fully bypassed this site, just as it does today. These 80% of the clicks thus did not benefit Google Shopping's standalone website, at least not directly.³²² They created traffic and advantages for Google's provision of Shopping Units as a standalone CSS. This in turn confirms that the Decision considers the provision of Shopping Units as a standalone CSS; in fact as Google's primary CSS. If 80% of the condemned anti-competitive advantages conferred to Google Shopping relate to the provision of Google Shopping Units, such provision must have been the central element of Google Shopping – and hence a relevant CSS.

1.2.6 The calculation of the fine takes the significant revenues from the isolated provision of Shopping Units into account

389 Finally, in the context of the calculation of the fine, the Decision considers the powering of Shopping Units as a part of Google's CSS:

³²⁰ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, pp. 3-4.

³²¹ Decision, recital (518) (2).

³²² Since the standalone website and the Shopping Unit shared the same infrastructure, any data gathered from the users' engagement with the Shopping Units could still be used to improve the quality of the standalone website. In particular, any improvement of the specialised product search algorithms also improved the quality of the matching on the standalone website.

*“The Commission concludes that the infringement directly or indirectly relates to the revenues generated by Google’s [CSS] [...]. For the purpose of the value of sales, the Commission therefore **uses revenues generated by Google’s [CSS]** in each of the thirteen national markets in which the Conduct takes place [...]. This **includes revenues from the paid product results displayed in the Shopping Unit**, revenues from the paid product results displayed on the standalone Google Shopping website and revenues obtained from bottom text ads displayed on the standalone Google Shopping website.”³²³*

390 The share of such revenues was significant. That is because “[c]licks on product ads [in Shopping Units] that went to third-party merchants account for the vast majority (more than 80 per cent) of the traffic increase that the Decision attributes to Google’s CSS form the display of Shopping Units”.³²⁴ Conversely, this means that less than 20% of the revenues attributed to Google’s CSS originated from clicks on results on Google’s standalone website. This in turn means that the focus of the case (and hence the bulk of the fine) is based on Google’s favouring of its CSS in the form of the provision of Shopping Units.

391 For the duration of the infringement, the Decision takes into account the three years (between November 2013 and September 2016), in which Google only operated Shopping Units in six of the investigated thirteen countries (recital (744)).

1.2.7 Google’s only defence: “the Shopping Unit is not a CSS in itself” – and what recitals (408), (412) and (423) actually mean

392 As outlined above, the Decision is clear on the point that the powering of Shopping Units is a “part” of Google’s own CSS if there is a corresponding standalone website and “all” of Google’s own CSS if there is no such standalone website. The Decision also made clear that any favouring of such “part” or “all” of Google’s CSS is an abuse of dominance (footnote 3).

393 When ostensibly reading the Decision, the only wording within the 215-page Decision that could possibly cast a doubt on the above findings and the only argument Google is currently flagging (in a misrepresented way)³²⁵ to anyone possibly listening can be found in recitals (408), (412) and (423):

³²³ Decision, recital (738) (emphasis added).

³²⁴ *Graf and Mostyn*, “Do We Need to Regulate Equal Treatment?”, *Journal of European Competition Law and Practice*, 18 September 2020, pp. 3-4.

³²⁵ See Google, Reply in Case T-612/17, para. 39: “*Product Universals and Shopping Units, by contrast, do not fit the Decision’s definition of the Google CSS. The Decision is clear on this: Product Universals and Shopping Units are not a Google CSS (Decision, ¶¶408, 412, 423)*”; *Graf*

394 Recital (408):

*“First, the Commission’s case is not that the **Product Universal** was in itself a comparison shopping service.* Rather, the Commission’s case is that the positioning and display of the Product Universal was one means by which Google favoured its comparison shopping service.*

** In the same way, generic search results leading to competing shopping services are not comparison shopping services in themselves.”*

395 Recital (412):

*“Second, the Commission’s case is not that the **Shopping Unit** is in itself a comparison shopping service. Rather, the Commission’s case is that the positioning and display of the Shopping Unit was one means by which Google favoured its comparison shopping service.”*

396 Recital (423):

“the fact that certain Shopping Units in the EEA display different offers for different product items is irrelevant in relation to the Conduct, since the Commission’s case is not that the Shopping Unit is in itself a comparison shopping service which displays offers for the same product items, but rather that the positioning and display of the Shopping Unit is one means by which Google favours the standalone Google Shopping website which does show different offers for the same product items.”

397 The wording of recitals (408) and (412) is identical. The only difference is that (408) relates to Product Universals, whereas (412) relates to Shopping Units. The relevant explanation for both statements can be found in recital (423), which thus contains the decisive finding.

1.2.7.1 The difference between the invisible backend of providing Shopping Units and the Shopping Unit as the visible consumer-facing frontend

398 Google argues that recitals (408), (412) and (423) confirm its view, as expressed throughout the investigation, that the *“Product Universals and Shopping Units are not [...] a separate ‘comparison shopping service’”*³²⁶ Google may also argue that therefore CM-Shopping Units may also not be seen as a CSS in themselves.

399 Such an argument would be just as misguided as it would be false.

and Mostyn, *ibid.* p. 6. “Some critics have argued that [...] the Shopping Unit is Google’s CSS. But the Decision is clear that the Shopping Unit is not a CSS itself (Decision, recitals 412, 423)”. Yet, at the very least, these recitals are anything but “clear”.

³²⁶ Google, SSO Response in Case AT.39740, footnote 270.

- 400 It is misguided because the legal argument made in this study does not depend upon whether or not the majority or all of Google's currently displayed CM-Shopping Unit in and of themselves fulfil all criteria of a CSS. Almost all of them now do so. However, this is irrelevant because it is not the individual CM-Shopping Unit in and of itself that constitutes Google's own CSS. It is the entirety of the hundreds of technologies, measures, steps and processes that Google has to implement and go through in order to provide such CM-Shopping Units, in order to allow users to compare products and prices.
- 401 As has been outlined in illustration 3 (above at ¶40), what can be seen on Google's general search results pages – the CM-Shopping Units – is only the *result*, the end product to searchers, the visible interface (or the software frontend) on which Google presents the outcome of its complex CSS intermediation service between merchants and searchers. An individual CM-Shopping Unit may not in and of itself show users all available products and offers (e.g., because of a pre-selection). However, this does not mean that the underlying service to provide such a CM-Shopping Unit (the hardware/software backend along with the merchant-facing interface) does not fulfil all criteria of a CSS. To illustrate the fundamental difference between the Shopping Unit as the (mere) consumer-facing frontend and the actual infrastructure that powers such frontend and thereby makes up a CSS, the following graph is illustrative. It demonstrates what constitutes a CSS as defined in the Decision.

Digital Value Chain of a Comparison Shopping Service

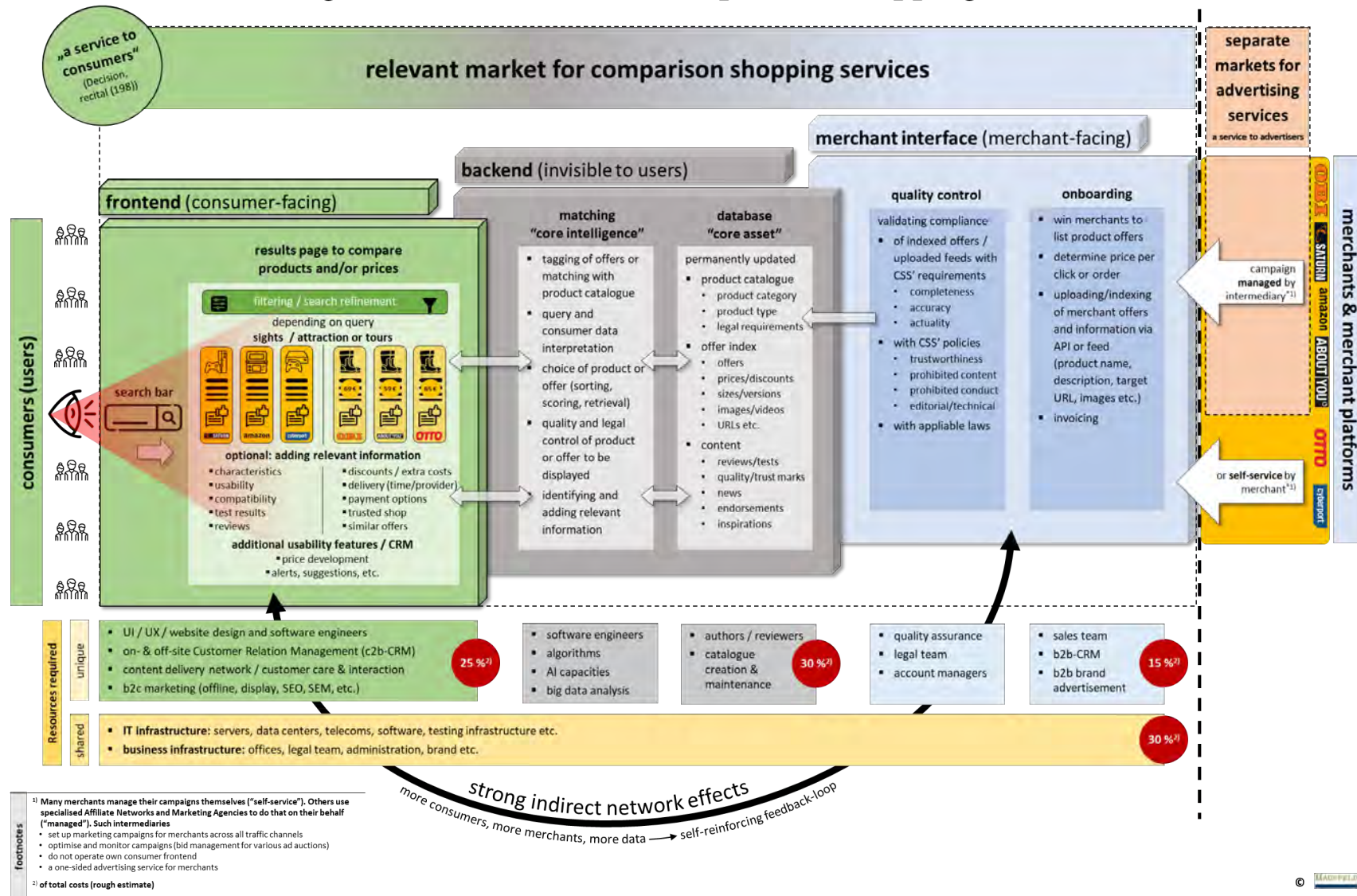


Illustration 1: Digital Value Chain of a Comparison Shopping Service

402 Recitals (408), (412) and (423) must be interpreted in line with this understanding of a CSS in the Decision. The Commission did not have to decide whether or not any particular Product Universal or Shopping Unit used by Google during the infringement period in and of itself fulfilled all criteria of a CSS, because it was clear that in any case Google's underlying service *Google Shopping* did fulfil them. This can be concluded from the question that was actually addressed with recitals (408), (412) and (423).

1.2.7.2 Recitals (408), (412) and (423) only clarify that in order to constitute a CSS not every single Shopping Unit it displays needs to contain different offers for the same product item

403 In recital (423), the Commission first points out that "**certain Shopping Units in the EEA display different offers for different product items**". This was used as an argument by Google that such Shopping Units could not be seen as a CSS because they did not "**show different offers for the same product items**" (see recital (423)).

404 In the Oral Hearing before the General Court, Google re-emphasised this point by arguing:

*"It is true that the Shopping Units shows multiple ads or multiple results. However, the Shopping Unit typically, not always, but typically shows or tries to show results or ads for offers for different products. [...] Now, the function of a comparison shopping service as it is defined in the Decision, I believe at recital (191), is to offer a comparison across offers for the same product. You have multiple merchants offering the same product model. That is what a comparison shopping service, in the definition of the Decision, does. But it's not what the Shopping Unit typically does."*³²⁷

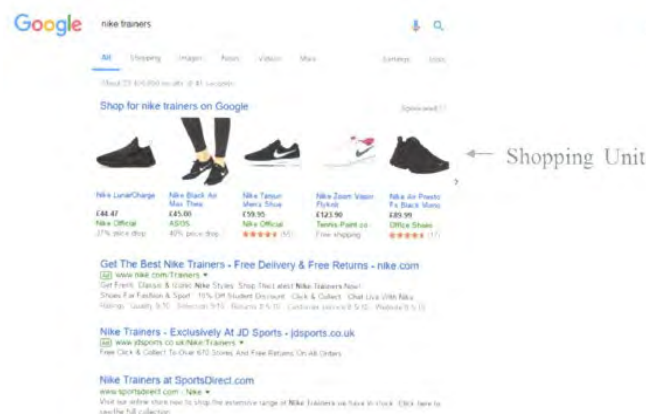


Illustration 57: Google illustration of a Shopping Unit, used in oral hearing and in Google's Application in case T-612/17, para. 4

³²⁷ Google lawyer Graf, answer to the Court's question at the oral hearing in Case T-612/17 on 13 February 2020, based on notes taken by the author.

405 Google provided the Shopping Unit above to illustrate this point (i.e. no offers for the same product).

406 For several reasons, this argument is obviously false on the facts and also on the law.

407 First, Google's "Product View for Shopping Unit" versions of its Shopping Units only contain offers for the same product, i.e., a pure price comparison.³²⁸ To claim that Google's Shopping Units do not compare offers for the same product is simply false.³²⁹

408 Second, the function of a CSS is never just to compare offers for the same product. That would otherwise be a pure price comparison site. Yet, for good reason, the Decision chose the term "comparison shopping service" to encompass both product and price comparison sites. Most CSSs offer both.

409 Third, the Decision's definition of a CSS does not require that every results interface / results page of a CSS must show offers for the same product. On the contrary – recital (191) defines a CSS as a service that "*allows user to search for products* (= product search) *and compare their prices* (= price comparison) *and characteristics across the offers of several different online retailers*" (= offers for different products and different prices). The emphasis is on the word "allow", i.e., to allow users to search and compare products and their prices and characteristics. Therefore, even if the Decision required that the service must compare offers for the same product (instead of offers for different products), it is sufficient that the service "allows" such comparison somewhere – not necessarily on every search results page that it displays. The nature of a service as a CSS cannot depend on how the searcher is using the service and which search query it enters. If some users do not search for precise products right away at Kelkoo, idealo, PriceRunner, Google or any other CSS, because the searchers first wish to get an idea what kind of products are available, this does not suddenly eliminate such service's nature as a CSS.

³²⁸ See illustrations 80 to 86 (¶¶548 et seq.).

³²⁹ See also the screenshots in ANNEX 2.

Following Google's logic, this website (of an established CSS) is **not** a CSS because this (particular) results page does not compare offers for the same product.

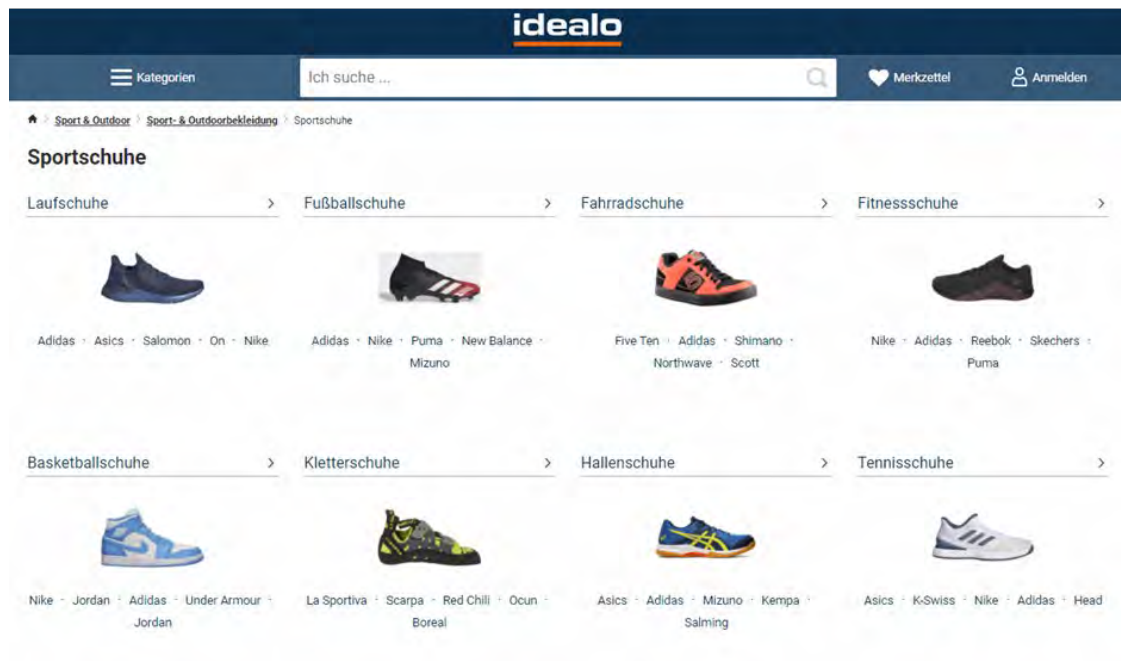


Illustration 58: Screenshot of a results page on idealo for a product search that would not constitute a CSS according to Google's logic

- 410 Even if one were to insist that a CSS must have a price comparison functionality, the compelling issue would be whether it *could* compare offers for the same product once the searcher has indeed shown an interest in that. In addition, providing a product comparison (where the query is broader) does not render the CSS into a non-CSS; rather, it simply makes it better. Google can and does show Shopping Units with offers for the same product if the query suggests an interest in a price comparison.
- 411 Fourth, a central element of a CSS's backend infrastructure is to analyse the search query and assess whether it suggests an interest in the comparison of different products or of different prices.³³⁰ This is also what Google's on-SERP-CSS does. Google's on-SERP-CSS caters to the entire customer journey of a buyer that is from the early stage of a pure product comparison (i.e., which products would cater to my needs), through the comparison of the various models of chosen product, up to the final stage of comparing the prices for the selected product model. For each stage of the product search, Google compiles different Shopping Units. It is only once the searcher's query suggests an interest in the final stage of price comparison that Google displays a unit with offers for the same product. However, this does not mean that the other Shopping

³³⁰ See illustration 1 of the value chain of CSSs above (p. 36).

Units are not part of Google's CSS. Without the more general product comparison Shopping Units, a searcher may never land at the level of a pure price comparison. All of such units lead the searcher to this final stage, and therefore all of them are part of the overall CSS. The screenshots below illustrate this point. They show a typical customer journey of a consumer that is first unaware of the available options, but then uses Google's toolbar to fine-tune the search query so as to finally reach the level of a pure price comparison. Crucially, each of these steps is carried out directly on Google's general results pages:

How the CM-Shopping Unit “allow[s] users to search for products and compare their prices and characteristics across the offers of several different online retailers”

(Decision, recital (191))

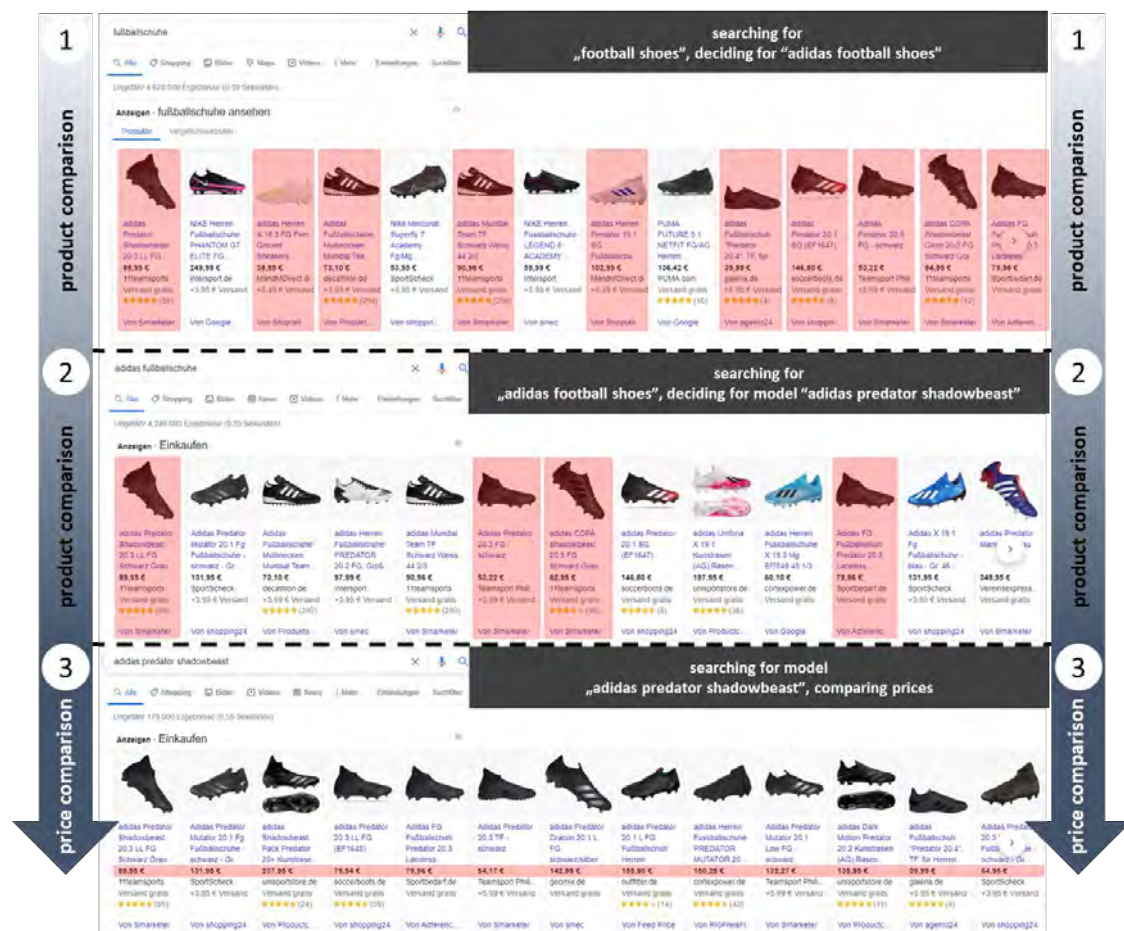


Illustration 59: Screenshots of a typical customer journey using Google's on-SERP-CSS illustrating how CM-Shopping Units “allow users to search for products and compare their prices and characteristics across the offers of several different online retailers” (Decision, recital (191))

412 Against this background, having clearly defined what a CSS is, for good reason, the Commission did not need to determine which particular display format or unit (frontend) was or was not in itself sufficiently capable to allow users to compare products and/or prices. There was no need for this, since it was clear that Google's operation of the

underlying service that powers all types of Shopping Units (including those that compare prices) was well within the CSS definition.

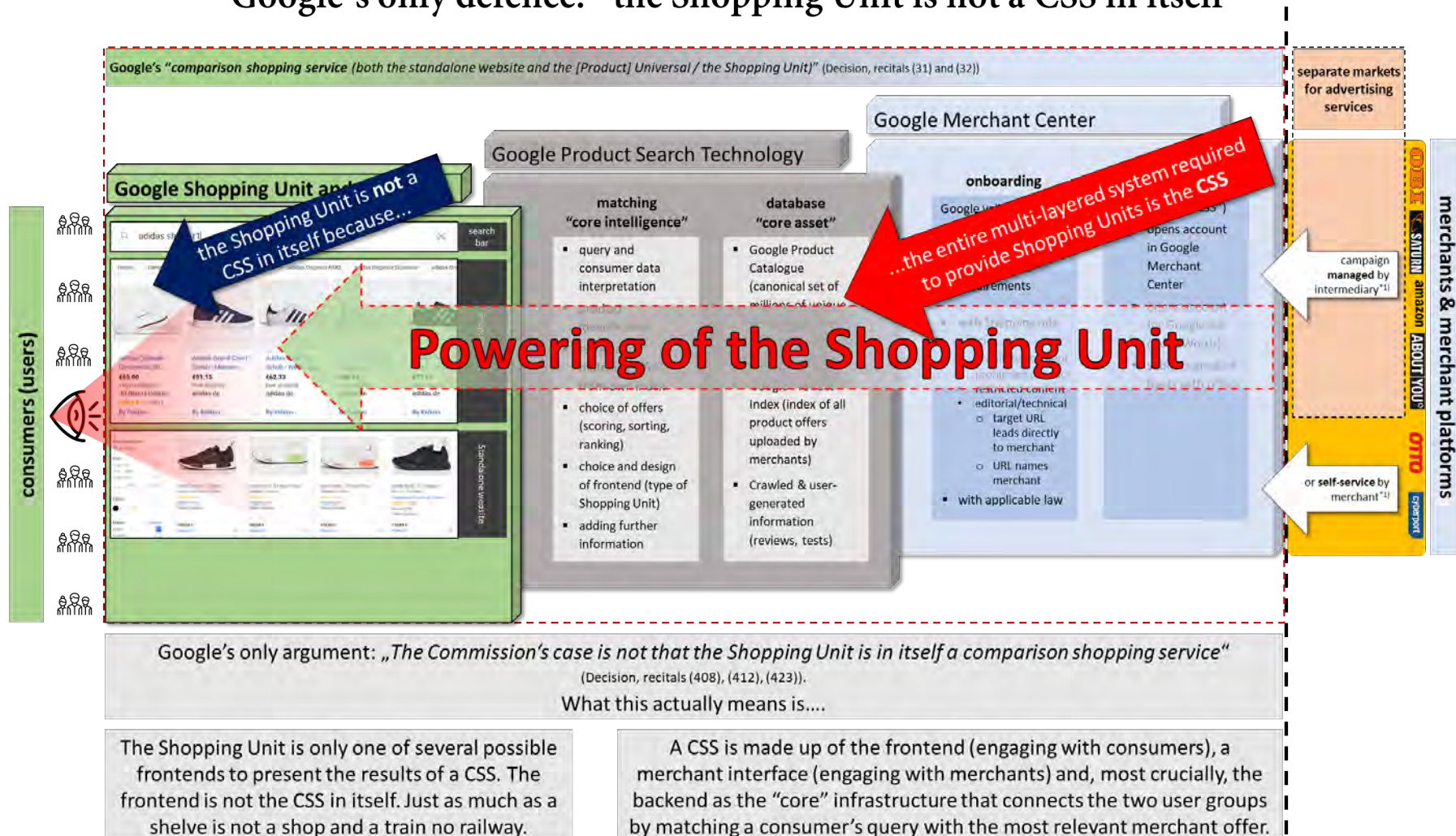
- 413 Conversely, recitals (408), (412) and (423) do not say that a Shopping Unit may not contain, or never will contain, sufficient information to compare products and prices and resultingly serve as a frontend of a CSS in and of itself. In fact, we find it hard to identify any current CM-Shopping Unit that does not fulfil this criterion.
- 414 This point appears to have been shared by Judge *da Silva Passos* at the General Court during the appeal hearing. Following Google's argumentation as quoted above (¶404), he looked at the screenshot provided by Google and replied as follows:

*"I am a little bit confused now regarding your explanation. Because if you refer to the slides [...] the first one where you have the Nike Trainers. [...] Can you explain that to me? Because here, even though you can say 'This is a Shopping Unit, it's no comparison.' Someone who wants to buy the Nike Trainers will be of course in the position to compare the shoes and the prices. So what's the difference between the Shopping Unit and the comparison shopping [service] if the result will be eventually the same?"*³³¹

- 415 The Shopping Unit in the screenshot provided by Google (and reviewed by the judge) is nowhere near as detailed as the currently used versions. Nevertheless, even after a look at this poor Shopping Unit, Judge *da Silva Passos* fully grasped the issue that is, the market for CSSs is defined from the perspective of consumers. From a consumer's perspective, it makes no difference whatsoever if the products and prices are compared on a standalone website or within a grouping of specialised search results. Rather, what matters is whether such results were generated in return of the consumer's entered search query on the basis of an own product database and an own specialised search algorithm. All of this applies to Google's provision of Shopping Units.
- 416 Considering the fundamental difference between the Shopping Unit in itself as the (mere) consumer-facing frontend and the underlying product search technology that actually makes up a CSS, recitals (408), (412) and (423) can thus be taken literally:

³³¹ Judge *da Silva Passos*, oral hearing in Case T-612/17 on 13 February 2020, based on notes taken by the author.

Google's only defence: "the Shopping Unit is not a CSS in itself"



³¹ Many merchants managed their campaigns themselves ("self-service"). Others used specialised Affiliate Networks and Marketing Agencies to do that on their behalf ("managed").
Such intermediaries

- set up marketing campaigns for merchants across all traffic channels
- optimise and monitor campaigns (bid management for various ad auctions)
- do not operate own consumer frontend
- a one-sided advertising service for merchants

Illustration 12: Google's only defence: "the Shopping Unit is not a CSS in itself"

417 Such a literal interpretation (i.e., referring to the difference between Shopping Unit and underlying technology) is fully in line with footnote 463³³² to recital (408), explaining why *“the case is not that the Product Universal was in itself a [CSS]”*. The fact that *“generic search results”*, the classic results of general search services, *“are not comparison shopping services in themselves”* (in fact share nothing with them) is so plainly obvious that no explanation was required. Nevertheless, the Commission felt the need to mention the difference between a mere result and the underlying service providing such results. The sentence *“the case is not that a Product Universal” / “Shopping Unit was in itself a comparison shopping service”*, explained with footnote 463, falls in the same category of clarifying the obvious – it is not the Shopping Unit that makes up Google's CSS. It is the entire infrastructure required to power such Shopping Units.

1.2.7.3 While it was not “the Commission's case” that Shopping Units in and of themselves constitute a CSS, the Decision clarifies the fact that their provision constitutes a CSS

418 Recitals (409), (412) and (423) do not say that Product Universals/Shopping Units (let alone their powering) do not comprise a CSS. The recitals only say that *“the Commission's case is not”* that a Product Universal/Shopping Unit in and of itself is a CSS.

419 With the term the *“Commission's case”*, the Decision means the finding of an abuse of dominance – i.e., the actual infringement. As to the Commission's finding of an abuse, whether or not all or most of the Shopping Units in and of themselves fulfil the definition of a CSS was *“irrelevant”*. The nature of a particular box as being a CSS (or not) did not matter, as it was clear that, in any case, the underlying infrastructure forms a CSS. The Commission therefore did not have to decide which of the various types and designs of the boxes that Google used over the years fulfilled all criteria of the frontend of a CSS. The Commission did not want to decide this question, because it would have required the distinguishing of the various emanations of the OneBoxes that Google had used between 2003 and 2017 in the various jurisdictions. For this, the Commission would have had to assess which of the many different boxes used over time already contain sufficient information so as to allow a user to compare products and prices, i.e. which of these designs serve as a sufficient frontend of a CSS. This was a task that the Commission tried to avoid, and is evident from several passages in the Decision:

³³² *“In the same way, generic search results leading to competing comparison shopping services are not comparison shopping services in themselves”.*

420 When first mentioning that the

“Commission’s case is not that the Product Universal was in itself a comparison shopping service⁴⁶³”

in recital (408), footnote 463 explains this comment as follows:

“in the same way, generic search results leading to competing comparison shopping services are not comparison shopping services in themselves”.

421 In other words, the clarification that the *“Commission’s case is not”* in recitals (408), (412), (423) only served to distinguish a CSS from simple blue links. Such links do not allow any comparison of products and prices, and therefore are not (yet) CSSs. Instead they are the core results of Google’s general search services. The need for clarification is understandable considering the early “hybrid” versions of “Product OneBoxes”. They were something in between pure generic search results and a coordinated grouping of specialised search results that directly allow the comparison of products and prices. Google had started to display such boxes as early as 2003:

37. In 2003, Google started to show groups of its improved product results, called **Product OneBoxes**, on its general result pages.¹⁴ The Product OneBox was displayed between the ads and the generic results. Yahoo! introduced similar grouped product results around the same time. Microsoft’s search service followed a while later.¹⁵ The images below shows grouped product results from Google and Yahoo! from this period:



333

422 Google first became dominant in some member states in 2004. The general approach of the Decision is that the abuse started with the launch of Product Universals. Accordingly, the abuse could also have commenced in 2004. Yet, the Decision found an infringement only as of 2008. One plausible explanation for this may have been that the Commission did not consider the original “Product OneBoxes” as sophisticated enough to sufficiently allow users to compare products and prices so as to form the frontend of a CSS (see recitals (112) and (117) of the Decision). While such uncertainties existed for the early versions of Google’s boxes, the designs currently used leave no doubt about their ability to compare products and prices.

³³³ Google, Application in Case T-612/17, para. 37.

1.2.7.4 While the SO/SSO/LoF were still ambiguous on whether a CSS requires a standalone website, the Decision clarified that it does not

423 The meaning of recitals (408), (412) and (423) becomes even more apparent if one considers their history, in particular the arguments raised by Google that triggered them.

1.2.7.4.1 The SO/SSO/LoF referred to Shopping Units and product ads as mere “emanations” of a Google CSS, and not yet as clearly as “all of” Google’s CSS

424 The Statement of Objections (SO), the Supplementary Statement of Objections (SSO) and Letter of Facts (LoF) laid out the facts of the case, not the legal views. In the SO and the SSO, the Commission was therefore free to be less clear as in the Decision regarding how it legally evaluated the provision of Google’s Shopping Units. Identifying the precise point at which Google’s Shopping Units included sufficient features to serve as a standalone frontend of a CSS was a complex matter. Legally, there was no real need to do so to show an abuse (see above at Chapter 1, C.1., ¶¶63 et seq.).

425 This is presumably why the SSO (merely) referred to Shopping Units as “*an emanation of Google Shopping*”.³³⁴ The SSO then explained in detail how the infrastructure that is used to provide the Google Shopping standalone website is also used to provide the Shopping Units (SSO, paras. (71) et seq.). As they were limited to describing the relevant facts, the SO, SSO and the Letter of Facts were not clear on the legal point, however, if the provision of Shopping Units is to be seen as a standalone CSS.

426 Neither was the crucial legal definition of what constitutes “*favouring*” as clear in the SO and SSO as it is now in footnote 3 of the Decision. The SO already clarified that, with favouring, “*the Commission means the more favourable positioning and display of links to Google’s own comparison shopping service and/or **parts or all** of Google’s own comparison shopping service*”. However, unlike footnote 3 of the Decision, the SO’s definition did not explicitly refer to Product Universals and Shopping Units to explain what is meant with a “*part*” or “*all*” of Google’s CSS (see above at ¶¶322 et seq. on this).

³³⁴ Commission, SSO in Case AT.39740, para. 71: “*In section 6.2.1.2 of the Statement of Objections of 15 April 2015, the Commission reached the preliminary conclusion that, like the Product Universal, the Commercial Unit included a set of specialised search results extracted from Google’s own comparison shopping service on the basis of specialised search algorithms. (72) This preliminary conclusion is supported by the following additional evidence, which indicates that: (i) Google Shopping is the successor of Google Product Search; and (ii) the Commercial Unit is an emanation of Google Shopping*”.

1.2.7.4.2 Google responded that Shopping Units and Shopping Ads do not constitute a CSS in themselves, but are part of Google's general search service

427 In its Response to the SSO, Google criticised the SSO's "concept of 'emanation'" as "nebulous and misconceived". Google argued that

*"Shopping Units are not a comparison shopping service or an emanation of such a service. They are groups of product ads."*³³⁵

*"Even if the SSO were correct that Google favored Product Universals and Shopping Units, the SSO would still fail because Product Universals and Shopping Units are, quite simply, not a comparison shopping service."*³³⁶

*"The Shopping Unit does not exhibit the characteristics of a comparison shopping service. It does not provide product search or price comparison functionality, such as a search box, filters, or sorting functionality. It thus does not meet the SO's definition of a comparison shopping service (SO, ¶142)."*³³⁷

*"[The SSO] introduces a meaningless concept of 'emanations' that is wholly unsuited for a serious analysis of complex technical mechanisms. The use of such a nebulous and undefined concept only serves to highlight the weakness of the SSO's theory."*³³⁸

*"Google could maintain the Shopping Unit, but shut down the Shopping subdomain. This would end the alleged infringement because without the Shopping subdomain, there would be nothing that could be favored."*³³⁹

*"Without the Shopping subdomain the Shopping Unit could also not be an 'emanation' of a comparison shopping service under the SSO's theory."*³⁴⁰

428 As a response to this, the Commission (in its Letter of Facts) appears to have clarified that it does not consider Product Universals and Shopping Units as an "emanation" of Google Shopping, but the product ads displayed in them. While the relevant sections are redacted, this can be concluded from Google's Response to the Letter of Facts. There, Google no longer emphasises that Shopping Units are not a CSS, but that "product ads" are not a CSS and that they cannot be seen as an "emanation" thereof. Such a claim would be a "fudge":³⁴¹

³³⁵ Google, SSO Response in Case AT.39740, para. 7.

³³⁶ Ibid., para. 81.

³³⁷ Ibid., para. 83.

³³⁸ Ibid., para. 92.

³³⁹ Ibid., para. 368.

³⁴⁰ Ibid., para. 382.

³⁴¹ Google, LoF Response in Case AT.39740, para. 68.

*"The LoF characterizes product ads as an "emanation" of a Google comparison shopping service. But this would not change the fact that product ads on general results pages do not benefit a Google comparison shopping service. [...]"*³⁴²

"The LoF also fails to demonstrate that displaying product ads on general results pages could benefit a Google comparison shopping service. Product ads are not a comparison shopping service. They have none of the functionalities of a comparison shopping service. They do not link to a Google comparison shopping service."

*In an attempt to fudge this issue, the LoF, like the SSO, resorts to a claim that product ads on general results pages are "an emanation" of a comparison shopping service. This nebulous term cannot change the fundamental fact that product ads on general results pages do not benefit a Google comparison shopping service."*³⁴³

429 The fact that Google is seriously explaining why a single product ad cannot be seen as a CSS in itself is quite remarkable. This is because the difference between a result and the underlying service is, of course, even more apparent than the fact that powering Shopping Units does make up a CSS. The exchange of arguments just demonstrates Google's attempt to distract from the obvious – it is not the Shopping Unit or any results therein that form the CSS – but the entire specialised system required to provide such boxes in return to search queries (see above at ¶¶392 et seq.).

1.2.7.4.3 The Decision rejected Google's argument and clarified that providing Shopping Units is not just an "emanation" of a Google CSS, but an independent CSS

430 Google's CM must be assessed within the legal framework of the Decision – not the SO, SSO or LoF, which merely set out the relevant facts.

431 The Decision clearly rejected Google's argument that product ads displayed on general search results pages may not benefit Google's own CSS. This is the very basis of the case. However, the final Decision went further than that. The Commission took Google's criticism on the concept of "*emanation*" seriously, that is, the idea expressed in the SSO that Shopping Units are "*emanations of Google Shopping*". Based upon Google's criticism, the Commission understood that the provision of Shopping Units is much more than a mere "*emanation*"; it is the real thing – an independent CSS. That is why the final

³⁴² Ibid., Executive Summary.

³⁴³ Ibid., para. 5 and 6. See also Google, *ibid.*, para. 68: "*Because product ads in Shopping Units are not a comparison shopping service and do not link to a Google comparison shopping service, the LoF, like the SSO, resorts to the claim that product ads in Shopping Units are "an emanation" of a comparison shopping service (LoF, ¶21). But this is a fudge. It cannot change the fundamental fact that product ads on general results pages are not – and do not – benefit a Google comparison shopping service*".

Decision dropped the emanation concept – but only with regard to Google's Shopping Units:

- 432 In contrast to the SO and LoF, the Decision does not refer to Shopping Units or product ads as “*emanations of Google Shopping*”. Before the General Court, Google observed this change of legal rationale as follows:

*“The SSO and LoF argued that Product Universals and Shopping Units were ‘an emanation’ of a Google CSS and were ‘extracted exclusively from’ a Google CSS (SSO, 1171-72, LoF, 1120-21). Google demonstrated that this was wrong (SSOR, H81-92; LoFR, 1165-94). The Decision accordingly dropped these claims.”*³⁴⁴

- 433 However, the Decision did not drop the entire emanation concept. The Decision still applies it to other groupings of specialised product results. According to footnote 581, when calculating the traffic to CSSs competing with Google Shopping, the Decision:

*“also includes clicks on all the items [...] included in the product listing units displayed on the general search results pages of Ask, Bing, Yahoo!, as well as in the product listing units displayed on third party websites by Kelkoo, LeGuide, idealo [...]. **This is without prejudice to the question whether one or several of these product listing units can be considered as emanations of comparison shopping services.** This is therefore a conservative estimate.”* (emphasis added)

- 434 In other words, for groupings of specialised results used by other companies, the Commission still saw the possibility that they merely represent an “emanation” of a CSS, instead of forming the frontend of an independent CSS. However, apparently the Commission did not consider this to be the case for Google's Shopping Units. Otherwise, one would have expected a similar “without prejudice to” reference in recitals (408), (412) or (423) dealing with Google's Shopping Units. In contrast to the SO, the Decision no longer refers to Shopping Units as “*emanations of Google Shopping*” for Google's Shopping Units. That is because, in the meantime, the Commission must have realised that the provision of such units constitutes an independent CSS in itself. It is independent because – as Google had pointed out itself³⁴⁵ – such CSS exists even if there is no corresponding standalone comparison website. This formed the foundation for finding an abuse in half of Europe, where Google only provided Shopping Units with no corresponding standalone website (see above at ¶¶333 et seq.). In other words, the

³⁴⁴ Google, Reply in Case T-612/17, para. 39, footnote 8.

³⁴⁵ Google, SSO Response in Case AT.39740, para. 368: “*Google could maintain the Shopping Unit, but shut down the Shopping subdomain. This would end the alleged infringement because without the Shopping subdomain, there would be nothing that could be favored.*” para. 382 “*Without the Shopping subdomain the Shopping Unit could also not be an “emanation” of a comparison shopping service under the SSO’s theory.*”

Commission decided to drop its “emanation theory” to prevent the situation described by Google that Google could avoid a prohibition of its self-favouring conduct by (simply) shutting down its Shopping standalone website. The Commission knew that this website only stood for less than 20% of the share of traffic that Google’s conduct diverted from its general results pages to Google Shopping.³⁴⁶ Accordingly, the Commission could not take such risk of an evasion of its Decision. Instead it adapted the entire Decision to clarify that Shopping Units are not just an “emanation” of a Google CSS, but that their provision is “*part of*” or, where no corresponding standalone website exists, “*all of*” Google Shopping.

- 435 In recitals (408), (412) and (423), the Commission did not recognise the need to clearly state this or to explain why the provision of Shopping Units is a CSS. To counter the precise criticism Google had raised against the SSO/LoF, the Commission could limit itself to clarifying that it was “*irrelevant*”, i.e., not necessary, to answer whether a Product Universal/Shopping Unit may in and of itself exhibit the characteristics of a CSS and which features and how many results it would need to contain. Google’s argument simply ignored the fact that even units containing just one product offer that perfectly matches the search query is associated with an underlying CSS and may therefore be a “*means by which Google favoured its comparison shopping service*” (recitals (408), (412)).
- 436 In any case, while the SO/SSO may still have been ambiguous on this point, in lack of any “emanation” argument all sections of the Decision now clarify that, the provision of Shopping Units in and of itself constitutes a CSS. This is irrespective of whether such boxes are displayed on the CSS’s own site or on a website of another company, such as a general search service or a third-party site, provided such units match queries and product offers (see above at ¶¶349 et seq.). In particular, the new definition of “*parts or all of Google’s CSS*” in footnote 3 along with the finding of an infringement in countries where there were only Shopping Units made this point abundantly clear.
- 437 Consequently, if Google were ever justified in arguing that Product Universals/Shopping Units did not fall under the less precise definition of a CSS in the SO/SSO, then this argument has lost its merit following the clarifications in the Decision. The Decision alone, not the SO/SSO, now lays out the framework for assessing compliance with the imposed remedy.

³⁴⁶ See above ¶¶388 to 389.

1.2.8 A look to Turkey: adopting the Decision's rationale, in its January 2020 decision on Google Shopping, the Turkish Competition Authority explicitly treats Google's provision of Shopping Units as an independent CSS

438 On 13 February 2020, the Turkish Competition Authority ("TCA") issued a decision ("the TCA Decision") against Google for abusing its dominant position in general search by favouring its own comparison shopping service in its general results pages.³⁴⁷ The TCA Decision is based upon the same facts as the Decision and explicitly refers to it on several occasions as a foundation of the reasoning.³⁴⁸

439 The TCA found that, with its shopping website and with Shopping Units, Google provided *two* comparison shopping services, both together referred to by the TCA as "SHOPPING". The first CSS, the provision of Shopping Units, including "Product View of Shopping Unit"³⁴⁹ is referred to as SHOPPING UNIT. The second CSS, the provision of a standalone website, is referred to as GOOGLE SHOPPING.

440 The TCA clearly rejected Google's argument that the provision of Shopping Units may not serve as a CSS because they only contain ads:

"It should be noted that SHOPPING offers advertising services to e-commerce websites, on the one hand, and comparison shopping services to consumers, on the other, owing to its nature as a multi-sided market. Therefore, the interpretation that SHOPPING UNIT and GOOGLE SHOPPING offer only advertising services would be one-sided and incomplete."

*"SHOPPING UNIT has a multi-sided nature, and offers comparison shopping service in addition to its advertising function."*³⁵⁰

441 The TCA then directly addressed the issue of whether the provision of Shopping Units may constitute a CSS in itself:

"It was also stated as part of the defence that contrary to what was purported in the Investigation Report, SHOPPING UNIT was not a GOOGLE SHOPPING service or comparison shopping website, but a design element that displays a group of product ads, and that there was a fundamental and critical distinction between GOOGLE SHOPPING and SHOPPING UNIT, therefore they should not be considered as integral parts."

As a result of its structure as a multi-sided market, Shopping Unit offers advertising services to e-commerce websites, on the one hand, and comparison shopping services to consumers, on the other. Therefore, the interpretation that

³⁴⁷ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 106.

³⁴⁸ *Ibid.*, para. 106.

³⁴⁹ *Ibid.*, summary and paras. 72, 125, 128, 150, 266, 274, 304, 306 etc.

³⁵⁰ *Ibid.*, para. 251.

*SHOPPING UNIT and GOOGLE SHOPPING offer only advertising services would be one-sided and incomplete.*³⁵¹

*"[The] Shopping Unit, on the other hand, is not only an ad space, but also a space where product prices can be compared. The SHOPPING space also resembles CSSs in terms of providing functions to compare and filter product prices and features, warranty, and payment options, and thus differs from text ads."*³⁵²

442 Accordingly, the TCA treats the provision of Shopping Units separately. It mentions, for instance, that

*"despite the continuously growing market structure, the market shares of enterprises actively engaged in business in the market are decreasing except for Google Shopping Unit".*³⁵³

443 Google had declared that there is "*no difference*" between Google's CSS offered in the EU and Turkey.³⁵⁴ That is why, for instance, as a remedy Google offered the very same solution it is applying in Europe. It follows that TCA's findings are based upon the same technical and economic features as we see in Europe. The same is true for the market conditions. While in some western European countries the e-commerce sector is more advanced today, at the time of the Commission Decision, in many countries where an infringement was found, the market conditions were no different to that in Turkey today.

444 It is no coincidence that, based upon this correct interpretation of the Commission's Decision as well as the nature of Shopping Units, the TCA ultimately rejected the CM that Google rolled out in Europe as a feasible solution to ensure equal treatment:

*"[M]erely giving placement to competitors in this space is not considered a solution that will enable competitors to compete under equal conditions as GOOGLE."*³⁵⁵

445 The precise reasons for this will be described in greater detail below at D (¶¶695 et seq.).

1.3 The provision of CM-Shopping Units continues to constitute a CSS

446 As outlined above, the Decision may only be interpreted in a way that the powering of Shopping Units constitutes a standalone CSS. However, even on the assumption that the Decision did not define the powering of *all* Shopping Units as a CSS, the Decision's definition of a CSS covers at least rich Shopping Units as shown in recital (32) of the

³⁵¹ Ibid., para. 259.

³⁵² Ibid., para. 283.

³⁵³ Ibid., para. 275.

³⁵⁴ Ibid., paras. 257, 277.

³⁵⁵ Ibid., para. 298.

Decision. Yet, in any case, at least the powering of the CM-Shopping Units fulfils all criteria of a CSS according to recital (191) of the Decision and therefore constitutes a CSS itself.

1.3.1 The CM is akin to Bing's powering of Shopping Units – which Google and the Decision identified as a CSS

447 As explained above at ¶¶357 et seq., Google's CM appears to further align with the manner in which, since 2013, Bing has been integrating product ads of competing CSSs into the "Product Listing Units" that it displays.

448 In contrast to Google, Bing did not just allow the presence of intermediaries – but even invited them, including CSSs, to participate in Bing Shopping; i.e., to upload feeds on behalf of their merchant customers. In addition, in contrast to Google, Bing had allowed any such aggregator to upload a single feed for all its merchants instead of having to upload them individually (see above at ¶368).

449 During the investigation, the latter difference was particularly seen as an indication that it was technically feasible for Google to ensure equal treatment of competing CSS's. Google had argued that the favouring of its own service was objectively justified because it was technically impossible to treat other CSS's equally, namely because Google could not handle the information of potentially hundreds of CSSs.³⁵⁶ Complainants and the Commission countered this argument relating to objective justification by pointing out that several technical options were available to Google to deal with complex databases of multiple CSSs.³⁵⁷ Amongst those options, Google could allow competing CSSs to conveniently upload their entire product database with just one single feed, for Google to then enable such CSSs to fill entire Shopping Units themselves; i.e., with their uploaded feed and based upon their own specialised mechanism. Complainants argued that, even if the much smaller search engine Bing managed to integrate single product feeds from many aggregators for millions of

³⁵⁶ See in particular Google, SSO Response in Case AT.39740, paras. 328 and 329.

³⁵⁷ Cf. Commission, LoF in Case AT.39740, para. 49 et seq.; BDZV and VDZ's comments and Visual Meta's comments of 23 December 2015 on Google's SO Response in Case AT.39740, p. 24: *"Google argues that it would be impossible to implement the remedy envisaged in the SO as it would require to include the data of several comparison shopping sites into its system. Considering the various existing co-operations between aggregators and merchants as well as amongst aggregators, we believe that Google's concerns are not justified."*

merchants respectively, such integration – as first step for a subsequent equal treatment – could not pose a technical hurdle to the much larger Google search service.³⁵⁸

- 450 Following the Decision, Google took the reference of complainants and the Commission to the “single feed” solution of Bing out of its context of “objective justification”. It falsely suggested that such references were an indication that Bing’s technical solution could work as a remedy.³⁵⁹ Looking at the CM today, it does appear to simply copy Bing’s mechanism of allowing aggregators to upload product feeds on behalf of merchants.
- 451 However, by copying Bing’s solution and selling it as a remedy to the Commission, Google also revealed that its chosen mechanism creates a CSS in itself. This is because Google – and subsequently the Decision – explicitly call Bing’s powering of Product Listing Units in its general search results pages a “CSS”. Crucially, Google and the Decision called Bing’s powering of Product Listing Units a “CSS” even though Bing had always allowed aggregators to upload product feeds – just like the current Google CM. If Bing’s powering of Product Listing Units was considered a CSS, even though it works the same way as Google’s CM, i.e., Google’s provision of (even more sophisticated) Shopping Units is unable to be viewed as anything other than a CSS.
- 452 Crucially, neither the complainants nor the Commission ever indicated that Bing’s mechanism may serve as a remedy.³⁶⁰ Bing does not have a dominant position and is not bound to treat competing CSSs equally. As a consequence, even in theory, copying Bing’s solution (which ultimately was just a copy of Google’s own solution), is not a suitable way to implement the Decision.

1.3.2 The richer CM-Shopping Units allow even more product comparisons than its predecessors

- 453 Against this background, there are even stronger reasons that the current powering of CM-Shopping Units also constitutes a CSS as well.

³⁵⁸ See Commission, LoF in Case AT.39740, para. 49.

³⁵⁹ Google, Application in Case T-612/17, para. 202: *“In its Letter of Facts, the Commission pointed to the way Bing shows product ads [...] as an approach to end the alleged infringement”*.

³⁶⁰ See Commission, Defence in Case T-612/17, para. 153: *“the Letter of Facts did **not** point to Bing’s current approach to showing competing CSSs [...] as “an approach to end the [...] infringement” (§202). Rather, the Letter of Facts simply noted that each approach “indicates that it would be technically feasible for Google to use the same underlying processes and methods in deciding the positioning and display of the results of its own comparison shopping service.” (emphasis added).*

- 454 First, the provision of CM-Shopping Units follows the same mechanisms and functionalities as the provision of Shopping Units before the Decision – which the Decision viewed as a CSS (see above at ¶¶322 et seq.).
- 455 In particular, the provision of Shopping Units encompasses all of the matching activities and functionalities listed above that make up a genuine CSS.
- 456 Second, the CM-Shopping Units do not contain any less product information than the previous Shopping Units that were sufficient to constitute a CSS. On the contrary, since the CM, the Shopping Units contain even more product items and information:
- **During the infringement period**, *“where [a Shopping Unit] is positioned on the left-hand side of the first general search results page, it generally feature[d] **five items** spread across one row. In instances where it is positioned on the right-hand side [...], it generally feature[d] **eight items** distributed over two rows.”*³⁶¹
 - **Today**, under the CM, on desktops a CM-Shopping Unit on the left-hand side typically features at least ten, often **up to thirty items**: a Shopping Unit on the right-hand side typically features nine items over two rows:

³⁶¹ Decision, recital 395 (emphasis added).

CHAPTER 4: LEGAL ASSESSMENT OF GOOGLE'S COMPLIANCE MECHANISM

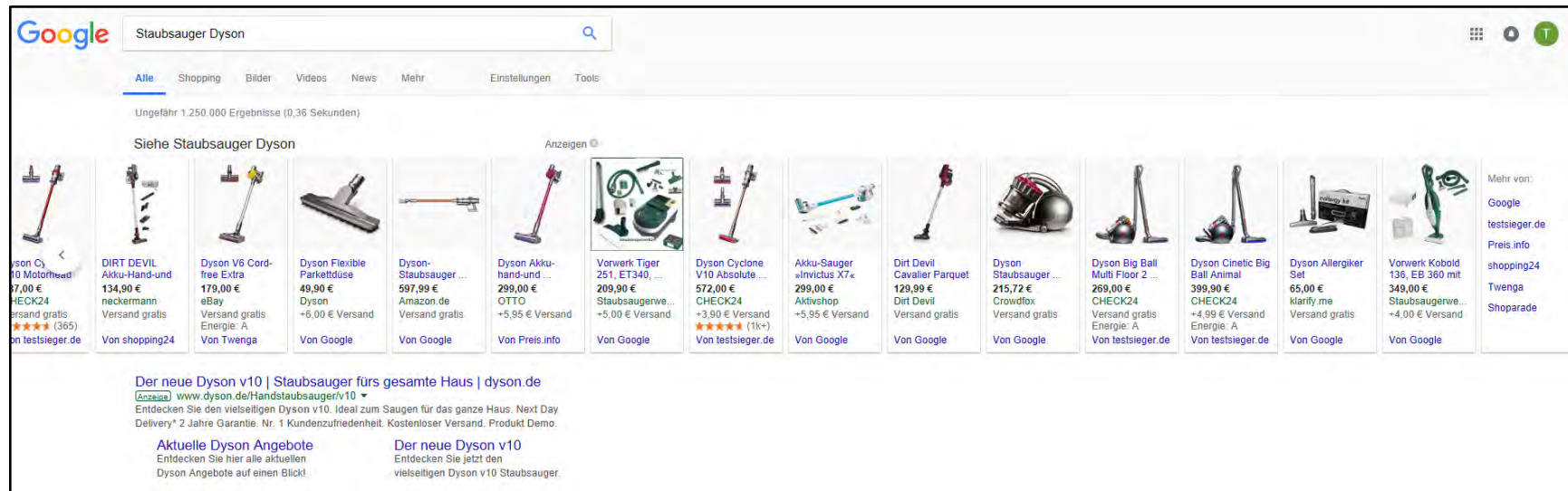
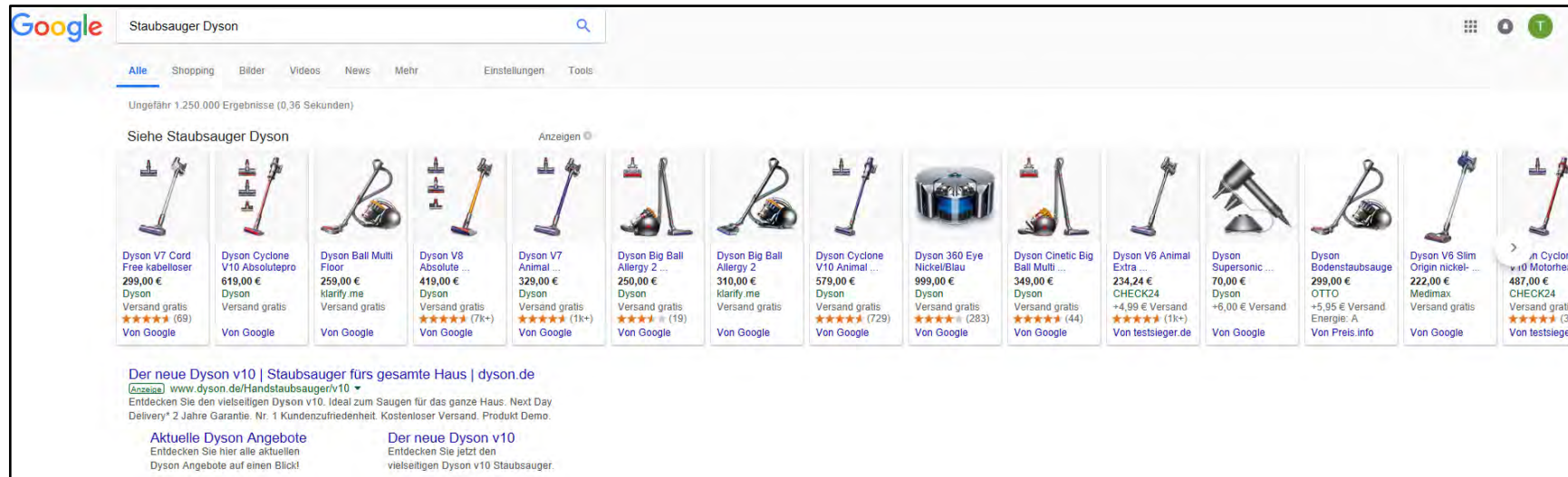


Illustration 60: Screenshot of thirty product items in one CM-Shopping Unit at top of the site

The screenshot shows a Google search for 'iphone xs'. On the right side, there is a grid of product listings for various iPhone models. A red box highlights a specific section of this grid, and a red callout box on the right states: "CM-Shopping Unit, implemented on Google's general search results pages, constitutes a standalone CSS".

Illustration 61: Nine product items in one CM-Shopping Unit on right-hand side

The screenshot shows a Google Shopping ad for 'puma schu... ansehen'. A red box highlights a specific product listing. A red callout box on the right lists six components of the shopping ad: 1) Product image, 2) Product name / description, 3) Product price, 4) Merchant name, 5) Shipping fee / information, and 6) Name of CSS / link to CSS. The bottom of the screenshot is labeled "Shopping Ads".

Illustration 62: Screenshot of product information in standard Shopping Ad

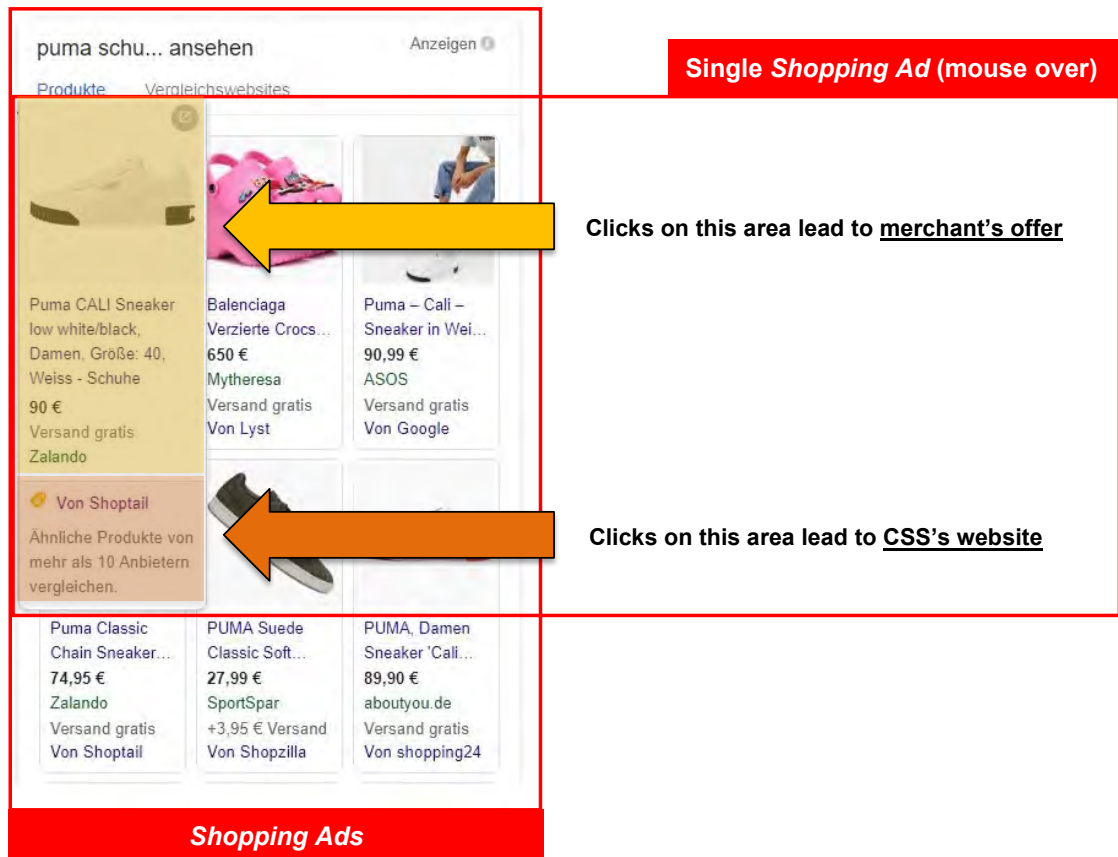


Illustration 63: Screenshot illustrating link structure of standard Shopping Ad

- 457 Third, the CM-Shopping Units often provide consumers with even more functionalities to fine-tune their search than the CM's predecessors. For specific search queries, the CM-Shopping Unit now even allows filtering within the CM-Shopping Unit and, apart from links to merchants, the CM-Shopping Units also offer links to CSSs. In addition, they allow users to pre-define which colour and/or model in which they are interested, as in the example below:

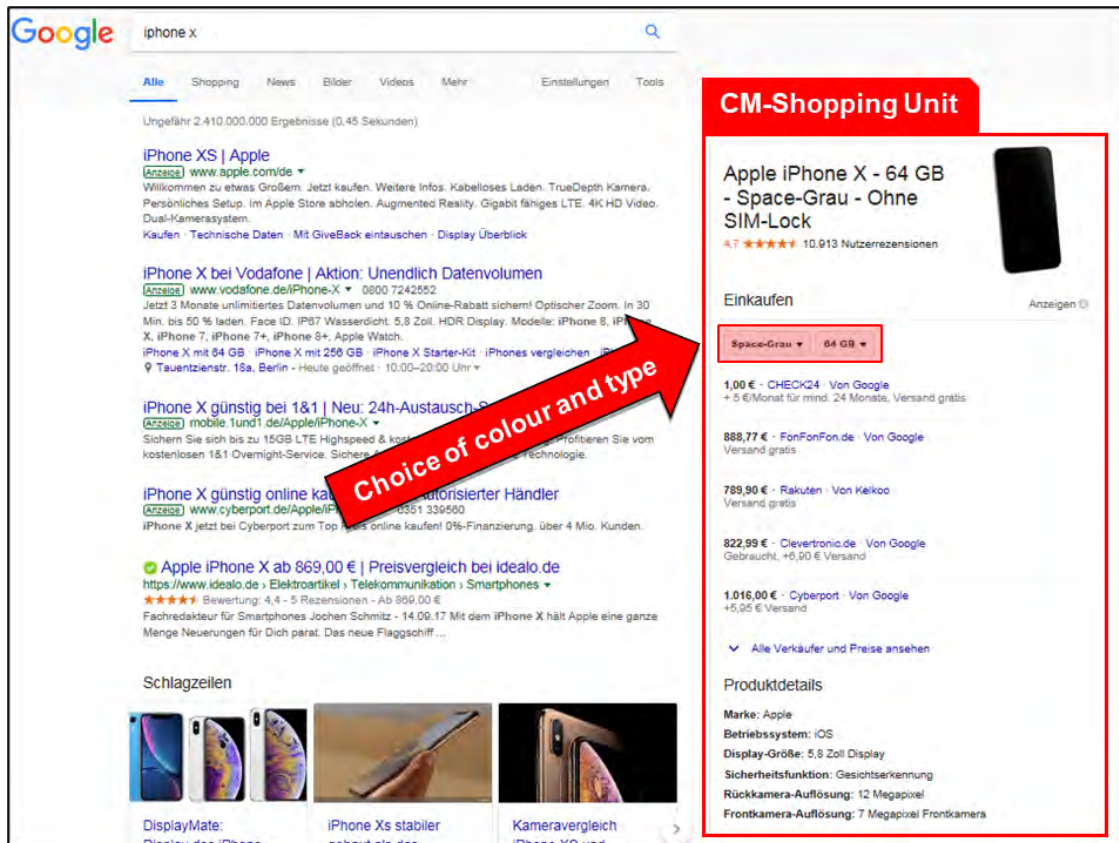


Illustration 64: Screenshot of CM-Shopping Unit with choice of product colour and type

458 Google also offered users the following further option to “compare the prices” within a CM-Shopping Unit:

CM-Shopping Unit

Apple iPhone X
★★★★★ 11,383 reviews

Details Reviews Shops

Shop now

Color Capacity

€108.99 - CHECK24 - By testsieger.de
Apple iPhone X 256 GB silber mit Vertrag + Allnet Flat ab 1 € bei CHEC...
+ €80/month for min 24 months, Free shipping

€272.00 - Back Market - By Google
Space-Grau - 64 GB
Refurbished, +€9.90 shipping

€629.90 - mobilshop3000 - By Google
Space-Grau - 256 GB
Used, Free shipping

€849.00 - real.de - By Adference Shopping
Silber - 64 GB
€2,830.00 / 1 kg, free shipping

€724.98 - refurb.de - By Surprice
Wie Neu: iPhone X | 64 GB | spacegrau
Refurbished, Free shipping

→ Compare prices

Compare prices

Illustration 65: Screenshot of CM-Shopping Unit with option to compare (even more) prices

- 459 A click on the option “compare prices” leads the searcher to a further sub-page with more details:

Apple iPhone X
★★★★★ 15,913 Rezensionen

Farbe: ☐ Versandkostenfrei ☐ Geschäfte mit Top-Bewertung

Speicherplatz: ☐ Generalüberholt oder gebraucht

Anzeigen

Verkauft von	Produktinformationen	Details und Sonderangebote	Artikelpreis
refurbed.de	Gebraucht iPhone X 256 GB spacegrau	Versand gratis - Erneuert	489,99 € Zur Website Von shopping24
Back Market	iPhone X 256 Gb - Silber - Ohne Vertrag	Versand gratis - Erneuert	481,84 € Zur Website Von Google
cellonix.de	Silber - 64 GB	Versand gratis	399,00 € Zur Website Von Google
eBay	Apple iPhone X - 64gb - Silber (ohne Simlock) A1901 (gsm)	+15,50 € Versand - Gebraucht	300,00 € Zur Website Von Shopping.com
flip4shop.de	Apple iPhone X, Gebraucht / 64 GB / Silber	Versand gratis	424,99 € Zur Website Von Google
ebay.it	Apple iPhone X - 256gb - Silber - Rechnung - Super Zustand - Facet Defekt	+5,99 € Versand - Gebraucht	300,00 € Zur Website Von Pricelist.com
altshop.de	Apple iPhone X (64GB) - Silber	Versand gratis	465,99 € Zur Website Von Catalove
HolyDogWater	Movil Apple iPhone X A1901 64GB Libre Plata Usado A	Versand gratis - Gebraucht	469,99 € Zur Website Von Altviolet

Illustration 66: Screenshot of a pop-up window with further filters that opens up after a click on the price filter in a CM-Shopping Unit

- 460 On mobile devices, as of 2020, there are even more search functionalities within CM-Shopping Units. In fact, as the screenshots below demonstrate, Google is consistently expanding the scope and depth of information contained in such boxes.
- 461 **On mobile devices, there is an ever-increasing variety of CM-Shopping Unit formats.** The standard format is a carousel with Shopping Units through which the user may scroll.

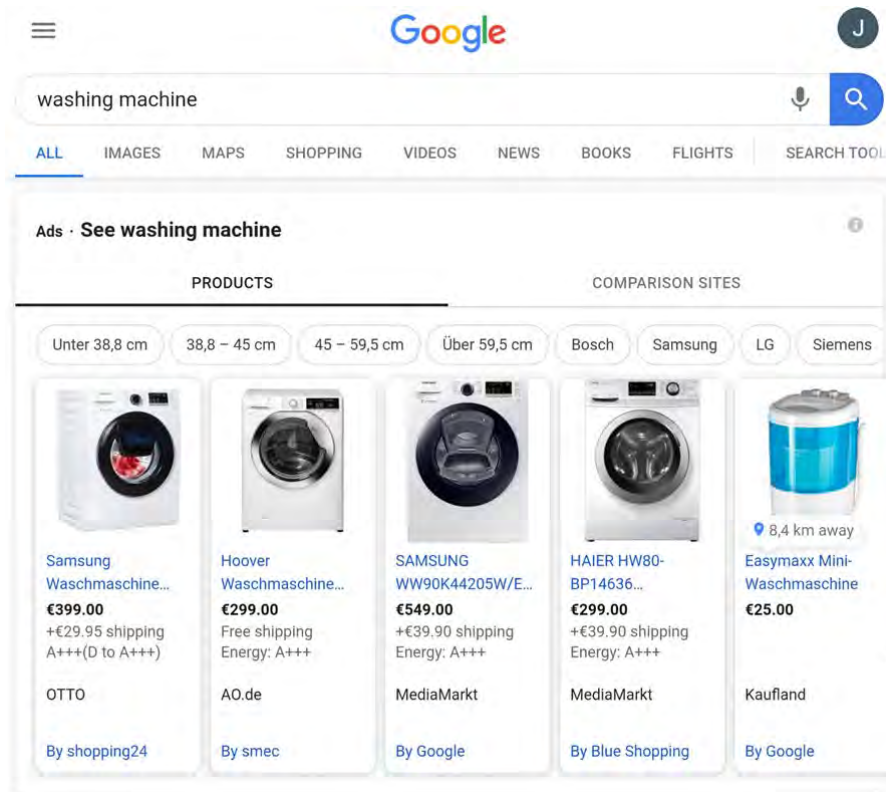


Illustration 67: Screenshot of a standard Shopping Unit on mobile device with various filter and sorting options

- 462 For more general search queries, Google's *Showcase Shopping Ads* now even feature up to over 200 product items – within one CM-Shopping Unit. The new *Showcase Shopping Ads* are presented in response to more general search queries. They enable consumers to compare different merchants on the first layer of the CM-Shopping Unit. If the user clicks further (staying within Google's general search results pages), then the user may compare various products of the merchant. This is a traditional CSS for more general search queries. Many of the search queries that, during the infringement period, triggered the well-known Shopping Units from Google Shopping are now served with CM-Shopping Units containing *Showcase Shopping Ads*, one example being the following:

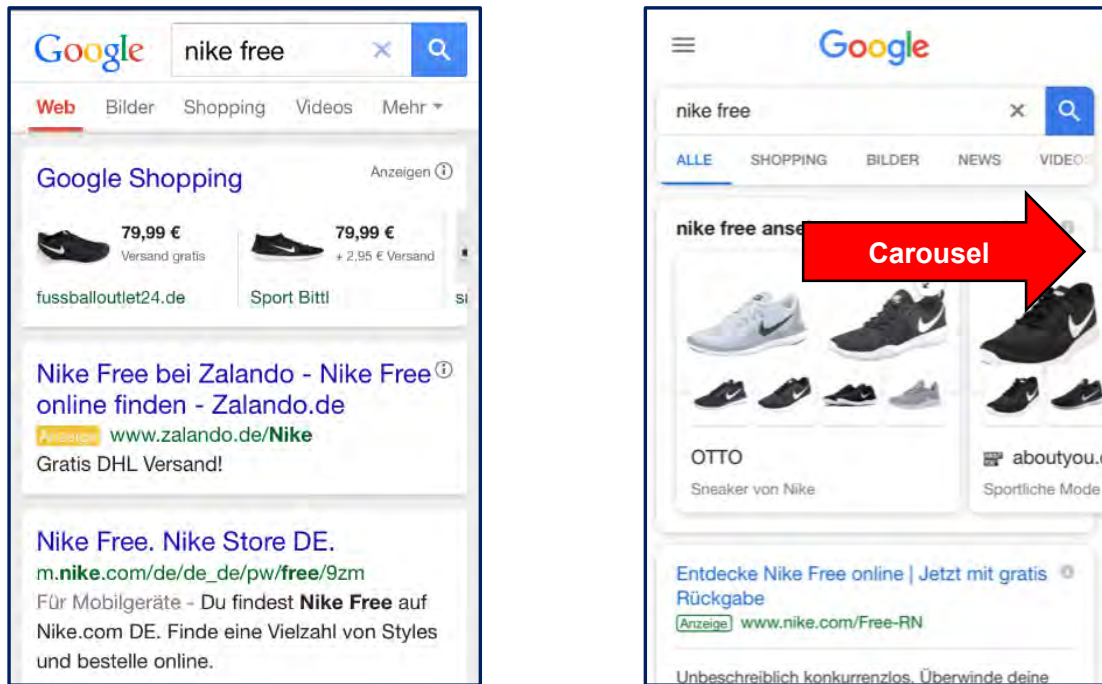


Illustration 68: Screenshots of (i) a Shopping Unit before the Decision for “Nike free”; (ii) a CM-Shopping Unit with Showcase Shopping Ad for the same search query and no mentioning of a CSS after the Decision


- 463 Crucially, these *Showcase Shopping Ads* are not powered by GSE. Rather, merchants and CSSs may choose them as an alternative to *Shopping Ads* in the Google Merchant Center (which is also used to set up the CM). In other words, it is Google’s on-SERP-CSS that is operating such *Showcase Shopping Ads* – and is thereby expanding its business from *Shopping Ads*.
- 464 For more specific search queries on mobile devices, Google uses CM-Shopping Units that focus more on background information. The four screenshots below, for instance, are all taken via Google’s general search results page in return of a search for “iphone X”. Note that the various options to fine-tune the search within the Shopping Unit (e.g. regarding colour, capacity, reviews, product information, delivery details, etc.).

Overview

←
→

Samsung Galaxy S10
★★★★★ 53.419 Rezensionen

ÜBERSICHT ONLINESHOPS & GESCHÄFTE DETAILS



Anzeigen · EINKAUFEN

Farbe ▾
Speicherpl... ▾

Telekom Samsung Galaxy S10 mit Vertrag, 24 Monatsraten Von Yamondo	219,90 € Versand gratis
MediaMarkt Schwarz · 128GB Von Blue Shopping	639,00 € Versand gratis
saturn.de SAMSUNG Galaxy S10 Enterprise Edition Smartphone Von Google	599,00 € Versand gratis

Merchants

←
→

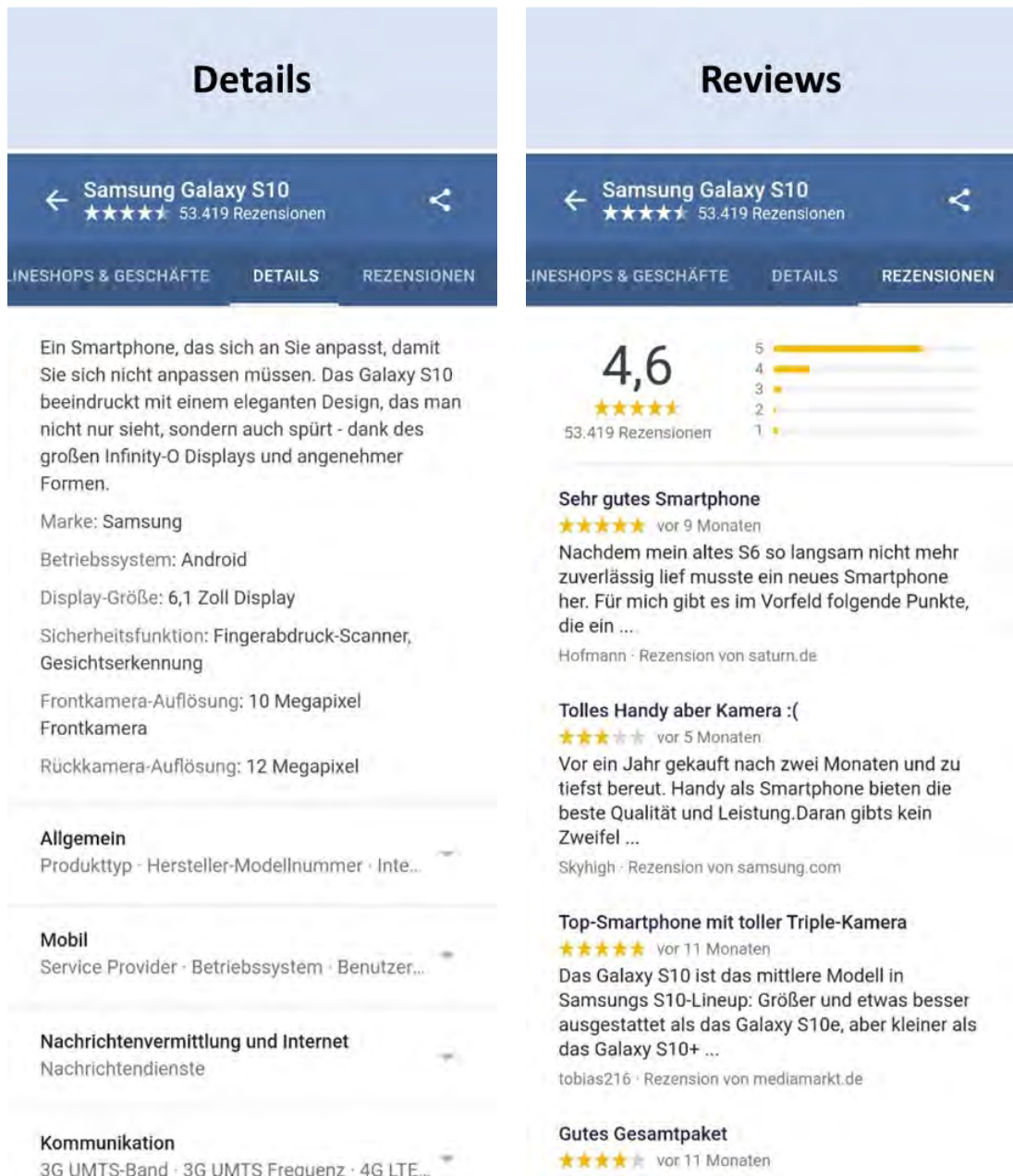
Samsung Galaxy S10
★★★★★ 53.419 Rezensionen

ÜBERSICHT ONLINESHOPS & GESCHÄFTE DETAILS

Anzeigen · EINKAUFEN

Farbe ▾
Speicherpl... ▾

Telekom Samsung Galaxy S10 mit Vertrag, 24 Monatsraten Von Yamondo	219,90 € Versand gratis
MediaMarkt Schwarz · 128GB Von Blue Shopping	639,00 € Versand gratis
saturn.de SAMSUNG Galaxy S10 Enterprise Edition Smartphone Von Google	599,00 € Versand gratis
Clevertronic.de Blau · 128GB Von Smarketer	460,99 € gebraucht +6,90 € Versand
idealo Samsung Galaxy S10 128GB Prism Black Von Google	554,89 € Versand gratis
CHECK24 Samsung Galaxy S10 128 mind. 24 × 35 €/Monat	24,99 €



Illustrations 69-70: Screenshots of a single-product CM-Shopping Unit ("Product View of Shopping Unit") on mobile device without various filters, reviews, information and search functionalities

- 465 It is also worth noting that, on the first layer of the CM-Shopping Unit (appearing on the general results page), there is no mention of any CSS that has been bidding for the *Shopping Ads*. Such link only appears after a click, *i.e.*, on a second layer of the CM-Shopping Unit.
- 466 In addition, Google is currently experimenting with even more search filters within the regular mobile CM-Shopping Units. By way of example, as of 2020, Google allows users to narrow down their search by a price range or by specific product characteristics (such as the type of camera). These are traditional features of a CSS:

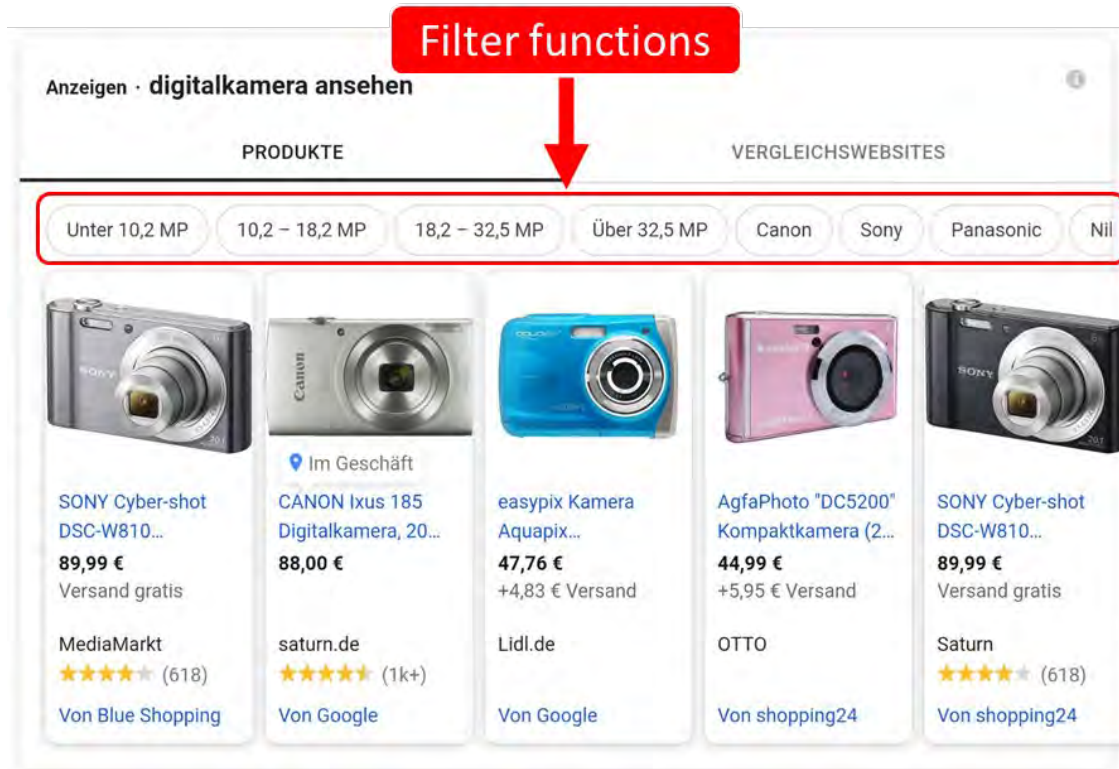


Illustration 71: Screenshot of new CM-Shopping Units with even more filter options

- 467 If the user searches for a certain product (e.g., "Samsung Galaxy S10") instead of a product group (e.g., "Adidas shoes"), Google now shows a product-specific format of a CM-Shopping Unit with additional options and further features that are typical for CSSs.

General search results pages

New form of CM-SU with additional options and extra rich features

CM-SU option menu

Product results from competing third-party CSSs

"Compare prices"

"More details"

"More prices"

The screenshot displays a Google search for 'samsung galaxy s10'. The results include a top section with product highlights, a 'Top stories' section with news snippets, a 'Videos' section with review thumbnails, and a 'People also ask' section. A prominent red box on the right side of the page highlights the 'Product View of Shopping Unit', which includes a 'Shop now' section with prices from various retailers (e.g., CHECK24, Global Central, real.de, Cyberport, ModMarkt) and a 'User reviews' section with a 4.6 rating. Red arrows with text labels point to specific features: 'CM-SU option menu' points to the 'Details' button; 'Product results from competing third-party CSSs' points to the list of prices from different retailers; 'Compare prices' points to the 'Compare prices' button; 'More details' points to the 'More details' button; and 'More prices' points to the 'More prices' button.

Illustration 72: Screenshot of the "Product View of Shopping Unit", illustrating filters and search functionalities

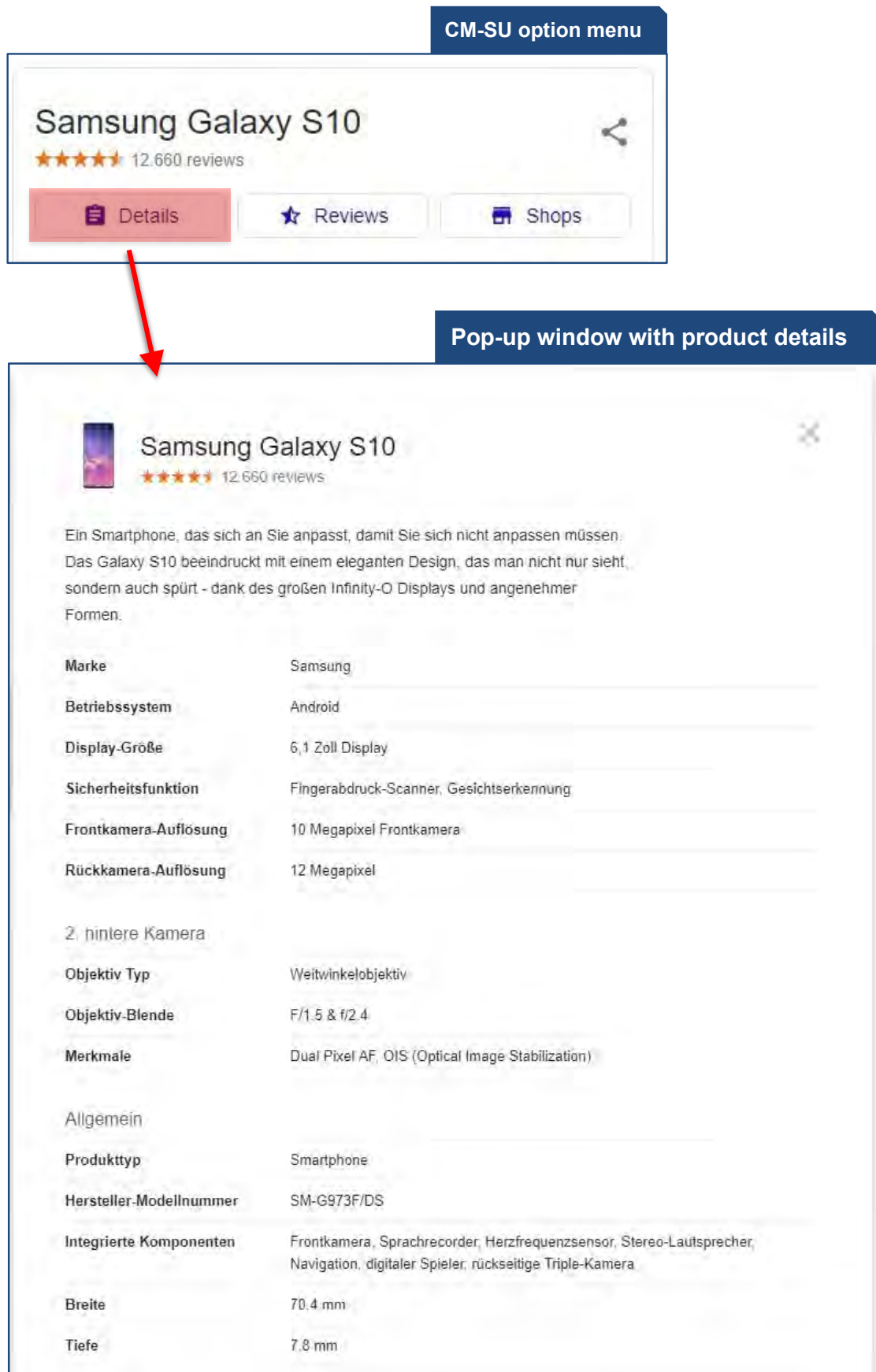


Illustration 73: Screenshot of the "Product View of Shopping Unit" - "details" button and pop-up window with all relevant product details a CSS could possibly provide

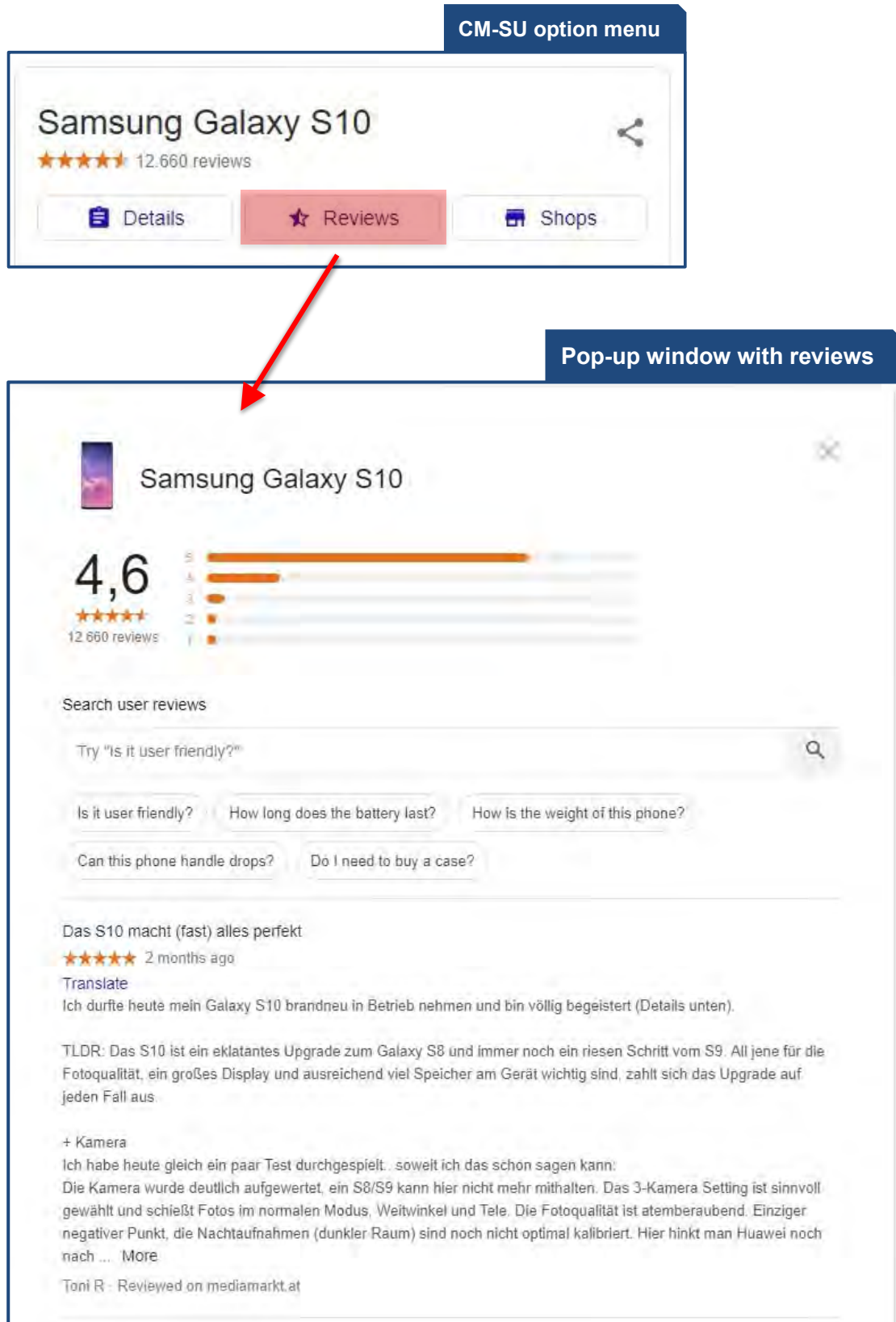


Illustration 74: Screenshot of the "Product View of Shopping Unit" - "Reviews" button and pop-up windows with ratings, reviews and customer Q&As - all CSS functionalities

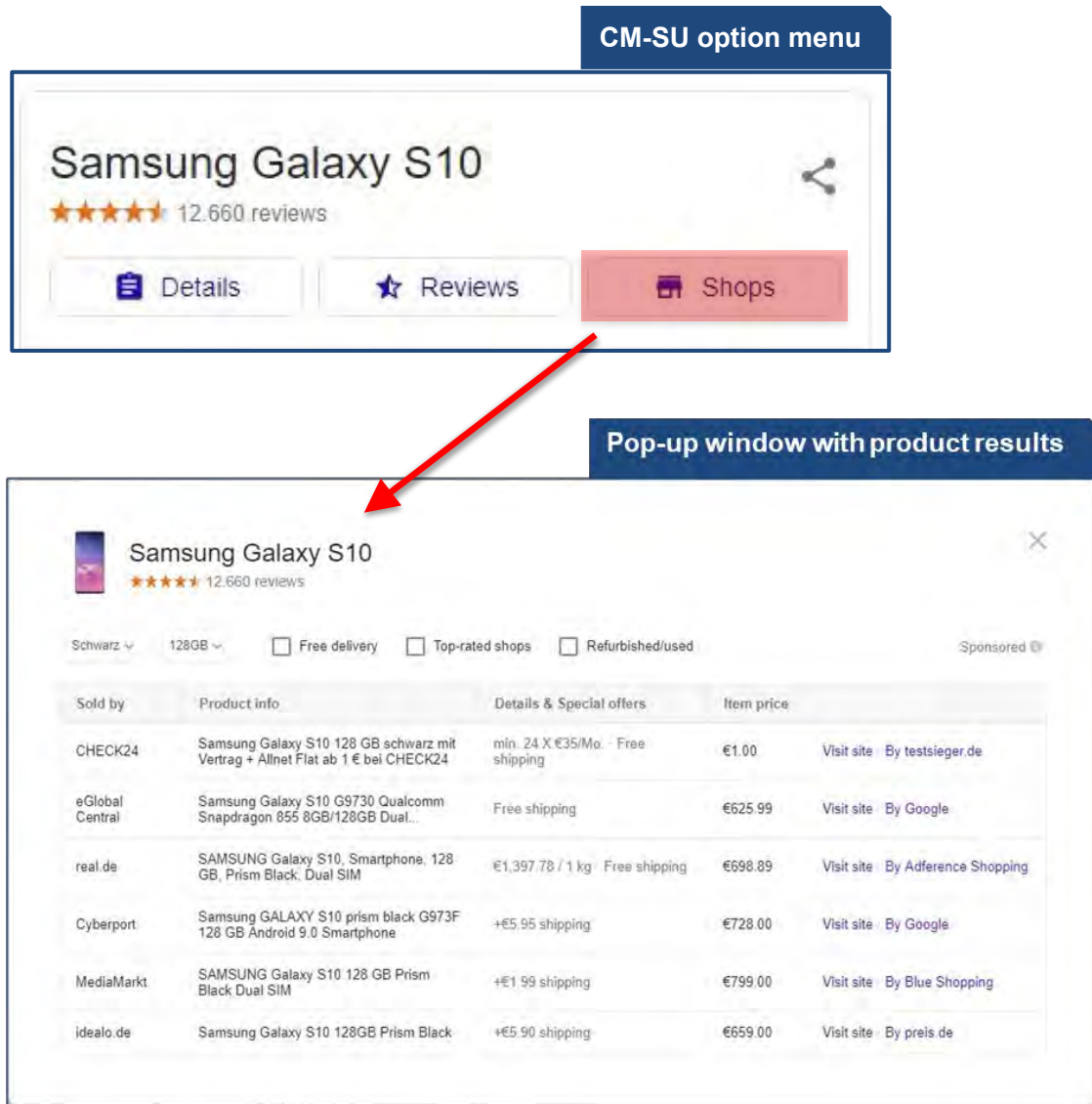


Illustration 75: Screenshot of the "Product View of Shopping Unit" - "Shops" button and pop-up windows with detailed product offers and further filters – all CSS functionalities

468 Fourth, the CM-Shopping Units contain a broader range of products to compare than previous versions. Previously, only merchant customers of *Google Shopping* participated. Now the CM is instrumentalising competing CSSs to invite new merchants to Google in order to serve *Shopping Ads*. Thus, CM-Shopping Units may display a wider scope of merchants.

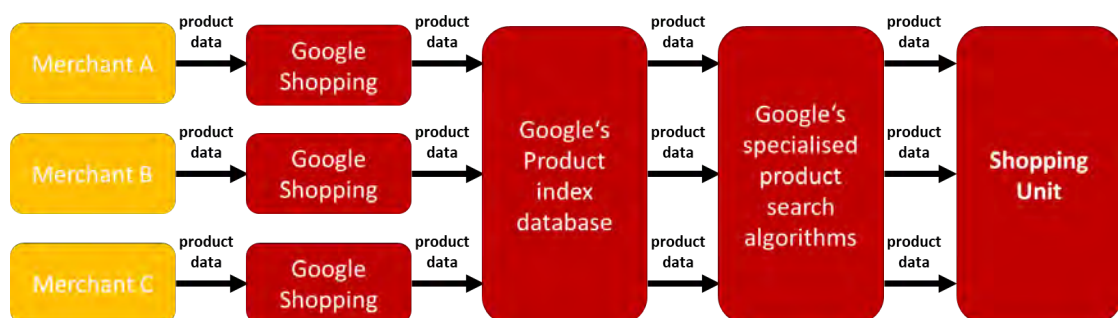


Illustration 76: Uploading of product data to Google's CSS before the Decision.

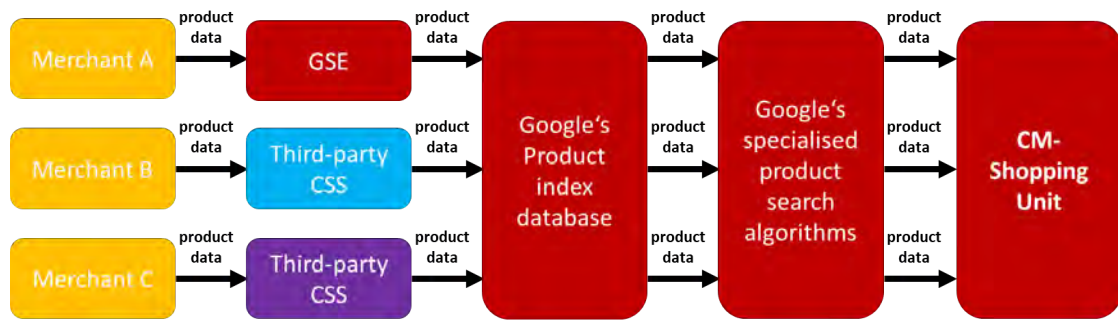


Illustration 77: Uploading of product data to Google's CSS after the Decision

- 469 Fifth, it is to be assumed that Google is displaying CM-Shopping Units more often than Shopping Units during the infringement period. This is particularly the case in return of more long-tail search queries. It is assumed that this is the result of the fact that more (Fake) CSSs are introducing more niche merchants to place *Shopping Ads* on Google. As a result, Google's on-SERP-CSS has a broader choice of product items from which to choose, and hence better options to power Shopping Units for even more search queries. We have heard that, in some Nordic countries, the CM actually helped Google in launching Shopping Units for the first time.
- 470 Sixth, the CM-Shopping Units are larger than its predecessors, allowing users to compare larger, more detailed product images (see screenshots above).
- 471 Moreover, during the infringement period, Shopping Units were always “*positioned above the first generic search result*” but below the *AdWords* text ads if the unit appeared on the left-hand side. Now CM-Shopping Units are even positioned above the first paid search results (see example above). This fact alone shows that CM-Shopping Units are not designed as ‘teasers’ for consumers to click to a CSS; rather, they are designed as a means to allow them to compare products directly on Google. The screenshots for mobile product searches above leave no doubt.
- 472 Seventh, since the introduction of the CM, the variety of Shopping Units has increased. We now find units that merely compare different *products* and those that compare different *prices* for the same product (see examples above).
- 473 As a result of the above, almost all Shopping Units now contain so much product information that they “*allow users to search for products and compare their prices and characteristics across the offers of several different online retailers [...] and merchant platforms*” as required by recital (191) of the Decision to form a CSS.
- 474 The fact that there is no separate toolbar to enter search queries is irrelevant. Between 2013 and 2016 there was no such toolbar in those six countries where Google only

operated Shopping Units (see above at ¶333). In such case, Google's general search toolbar also serves as the means to "*allow users to search for products*". There is nothing in the Decision to suggest that there is a need for a separate toolbar.

475 For merchants, nothing has changed regarding the upload of product feeds. They have only obtained additional opportunities to use intermediaries (i.e., CSSs) to organise the bidding on their behalf.

1.3.3 Including product ads uploaded by CSSs on behalf of merchants does not alter the fact that the provision of CM-Shopping Units constitutes a CSS

476 For several reasons, the fact that product results of competing third-party CSSs are displayed in the CM-Shopping Units does not alter the fact that the powering of such units constitutes a CSS.

477 First, the Decision's definition in recital (191) only requires that the product offers listed by a CSS come from "*several different online retailers (also referred to as online merchants) and merchant platforms*". The Decision does not preclude a CSS from obtaining its product data (also) from other CSSs – provided such CSSs list product offers from "*several different online retailers*". Thus, it is clear that the essential prerequisite of a CSS is that it lists product offers from several different online retailers, wherever they come from.

478 The only difference compared to the situation prior to the Decision is that Google is now forcing online retailers and merchants to use a CSS to place *Shopping Ads* in the Shopping Unit. However, this does not alter the fact that Google is obtaining the product data from the online retailers and merchants – even if this is achieved via the help of GSE or competing third-party CSSs.

479 Second, the Commission defined the relevant market for CSSs from the perspective of users (see recital (191): "*allow users*"). Whether or not such product offers are directly provided by the online retailers is irrelevant, since this is an irrelevant fact from the relevant user's perspective. Rather, users want to compare products and prices – not product data sources or websites.

480 Third, Google did not design and build the CM-Shopping Unit as a comparison tool for different CSSs or different product data sources. As regards the content design and the graphics of the CM-Shopping Units, users do not recognise at first glance that the CM-Shopping Units contains not only product results of GSE, but also those of competing

third-party CSSs. The design of the CM-Shopping Unit is made to compare products and prices – as this is typical for CSSs. GSE and its competitors hardly appear in such units. They do not give the CM-Shopping Units their specific nature. In the end, from a user's perspective as to the core functions of a CSS (*i.e.*, comparing products and prices), there is no difference between the Shopping Units prior to the Decision and the Shopping Units after the Decision. To the contrary, the CM-Shopping Units have a richer design and additional CSS-features compared to the Shopping Units before the Decision.

1.3.4 That CM-Shopping Units are meant to guide the user to the merchant's website as quickly as possible by satisfying their comparison demand directly further confirms the CSS status

- 481 With regard to Google's business model and the CPC pricing model, one could argue that CM-Shopping Units are probably meant to guide the user to the online retailer's or merchant's website as quickly as possible. However, even if this were true, for several reasons this would not alter the fact that the powering of CM-Shopping Units constitutes a CSS.
- 482 First, CSSs are precisely intended to guide users to the merchant's website as quickly as possible. Users use CSSs to "*search for products and compare their prices and characteristics*" (see recital (191) of the Decision). It goes without saying that users are not interested in a product search process lasting for hours. Their main goal is to buy a product from the merchant – and not from the CSS. This is precisely why users are highly interested in obtaining information regarding the best product and best price by using a CSS as quickly as possible.
- 483 Second, because of the CPC pricing model, it is not the business model of CSSs to keep users on their websites for as long as possible. Providers of CSSs only earn money if users click on the product results. This is why CSSs are interested in guiding users to the merchant's websites as quickly as possible. The faster the user clicks on a product link, the better. This is true even for CSSs with product and price comparison features better than those of its competitors. In the end, such services want the user to click on product results as well.
- 484 Ultimately, Google's own choice of the design for Shopping Units confirms that its provision must constitute a CSS – there is an undeniable consumer demand for

comparison shopping services that forms the basis for this market.³⁶² Under Google's CM, a user may enter any product search query on Google to express his or her demand for a product or price comparison. Regardless of how generic or specific the query is, Google will match it with a corresponding Shopping Unit that reflects the likely "level" of the user in its consumer journey. 99% of the clicks that ultimately lead the user to a website outside of Google then go directly to a merchant's site. On such product landing page, no further products and prices can be compared (as the merchant does not show rival offers). Instead, on this page the purchase is concluded. However, during this entire customer journey from entering the query on Google, up to purchasing the product on the merchant's site, the user only ever sees one frontend for the comparison of the products and prices, i.e., Google's Shopping Units.

485 If a user came to Google with a demand for a product and price comparison originally and then ultimately purchases a product at the merchant's website, s/he obviously must have satisfied its demand somewhere. The demand does not suddenly vanish. The only service, however, that may have satisfied that user's demand for a product or price comparison between entering a query on Google Search and purchasing a product on a merchant's site is Google's provision of Shopping Units. Accordingly, if – fully aware of user's search interests – Google designs its Shopping Units in a way that click-outs lead the user directly to a merchant's website (instead of a CSS's site) to purchase the product, this suggests that Google itself does not consider any visit to any other CSS frontend to be necessary for the user. This is because Google knows that its query-based and permanently updating Shopping Units satisfy the demand for product and price comparison services.

1.3.5 The fact that consumers use Shopping Units more and more although the frontends of competing CSSs offer more filtering options further confirms the CSS nature of Shopping Units and the continuing abuse

486 During the investigation, Google has argued that Shopping Units cannot constitute a CSS because they show only a limited number of product offers and contain less filter options than the standalone Google Shopping website.

487 This argument of Google is factually outdated, now as CM-Shopping Units contain a potentially unlimited number of product offers (see above at ¶453 and below at ¶¶546 et seq.). However, even for lack of such new features, the argument has no merit.

³⁶² See Decision, section 5.2.2.

488 The different design and content of Shopping Units as compared to standalone comparison websites does not change the nature of the service offered by Google.³⁶³ Provided a product and price comparison service has the CSS core features mentioned in recital (191) of the Decision, in particular an independently operating backend for matching queries with product offers, the quality of the CSS in terms of filter and sorting options offered has no influence on its qualification as a CSS. Otherwise, services of inferior quality would automatically fall outside of the CSS market.

489 On the contrary, the fact that Google's Shopping Units are so successful despite less filtering options provided by some competitors only confirms the abuse of dominance. This has been well observed, and was established by the Turkish Competition Authority in its Google Shopping Decision of February 2020:

*"As can be seen from the examples, it is understood that competitors operating in the market for comparison shopping services offer more options to the user compared to the number of filters, number of products, historical price information, and the options offered to users by Google."*³⁶⁴

*"In light of the description above, consumers prefer to use Shopping Units and tend to use it more and more, although it is indicated to be ad space. Therefore, as a result of the information obtained within the scope of the file and searches on competing sites, it is assessed that the presentation of Google Shopping, which offers less options and content at first glance than its competitors, with the above mentioned display shape and location, may artificially emit consumers' preferences and lead to a decrease in consumer welfare."*³⁶⁵

490 In other words, the fact that Google's Shopping Units are used more often even though they contain less features than competing sites only confirms the anti-competitive effects of the favouring of Shopping Units in Google's general results pages. This was also a central element of the Decision. One of its core findings is that Google could establish its CSS of inferior quality on the CSS market only by favouring its service over the services of competitors.³⁶⁶

491 It is contradictory for Google to argue that the provision of its Shopping Units may not constitute a CSS because (some) Shopping Units have less filtering and sorting options than competing CSS's standalone website provide, while at the same time more and more users use Google's Shopping Units and click directly to merchants to conclude a sale. Either the Shopping Units are so poor that they cannot provide a CSS – in this

³⁶³ See TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, paras. 154, 186, 189.

³⁶⁴ *Ibid.*, para. 186.

³⁶⁵ *Ibid.*, para. 189.

³⁶⁶ Decision, recitals (489) to (494).

case, Google should lead the user to a CSS website where they can satisfy their demand – or they are in fact providing the service directly. In that case, there is no question about its nature as a CSS.

1.3.6 The provision of CM-Shopping Units only fits into the definition of the market for CSSs

492 The finding that Google's provision of CM-Shopping Units constitutes a CSS that is independent of the provision of the standalone website by Google Shopping Europe, is further confirmed by the market definitions. The provision of such Units only fits the definition of the market for CSSs.

1.3.6.1 Google's provision of Shopping Units is not part of the market for general search services

493 The Decision distinguishes general search services from specialised search services (section 5.2.1.2.2.), in particular CSSs (section 5.2.2.). For the same reasons provided in the Decision, Google's provision of CM-Shopping Units belongs to the market for CSSs and not to that for general search services.³⁶⁷

494 First, the nature of Google's powering of Shopping Units under the CM ("Google's on-SERP-CSS") and its general search service is different. Google's on-SERP-CSS does not have the objective of providing all possible relevant results for queries. Rather, it focuses on providing purchasing options in the monetisable field of products. Google's on-SERP-CSS does not return any information other than that regarding products. Moreover, it is only displayed in response to search queries that suggest an interest in comparing products and their characteristics ("product queries").

495 Second, there are a number of significant differences in the technical features of Google's on-SERP-CSS and its general search service.

496 In the first place, Google's on-SERP-CSS entirely relies on product feeds that were actively uploaded to the Google Merchant Center. The main input for Google's general search service originates from an automated process called "web crawling". Google's on-SERP-CSS does not crawl any websites (despite the technical possibility to do so).

497 In the second place, Google's on-SERP-CSS is monetised differently. While Google's general search service is monetised through text ads that are served in a manner

³⁶⁷ The following paragraphs adjust the general market delineation under the Decision to the specifics of Google's on-SERP-CSS.

corresponding to keywords, Google's on-SERP-CSS is financed by paid inclusions, which correspond to a particular product; i.e., instead of a keyword-based auction, there is a product-based auction.

- 498 Third, the facts observed in the market, the history of the development of the products concerned and Google's commercial practice further support the conclusion that Google's on-SERP-CSS and its general search service are different.
- 499 In the first place, specialised CSSs have been offered on a standalone basis for several years now. Examples include CSSs such as Shopzilla, LeGuide, idealo, Bestlist, Kelkoo and Twenga. Due to the high barriers to entry, none of such companies also offers a general search service.
- 500 While most of these services focus on attracting users directly to their website in order to compare products and prices there, it is not uncommon to co-operate with third-party websites to provide the frontend on such websites.³⁶⁸ Accordingly, the fact that Google's on-SERP-CSS is displayed on a third-party website (*Google Search*), is irrelevant. In fact, the Commission has already found that the provision of Product Listing Units by a general search service as well as the provision of Product Listing Units on third-party websites constitute a CSS.³⁶⁹ This is despite the fact that (i) in both cases the toolbar for entering the search query is not found within the Product Listing Unit but within the 'hosting' website (e.g. Bing Search or MyDealz) and (ii) the 'hosting' websites also provide their own general or specialised search service.
- 501 Similarly, it is not uncommon for a specialised search service to allow its users to use one and the same toolbar to active the services of different specialised search services, active on different product markets.
- 502 For instance, in addition to a product search, idealo also offers consumers a search for flights, hotels and rental apartments – on the same website www.ideal.de. The same is true, for instance, for Check24 and Verivox. Both services allow users to enter search queries in a general search bar for various specialised search and comparison requests (such as rental cars, flights, etc.).

³⁶⁸ See above Chapter 4, A.1.2.4.2 (¶¶376 et seq.) with the example of idealo's Product Listing Units being displayed on mydealz (illustration 56, see above at ¶379).

³⁶⁹ Decision, recital (613)(a)(c), see above Chapter 4, A.1.2.4 (¶¶349 et seq.).

503 Hence, the fact that Google allows consumers to use the toolbar on the website of Google Search as an interface to also send queries to Google's specialised on-SERP-CSS is neither unusual nor a relevant criterion of a distinguished, specialised search service when compared to a general search service. With a view to Google Search, the Decision found that, "[w]hile the user interface may vary depending on the type of device, the underlying technology is essentially the same".³⁷⁰ The same is true for Google's on-SERP-CSS: For the nature of a CSS, where Google places the interface to consumers makes no difference: what matters is the technology that powers the specialised search results to any query entered on any interface.

504 The Google toolbar is just the first entry point for several different Google online services.



Illustration 78: Google's toolbar serving as a joint software frontend of several Google online services

505 One could argue that users of specialised search services with a standalone website have an intention that is different to that of users which enter a search query into the Google toolbar. It goes without saying that users of such services want to compare products, services and prices. In contrast, one could say that users, which enter a search query into the Google toolbar, simply want to search the World Wide Web. However, this is not the case. It may be correct that Google shows Shopping Units to a certain percentage of users, which do not have any interest in buying a product. However, the reason for such false assumption of the user's intention simply lies in a programming of Google's algorithms that is not yet fully developed. Such self-learning algorithms attempt to recognise the user's intention by analysing a user's search query and the user's search history.³⁷¹ Every time the algorithms 'think' that the user has the intention of buying a product, the algorithms show a Shopping Unit with product results to the user. It follows that the only difference between CSSs with standalone websites and Google's CSS in form of the provision of a Shopping Unit (accessible via the Google toolbar) is the fact that providers of CSSs with standalone websites know the user's

³⁷⁰ Decision, recital (9).

³⁷¹ Google Ads Help, "Why you're seeing an ad", <https://bit.ly/3iWFFt2>.

intention from the very beginning, whereas Google's algorithms initially attempt to recognise the user's intention. That this is not a relevant factor follows from the Decision's finding that Bing's provision of Product Listing Units forms a CSS, even though on Bing too, users first enter the toolbar of the general search service.

506 In the second place, Google offers and describes its on-SERP-CSS as a service distinct from its general search service. Within its Google Merchant Center help page, Google has a separate 'help page' for merchants interested in the on-SERP-CSS. As outlined above at ¶¶265 to 270, on all such pages, Google presents the on-SERP-CSS as a service to merchants as indirect customers (*"merchants participate in Shopping ads through one or several CSS of their choice"*) or CSSs as direct customers of Google's on-SERP-CSS.

507 Google offers its on-SERP-CSS as a separate standalone service and describes its functionality and purpose differently to how it describes its general search service (and its other service, *Google Shopping Europe*). In addition to the examples provided above at ¶¶265 to 271, there is, for example, a dedicated information page regarding the on-SERP-CSS entitled *"About advertising with Comparison Shopping Services"*. It describes the on-SERP-CSS as a new tool that

*helps [CSSs] and merchants to connect more effectively with shoppers through Shopping Ads [...] making access to Shopping Ads seamless for merchants".*³⁷²

508 There is no reference to this service within the description of Google's general search service.

509 Fourth, even though search results provided by its general search service sometimes overlap with the results provided by its on-SERP-CSS, the two types of search services act as complements rather than substitutes.

510 In the first place, Google's general search service is the only online search service on which users may potentially obtain relevant results from all categories of content at the same time.

³⁷² See Google Comparison Shopping Partners, "Grow your business with Google's CSS Partner program", <https://bit.ly/2FZj4gl>.

- 511 In the second place, Google's on-SERP-CSS offers certain search functionalities that do not exist on its general search service. For instance, *within* Google's CM-Shopping Units, users may fine-tune their search by choosing the colour or type of product.
- 512 Within other CM-Shopping Units, users may see the ratings for a product or the costs of delivery. Such functionalities are unavailable to the same extent within Google's generic search results or text ads for the same queries.
- 513 In the third place, a substantial number of users reach CSSs only after having first entered a query in a general search service such as that of Google. Hence, it is not uncommon for a CSS to be primarily accessible through Google's general search service.
- 514 Fourth, even though Google shows OneBoxes not only for product queries but also for many other types of search queries (e.g. persons, music, movies, lyrics), this does not necessarily mean that Google has implemented several specialised search services into its general search service, all accessible via the Google toolbar. Whether this is the case, and whether Google is operating on certain markets for specialised search services by integrating specialised search services into its generic search service is always a question of market definition. Much depends on whether the specialised service shares the same backend as the general search service or whether it uses its own cataloguing and indexing technologies and its own algorithms. In case of product search, the technical differences are so significant that the powering of CM-Shopping Units is not a part of Google's general search service, but rather constitutes a standalone CSS which is part of the CSS market. However, this does not imply that the provision of every single Google OneBox for specific search results constitutes a specialised search service. It follows that certain search results placed in OneBoxes could be also part of Google's general search service. It depends on the underlying infrastructure, the backend to such results. Thus, the finding that the provision of the CM-Shopping Unit constitutes a standalone CSS does not automatically lead to the artificial definition of micro-markets for every type of OneBox.

- 515 The Decision itself clarifies the fact that:

*"Google's general search results pages return different categories of search results, including generic search results [...] and specialised search results [...]."*³⁷³

³⁷³ Decision, recital (10).

*"When a user enters a query, Google's programmes essentially run two sets of algorithms: generic search algorithms and specialised search algorithms."*³⁷⁴

516 Against this background, the Decision does not find that all search results on Google's general search results pages are part of one service and market. Rather, it is possible that different search queries and results could be part of different services and markets. The Decision acknowledges that such different results and services,

*"[...] the generic search results and the specialised search results – appear together on Google's general search results pages."*³⁷⁵

517 Thus, it is clear that the Decision understands Google's general search results pages as a kind of software framework where Google can combine different horizontal and vertical search services and results. From a software developer's perspective, these different services are simply software modules put together and sorted by a main program routine (in this instance, the general search results pages). The Decision clearly acknowledges that Google provides several search services via a single toolbar and that one must make a difference between such services in light of the market definition criteria. In particular, one must ask whether there is a specific consumer demand for a vertical search service such as a CSS. In other words, putting generic search results in OneBoxes does not automatically constitute a vertical search service for each of these OneBoxes.

³⁷⁴ Decision, recital (11).

³⁷⁵ Decision, recital (13).

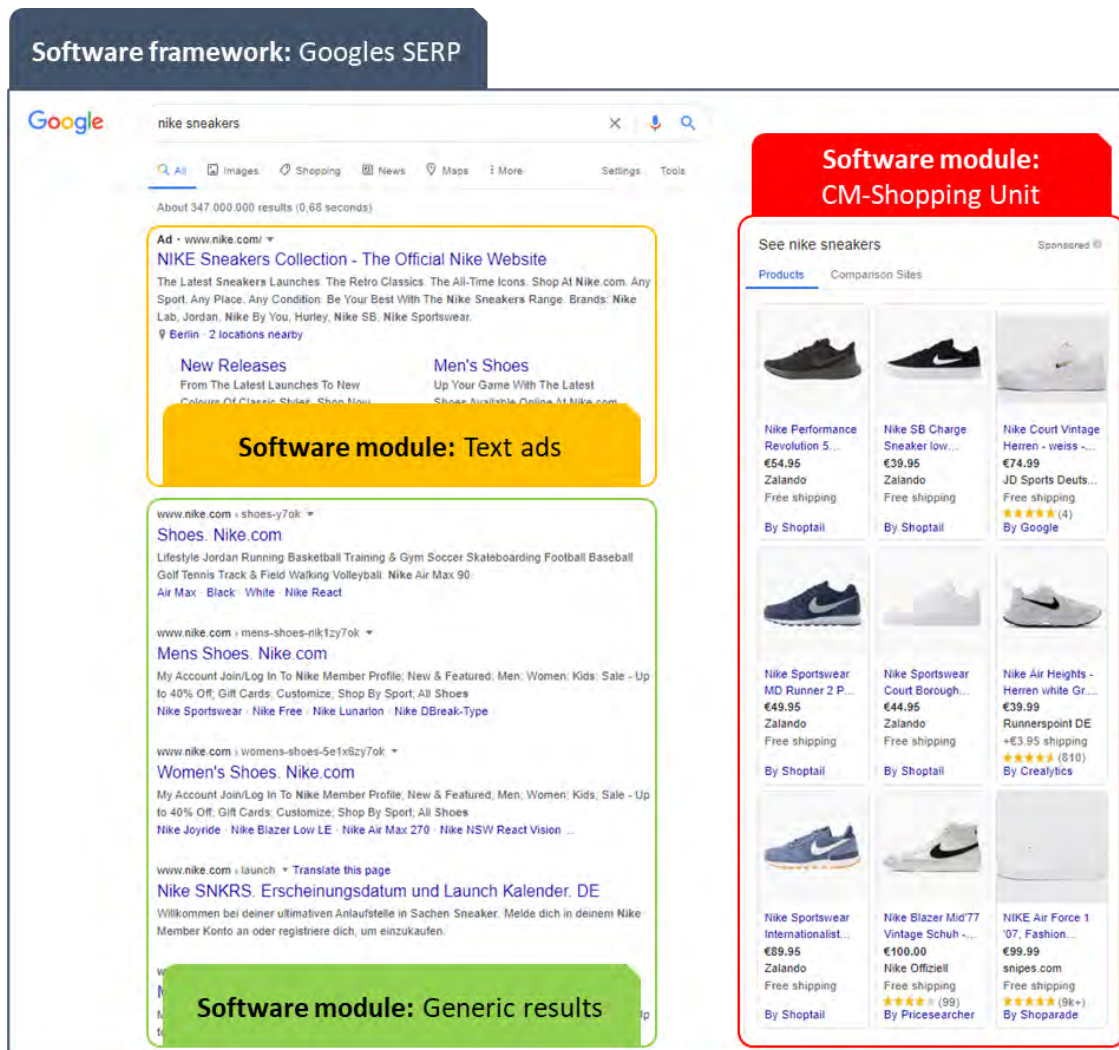


Illustration 79: Google's general search results pages is a "software framework"

1.3.6.2 Google's provision of Shopping Units does not fall into the market for online search advertising platforms

- 518 For the same reasons that other CSSs are not interchangeable with other services, Google's on-SERP-CSS only falls into the market for CSSs. In particular, there is limited substitutability between Google's on-SERP-CSS and its online search advertising service (*AdWords*).
- 519 From the demand-side perspective, while online retailers generally promote their offers through both Google's on-SERP-CSS and its *AdWords* advertising service, the latter does not provide services that are interchangeable from the perspective of users and online retailers (and other advertisers).
- 520 First, users perceive CSSs (including Google's on-SERP-CSS) as a service for them and navigate either directly (albeit to a limited extent) or (mostly) – as in case of Google's on-SERP-CSS – through a general search service to a CSS to compare products and

receive specialised search results. By contrast, users do not perceive online search advertising (like *AdWords* text ads) as a service for them and do not enter a query in a general search engine specifically in order to receive search advertising results.

- 521 Second, CSSs (including Google's on-SERP-CSS) and online search advertising platforms are also complementary and not substitutable from the perspective of online retailers and other advertisers.
- 522 In the first place, only specific subsets of advertisers (i.e. CSSs as broadly defined by Google on behalf of merchants or merchant platforms) may bid to be listed in Google's on-SERP-CSS, whereas any advertiser may bid to be listed in its *AdWords* online search advertising results.
- 523 In the second place, participation in Google's on-SERP-CSS involves conditions that are different to those in its *AdWords* online search advertising results, including the provision to Google's on-SERP-CSS of structured data in the form of feeds. For instance, merchants or merchant platforms wishing to be listed in Google's on-SERP-CSS must provide the name of the CSS which is supposed to represent them in the bidding, dynamic access to structured information on the products that can be purchased on their websites, including dynamically adjusted information on prices, product descriptions and the number of items available in their stock.
- 524 In the third place, Google's on-SERP-CSS displays its results in formats richer than those of Google's *AdWords* online search advertising results.
- 525 In the fourth place, the results of Google's on-SERP-CSS are ranked based upon different algorithms that take into account different parameters and are tailored to the relevant specialised search category of products.
- 526 In the fifth place, unlike with online search advertising platforms (including *AdWords*) – and in order to appear in Google's on-SERP-CSS, third-party websites bid on products and not on keywords. This is an important difference – Google is solely responsible for matching products with searches, and third parties have no say in whether their bid is matched to a given search term or user.
- 527 In the sixth place, when Google's own on-SERP-CSS appears in Google's general search results pages, Google text ads (formerly *AdWords*) may also appear, therefore illustrating that the two services are complementary from Google's perspective.

528 From the supply-side perspective, the functionalities and infrastructures required for the provision of Google's on-SERP-CSS are different from those required for the provision of its online search advertising service. In particular, the provision of online search advertising services requires a company to invest in technologies allowing users to search for keywords that are capable of being matched with the online search advertisement, and in a search advertisement technology to match keywords entered by users in their queries with relevant online search advertisement.

1.3.6.3 Google's provision of Shopping Units does not fall into the market for merchant platforms

529 There is also limited substitutability between CSSs (including Google's on-SERP-CSS) and merchant platforms, such as Amazon Marketplace and eBay Marketplaces.

530 From the demand-side perspective, while CSSs (including Google's on-SERP-CSS) and merchant platforms both aggregate offers from different sellers and provide a search functionality to search and filter those offers based upon certain criteria, they serve a different purpose for users and for online retailers.

531 First, Google's on-SERP-CSS (i) acts as an intermediary between users and online retailers/merchant platforms using other CSSs on their behalf, allowing users to compare offers from different online retailers/merchant platforms in order to find the most attractive offer; (ii) does not offer users the possibility to purchase a product directly on Google, but seeks to refer users to third-party websites where they can buy the relevant product; (iii) does not offer after-sale support, including product return functionalities; and (iv) only lists offers from professional sellers for new products (unlike, for example, eBay and Amazon).

532 On the other hand, like online retailers, merchant platforms (i) act as places where retailers and consumers may conclude sales (indeed, a number of merchant platforms (e.g. Amazon, Fnac, Rue Du Commerce, Zalando)) are online retailers that have also decided to include and sell on their websites third-party products, mainly to complement their own offering; (ii) are perceived by users (and CSSs) as multi-brand retailers, *i.e.* a final destination where users can buy products; (iii) offer after-sale support; and (iv) may also list offers for second-hand products from non-professional sellers.

533 The business models of CSS and merchant platforms are thus quite different and they are not interchangeable. Merchant platforms and CSSs simply cater to different needs

of different types of online retailers. These different needs mean that CSSs cannot easily be transformed into merchant platforms and vice versa.

- 534 Retailers can either sell a product on a marketplace within a merchant platform or on a separate website of the retailer itself, which is called a store. Since merchant platforms sell products directly on their website and control the entire logistic behind it, retailers cooperating with merchant platforms have to accept that the merchant platform takes over the customer relationship with the buyer. Whoever buys on Amazon is first and foremost a customer of Amazon, not of the retailer. On the upside, this reduces the conversion risk for retailers because – unlike in the case of a CSS forwarding a consumer – the retailer only has to pay a commission if a product is actually sold. On the downside, this also means that retailers lose all the strategic customer information and data resulting from a purchase (contact & payment details, interest in products etc.) to the merchant platform which usually do not share that data with retailers, but may even, as is currently investigated by the Commission in relation to Amazon, use that data against the commercial interests of the retailer.
- 535 Such cooperation with a merchant platform works for some online retailers, in particular small and medium sized companies that do not have the resources to set up and successfully market their own online store. However, merchant platforms are a no-go for many other retailers that perceive them as competitors. For several reasons, large online retailers with their own online stores such as Otto, Saturn or Zalando tend to sell only a small fraction of their inventory via a merchant platform. Firstly, like in the offline world, retailers with a strong brand want to sell their products on their own website, in particular with a view to cross-selling further goods to a customer that comes to their store. They hope for the typical 'IKEA scenario'. Consumers go there just to buy a cheap Billy bookcase but end up also buying over-priced candles, towels and whatnot. Secondly, retailers with their own store want to provide all the additional services offered by merchant platforms to consumers themselves. They want to engage with their customer base and provide customer service on their site. For that the retailer requires a direct customer relationship. Thirdly, large retailers consider merchant platforms like Amazon to be a competitor - not a distribution channel. But the very same retailers will turn to CSSs to boost their online store. It is the very fact that CSSs do not try to seize the customer relationship by concluding sales on their own website that makes them attractive as a marketing partner for larger retailers. Once a CSS has forwarded a customer to a retailer's side, retailers can present the wide range of their products, cross-sell complementary goods (which on average makes up 30% what ends up in the shopping basket) and build up lasting customer relationships, so that the buyers come

back to their sites directly. None of this is possible if the retailer sells their goods on a merchant platform.

536 These differences between merchant platforms and CSSs are not called into question by the attempts of a small number of CSSs to introduce buy-buttons for direct sales on their sites. On the contrary, these exceptions only confirm the rule. Several CSSs tried to introduce a buy-button but could not gather sufficient support from retailers. Even years after their introduction and heavy investments only a fraction of retailers allow such check-out functionality. In the case, for instance, of *idealo*, less than 10% of all clicks go to a page with a buy-button. The retailers' disapproval of buy-buttons will also be the main reasons why even twelve years after the launch of Google Shopping and its market leading position in many countries, Google has not rolled out a buy-button in Europe yet. In March 2019, Google started testing a checkout functionality called "Shopping Actions" in France.³⁷⁶ However, to appease its retail customers, Google felt obliged to explain in a corresponding press release that: "*Shopping Actions is a format that complements our advertising solutions. We do not want to be a marketplace*".³⁷⁷

537 The different purpose served by CSSs (including Google's on-SERP-CSS) and merchant platforms for users is further confirmed by the following evidence:

- The fact that Google itself distinguishes the different purpose and characteristics of, respectively, Google's on-SERP-CSS and of merchant platforms. On its "*Sign up as a Comparison Shopping Service*"-page outlining the requirements to take part in Google's on-SERP-CSS, Google explains that "[i]f your business is primarily a marketplace allowing transactions on your own domain, you cannot participate as a CSS, but you may participate as a marketplace through one or several CSSs of your choosing".³⁷⁸
- Google allows any company that merely operates a website with hardly any content or search functionality to bid for *Shopping Ads* in its on-SERP-CSS (see above at ¶¶147 et seq.), but does not allow merchant platforms to do so.
- While CSSs may bid on behalf of merchants in Google's on-SERP-CSS, they may not present products on marketplaces as they are reserved for online retailers.

³⁷⁶ Google Merchant Center Help, "Shopping Actions participation criteria", <https://bit.ly/2S0X9rW>.

³⁷⁷ Search Engine Land, "New personalized, Shopping Actions-enabled Google Shopping debuts in France", 22 March 2019, <https://bit.ly/3j8Sbp6>.

³⁷⁸ See Google Merchant Center Help, "Sign up as a Comparison Shopping Service", <https://bit.ly/35VUyb9>.

- The fact that Google's on-SERP-CSS lists offers (placed through CSSs) from merchant platforms based upon the same terms and conditions applied to online retailers and that eBay (followed by other merchant platforms) appears to be consistently among the top online retailers in terms of revenues for Google's on-SERP-CSS.

538 Regarding the different purpose served by Google's on-SERP-CSS and merchant platforms for online retailers, on the one hand, Google's on-SERP-CSS offers retailers the opportunity to promote their offerings to a large audience of users in search of a specific product. This allows online retailers both to increase brand awareness and to attract user traffic to their own websites, while retaining full control over their retail activities. Google's on-SERP-CSS tends to list offers from larger retailers that do not want to concede the customer interaction and data regarding their business and their customers to merchant platforms, such as Amazon, which they view as competitors.

539 On the other hand, merchant platforms offer a full service to retailers that wish to focus on sourcing and logistics. Merchant platforms therefore tend to list offers mostly from certain small-sized and medium-sized professional retailers that have limited brand awareness and/or are unable or unwilling to develop and maintain their own online stores (or even a website) or even non-professional sellers (including sellers of second-hand products).

540 From the supply-side perspective, the services provided by Google's on-SERP-CSS and merchant platforms require different functionalities.

541 First, on the one hand, Google's on-SERP-CSS collects and selects the relevant information in response to each user query by analysing in real-time feeds uploaded by CSSs for as many online retailers as possible and by providing users with such information. It does not, however, sell the products directly on Google. On the other hand, merchant platforms manage the inventory of their retailer partners and sell the products directly on their website; these activities require specific functionalities (e.g. after-sale support) and are subject to specific regulatory frameworks.

542 Second, Google's on-SERP-CSS and merchant platforms are remunerated in different ways. On the one hand, Google's on-SERP-CSS is remunerated based upon a cost-per-click model, with the bidding CSS-customer paying a fee for each visit sent to a merchant (or in rare circumstance to its own website), regardless of whether the user eventually makes a purchase. On the other hand, merchant platforms are generally remunerated by a commission on the transaction performed on the platform or a nominal

listing fee or, in the event that they also sell their own products, by the actual price of the products sold.

543 Third, the fact that, at least on paper, under the CM CSSs are the customers of Google's on-SERP-CSS is not a reason to exclude Google's on-SERP-CSS from the relevant product market for CSSs. This is because – as Google itself rightly pointed out in its response to the SO³⁷⁹ – firms may simultaneously be each other's customers and competitors.

544 Google argues that merchant platforms provide a product search comparison function that is substitutable from the perspective of users and online retailers to the product search and comparison function provided by Google's on-SERP-CSS. However, for the same reasons given in the Decision in recitals (227) to (246), the limited demand-side and supply-side substitutability between Google's on-SERP-CSS and merchant platforms are not called into question. If the Commission found that the Shopping Units powered by what was previously *Google Shopping* were not substitutable with the product search and comparison functions of marketplaces, then the same must be true for the CM-Shopping Units powered by Google's on-SERP-CSS. This is, because the design of such units has not changed fundamentally.

1.3.6.4 Filters and sorting tools directly in the results unit are not a constitutive criterion for a CSS as defined in the Decision

545 Google has argued that Shopping Units and *Shopping Ads* within those do not constitute a CSS because they would not contain any filtering or sorting functionalities that would be characteristic for a CSS. This is not compelling in several respects.

1.3.6.4.1 Google has included several powerful filters and sorting tools around its on-SERP-CSS frontend

546 It is common for ordering mechanisms employed by digital platforms that filter, classify, recommend, or rank items to structure the user experience in a way that it reduces the cognitive weight without any need for the user to become particularly active.³⁸⁰ To this end, such systems often 'suggest' or 'recommend' items to users without asking them explicitly. In addition they use 'contextual' information, such as about the user's

³⁷⁹ Google, SO Response in Case AT.39740, paras. 183-190.

³⁸⁰ Expert Group for the Observatory on the Online Platform Economy, Progress Report - Work stream on Differentiated treatment, July 2020, p. 14, <https://bit.ly/3j4GJul>.

geographic position or personal background, to pre-select particular items by way of a personalisation.³⁸¹

547 Google is particularly advanced in this respect. First, as early as the point in time when the user is formulating his or her first query to describe a product in a Google toolbar, Google offers a very powerful filter – its auto-complete function. If a user starts entering a word that relates to a product type of a particular product, Google will automatically provide a choice of several models for it, without the user asking for that. Thus, the user can filter already while typing in his or her query. This auto-complete functionality used by Google is likely connected to the product catalogue of Google's CSS,³⁸² so that the catalogue can be used for the 'suggestions'. The more products are included in Google's CSS's catalogue, the more fine-tuned the auto-complete filter functionality can work.

548 In the example below, just two letters "ip" lead to 9 models of an iPhone. The query "sport shoe" allows filtering for "women", "men", "children", "Berlin", "Nike", "sale":

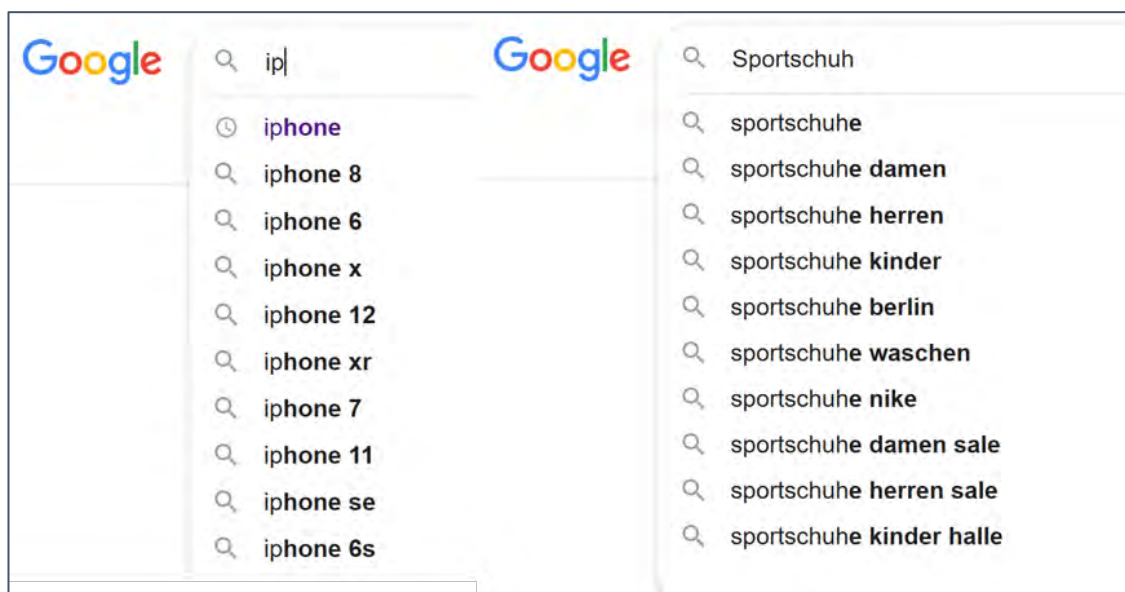


Illustration 80: Screenshots with examples for Google's auto-complete product pre-filter function

549 If a user clicks on a particular model (here, iPhone 11), Google's Shopping Unit will only contain offers and information for this particular model (see illustration 81 below, ¶549). Therefore, the most fundamental filtering already happened when the user entered the query in Google's toolbar – which interreacts with Google's CSS:

³⁸¹ Expert Group for the Observatory on the Online Platform Economy, *ibid.*

³⁸² See above at Chapter 2, B.1.1.3.1 (¶¶221 et seq.) on the technicalities.

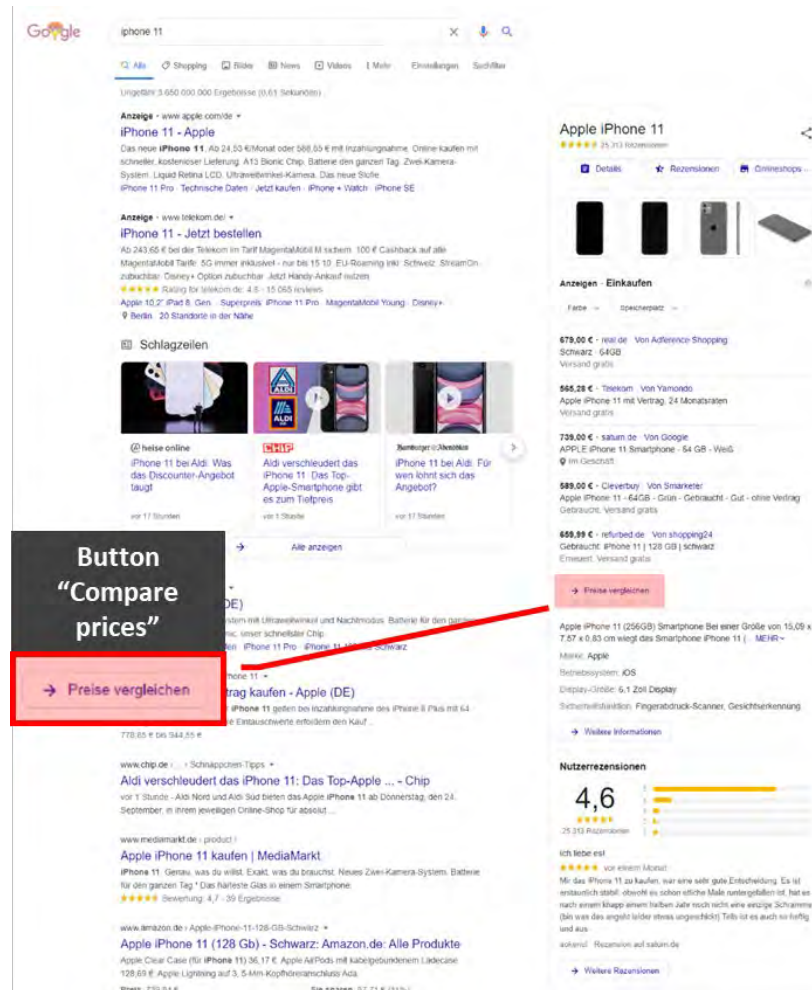


Illustration 81: Product filtering on Google's on-SERP CSS in response to a pre-filtered query

- 550 Second, once the user has entered the query, Google's algorithms include powerful automatic filtering and sorting functions. Google's algorithms are programmed in such a manner that Google is able to recognise what the individual user is looking for from the search query alone, with a high degree of precision. In addition to the search query entered, Google can take several signals into account to fine-tune the response automatically, in particular the individual user's profile (age, gender, propensity to buy etc.), its geographic location, the device it is using and its individual transaction history (prior similar searches, chosen results, concluded transactions).
- 551 As a result, the very first search results displayed to the individual user within a Shopping Unit are already filtered and pre-sorted by Google's algorithms. In this manner, Google recognises whether the user is searching for products at all. By analysing the query and the accompanying data provided by the user, Google can identify the stage of the customer journey in which the user is currently located. Google may thus recognise if the user is still interested in comparing different products, or whether s/he has made up

his or her mind for a particular product and only wishes to compare prices. In both cases, Google displays different units (see above at ¶¶81 et seq. and ¶¶546 et seq.).

- 552 Third, if, despite the mentioned pre-filtering, the user is unhappy with the content of the first Shopping Unit that Google presents, the user will typically adjust his or her search query in the search toolbar.
- 553 Fourth, to make matters even easier, at least the Shopping Units that Google has been using since September 2017 directly contain filters and sorting options (see screenshots in ANNEX 1 and illustrations 80 to 86, ¶¶548 et seq.). Through these tools, users may narrow down the results in a Shopping Unit from a comparison of separate products to the comparison of prices for the same product. For instance, in the example above, if a user clicks on the “compare prices” link, the following sub-unit pops up – again directly within Google’s general results page – and again fully powered by Google’s CSS:

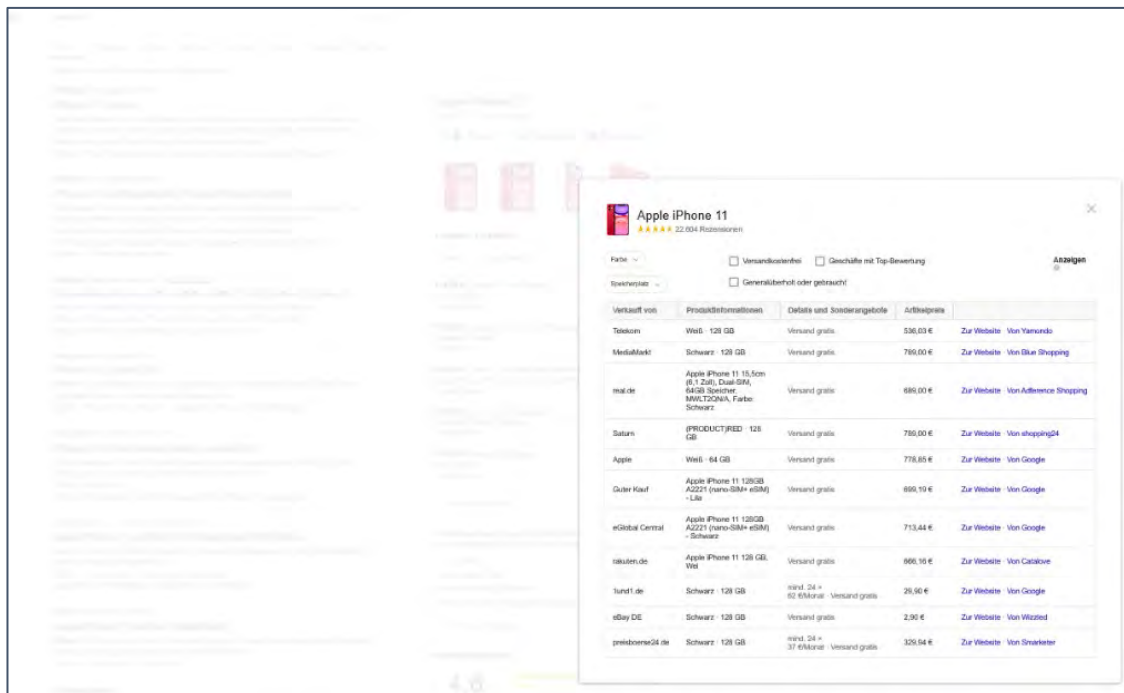


Illustration 82: Google's on-SERP-CSS sub-unit after clicking on “compare prices”

- 554 Fifth, Google even provides further filters through its image search OneBox. If a user clicks on a particular product image within image search, Google automatically adjusts the corresponding Shopping Units it displays along the image search OneBox – now only including the product offers for the product image displayed. Users thus have a holistic view of search results pages.³⁸³ They will consider and use any filter and sorting

³⁸³ Cf Hayman and Franklyn, “Search Neutrality v. Search Bias: An Empirical Perspective on the Impact of Architecture and Labelling”, 9 May 2013, <https://bit.ly/3iYDTr2>, pp. 22, 34.

opportunity provided to them, irrespective of whether such tools are directly within the Shopping Unit or somewhere around it. Similarly, on standalone websites of CSSs, the filters and sorting functionalities are not typically within the box of the product offers but on the left side or above such box. The following illustrations 83 to 85 show such filters and their interaction with the Shopping Unit. Each time a user engages with such filter, Google appears to use that data to adjust its Shopping Unit.

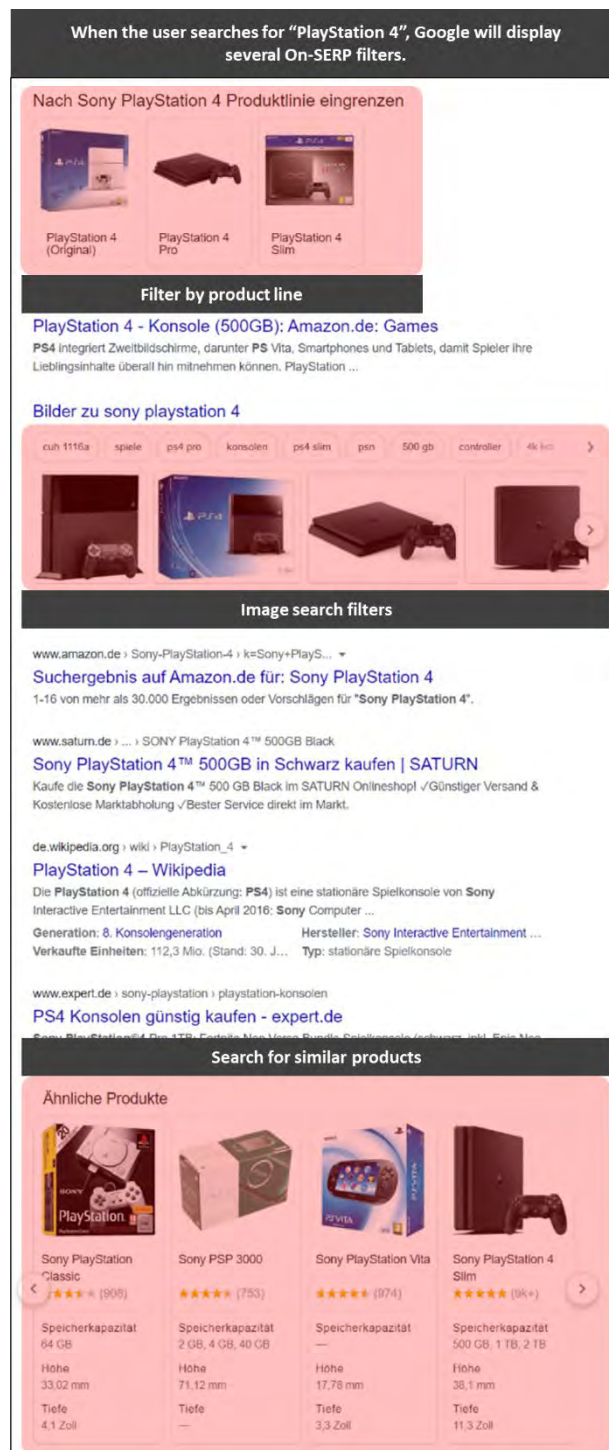
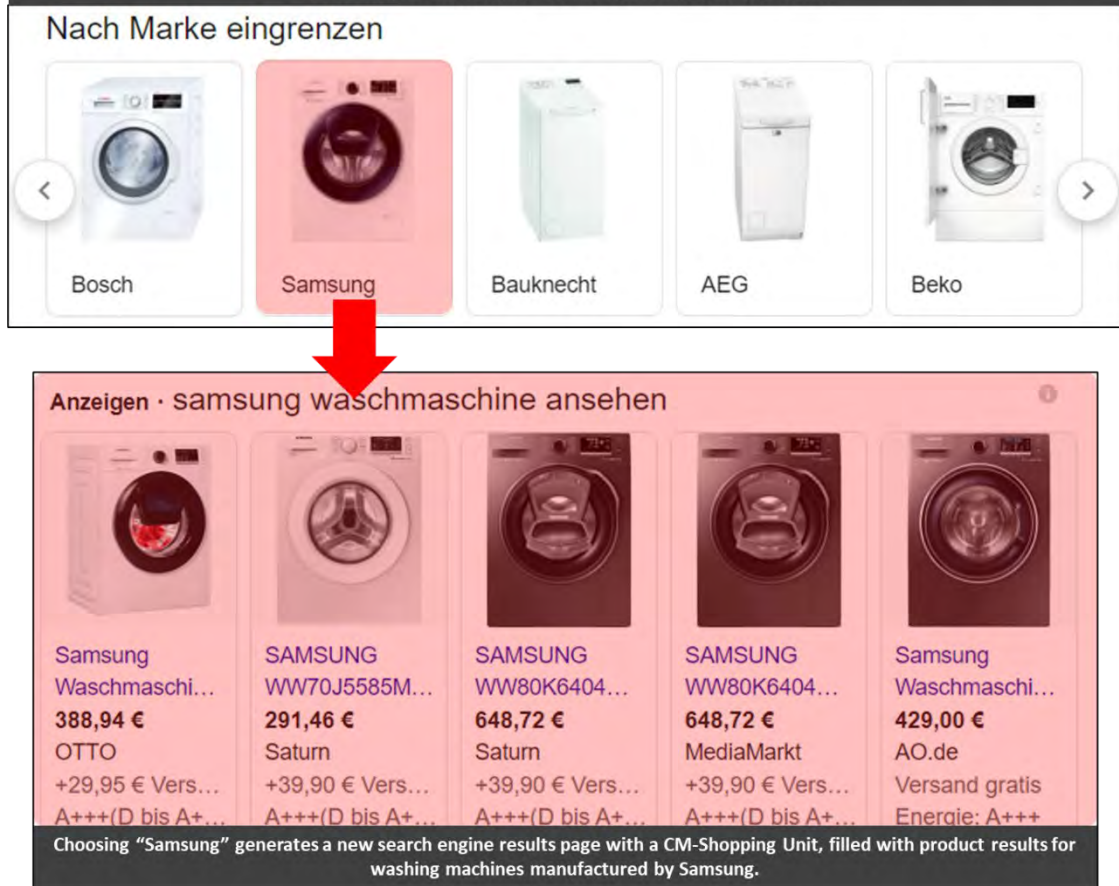


Illustration 83: Screenshot illustrating various filters on general search results page that interact with Google's SERP-CSS

When the user searches for "washing machine", Google will display a filter "Filter by brand". Such filter allows the user to choose between different washing machine brands or manufacturers.

Nach Marke eingrenzen



Choosing "Samsung" generates a new search engine results page with a CM-Shopping Unit, filled with product results for washing machines manufactured by Samsung.






Anzeigen · samsung waschmaschine ansehen				
				
Samsung Waschmaschi...	SAMSUNG WW70J5585M...	SAMSUNG WW80K6404...	SAMSUNG WW80K6404...	Samsung Waschmaschi...
388,94 €	291,46 €	648,72 €	648,72 €	429,00 €
OTTO	Saturn	Saturn	MediaMarkt	AO.de
+29,95 € Vers...	+39,90 € Vers...	+39,90 € Vers...	+39,90 € Vers...	Versand gratis
A+++ (D bis A+...)	A+++ (D bis A+...)	A+++ (D bis A+...)	A+++ (D bis A+...)	Energie: A+++

Illustration 84: Screenshot illustrating the interaction between brand search filter and CM-Shopping Unit

When the user searches for "PlayStation 4", Google will display a filter "Similar products". Such filter allows the user to choose between up to twelve similar products.

Ähnliche Produkte				Ähnliche Produkte				Ähnliche Produkte			
Sony PlayStation 4	Sony PlayStation Classic	Sony PSP 3000	Sony PlayStation Vita	Sony PlayStation 4 Slim	Sony PlayStation 4 Pro	Sony PlayStation 2 Slim	Sony PlayStation 2	Sony PlayStation 2	Mini Arcade Machine	Sony PlayStation 3 Slim	Sony PlayStation Vita Slim
★★★★★ (9k+)	★★★★★ (908)	★★★★★ (753)	★★★★★ (874)	★★★★★ (9k+)	★★★★★ (9k+)	★★★★★ (535)	★★★★★ (806)	★★★★★ (806)	★★★★★ (84)	★★★★★ (2k+)	★★★★★ (138)
Speicherkapazität 500 GB, 1 TB	Speicherkapazität 64 GB	Speicherkapazität 2 GB, 4 GB, 40 GB	Speicherkapazität —	Speicherkapazität 500 GB, 1 TB, 2 TB	Speicherkapazität 1 TB, 2 TB	Speicherkapazität —	Speicherkapazität 400 GB	Speicherkapazität 400 GB	Speicherkapazität —	Speicherkapazität 120 GB, 160 GB, 250	Speicherkapazität —
Höhe 53,34 mm	Höhe 33,02 mm	Höhe 71,12 mm	Höhe 17,78 mm	Höhe 38,1 mm	Höhe 55,88 mm	Höhe 27,94 mm	Höhe 78,74 mm	Höhe 78,74 mm	Höhe —	Höhe 68,04 mm	Höhe 86,36 mm
Tiefe 12 Zoll	Tiefe 4,1 Zoll	Tiefe —	Tiefe 3,3 Zoll	Tiefe 11,3 Zoll	Tiefe 12,9 Zoll	Tiefe 6 Zoll	Tiefe 7,2 Zoll	Tiefe 7,2 Zoll	Tiefe —	Tiefe 11,4 Zoll	Tiefe 3,3 Zoll

Illustration 85: Screenshot illustrating the interaction between the "similar product" filter and Shopping Units

555 Considering all of the above, Google's claim that the provision of Shopping Units is unable to constitute a standalone CSS for lack of filters and sorting functionalities within such units has no factual basis.

556 To be clear, even if Google eliminated all such tools from the units, the nature of this service as a CSS would not cease. It would just be an (even) poorer CSS – but still on Google's first page. The Decision does not require filter and sorting functionalities for a service to be a CSS. According to the Decision, such tools are only *possible* criteria useful to elevate CSSs from other specialised search services from the user's perspective. They are neither constitutive criteria to define a CSS nor suitable to distinguish CSSs from online search advertisement platforms such as *Google AdWords*.

1.3.6.4.2 The Decision's defining of specialised search services in general, CSSs in particular and Google Shopping without mentioning any tools of filtering and sorting

557 According to recital (191), CSSs are (certain types of):

“specialised search services that (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers (also referred to as online merchants) and merchant platforms (also referred to as online marketplaces); and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms.”

558 Tools of sorting and filtering are not mentioned in this context.

559 Recital (23) of the Decision defines what constitutes Google's “specialised search results” in general. As in the case of recital (191), tools of sorting and filtering are not mentioned:

“In response to a user query, Google's general search results pages may also return specialised search results from Google's specialised search services. In most instances, specialised search results are displayed with attractive graphical features, such as large scale pictures and dynamic information. Specialised search results in a particular category are positioned within sets referred to by Google as “Universals” or “OneBoxes”.

560 Then, recital (24) explains that

“Google operates several search services that can be described as “specialised” because they group together results for a specific category of products, services or information (for example, “Google Shopping” [...]). In addition to the results returned in “Universals” or “OneBoxes”, Google's specialised search services can be also accessed through menu-type links displayed at the top of Google's search results pages.”

561 It follows that the Decision established that the user may access Google's specialised search services through Google's general search results pages by entering specialised search queries such as product queries. Particular attention must be paid to that fact that, once again, the Decision fails to mention any tools of sorting and filtering in this context. Neither are such tools mentioned when the Decision describes Google's own CSS, as explored below.

562 According to recital (26):

"Google's comparison shopping service is one of Google's specialised search services. In response to queries, it returns product offers from merchant websites, enabling users to compare them."

563 The definition of a CSS in recitals (23), (24), (26) and (191) is the only definition of a CSS delivered by the Commission which may be considered as being truly constitutive. All other criteria employed by the Commission starting from recitals (193) et seq. only serve the purpose of differentiating among other closely related services; see below.

1.3.6.4.3 While distinguishing CSSs from other services, the Decision does consider tools of filtering and sorting as a relevant distinguishing criterion

564 According to recital (193):

"[t]here is limited substitutability between comparison shopping services and other specialised search services."

565 Recital (194) specifies as follows:

"From the demand side perspective, each type of service focuses on providing specific information from different sources in its respective field of specialisation. [...] Thus, comparison shopping services provide users that are looking for information on a product with a selection of existing commercial offers available on the internet for that product, as well as tools to sort and compare such offers based on various criteria. [...] From the perspective of those users, such a service is not substitutable with that offered by search services specialised in different subject matters such as flights, hotels, locals [...], and news."

566 As can be seen from this formulation, the existence of "*tools to sort and compare*" is irrelevant to the distinction between CSSs and other specialised search services. In fact, the criteria of "*tools to sort and compare*" is unsuitable to distinguish CSSs from other specialised search services since such "*tools*" can be appropriate for every specialised search service, not only for CSSs. For instance, flight or hotel offers may be sorted and compared based upon various criteria. Rather, with regard to recital (194), what the essential differentiating criterion really is has become clear: Each type of specialised search service "*focuses on providing specific information from different sources in is*

respective field of specialisation“ and it is *“specialised in [a] different subject matter”*. Therefore, the Decision’s definition of a CSS in recitals (23), (24), (26) and (191) is not called into question.

567 Similarly, when the Decision distinguishes CSSs from online search advertising platforms, tools of sorting and filtering are not mentioned.

568 In recitals (196) to (206), the Decision distinguishes CSSs from online search advertising platforms such as *AdWords*. However, tools of sorting and filtering are not mentioned in this context. For this reason, the existence or non-existence of such tools is without any relevance for distinguishing CSSs from online search advertising platforms. Rather, recital (209) confirms what the Decision already established in recitals (23), (24), (26) and (191):

“[CSSs] allow users to compare offers from different online retailers in order to find the most attractive offer.”

569 It is out of the question that users are able to “compare offers” without tools of sorting and filtering. This is why such tools are additional, and not constitutive, features of a CSS.

570 Additionally, in recitals (202) et seq., the Commission lists several criteria to distinguish search advertising services from CSSs. Each of the criteria for a CSS are also fulfilled with regard to the CM-Shopping Unit: (i) CSSs show a richer format than ads; (ii) only specific subsets of advertisers can bid to be listed in a CSS; (iii) third parties bid on products, not on keywords; (iv) when entering a product query in the general search bar, both ads and Shopping Units appear, thus showing that they are complementary.

571 In view of the fact that filtering and sorting tools have no relevance to online advertisement platforms, one cannot randomly pick these criteria and use them as exclusion criteria.

572 Finally, when distinguishing CSSs from merchant platforms, filtering options are only mentioned as a common feature of CSSs and merchant platforms but not as an indispensable feature.

573 The Decision states that sorting and filtering is common among both services whereas their purpose (and inventory) differ.³⁸⁴ Conversely, this must mean that - as a general

³⁸⁴ Decision, recital (217).

rule - the aspect of filtering and sorting functions is not suitable as a criterion of distinction. By no means does the Decision establish that tools of sorting and filtering comprise a constitutive feature of a CSS. Therefore, the Decision's definition of a CSS in recitals (23), (24), (26) and (191) is not called into question.

2. Google continues to favour its own on-SERP-CSS on general search results pages

574 According to footnote 3 of the Decision, the Commission prohibited the

“more favourable positioning and display in Google’s general search results pages of Google’s own comparison shopping service compared to competing comparison shopping services [...] means the more favourable positioning and display of [...] parts or all of Google’s own comparison shopping service”.

575 The Decision's remedy is not limited to prohibiting Google's favouring of a standalone CSS website. It prohibits the favouring of any of Google's own CSS, including one that Google provides exclusively through Shopping Units within its general search results pages.

2.1 No other CSS may display equivalent groupings of search results sourced from its own product database and selected by its own specialised algorithms

576 As at today, Google continues to position CM-Shopping Units from Google's own CSS more favourably than the search results from competing CSSs in its general search results pages. Moreover, Google continues to display such units more attractively than any other CSS. No other CSS may serve equivalent result boxes, even though most CSSs would be able and willing to do so, and in many cases with a better matching quality than Google.

2.2 Only Google's own CSS may provide its service to consumers directly on Google's general search results pages, without any need for a click and at no cost to Google's CSS

577 Google may offer a comparison service directly on general search results pages via its various types of Shopping Units. There, users may consume the service directly, without any need for a further click. In contrast, all competing CSSs are only able to provide their service once a consumer has clicked on a generic search result, a Google text ad or a voluntary “By CSS” link below Google's Shopping Units product results. Thus, while

Google may offer its service without requiring consumers to click a link, rivals first need to be found and clicked on.³⁸⁵

578 Moreover, while Google may compile the Shopping Unit entirely independently based upon its own product database and its own specialised algorithms, competing CSSs may be listed in such space with only a single product offer, with no influence whatsoever in return of which query such offer is displayed and in what kind of Shopping Unit it is included. Additionally, while Google's on-SERP-CSS does not have to pay anything to Google to provide its service directly to consumers, competing CSSs are charged for any click of a consumer on any product result in Google's Shopping Unit.

2.3 Allowing the uploading of product feeds and the bidding for ads in favoured Shopping Units reserved to Google's CSS provides no equal treatment

579 The full equal treatment of Google's CSS and competing services, as required by the Decision (in particular in Article 3 and 1, recitals (341), (342) and (699)), is not ensured by allowing competing services to place product offers in Shopping Units and to submit bids on such offers on behalf of merchants. Two reasons can be given for this:

580 First, competing CSSs could bid on behalf of merchants prior to the CM – without this precluding the abuse. Second, the case does not concern the CSSs' access to Shopping Units; rather, it concerns the favouring of Shopping Units within Google's general search results pages as such. Therefore, "access" to the CM-Shopping Unit is inadequate as a remedy.

2.3.1 CSSs could bid on behalf of merchants prior to the CM – without this precluding the abuse

2.3.1.1 The Decision requires equal treatment on general search results pages, not any access to Shopping Units

581 The Decision defines the abuse as the more favourable positioning and display of, *inter alia*, Google's Shopping Units when compared to competing CSSs in Google's general search results pages. The Decision does not define the abuse as any form of exclusivity, i.e., that Google reserves all slots in such Shopping Units exclusively to merchants from its own CSS. Thus, it is incorrect for Google to now claim that the Decision only

³⁸⁵ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, para. 298.

“raised a concern about unequal access – as between Google Shopping and rival comparison shopping services (CSSs) – to an attractive design on Google’s results pages known as ‘Shopping Units’”

582 and that therefore

“[i]f CSSs have equal access to Shopping Units, the alleged unequal treatment found in the Decision falls away”.³⁸⁶

583 The Decision’s description of the abuse in section 7 does not highlight that competing CSSs were unable to bid for inclusion of links to their sites in Shopping Units. In fact, the only reference can be found in recital (439), which is supposed to explain why Shopping Units are not an improved form of *AdWords* results (as claimed by Google).

584 Recital (220), to which recital (439) refers, does not describe the abuse, but rather lists the reasons as to why CSSs and merchant platforms do not fall into the same market:

“The fact that Google allows merchant platforms, but not competing comparison shopping services, to participate in Google Shopping”.

585 It is worth noting that recital (439) does not even say that competing CSSs were banned from Shopping Units. On the contrary, recital (439) confirms that, already prior to the CM, every CSS could have bid for inclusion of a *Shopping Ad* in a Shopping Unit if the CSS added a direct purchase functionality (checkout) or if it acted as an advertising agent on behalf of a merchant. Idealo, for instance, was entitled to bid for Shopping Units during the period of the infringement because idealo operated a checkout functionality. Similarly, Check24 appeared in Google’s Shopping Units – not as a CSS but because they operate a marketplace.

2.3.1.2 Competing CSSs always had ‘access’ to Shopping Units if they acted as pure intermediaries – which did not prevent the abuse

586 In order to prevent the finding of an abuse, during the investigation Google had consistently argued that there was no favouring (and hence no abuse) because competing CSS *“can appear in Shopping on the same terms as other advertisers”*.³⁸⁷ CSS were always able to buy ads provided that:

³⁸⁶ Graf and Mostyn, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020, p. 3.

³⁸⁷ Google, SSO Response in Case AT.39740, paras. 95 et seq.: *“Google [...] can and does include feeds from aggregator inventories, and it ranks aggregator offers alongside its other product ads. Aggregators can place product ads in Shopping Units on the same terms as other advertisers. Complainants’ claims that ‘competitors are excluded from appearing in these Universals and*

“(1) the product ads link to pages where users can purchase the advertised product; and (2) the advertiser controls the site that the ad links to or is authorized by the site’s owner.”³⁸⁸

587 In particular,

“[a]ggregators can also place product ads on Google that link to the pages of their merchant partners. They may then charge their partners, for example, based on a percentage of the ad spend involved”³⁸⁹

588 One of Google’s legal advisers used the following example to illustrate this option.

And CSSs could appear in Shopping Units, **even prior to the remedy**

Price	Product Name	Merchant	Shipping	Energy Class
119,00 €	Miele Classic C1 Special ...	idealo.de	Verwand gratis	Energie: A
199,00 €	Complete C3 Excellence ...	Euronics PHP...	+ 5,95 € Versand	Energie: A
179,00 €	Miele Compact C2 Excellence	premiumshop...	Verwand gratis	
234,00 €	Miele Complete C3	CHECK24	Verwand gratis	
139,00 €	Miele Classic C1 Hardfloor...	premiumshop...	Verwand gratis	
219,00 €	Miele Complete C3	Fonq.de	Verwand gratis	

■ Like any advertisers, CSS can buy product ads in Shopping Units

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Illustration 86: Slide from presentation of Google advisor M. Dolmans in Google Shopping case; “Reflections on the Google Shopping Decision”, 30 November 2017, CCIA Conference

589 However, the Decision did not consider the fact that CSSs had the opportunity to buy *Shopping Ads* in Shopping Units to be relevant, because doing so involved operating on a different market than the CSS market. This option did not therefore preclude the

Units’ are therefore wrong. All interested advertisers can place product ads in Shopping Units, provided they meet two principal conditions: (1) the product ads link to pages where users can purchase the advertised product; and (2) the advertiser controls the site that the ad links to or is authorized by the site’s owner. Aggregators can and do meet these conditions in two ways – Aggregators can place product ads on Google that link to pages on their sites with purchase functionality. Axel Springer (one of the complainants claiming that aggregators cannot appear in Shopping Units) uses this option for its Idealo service. It secured more than [...] impressions in Google’s Shopping Units over the last year. [...] Aggregators can also place product ads on Google that link to the pages of their merchant partners. They may then charge their partners, for example, based on a percentage of the ad spend involved. Twenga is an example of an aggregator that makes use of this option”.

³⁸⁸ Ibid., para. 95.

³⁸⁹ Ibid.

abuse. The Commission expressed this clearly in recital (439) of the Decision. The Commission evaluated Google's conditions for placing ads as tantamount to having to leave the market for CSSs and become customers of Google's service:

*"The conditions for appearing in Shopping Units prior to the Decision were such that, in order to appear in Shopping Units, competing CSSs had to change their business model and become a customer, rather than a competitor, of Google's CSS (recitals 220(2) and 439)."*³⁹⁰

*"[P]rior to the Decision, competing CSSs could not appear in Shopping Units (§§198-201 and §§204-205). As recitals 220(2) and 439 find, and as the Applicants admit at §198, competing CSSs could appear in Shopping Units only if they introduced a "buy" button **or** were acting as agents / intermediaries for placing merchant results in Shopping Units, i.e. if **they changed their business model and stopped being CSSs**."*³⁹¹

590 Following the launch of the CM, Google confirmed that the conditions for a CSS to "buy product ads in Shopping Units" have not changed. Google told the General Court:

*"Under the compliance mechanism, Google stipulates the same conditions for the destination pages to which product ads must link as Google applied prior to the Decision. This means that product ads must link to a page where the user can buy the advertised offer. Aggregators therefore have two options to place product ads in Shopping Units under the remedy, just as they had before the Decision— Their product ads can link to a page on their site where users can buy the promoted offer (i.e., if that page has a buy button for purchasing the promoted offer). – Their product ads can link to the page of one of their merchant partners where users can buy the promoted offer. [...] **Aggregators therefore already had the same access to Shopping Units as the Google CSS before the Decision**."*³⁹²

591 If the previous option for CSSs to buy Shopping Ads if they act "as intermediaries for placing merchants' paid product results in the Shopping Unit" (recital (439)) did not prevent the finding of an abuse, the current identical option for CSS to "place a Shopping Ad on [a merchant's] behalf" (Google's description of the CM) cannot bring the established infringement to an end.

³⁹⁰ Commission, Rejoinder in Case T-612/17, para. 107.

³⁹¹ Commission, Defence in Case T-612/17, para. 151 (emphasis added).

³⁹² Google, Response to the Court's Questions for written answer of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.11.

2.3.1.3 Google's "access to the Shopping Unit" does not apply to the market for CSSs, as it only allows activities that take place outside of this market

- 592 Google itself highlights the limited scope for competition that the CM allows. Under the CM, the function and business of 'CSSs' is limited to advertising services³⁹³ – the optimisation of product data feeds and the management of advertising campaigns. In the case of the "self-service" model, as referred to by Google, the business is limited to a mere rental of the Google Merchant Center Account. Such business activities and services have nothing to do with the original business of CSSs. Under the CM, CSSs must give up their multi-sided business model, which is characterised by indirect network effects (see for example recitals (209), (445) and (446) of the Decision). Neither the optimisation of product data feeds, the management of advertising campaigns nor the rental of the Google Merchant Center account depend upon whether the respective CSS has the largest possible user community. Under the CM, it is sufficient to be considered by Google as a 'CSS' if a company maintains a one-sided supply relationship – to merchants who wish to place product ads in Shopping Units with the help of (purported) 'CSSs'. This is one of the main reasons why so many marketing agencies – without any of their own user bases and largely meaningless websites – may very easily participate in the CM (see above at ¶¶110 et seq.).
- 593 The CM does not take into account the requirements set out in recital (439). Accordingly, it affects the wrong level playing field and thus the wrong market. It is therefore, from the outset, unsuitable in terms of being able to resolve the interplay between the conduct, the traffic diversion and the anti-competitive effects on the market for CSSs, as established in recitals (341) and (342) of the Decision.
- 594 **Comparing the situation with supermarkets:** To illustrate, the situation under the CM may be compared to that of competing supermarkets in a monopoly shopping mall. Supermarkets are comparable with CSSs because the ranking that a CSS displays to users can be compared to the way a supermarket displays products to shoppers as they walk along the shelves in the store.³⁹⁴ Now, imagine that a monopoly shopping mall were required to treat its own supermarket no less favourably than competing supermarkets. Google's CM amounts to the operator of the shopping mall offering

³⁹³ Google Merchant Center Help, "Different ways to work with Comparison Shopping Services", <https://bit.ly/3ckiuGj>.

³⁹⁴ See Expert Group for the Observatory on the Online Platform Economy, Progress Report - Work stream on Differentiated treatment, July 2020, pp. 6-9, also on the differences, <https://bit.ly/3j4GJul>.

competing supermarkets the inclusion of all their products into the shelves of its own supermarket. It is apparent that keeping the monopoly supermarket and merely inviting rivals to fill up the shelves with their products would not amount to equal treatment. All competing supermarkets would be reduced to a mere supplier of goods – not a place where customers make purchases. Yet, this is exactly what Google's CM means for CSSs – they are invited to fill up Google's on-SERP-CSS in order to make it even more attractive for consumers. They do not participate in the CM as CSSs, but as mere providers of product offerings – i.e., intermediaries acting on behalf of merchants.

595 **Comparing the situation with competitors use of a railway infrastructure:** To provide another example, imagine a vertically integrated railway company that is legally required to treat competing railway services operating transport services via its monopoly grid infrastructure equally. The infrastructure service must be provided with such railway service providers in a non-discriminatory way. To provide a railway service, a company does not just require rolling stock (trains) but also a ticketing system, a service team and personnel to operate and maintain the trains (i.e., the backbone). Google's CM is tantamount to the monopoly operator of a railway infrastructure implementing an equal treatment obligation by allowing all rival railway service providers to let their customers use the trains of the undertaking's own railway service on equal terms and conditions, as is offered by their own service. Since all railway services now have equal "access" to the incumbent's "trains", as the relevant frontend to the user, there is purportedly equal treatment. The fact that the incumbent would remain the only company entitled to operate trains via its grid (similar to providing Shopping Units via a general search service) would not constitute discrimination (in Google's logic), because a train is not a railway service in itself (as much as a Shopping Unit is not a CSS). In addition, all remaining activities (the backbone to get a train running, equivalent to the backbone of a CSS) would be part of the underlying grid infrastructure (i.e., part of general search) and therefore not subject to any obligation to allow other CSSs to provide such activities themselves. It is apparent that this solution would not be accepted by any authority as equal treatment. Akin to CSSs, railway services do not wish to be limited to sending their customers to the rival service, i.e. 'access' the incumbent's train (= Shopping Unit). They wish to provide such service themselves. Likewise akin to CSSs, railway services are entitled to receive the infrastructure service in an unbundled way; i.e., they only need to use the actual monopoly service (i.e., usage of the grid), while continuing to be able to provide all further services themselves. 'Equal access' to a train is something entirely different to equal, and unbundled, access to the infrastructure itself. In the same vein, 'equal access' to Shopping Units is something

entirely different to equal treatment on general search results pages (see below at ¶¶598 et seq.).

2.3.2 Voluntarily adding “By CSS” and “view more” links that no one clicks at does not create equal treatment

596 The only difference between the Shopping Unit prior to the Decision and the CM-Shopping Unit is the insertion of a simple blue link “By CSS” or “view more” to the CSS’s website below the individual product offers. Since nothing else has changed, the integration of such simple blue links could be the only reason why the CM-Shopping is said to be compliant. However, it is evident that such changes do not create equal treatment. In January 2020, Google revealed that such links were included “voluntarily” and “account for around 1% of all clicks” on the Shopping Unit.³⁹⁵ In other words, they may be disregarded.

597 From a competition law perspective, the fact that, users may theoretically access competitors via a different channel (for instance, by clicking on the “By CSS”, “view more” links) is irrelevant, as long as they are not actually doing that to counter the effects of anti-competitive conduct.³⁹⁶ Google provides its CSS directly on the general search results pages. All rival CSSs are only accessible if a user finds them in the tiny “By CSS” and “view more” link (or in the less attractive generic results) and then actually clicks on such a link. This is anything but equal treatment on Google’s general results pages.³⁹⁷

2.3.3 The case does not concern CSSs’ access to Shopping Units, but the favouring of Shopping Units within Google’s general search results pages as such

2.3.3.1 A response to Google’s advisers *Graf* and *Mostyn* defending the CM in the Journal of Competition Law & Practice, September 2020

598 The above finding is consistent with the overall approach taken in the Decision. Contrary to Google’s misleading rhetoric, the Decision does not concern access of CSSs to Google’s Shopping Units.

599 Regrettably, most of Google’s misinterpretation and misrepresentation of the case, particularly in the context of framing the CM happened behind the scenes. However, an

³⁹⁵ Google, Response to the Court’s Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, footnote 73.

³⁹⁶ See Case T-201/04, *Microsoft*, ECLI:EU:T:2007:289, para. 1049; Commission Decision of 18 July 2018, CASE AT.40099 – *Google Android*, OJ 2019/C 402/08, paras. 916 et seq., 923.

³⁹⁷ Cf. TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, paras. 411 et seq.

article³⁹⁸ published in September 2020 by Google's lead advisers in the *Shopping* case, including in the appeal proceedings before the General Court, summarises Google's line of argumentation. While the opinions expressed in the article are supposed to be those of the authors, the authors thank no less than seven members of Google's competition in-house team for "*invaluable comments and help*", including the head of competition, EMEA and the head of performance, EMEA. Thus, the paper can be expected to reflect Google's views, to say the least. In fact, large parts of it were directly taken from Google's submissions to the General Court³⁹⁹ and the TCA⁴⁰⁰.

600 Google's fundamental strategy of misrepresenting the Decision, the imposed remedy and the Commission's reaction thereto becomes clear as early as the article's introduction:

"In Shopping, the EC raised a concern about unequal access - as between Google Shopping and rival comparison shopping services (CSSs) - to an attractive design on Google's results pages known as the 'Shopping Unit'. While Google has appealed the Shopping Decision, it has implemented the Decision's remedial order. Consistent with that order, Google provides CSSs with equal access to the Shopping Unit."

601 Every single sentence is incorrect. First, the Commission did not raise any concern about CSSs' access to Google's Shopping Units. Second, the remedy imposed does not require any such access to Shopping Units. And, third, Google's chosen CM is inconsistent with the remedial order imposed by the Decision.

602 Google's advisers begin by claiming:

"The Decision explains that it does not object to Google showing Shopping Units prominently (Decision, recitals 537–538, 662). It also makes clear that it does not object to demotions of CSSs in generic results (Decision, recital 661)."

603 It is convenient that this first statement mentions only what the Decision did *not* object to, while disregarding the actual core messages of the quoted recitals on what the Decision *does* object to:

Recital (537): *"the Commission does not object to Google applying specific criteria per se but to the fact that Google prominently positions and displays*

³⁹⁸ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020.

³⁹⁹ In particular, Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020.

⁴⁰⁰ See Google, Briefing Notes for Governmental Outreach, submitted to the TCA.

results only from its own comparison shopping service and not from competing comparison shopping services. [...]"

Recital (538): *"the Commission does not object to Google applying rich features to certain results but to the fact that Google applies such rich features only to its own comparison shopping service and not to competing comparison shopping service."*

Recital (661): *"the Commission is not preventing Google from applying adjustment mechanisms. The abuse established by this Decision concerns simply the fact that Google does not apply these mechanisms in the same way to Google's comparison shopping service and competing comparison shopping services."*

Recital (662): *"[T]he Commission is not preventing Google from displaying categories of specialised search results, such as shopping results, in its general search results pages when it determines that they are likely to be relevant or useful to a query. The abuse established by this Decision concerns simply the fact that Google does not position and display in the same way results from Google's comparison shopping service and from competing comparison shopping services".*

604 Nothing in these recitals supports the claim that the Commission would not object to Google showing Shopping Units with rich features prominently that are provided exclusively by Google's CSS. Neither do these recitals support the claim that the Commission would not object to demoting competing CSSs. Recital (662) is clear on this: if such algorithms are not applied to Google's own CSS, then they constitute an abuse.

605 Leaving aside the relevant parts, Google's advisers instead explain the Decision as follows:

*"Rather, the alleged abuse arises from the combination of Google prominently showing results from its own CSS **in Shopping Units**, while rival CSSs can appear only in generic, blue link results that are less attractive (Decision, recital 344)."*

606 However, this does not capture the full ambit of the Decision's meaning as recital (344) goes much further:

*"The Commission concludes that notwithstanding Google's arguments to the contrary (section 7.2.1.3), Google positions and displays, **in its general search results pages**, its own comparison shopping service (section 7.2.1.2) more favourably compared to competing comparison shopping services (section 7.2.1.1). While competing comparison shopping services can appear only as generic search results and are prone to the ranking of their web pages in generic search results **on Google's general search results pages** being reduced ("demoted") by certain algorithms, Google's own comparison shopping service is prominently positioned, displayed in rich format and is never demoted by those algorithms."*

607 Recital (344) does not mention Shopping Units at all. Instead, recital (344) clarifies that the favouring relates to Google's prominent positioning and display of its own CSS "*on Google's general search results pages*". According to the recital, the Commission is not concerned with "*Google prominently showing results from its own CSS in Shopping Units*", as Google claims, but with "*Google position[ing] and display[ing], in its general search results pages, its own [CSS] more favourably compared to competing [CSSs]*." There is a crucial distinction to be made: even if Google treats all services equally within a Shopping Unit, then there is still an abuse provided that only its own CSS provides such Shopping Units within Google's general search results pages (which encompass all types of results).

608 Following the quoted misrepresentation of the Decision, Google then moves to its core message:

*"In other words, the Decision considers that the ability to place product ads in attractive Shopping Units confers an advantage to the Google CSS that is not available to rival CSSs. The abusive conduct therefore consists in failing to provide CSSs with equal access to Shopping Units. If CSSs have equal access to Shopping Units, the alleged unequal treatment found in the Decision falls away".*⁴⁰¹

609 Google's advisers repeat this apparent co-relation a further five instances in the article. It constitutes their central message.⁴⁰²

610 If one wanted to pinpoint the root of the problem, then it is this false conclusion of Google. As quoted above, the Decision did not object to "*Google applying rich features to certain results*" (recital (538)), but to the fact that "***Google's own comparison shopping service is prominently positioned, displayed in rich format***" (recital (344)).

⁴⁰¹ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 3.

⁴⁰² Ibid., p. 4: "*The remedy fits the abuse as defined in the Decision: the Decision's objection was that CSS were denied an advantage because they did not have the same access to the Shopping Unit as Google Shopping.*"; p. 6 "*Once rival CSS have the same access to the Shopping Unit as Google Shopping, any alleged advantage is removed.*"; p. 7: "*because the advantage alleged at recital 421 arises from the ability to place product ads in Shopping Units that send traffic to merchants, giving rival CSS the same ability to place product ads removes the alleged advantage and ensures equal treatment*", p. 8 "*[the Decision] is about the ability to place product ads that link to merchants.*"; p. 9: "*The remedy seeks to address the concern expressed in the Decision, which is about unequal treatment of Google's CSS and rival CSSs in the ability to place product ads in Shopping Units.*"; p. 10: "*In Shopping, the EC ultimately focuses on a specific concern related to unequal access to the Shopping Unit, which Google addressed by ensuring that CSSs have equal access to the Unit.*"; p. 13: "*The Decision set out a concern that a CSS did not have equal access to Shopping Units as Google's own CSS. The remedy addresses that concern by providing CSSs with equal access*".

These concerns do not relate to the way that a competing CSS may present any product offer from a *merchant* wishing to advertise. Rather, the concerns relate to the way in which Google displays a CSSs on Google's general search results pages.⁴⁰³ The Decision objects to Google prominently displaying its own CSS with a rich Shopping Unit, while competing CSSs are displayed only as 'blue links' further below the general search results page. Crucially, this advantage for Google's CSS would remain even if the Shopping Unit did not contain any product ads at all, but, for instance, only images of, advertising for and links to Google's CSSs website.

611 Contrary to what Google claims, the Decision thus does not consider "*that the ability to place product ads in attractive Shopping Units confers an advantage to the Google CSS*". Rather, the Decision considers that the ability to compile and display Shopping Units with attractive formats for product results chosen from Google's own product index, based upon Google's own specialised algorithm confers an advantage to Google's CSS. Such advantage would remain even if Google's CSS did not place any advertisement in Shopping Units. The "*ability to place product ads in attractive Shopping Units*" cannot have been the relevant advantage for Google's CSS, for the following reasons:

- Google itself repeatedly stated that competing CSSs "*already had the same access to Shopping Units as the Google CSS before the Decision*".⁴⁰⁴ Yet, if rival CSS's always had the same access to Shopping Units as the Google CSS before the Decision (by implementing a buy-functionality or acting as an intermediary for merchants), Google cannot now argue that "*[t]he abusive conduct [...] consists in failing to provide CSSs with equal access to Shopping Units*" and that if such access was granted "*the alleged unequal treatment found in the Decision falls away*" – despite that these options did not prevent the finding of an abuse (see recital (439)). This is simply contradictory.⁴⁰⁵
- Competing CSSs demand that Google ceases displaying Shopping Units with rich product results in a way that directly compares products and price on Google's

⁴⁰³ Cf. headings of sec. 7.2.1., including 7.2.1.2.: "*The way Google's comparison shopping service is positioned and displayed in its general search results pages*".

⁴⁰⁴ Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.12.

⁴⁰⁵ See Chapter 4, A.2.3.1.2 (¶¶586 et seq.).

general search results pages altogether.⁴⁰⁶ They wish to remove the unfair competing frontend as it satisfies consumer's demand for CSSs directly on Google's general search results pages, thereby unfairly benefitting from this service's de facto omnipresent distribution and pre-installation. That is why genuine CSSs have welcomed that, following the TCA's rejection⁴⁰⁷ of the CM that Google has implemented in Europe, in Turkey, on 10 August 2020 Google ceased displaying product ads in Shopping Units altogether.⁴⁰⁸ Wishing to remove product ads on Google's general results pages is, however, the very opposite as wishing to get access to such product ads. No company would desire to be 'able' to pay for product ads, if without them the company would appear at the top of Google's general search results pages in the form of a generic search result at no costs (because Google's general algorithms appreciate that this company's website is the most relevant result to the respective query). Google's misrepresentation of the Decision blatantly twists the economic realities and ignores the interests of the parties.

- When outlining the advantages of the abusive conduct for Google's CSS, the Decision focused upon the preferential ranking of Shopping Units as compared to the lower ranking generic search results, appearing below.⁴⁰⁹ The Decision does not

⁴⁰⁶ See Joint letter of 41 CSSs to Commissioner Vestager, 28 November 2019, <https://bit.ly/308ep2X>

⁴⁰⁷ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*, see below at D. (¶¶695 et seq.).

⁴⁰⁸ Google Türkiye Resmi Blog Sitesi, 20 August 2020, "An update on Shopping ads in Turkey", <https://bit.ly/3mZthdN>: "Earlier this year, the Turkish Competition Board ordered us to treat Comparison Shopping Services (CSSs) equally. In response, we have offered a series of remedies to the Turkish Competition Authority (TCA), including implementing a solution that would have given CSSs the same opportunity to show Shopping ads from merchants as we give to Google Shopping in Turkey, while maintaining the quality of our Shopping ads for users and merchants. This would be similar to the way Shopping ads have worked successfully in Europe for 3 years where more than 600 CSSs participate. However, it is uncertain whether the suggested remedy will be acceptable for Turkey. As a result, regrettably, we will be removing Shopping ads from Google's Search pages in Turkey from 10th August 2020, in order to operate within the law and give our customers enough time to prepare."

⁴⁰⁹ Cf. Decision, recital (390): "As of 2009, Google began to ensure that the Product Universal would always be positioned at the top of the first Google general search results page."; recital (394): "The Shopping Unit is always positioned at the top, of the first Google general search results page."; recital (395): "the trigger rate of the Shopping Unit exceeds: (in most instances the trigger rate of all 361 SO Response Aggregators (taken together) in the first four generic search results".

discuss any preferential display of any product ads, let alone the ability to place them.⁴¹⁰

- Similarly, when outlining the advantages for Google's CSS, the Decision discusses the advantages of the different display features of the Shopping Unit to general search results.⁴¹¹ The Decision does not discuss the advantages of placing any products ads anywhere, let alone in the Shopping Unit.
- Overall, the Decision's concern is not any form of denied access of CSSs to a Shopping Unit or graphical features or a particular position in Google's general search results. Rather, the Decision is concerned with the fact that Google reserves the right to compile and prominently display such Shopping Units in the first place, while no competing CSS receives a similar box in a similar position within Google's general search results pages. The solution to this concern may not simply be a revamped option for CSSs to bid for slots within the favoured Shopping Units of Google's own CSS.
- Section 7.2.2. is dedicated to the importance of user traffic to websites of CSSs for their competitiveness. Yet, this would be pointless if the relevant advantage to Google's CSS were seen in its "*ability to place product ads in attractive Shopping Units*", i.e. "*product ads that link to merchants*".⁴¹² Such product ads do lead to CSS's website. They do not generate any traffic for the CSS. Neither do clicks on such product ads convey any of the further advantages that the Decision attributes to 'traffic'.⁴¹³

⁴¹⁰ The Decision elaborated upon "*the way that Google's comparison shopping service is positioned and displayed in general search results pages*" (section 7.2.1.2.). Here, the Decision describes how Google's Shopping Units are positioned higher on general search results page and that such Shopping Units contain richer graphical features than generic search results. However, in this context, the Decision does not elaborate on the questions of what information is included in Shopping Units and who is entitled to include particular information (such as a Shopping Ad). The sole issue was that the Shopping Units contain richer graphical features and were placed higher. The source from which Google was getting the pictures (i.e., whether directly from a merchant, an intermediary or a CSS that had adjusted its business model) was irrelevant to the abuse.

⁴¹¹ Cf. Decision, recital (400): "*Google has stated that it has developed 'the display formats of Product Universals and Shopping Units based on what thought was relevant for users. [...] It also mentions 'that display formats in Product Universals and Shopping Units let users distinguish these results from Google's generic blue links'*".

⁴¹² Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 8.

⁴¹³ See in detail Chapter 4, B.1.2 (¶¶645 et seq.).

- 612 Google appears to be fully aware of this. That is why it felt obliged to try to overshadow these facts by arguing (in a footnote):

*“The Decision’s discussion of the different display features of Shopping Units v generic results, the different algorithms for Shopping Units v generic results, and the different positioning of Shopping Units v generic results, are factual descriptions which explain why it is more advantageous to have access to the Shopping Units than merely to generic results.”*⁴¹⁴

- 613 Yet, this sentence only raises the absurdity of Google’s ‘access agenda’ to a new level. The sentence does indeed compare “*access to the Shopping Unit*” with access merely “*to generic results*”. However, there is no such thing as ‘access to generic results’. Google crawls and indexes websites at its initiative and displays them in return of a search query as a generic search result. This display is based upon Google’s generic search algorithm that is purely relevance-based, has not caused competition concerns and has nothing to do with the way in which Google selects and displays specialised product search results.⁴¹⁵ In fact, no CSS or any website at all, is able to ‘access’ generic results. Provided that the websites do not block Google’s crawlers, they are automatically indexed and Google’s general search algorithm automatically ranks them, meaning that they are automatically displayed in return of a corresponding query. Thus, either a CSS is relevant enough to be displayed on Google’s general search results page by means of a generic result or it is not. A CSS cannot bid its way into being considered as a generic result. Google’s comparison is simply a failed attempt to dismiss the obvious: Google’s argument that “*the Decision considers that the ability to place product ads in attractive Shopping Units confers an advantage to the Google CSS that is not available to rival CSSs*” has no backing in the Decision.

- 614 Since the above claim mounted by Google is unfounded, all of Google’s further conclusions collapse like a house of cards. The abusive conduct does not “*consist in failing to provide CSSs with equal access to Shopping Units*”, rather the abusive conduct consists in failing to treat competing CSSs equally on Google’s general search results pages. Accordingly, it is not correct to assume that “[*if CSSs have equal access to Shopping Units, the alleged unequal treatment found in the Decision falls away*”. As long as only Google’s own CSS may provide a Shopping Unit with rich results sourced from its own index and algorithm, while competing CSSs are limited to appearing below this unit as generic results, the unequal treatment on Google’s general results pages

⁴¹⁴ Graf and Mostyn, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020, p. 3 (footnote 9).

⁴¹⁵ Decision, section 5.2.1.2.2.

remains. This is irrespective of the mechanism that Google's CSS then employs to select any results and links that it wishes to include in the Shopping Unit.

- 615 However, the misrepresentation goes even further in Google's advisers' article as it argues:

"Consistent with its finding that there is no objection to Google displaying groups of specialised results (Decision, recital 661), the Decision permits Google to continue to show Shopping Units. If it does, though, Google must give rival CSSs the same access to Shopping Units as it gives to Google Shopping, using the same mechanisms (processes and methods) to allocate access (Decision, recitals 699-700)."

- 616 Again, Google draws the wrong conclusion by simply ignoring the Decision's clear wording. While it is correct that the remedy permits Google to continue to display a Shopping Unit or another equivalent form of grouping of links, it must ensure that it grants such display features to every CSS, including its own, on equal terms and conditions. In other words, if its own CSS may compile and display a Shopping Unit with product results sourced from its own product index and selected by its own specific product search algorithm, competing CSSs must have the same option to display a Shopping Unit or an equivalent grouping of search results sourced from their own product index and selected by their own specific product search algorithms. The relevant benchmark is the equal treatment on Google's general results pages. If Google grants its own CSS a Shopping Unit, it must grant all other CSSs a Shopping Unit as well. It will then be for Google to decide if it displays several Shopping Units from several CSSs or selects the most relevant Shopping Unit from the most relevant CSS. In any case, reserving such boxes just for its own CSS, while inviting all competing CSS to bid for ads within the Shopping Units that Google's CSSs compile, is no equal treatment on general search results pages and therefore not compliant.

- 617 Google's argumentation becomes even more circular where it tries to use alleged premises that it falsely created itself as an argument against criticism raised by complainants. This can be observed in the following quotation:

"Some complainants argue that the finding in Decision, recital 421[416], implies that CSSs should receive the opportunity to place links to their websites. But the opposite is the case: because the advantage alleged at recital 421 arises

⁴¹⁶ *"links with the Shopping Unit fulfil the same economic function as links within Google's standalone [CSS]. Both lead users directly to the website of Google's merchant partners and trigger a payment by the relevant partner to Google. Google's [CSS] therefore benefits economically from that click in the same manner as if the user had taken the intermediary step of going through the standalone Google Shopping website before clicking on the product of that merchant partner".*

from the ability to place product ads in the Shopping Unit that send traffic to merchants, giving rival CSSs the same ability to place product ads removes the alleged advantage and ensures equal treatment. This is a crucial point. It is incoherent to argue that Google Shopping gained an advantage by being able to place product ads that link to its merchant partners and, at the same time, argue that CSSs obtain no advantage from placing product ads that link to their merchant partners.”⁴¹⁷

618 This line of argumentation combines three misrepresentations of the Decision to create a fourth false claim, which is called the “*crucial point*”:

- First, no complainant argued that recital (421) “*implies that CSSs should receive the opportunity to place links to their websites*”. Rather, they argued, owing to recital (421) Google’s CM is non-compliant: it continues to reserve the commercial benefit of a click to Google.
- Second, the advantage described in recital (421) does not “*arise from the ability to place product ads in the Shopping Unit that send traffic to merchants*”. The advantage described in recital (421) arise from the ability of Google’s CSS to match search queries with an interface that allows the consumer to compare and display product offers directly within Google’s general search results pages. It is this ability that allows Google’s CSS to charge merchants for any click of a consumer on a link in the Shopping Unit. Thus, it is the ability to provide Shopping Units that constitutes the relevant advantage, not the ability to place any product ads, that matters (see above).
- Third, since it is not the product ads as such that are problematic but the fact that Google’s CSS is the only CSS that may provide Shopping Units (with any type of result in them), it is incorrect to assume that “*giving rival CSSs the same ability to place product ads removes the alleged advantage and ensures equal treatment*”. It does not remove the relevant advantage, because the relevant advantage of Google’s CSS is not the “*ability to place product ads*” but the ability to power and display Shopping Units within Google’s general results pages.
- Fourth, Google combines the three false premises described above to make one, what they call, “*crucial point*” (the author’s personal highlight of the article):

“This is a crucial point. It is incoherent to argue that Google Shopping gained an advantage by being able to place product ads that link to its merchant

⁴¹⁷ Graf and Mostyn, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020, pp. 6-7.

partners and, at the same time, argue that CSSs obtain no advantage from placing product ads that link to their merchant partners.”⁴¹⁸

Yet, it is Google alone that argues that Google Shopping gained a relevant advantage by being able to place product ads that link to its merchant partners. Neither the Commission, nor the complainants have ever made this point. Google is portraying an alleged inconsistency in the argumentation of critics that simply does not exist, because not the critics but Google itself had conjured up the arguments that allegedly contradict themselves. Ultimately Google is just revealing the circularity of its own argumentation.

619 Google’s advisers’ explanation as to why Google ignored the Decision’s finding of an abuse as regards algorithmic demotions is similarly surprising. The Decision clarifies that “[t]he abuse established by this Decision concerns [...] the fact that Google does not apply these [adjustment] mechanisms in the same way to Google’s comparison shopping service and competing comparison shopping services.” (recital (661)). This implies that such mechanisms exist and that Google may not apply them to rival CSSs, unless Google also applies them to its own CSS. Despite this unambiguous wording, Google claims:

“[t]he Decision states that the EC does not prevent Google from applying these algorithms (Decision, recital 661). And Google has not made changes to its demotions as part of the remedy, without the EC objecting in over 3 years”.⁴¹⁹

620 In other words, Google simply ignored the Decision and now justifies continuing to do so because the Commission has not yet objected to Google’s non-compliance.

621 Following the lack of substantial arguments coming from Google (despite distorting the Decision’s findings to an unbearable point), Google’s advisers then move on to misrepresenting the legitimate arguments made by critics of Google’s CM.

622 First, Google’s advisers try to attack the credibility of the critics by claiming:

“These complaints are mainly driven by entities that have brought damage actions against Google. They are not representative of the general C[S]S ecosystem participating in the remedy, much less of users and merchants. In fact, complainants account for just 8 per cent of active CSS groups participating in the remedy and 8 per cent of ad spend.”

623 However, the opposite is true. The critics represent the CSS ecosystem:

⁴¹⁸ Ibid., p. 7.

⁴¹⁹ Ibid., pp. 9-10.

- It is the right of every company affected by an anti-competitive conduct to seek compensation for the harm done. In the press release on the Shopping decision, the Commission even encouraged such steps in order to ensure an effective enforcement of European competition law.⁴²⁰ Where the remedy imposed by the Decision has no sufficiently deterrent effect, turning to private enforcement is the only option that is left for affected companies to deter from further infringements.
- To the author's knowledge, amongst the 41 CSSs that wrote a letter to Vestager in November 2019 to request steps against Google's CM, only three had brought damage actions against Google.⁴²¹ Amongst the 25 CSSs that contributed to this study, only four have filed a damage claim. The individual damage claims of these companies will not have motivated any of the other CSSs to raise their voices against Google's CM.
- Several of the CSSs that have criticized Google's CM cannot be interested in damages at all because they operate in countries in which Google only launched the CM after the Decision.⁴²² Yet, such CSSs are concerned that the CM forecloses competition. Contrary to Google's lobbying, damages claims are simply unrelated to the topic at hand. While such claims seek compensation for past conduct, the criticism on Google's CM is aiming at creating a level playing field for the future.
- The group of CSSs supporting this study is far more representative for CSSs as defined by the Decision as the group of 'CSS' that Google's advisers lists as representatives of companies taking part in Google's CM.⁴²³

⁴²⁰ Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service" 26 June 2017, <https://bit.ly/3mWwpqZ>: "Google is also liable to face civil actions for damages that can be brought before the courts of the Member States by any person or business affected by its anti-competitive behaviour. The new EU Antitrust Damages Directive makes it easier for victims of anti-competitive practices to obtain damages."

⁴²¹ idealo, Kelkoo, Trovaprezzi.

⁴²² For instance: Portugal (Kuantokusta); Hungary (Arukereso.hu); Greece (Skrouz.gr).

⁴²³ See above at ¶162 for an introduction of the critics of the CM. In contrast, *Graf* and *Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 5 (footnote 18) list the following companies as 'success stories' for the CM: "Pinshop, HomeBook, Plumbworld, Moebel, Shoparade, Genie, Productcaster, Croud, Connexity, Shopping 24, Kelkoo, Stylight, Pricerelevance, Buy, and Redbrain". In the CSS market the market shares are analysed by the monitoring service SimilarWeb. According to SimilarWeb, on 25 September 2020, apart from Kelkoo none of these fifteen alleged 'CSS's even made it into the category of 'price-comparison sites'. In other words, the monitoring service does not recognise these websites as price comparison sites. If at all, Google's listed firms only

- The vast majority of companies taking part in Google's CM are fake 'CSSs'.⁴²⁴ In contrast, several leading CSSs, including those complaining against the CM, have decided against taking part in the CM because it appeared fatal to them (and they have the market position to not fall into the 'prisoner's dilemma' Google wishes to create). Against this background, it is of no surprise whatsoever that the expenditure of such genuine CSSs on Shopping Ads may only represent a comparatively small proportion of the total ad spend on Google. Yet, it is not the amount of money a CSS spends on Google's Shopping Ads that defines its market position. On the contrary, it is the success it has outside of this Google-controlled system.

624 Second, Google claims that

*"[T]he complaints against the remedy generally fall into three buckets: (A) the remedy does not generate clicks to CSS's websites, (B) the remedy involves an auction; and (C) the remedy does not have a restorative element".*⁴²⁵

625 However, this mispresents the criticism:

appeared in special categories (such as for furniture). Only two of the companies were amongst the top 10 in any country in such categories. And this 'success' is only due to the fact that such companies represent one or two strong merchants (that are using the fake 'CSS' to bid for Shopping Ads) which attract the clicks. However, by definition, listing offers from just a couple of merchants does not constitute a CSS as it does not allow a broad comparison of offers. According to SimilarWeb, in August 2020, Google's 'success stories' fall into the following categories and had the following success in these categories in terms of traffic share: *Pinshop* (computer hardware): 0,10% in Serbia; *homebook.com* (E-commerce and shopping): 2.61% in Poland; *plubmworld.co.uk* (Home and garden): 0.18% in UK; *moebel.de* (Furniture): 5.83% in Germany; *shoparade.de* (Home and garden): 0.02% in Germany; *genie.co.uk* (Arts and Entertainment): n.a. (active in South Korea); *productcaster.com* (Home and garden): 0.07% in France; *Croud.com* (Fashion and Apparel): 0.03% in UK; *Connexity* (Marketing and Advertising); *shopping24.de* (Marketplace): 0.07% in Germany; *Stylight.de* (Fashion and Apparel): 0.72% in Germany; *pricerlevance.se* (does not appear at all): n.a.; *buybuybuy.com* (does not appear at all): n.a. (domain inactive); *redbrain.shop* (Price comparison): 0.26% in UK. Apart from Kelkoo none of these companies has any significant market share in any European country on the market for CSS, neither by the ranking of SimilarWeb, SearchMetrix or ComScore. These are marketing agencies, fake 'CSS's, existing only in Google's Shopping Unit ecosystem. Kelkoo, in turn, is amongst the most vocal critics of Google's CM and can thus not serve as a witness for Google's alleged popularity and success of the CM. Kelkoo operates both a CSS and a marketing agency. The articles on Kelkoo's blog on the "*benefits of the remedy for merchants*" (*Graf/Mostyn*, footnote 16) reflect the view of this marketing agency.

⁴²⁴ See above Chapter 2, A.4 (¶¶110 et seq.).

⁴²⁵ *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 6.

- Regarding point (A), Google's advisers claim that in the joint letter of 41 CSSs of November 2019⁴²⁶ (conveniently labelled by Google's advisers as "*Hausfeld letter*") the "*central thesis is that users who click on product ads in Shopping Units should not be taken to a merchant's website where they can buy the product in question. Instead, Hausfeld [sic] argues that users should be directed to the 'websites of a competing CSS'*".⁴²⁷ Yet, the letter did not request this anywhere. The partially quoted sentence actually reads "[l]ess than 5% of all users clicking on a Shopping Unit end up on the website of a competing CSS. Thus, Google is satisfying more than 95% of the demand for comparison shopping." The letter does not suggest that product ads should lead to CSS's website. The letter is very clear on the CSS's central point, right in its first bullet: "*At least since the Compliance Mechanism, Google's Shopping Units constitute a CSS in themselves – which Google clearly continues to favour on its SERPs*".
- Regarding point (B), Google claims that "[c]omplainants demand that they receive free clicks from the remedy".⁴²⁸ Yet, this is simply untrue and Google is unable to point towards a single complainant that made such demands. Neither the aforementioned letter nor other criticism that has been raised, requested free clicks. This is a pure creation on Google's part aimed at discrediting the legitimate criticisms raised. To be abundantly clear on this: this study does not demand free clicks either.
- Similarly, we are not aware of any CSS ever having criticised Google for a lack of restorative elements in the CM. Google itself is also unable to cite such criticism. Complainants are well aware that the remedy is imposed by the Commission, not by Google.⁴²⁹ However, it was up to Google to implement the cease-and-desist remedy that the Commission imposed, including the obligation "*to refrain from any act or conduct having the same or an equivalent object or effect*" (Article 3 para. 2). Google does not react to that. To be clear again: this study does not criticise Google for not having voluntarily introduced any restorative element in its CM.

⁴²⁶ Joint Letter of 41 CSSs to Commissioner Vestager, 28 November 2019: "*Google's ongoing abuse of market power is harming consumers and digital companies all over Europe. Comparison shopping services call for vigorous actions against Google's non-compliance with the European Commission's decision in the Google (Shopping) case*", <https://bit.ly/308ep2X>.

⁴²⁷ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 6.

⁴²⁸ *Ibid.*, p. 7.

⁴²⁹ See above Chapter 1, B. (¶¶51 et seq.).

- Tellingly, the most vocal criticism of CSSs, Google does not mention at all: Nearly all critic focus on the fact that Google's provision of Shopping Units continues to constitute a CSS in itself and that therefore Google's decision to display such Shopping Units for its own service, while no competing CSS may provide such units, constitutes unequal treatment.⁴³⁰ In this respect, Google limits itself to claiming "[t]he Decision is clear that the Shopping Unit is not a CSS itself (Decision, recitals 412, 423)".⁴³¹ That this does not mean that the underlying providing of Shopping Units constitutes a CSS in itself, has been explained in great detail in Chapter 4, 1.2.7 (¶¶392 et seq.).

626 In addition to the above, Google's defence of its CM is filled with many further misrepresentations and omissions. Just to name a few:

- Google claims that "[o]nly CSS as defined by the Decision can bid for slots in a Shopping Unit". Yet, it was Google that broadly defined which (fake) 'CSS' can bid.⁴³²
- Google claims that "Commissioner Vestager confirmed that 'we do not have a non-compliance case'", omitting that this only refers to whether there is a pending case, not to whether there is non-compliance issue calling for such case.
- Google highlights that "more than 600 CSSs participate in the remedy, placing product ads for over 30.000 merchants". These figures would mean that, on average, each of the 600 'CSS' has exactly 50 merchant customers. Genuine CSSs compile thousands of merchants – each.⁴³³
- Google highlights that such 600 CSSs "have won more than 1 trillion impressions and 16 billions clicks for their ads". This omits the fact that an "impression" is simply the inclusion of an ad of a merchant customer in any Shopping Unit, irrespective of whether it is clicked at or not. Such impressions do not help a CSS. Neither do the

⁴³⁰ See Letter of 41 CSSs to Commissioner Vestager, cited in footnote 430; Letter of 7 associations and 12 specialised search services to Margrethe Vestager, 28 October 2018: "*the aggregation of rich product ads (derived from product feeds of their equivalent) in itself constitutes a comparison shopping service which Google is favouring in its general search results. Note that this remains true with or without the participation of Google Shopping*", <https://bit.ly/3427g5q>.

⁴³¹ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 6.

⁴³² See above Chapter 2, A.4.5 (¶¶147 et seq.).

⁴³³ See ANNEX 2 as well as illustration 43 (¶248).

16 billion clicks on such ads help a CSS because 100% of such clicks lead to the merchant.⁴³⁴

- Google claims that “CSSs have praised the benefits of the remedy in their public statements. They have published articles, white papers, and case studies noting the ‘huge opportunities’ of the remedy”. Yet, when looking at such statements it becomes apparent that (i) almost none are from genuine CSSs, but fake ‘CSS’, (ii) they all just praise the advantages of product ads for merchants – not the advantages of the CM for CSSs (iii) several of the companies that Google calls up as ‘witnesses’ have openly criticized Google’s CM, including Kelkoo⁴³⁵ and RedBrain.⁴³⁶ RedBrain’s CEO clarified that “[i]t is definitely the case that lots of ‘fake’ CSSs have appeared recently to take advantage of the CSS credit program”⁴³⁷ and “that RedBrain does not make money from the CSS Partner Program”.⁴³⁸
- Google’s advisers claim that “while taking part in the remedy, CSSs have expanded their customer base into new geographies, built dedicated teams, expanded their customer bases, and hired new employees”.⁴³⁹ In lack of any evidence for this, Google’s advisers are desperate to note that “CSSs are still advertising open positions, including (accurate as late June 2020) Beslist (13 jobs), Kelkoo (5 jobs), and Axel Springer’s Visual Meta (9 jobs).”⁴⁴⁰ We are talking about companies that have hundreds of employees. These small figures just reflect normal fluctuation in this dynamic industry, no evidence of growth. Google advertises hundreds of jobs.

⁴³⁴ Below Chapter 4, B.1.3 (¶¶668 et seq.).

⁴³⁵ mlex, “Google not following its own rules, Kelkoo CEO tells US House antitrust panel”, 3 August 2020, <https://bit.ly/36ajETB>; mlex, “Google’s shopping changes don’t remedy EU abuse, Kelkoo says”, 3 August 2019, <https://bit.ly/2S0qfrE>; mlex, “Kelkoo says Google isn’t complying with EU antitrust decision”, 19 December 2017, <https://bit.ly/3j3Jexj>.

⁴³⁶ See Major, CEO of RedBrain in: “Google Complainants flag rise of ‘fake’ comparison sites to EC in Shopping case remedy”, PaRR, 2 October 2018, <https://bit.ly/32QsUuc>. In November 2018, Redbrain also sent a letter to Commissioner Vestager clarifying: “*This letter is to inform you that in the short term even though the CSS opportunity offered by Google in the course of its compliance mechanism has been good for us we do not believe it is a good long term solution for ourselves, other shopping comparators, shoppers or consumers. As extremely active bidder for Shopping Ads, we have seen first-hand that the ultimate only long term winner in Google’s CSS’s program will only be Google.*”

⁴³⁷ Major, CEO of RedBrain in: “Google Complainants flag rise of ‘fake’ comparison sites to EC in Shopping case remedy”, PaRR, 2 October 2018, <https://bit.ly/32QsUuc>

⁴³⁸ Major in: K. Vasant, PaRR, 2 October 2018, “Google complainants flag rise of ‘fake’ comparison sites to EC in Shopping Case remedy”.

⁴³⁹ Graf and Mostyn, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020, p. 5.

⁴⁴⁰ Ibid., footnote 20.

What Google omits to say is that these very companies had to let off hundreds of people over the last years because of Google's conduct. And these figures are nowhere near outweighed by the couple of employees that the alleged new 'CSSs' employ.

- Google's advisers claim that "[h]aving product ads in Shopping Units go directly to pages of merchants [...] ensures an efficient and beneficial experience for both users and merchants. It reduces the amount of time spent clicking and increases the effectiveness of the ads being placed by merchants"⁴⁴¹. What Google omits to say: All of these benefits could also be achieved if competing CSSs were entitled to provide their own Shopping Units on Google's general search results pages with results that link directly to the merchants.⁴⁴² For the same reason it is incorrect and a slap in the face of consumers to claim that "[a] broad prohibition on unequal treatment may [...] have prevented Google from launching these indisputably beneficial and procompetitive innovations in Europe. European consumers would have thereby been deprived of the benefits of these improvements"⁴⁴³. Such alleged improvement would benefit consumers even more if they were provided in a non-discriminatory, competitive manner, allowing the most specialised, high quality company to provide the service. This, however, presupposes equal treatment on Google's general results pages.

2.3.3.2 Google's 'access argument' in light of Slovak Telecom

- 627 The reason for Google's distorting of the Decision to an unbearable point, ultimately stems from the legal theory that Google relied upon throughout the entirety of the Commission's investigation. Google has always argued that the case solely concerned 'access' of competitors to the Shopping Units. The Decision clearly rejected this, clarifying that the case concerned the more favourable positioning and display by Google of its own CSSs within its general search results pages (of which Shopping Units are just one element) (recital (650)).
- 628 However, when setting up the CM, Google ignored this part of the Decision and simply adhered to its own (but rejected) theory.

⁴⁴¹ Ibid., p. 6.

⁴⁴² See above at ¶298.

⁴⁴³ Graf and Mostyn, "Do We Need to Regulate Equal Treatment?", Journal of European Competition Law and Practice, 18 September 2020, p. 11.

*“The remedy chosen by Google is therefore framed as an ‘access remedy’ in that, through the auction mechanism, Google is giving rival comparison shopping services access to the Shopping Unit”.*⁴⁴⁴

629 Google focuses upon the equal conditions for “*access to the Shopping Unit*” to suggest that an equal right of CSSs to bid for product ads was sufficient to comply. Yet, as explained above, equality within a Shopping Unit is less than equality within Google's general search results pages, which the Decision actually demands.

630 In the meantime, Google's reliance on its ‘access argument’ lost further weight as the Commission's narrow reading of the *Bronner* case was confirmed by the opinion of Advocate General (AG) *Saugmandsgaard Øe* in the cases *Slovak Telecom* and *Deutsche Telekom*. He observed that “*the Court has never applied the conditions laid down in Bronner, or any equivalent legal criterion, to unfair contract terms.*”⁴⁴⁵ AG *Saugmandsgaard Øe* further found that there was

*“a fundamental difference between, on the one hand, penalising the terms of an agreement [...] on the ground that they favour an undertaking which, because of its dominant position, is not subject to market discipline, and, on the other hand, penalising a refusal to make available.”*⁴⁴⁶

631 The strict *Bronner*-criteria would only be justified if a company were to reject ‘access’ to its infrastructure altogether. The Shopping Decision clearly does not concern such refusal but only the terms under which CSSs are displayed on Google. Accordingly, Google's ‘access argument’ does not help Google in preventing a finding of abuse by the ECJ or in preventing the finding of Google's non-compliance. Somewhat ironically, the blatant failure of Google's chosen ‘access remedy’ to have any economic impact only confirms the Commission's approach, namely that this is not an ‘access’ case.

2.3.3.3 Google's ‘access argument’ in light of the failure of Google's ‘access remedy’ to have any economic impact

632 Google argues that the Shopping case raised a concern about “*access to Google's Shopping Units*”. Accordingly, it framed the compliance mechanism as an ‘access remedy’, whereby competing CSSs can bid for product ads in Shopping Units. Google

⁴⁴⁴ See Google's advisers *Vesterdorf* and *Fountoukakos*, “An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law”, (2018) 9 *Journal of European Law & Practice*, 3.

⁴⁴⁵ Opinion of Advocate General *Saugmandsgaard Øe* in Cases C-152/19 P and C-165/19 P, ECLI:EU:C:2020:678, 9 September 2020, para. 86.

⁴⁴⁶ *Ibid.*, para. 68.

argues that if CSSs have equal access to Shopping Units, then the identified concerns would “*fall away*”.⁴⁴⁷

633 However, the empirical data shows that this mechanism had no positive impact on competition on the relevant markets for CSSs (above Chapter 3, ¶¶156 et seq.). If granting access to Google's Shopping Units did not improve the situation on the relevant markets, this would suggest that the lack of such access was not the underlying issue in the first place. This, of course, is what the Commission has been saying all along. The abuse is not a refusal of access to a Google infrastructure but rather a favouring of Google's service vis-à-vis competing services on its general search results pages.

B. Google's failure to bring the anti-competitive effects of the conduct referred to in Article 1 to an end

634 Pursuant to Article 3 para. 1 of the Decision, Google must bring the “infringement” to an end. The “infringement” is more than the conduct leading to it. An abuse requires the finding that the conduct may have anti-competitive effects on a market. Thus, the infringement consists of both the conduct and its anti-competitive effects. Accordingly, following the description of the favouring under the heading “[t]he abusive conduct: the more favourable positioning and display” in section 7.2., the Decision lists the potential anti-competitive effects of this conduct in section 7.3. This section is entitled “[T]he Conduct has potential anti-competitive effects on several markets”. To comply, Google must cease the conduct and undo the anti-competitive effects that materialised.

635 However, thus far, Google has failed to bring the anti-competitive effects of its conduct to an end, because the CM fails to cease the traffic diversion from Google's general search results pages to Google's own CSS and away from competing CSSs.

1. The CM fails to cease the diversion of traffic from Google's general search results pages away from rival CSSs and to Google's own CSS

636 The Decision's primary concern is that the identified conduct (the favouring)

“diverts traffic in the sense that it: (i) decreases traffic from Google's general search results pages to competing comparison shopping services; and (ii) increases traffic from Google's general search results pages to Google's own comparison shopping service”, recital (452).

⁴⁴⁷ Graf and Mostyn, “Do We Need to Regulate Equal Treatment?”, Journal of European Competition Law and Practice, 18 September 2020, p. 3.

637 The sub-sections of section 7.2. describing the abuse, illustrate the relevance of traffic for the finding of abuse:

- “7.2.1: Google positions and displays, in its general search results pages, its own [CSS] more favourably compared to competing [CSS]”;
- “7.2.2 The importance of user traffic for [CSSs]”;
- “7.2.3. The Conduct decreases traffic from Google’s general search results pages to competing [CSSs] and increases traffic [...] to Google’s own [CSS]”; and
- “7.2.4. The traffic diverted by the Conduct accounts for a large proportion of traffic to competing [CSSs] and cannot be effectively replaced by other sources currently available to [CSSs]”.

638 The entire abuse concerns the relevance of (generic) search traffic, the lack of alternatives to such traffic and the manner with which Google diverted such traffic from competing CSSs to its own CSS by placing Product Universals/Shopping Units prominently above all competing CSSs, thereby pushing them down on the general search results pages.

639 The CM has not stopped this traffic diversion:

- The condemned impact of the abuse was a “*diversion of generic search traffic*”. Yet, the CM has not increased, but further decreased such traffic to rival CSSs (see 1.1).
- Clicks on product results in Shopping Units leading directly to merchants do not constitute traffic to rival CSSs, but traffic to Google’s on-SERP-CSS.⁴⁴⁸ Therefore, the CM has overall only increased traffic from general search to Google (see 1.2).
- Irrespective of the traffic allocation, competing CSSs do not benefit economically from taking part in the CM (see 1.3).

1.1 Instead of increasing, the CM further decreases generic search traffic from Google’s general search results pages to rival CSSs

640 As the relevant anti-competitive effect of the favouring conduct, the Decision found that Google’s:

⁴⁴⁸ See Marsden, “Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (an How to Fix it)”, Journal of European Competition Law & Practice, 17 September 2020, p. 5: “the clicks the Commissioner refers to are not actually clicks to CSSs but instead clicks from Google’s PLA module to merchants. In fact, there has been no real increase in traffic to rival CSSs due to the PLA remedy.”.

“conduct [i] decreases traffic from Google’s general search results pages to [CSSs] and [ii] increases traffic from Google’s general search results pages to Google’s own [CSS]”. (heading of section 7.2.3.)

641 Regarding [i] – the decreased “traffic to competing CSSs”, the Decision only measured the:

“Impact of the Conduct on generic search traffic from Google’s general search results pages to competing comparison shopping services”. (heading of section 7.2.3.2.)

642 The term “*generic search traffic*” relates to clicks on “*generic search results*” as defined in footnote 8 of the Decision in terms of “organic” or “natural” search results. The Decision’s impact assessment was not concerned about any decrease of traffic from different sources of search results such as from Google text ads (formerly *AdWords*) or specialised search results. Instead, it found that “*Generic search traffic from Google’s general search results pages accounts for a large proportion of traffic to competing comparison shopping services*” (heading of section 7.2.4.1.) and that “*Generic search traffic from Google’s general search results pages cannot be effectively replaced by other sources*” (heading of section 7.2.4.2.1.), in particular traffic from *AdWords*, mobile apps or direct traffic. Consequently, throughout the entire Decision, the decrease of traffic to rival CSSs is referred to as the “*traffic from generic search results on Google’s general search results pages to the website of a [CSS]*”.⁴⁴⁹

643 If the identified anti-competitive effect was a decrease of generic search traffic, the remedy must unwind the decrease of generic search traffic. Since the Decision clearly laid out that alternative sources cannot effectively replace generic search traffic, it is not sufficient for the CM to increase any such alternative source of traffic. The CM needs to remedy the established decrease of generic search traffic. However, this has not happened.

644 As outlined above at ¶¶169 et seq., since the introduction of the CM, the volume of generic search traffic to rival CSSs has further decreased. Thus, the CM has not remedied the anti-competitive effects of the abuse and thus not ceased the infringement.

⁴⁴⁹ Decision, recital (464); see also recitals (463) et seq. and footnote 581.

1.2 Instead of decreasing, the CM further increases search traffic to Google's own CSS

645 Since the introduction of the CM, Google has argued that the anti-competitive effects of the favouring conduct would have ceased because rival CSSs may now bid for *Shopping Ads* in the Shopping Units that Google continues to favourably display. Google argues that the clicks on such *Shopping Ads* would now generate traffic to rival CSSs and that they would therefore benefit from the favourable display of such ads in Shopping Units just as much as *Google Shopping Europe* does.

646 The Commission took note of this line of argument and observed whether CSSs indeed used the option to appear in Shopping Units and to what extent. In a press statement on the state of affairs in June 2019, Commissioner *Vestager* declared, for instance, that:

*"Since September 2017, rival comparison shopping services have been able to bid for space in the shopping unit. It has taken time for the mechanisms to show results. The data we shared in June last year found that around 30% of Shopping Units included at least one of Google's competitors. The latest data shows that these 30% now increased to 75% of shopping units that included at least one of Google's rivals. Our June 2018 data also found that only above 6% of clicks in the Google shopping unit went to competitors. Now this 6% has also increased. Around 40% of clicks on product results now go to competitors of Google."*⁴⁵⁰

647 In the same vein, on 16 September 2020, Director General *Guersent* said that Google's CM was showing "*positive developments in terms of market uptake*".

*"The data actually available show that now 83% of Units include at least one rival and that 47% of clicks go to those. By definition during the period of abuse there were no offers from rivals in the Shopping Unit."*⁴⁵¹

648 While at first glance the increased uptake, in particular during the SpendMatch program⁴⁵², may appear as something positive, it would be false to conclude that this development somewhat counters the diversion of traffic and thus the anti-competitive effects of the abuse. This is because, from a technical, economical and legal perspective, the clicks on product results (*Shopping Ads*) in Shopping Units do *not* go to a rival CSSs. Based upon the Decision's definition and calculation of "traffic", such clicks are not traffic for rival CSSs (bidding on behalf of merchants), but traffic to Google's on-SERP-CSS (matching and displaying the results). Even if 100% of the

⁴⁵⁰ Statement by Commissioner *Vestager* on Commission decision to fine Google €1.49 billion for abusive practices in online advertising, Brussels, 20 March 2019, <https://bit.ly/3mDLptP>.

⁴⁵¹ *Guersent*, speech 17 September 2020, ICN 2020, Virtual Annual Conference, Unilateral Conduct Working Group, <https://bit.ly/32Pi1ZF>.

⁴⁵² See above ¶Ch 2 A 4.1.

Shopping Units included 100% product ads placed by other companies than GSE and 100% of the clicks went on such ads, this would still not constitute the required equal treatment on Google's general search results pages. Because 100% of such clicks would trigger economic advantages only for Google's on-SERP-CSS as it is this service that matches the query with the results, while 0% of the clicks go the websites of the companies placing the bids on behalf of merchants.

649 In summary, clicks on Shopping Units are clicks to Google's on-SERP-CSS because, according to the Decision:

- The general rule is that "traffic" is (only) a click leading the user to the website of a CSS.
- As an exception to this rule, a click that leads to the website of a third-party (i.e., a merchant) may be considered as "traffic" for a CSS if that click was generated on an interface (frontend) that is powered by the CSSs. This is because, in such a case, the CSS has provided its service through this interface and the click has the same economic value as though the user had first clicked on the CSSs' website.
- Prior to the CM, this logic justified counting clicks in Shopping Units that the lead directly to merchants (that bid for the results) as traffic for Google Shopping, because Google Shopping powered the Shopping Units (interface) displayed on Google's SERP.
- Prior to the CM, this logic also justified counting clicks on results in Product Listing Units that were displayed on the results pages of some general search services and other publishers as traffic (not for those publishers but) for CSSs that provided such boxes by filling them with product offers from their own databases based upon their own specialised algorithms.
- Following the CM, this logic disallows counting clicks in CM-Shopping Units that continue to lead users directly to merchants (that now merely bid via intermediary CSSs) as traffic for the intermediary CSSs, because they do not provide / power the CM-Shopping Units.
- It is solely Google that power the CM-Shopping Units. Therefore, any click generated through such units is traffic for Google's on-SERP-CSS, not traffic for the CSSs allowed to bid on behalf of merchants for individual ads in the unit.

1.2.1 The Decision's coherent methodology for calculating traffic

- 650 When the Decision discusses “user traffic”, it generally means a “visit” to a website.⁴⁵³ Such “visit” requires that the user sees the landing page, i.e., that the website loads in the user’s web browser. Since traffic equals visits to a site, the starting point is that the Decision calculates traffic to a CSS as the sum of the clicks on links in Google’s general results pages that lead the user to the standalone website of the CSS.⁴⁵⁴
- 651 However, the Decision acknowledges that a CSS may offer its consumer-facing service not just on its own website, but also through interfaces that it displays on the websites of third parties. Several CSSs co-operate with other website operators (publishers) to integrate their offerings if a consumer carries out a search on such publishers’ website. In particular, apart from Google, other general search services also display groupings of specialised product search results in order to provide a CSS to their customers. As has been described above at ¶¶357 et seq., in particular Bing’s CSS ‘Bing Shopping’ provides, what the Decision refers to as Product Listing Units, directly on Bing’s general results pages. Similarly, third-party websites display Product Listing Units powered by CSSs such as Kelkoo, LeGuide and idealo. The example of the co-operation between idealo and mydealz is described above at ¶¶376 et seq.
- 652 The Decision acknowledges that such units displayed on websites other than those operated by the CSS itself (i.e., on a general search service or a third party site) are capable of fulfilling the economic function of the standalone website of the CSS itself. Both interfaces are just the frontend for consumers to engage with the underlying comparison service. Accordingly, the Decision considers that the powering of such units may constitute a CSS in itself (above at ¶¶333 et seq.).
- 653 The Decision’s methodology for counting traffic follows this distinction. Given that the powering of Google’s Shopping Units and of equivalent Product Listing Units are seen as a CSS, the Decision also attributes clicks on links in such units to traffic for the CSS (powering the box). Crucially, this includes all clicks on links that lead the user directly to a merchant’s website. The total traffic of a CSS is thus the sum of (i) clicks on links

⁴⁵³ See for example Decision, recital (622): “*clicks on links within the Shopping Units that lead the user directly to a webpage of a merchant should not be counted as visits to Google Shopping*”; see also recitals (278), (422), (553), (558) and footnotes 581, 607, 707.

⁴⁵⁴ Decision, section 7.2.3.2., recital (463): “*impact of the Conduct on generic search traffic from Google’s general search results pages to their websites*”, emphasis added; footnotes 581 and 607: “*In addition to the visits of the standalone websites of the relevant comparison shopping services [...]*”; see also recital (613) and footnotes 603, 604, 606.

that lead directly to the CSS's website; and (ii) clicks on links within a (Product Listing/Shopping) Unit displayed on a third-party website in return of a search query with results extracted from the CSS.

654 Relating to Google Shopping:

“traffic to Google's own comparison shopping service is based: (a) For Google Product Search, the sum of the clicks on links that led the user to the standalone Google Product Search website, including the Shopping menu link displayed at the top of Google's general search results pages; (b) For Google Shopping, the sum of the clicks on links that led the user to the standalone Google Shopping website, including the Shopping menu link displayed at the top of Google's general search results pages, and the clicks on links that lead the user directly to a webpage of a merchant (see recital (421)).”⁴⁵⁵

655 Related to competing CSSs:

“In addition to the visits to the standalone websites of the relevant comparison shopping services, the total traffic to competing comparison shopping services also includes clicks on all the items (including, where applicable on links leading to a standalone comparison shopping service's website) included in the product listing units displayed on the general search results pages of Ask, Bing, T-Online, and Yahoo, as well as in the product listing units displayed on third party websites by Kelkoo, LeGuide, Idealo (Axel Springer), and Sanoma (Kieskeurig), when these units are displayed in reply to a query.”⁴⁵⁶

656 Note that, throughout the investigation, Google had argued that:

“clicks on links within the Shopping Units that lead the user directly to a webpage of a merchant should not be counted as visits to Google Shopping because they are ads and clicks on them would not benefit Google Shopping.”⁴⁵⁷

657 The Decision rightly rejected this argument because, while these results are ads (as offers for merchants), they are nevertheless also used *vis-à-vis* consumers to provide a product and price comparison, thus reflecting the two-sided nature of CSSs.

658 It is further noteworthy that, according to Google's own submissions, the “*Decision does not dispute that aggregators can participate in Shopping Units*” and that “*aggregators already had the same access to Shopping Units as the Google CSS before the Decision*”⁴⁵⁸ by placing product ads there as intermediaries. Accordingly, Google's

⁴⁵⁵ Decision, recital (614); see also the identical definitions of “traffic” in footnote 603 and 606 of the Decision.

⁴⁵⁶ Decision, footnote 581; see also footnote 607.

⁴⁵⁷ Decision, recital (622).

⁴⁵⁸ Google, Response to the Court's Questions for Written Answer of 19 December 2019 in Case T-612/17, 22 January 2020, para. 6.12.

Shopping Units were filled both by merchants directly and by intermediaries acting on their behalf.⁴⁵⁹ Nevertheless, the Decision counted all clicks on the Shopping Unit as traffic for Google's CSS – not as traffic for the intermediaries placing bids on merchant's behalf:

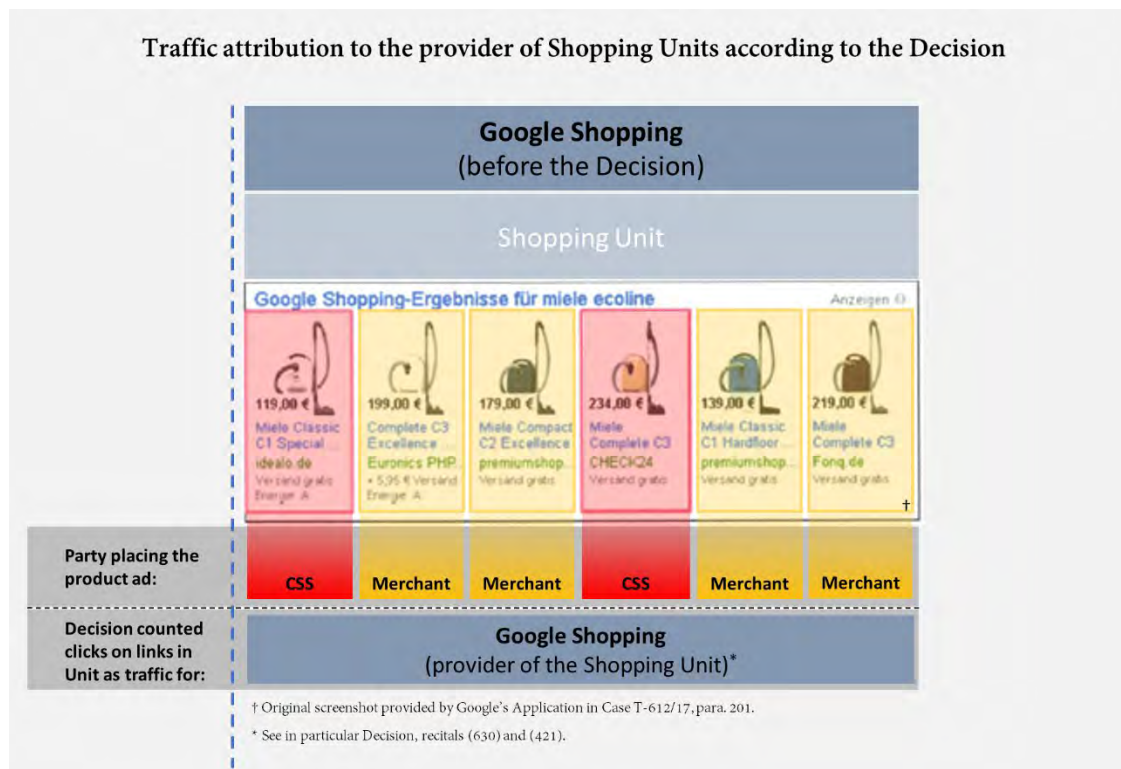


Illustration 87: Traffic attribution to the provider of Shopping Units (Google Shopping) according to the Decision

659 Equally, according to Google's own submission, Bing's Product Listing Units (the equivalent to Shopping Units) constitute "*the same kind units*" as Google's own powering of Shopping Units.⁴⁶⁰ It was therefore only necessary for the Commission to count all clicks on links in such Bing-powered Product Listing Units as traffic to Bing's on-SERP-CSS. This is particularly revealing since, as early as 2013, Bing had allowed aggregators (including CSSs) to buy Bing product ads, provided that such ads lead the user directly to a shop.⁴⁶¹ This would render Bing's model the blueprint for Google's current CM (see above at ¶¶362 et seq.). Nevertheless, the Decision counted all clicks on Bing's Shopping Units as traffic for Bing – and not the aggregators.

⁴⁵⁹ Decision, recital (439).

⁴⁶⁰ Google, SSO Response in Case AT.39740, para. 276.

⁴⁶¹ See above at ¶362 and Bing Merchant Center Integration Guide, 23 August 2013, p. 24.

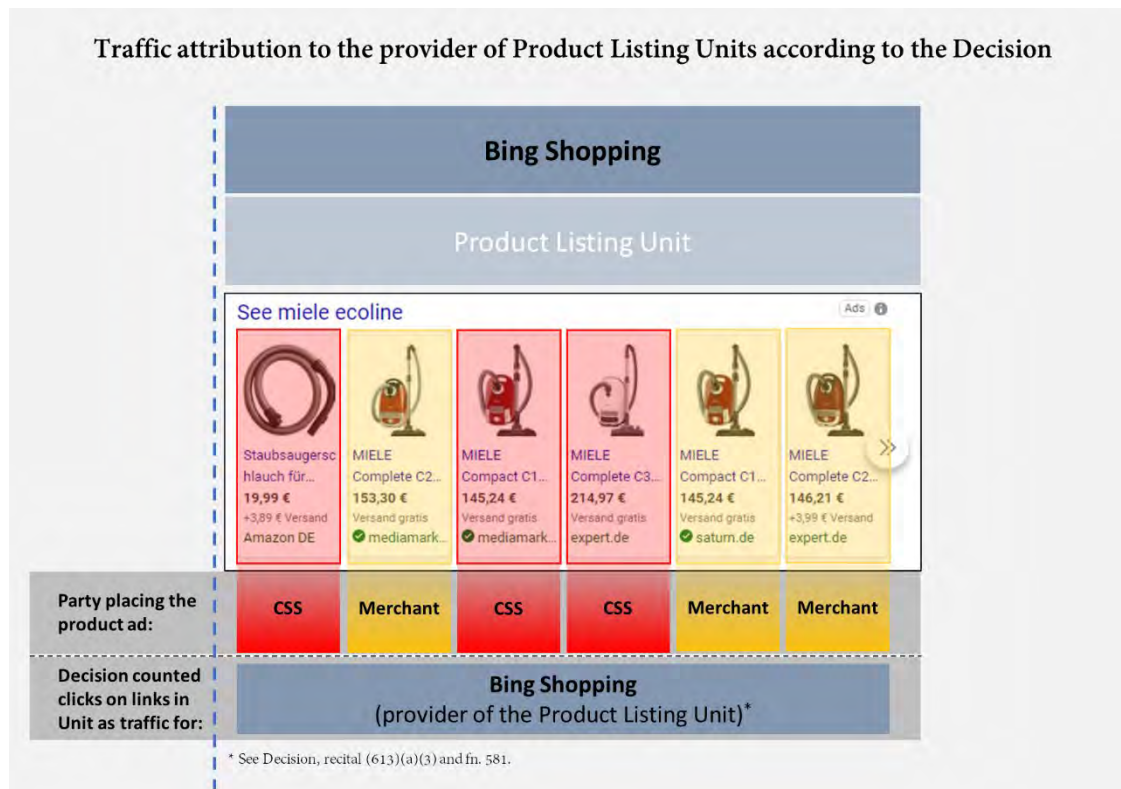


Illustration 88: Traffic attribution to the provider of Product Listing Units according to the Decision

1.2.2 Applying the Decision's methodology for calculating traffic, 99% of the clicks on CM-Shopping Units is traffic for Google's on-SERP-CSS

- 660 A significant share of the ads in both Google's Shopping Units, and even more so in Bing's Product Listing Units were placed there by aggregators, including CSSs (as now in CM-Shopping Units). Nevertheless, the Commission had counted all clicks on the links in the Shopping Units as traffic for the company providing the unit (Google Shopping / Bing Shopping), even if the ads were placed by aggregators.
- 661 It is even the case that the Commission only requested traffic data from Bing itself, not the aggregators or CSSs buying ads in the boxes.⁴⁶² Thus, in the case of Google's and Bing's Shopping Units, the Commission did not even consider counting clicks on links that lead the user directly to a merchant as a click for that merchant or the aggregator (CSS) that placed the bid on the merchant's behalf. The Commission considered all clicks on Google's Shopping Units and Bing's Product Listing Units as traffic for Google's and Bing's on-SERP-CSS – not as traffic for the CSSs that bid for individual product ads in such units. This precludes the Commission from now counting such clicks in Google's Shopping Units as traffic to the CSS bidding for the ad.

⁴⁶² Commission, LoF in Case AT.39740, para. 37 and footnote 139.

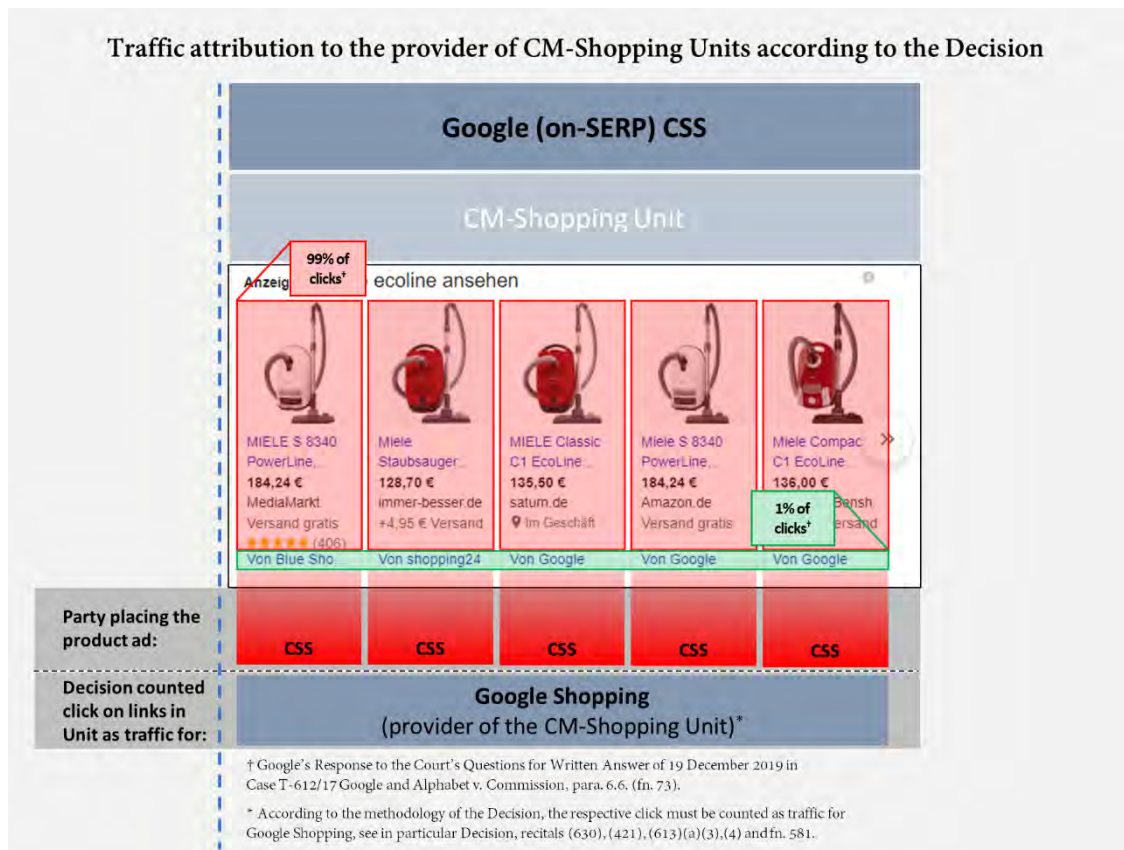


Illustration 89: Traffic attribution to the provider of CM-Shopping Units (Google) according to the Decision

- 662 The Decision follows the same rationale for Product Listing Units that a CSS places on third-party website (such as idealo providing Product Listing Units on mydealz, above at ¶¶376 et seq.). Here, the Decision explicitly only accepts clicks on such boxes as traffic for the CSS (rather than the third-party website on which the unit appear) “*when these units are displayed in reply to a query*”. Only in such a case may the CSS match the content of the unit to the respective search query. Clicks on units that are not related to a query, i.e., displayed by the third-party website automatically, do not count as traffic for the CSS, even if the units link to its website (see footnote 581 of the Decision).
- 663 The underlying common rationale for this methodology is apparent: If a click on a link does not lead the user to the website of a CSS (but directly to a merchant), such a click shall nevertheless count as “traffic” for the CSS provided such click is: (i) rendered on an interface (Shopping Unit/Product Listing Unit); (ii) that is displayed “by” the CSS on its own website (as in the case of Bing) or a third-party website (as in the case of Kelkoo, idealo, LeGuide); (iii) in return of a search query entered on that website; and (iv) filled with a set of specialised product results extracted from the CSS’s own database on the basis of its own specialised search algorithms.

- 664 This is coherent because if, in response to a search query entered on any website, a CSS displays an entire unit with specialised search results extracted from its own database and based upon its own algorithms, it is the CSS (and not the operator of the website) that matches the query with the results. By doing so, the CSS provides the core of its comparison shopping *service* to the consumer entering the query (and the merchant that it displays). For a CSS, it makes no difference whether it provides its matching service on its own website or on a third-party website, provided that the CSS itself decides which product results are displayed in return for a query, and any corresponding click on the result triggers payment. This was the case for: (i) Google Shopping regarding the powering of Shopping Units; (ii) Bing regarding the powering of identical Product Listing Units; and (iii) for Kelkoo, idealo and LeGuide regarding the powering of Product Listing Units displayed on third-party websites. This continues to be the case for Google powering CM-Shopping Units on its own website.
- 665 The Decision confirms this rationale in recital (614) when explaining why traffic from Google's general search results pages to Google's own comparison includes *"clicks on links that lead the user directly to a webpage of a merchant (see recital (421))"*. The referenced recital (421) (et seq.) explains in detail why *"links within the Shopping Unit fulfil the same economic function as links within Google's standalone comparison shopping website."* The underlying rationale is that, in both cases, the infrastructure of Google Shopping determined which links are displayed in the Shopping Unit, so that a click on such link was the fruit of the CSS's labour and therefore rightfully directly triggered a payment from a merchant. The product results in the Shopping Units were the work of Google Shopping – not of Google's general search service (or the merchants selected to appear in the unit).
- 666 In any event, the Commission's coherent approach of counting traffic if a click does not link to a CSS's website allows no other interpretation than the following: after the CM, any click on a product ad is not 'traffic' for the CSS that did the bidding, but for Google's on-SERP-CSS. In contrast, Google's argument (namely if the Decision counted clicks on links as leading directly to merchants as 'traffic' for Google Shopping, then such clicks must count as traffic for the CSS that did the bidding, is incompatible with the Decision's methodology. It turns the rationale for counting clicks and measuring 'traffic' on its head.
- 667 The illustration below summarises this crucial point. It demonstrates that there are no differences between the way Google Shopping Units, Bing Product Listing Units and idealo Product Listing Units work as compared to Google's current CM-Shopping Units.

In all of the former cases, the Decision counted clicks on links in such units as traffic for the undertaking providing the unit (i.e., filling it with product results from their own databases based upon their own specialised search algorithms). Accordingly, clicks on CM-Shopping Units are also traffic for Google's on-SERP-CSS, not the CSSs that bid for individual product offers.

Decision's consistent treatment of intermediaries that place product ads in Shopping or Product Listing Units

Comparison of Units	Google Shopping Units before 9/2017	Bing Product Listing Units since 8/2013	Product Listing Units on third-party websites	Google Shopping Units since 9/2017
host: website with search bar where user enters query and results Unit is displayed	Google (Google Search)	Bing (Bing Search)	any third-party website (here: mydealz)	Google (Google Search)
provider of Unit: service matching query with results from own product database using own special algorithms	Google (Google Shopping)	Bing (Bing Shopping)	idealo	Google (Google on-SERP-CSS)
example image of website and Unit (marked red)				
party uploading product feeds to product database used to select results in Unit	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)	merchant (self-service) or intermediary (managed)
conditions for intermediary to upload product feeds	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary 	<ul style="list-style-type: none"> uploading on behalf of merchant URL must link directly to merchant's website result must name merchant, not intermediary
website to which clicks on product results in Unit lead to	merchant	merchant	merchant	merchant
standalone comparison website user sees during its journey to merchant	none	none	none	none
space where user compares products & prices before click to merchant to conclude sale = where demand for CSS is satisfied	Unit	Unit	Unit	Unit
service earning CSS revenue directly from click in Unit	provider of Unit: Google (Google Shopping)	provider of Unit: Bing (Bing Shopping)	provider of Unit: idealo	provider of Unit: Google (Google on-SERP-CSS)
service earning commission for online advertising/marketing	self-service: none or managed: intermediary	self-service: none or managed: intermediary	self-service: none or managed: intermediary	self-service: none or managed: intermediary (if via Google Shopping Europe)
service the Decision attributes clicks as "traffic" to if user clicks on result in Unit	provider of Unit: Google (Google Shopping) (see in particular recitals (421) and (630) of the Decision)	provider of Unit: Bing (Bing Shopping) (see in particular recital 613 (a) (3) and footnote 581 of the Decision)	provider of Unit: idealo (see in particular recital 613 (a) (4) and footnote 581 of the Decision)	Applying the Decision's methodology, it can only be the provider of the Unit: Google (Google on-SERP CSS).
service the Decision identifies as the CSS	provider of Unit: Google (Google Shopping) (see in particular recitals (31) and (32) of the Decision)	provider of Unit: Bing (Bing Shopping) (see in particular recital 613 (a) (3) of the Decision)	provider of Unit: idealo (see in particular recital 613 (a) (4) of the Decision)	Applying the Decision's methodology, it can only be the provider of the Unit: Google (Google on-SERP CSS).

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Illustration 10: Decision's consistent treatment of intermediaries that place product ads in Shopping or Product Listing Units

1.3 Competing CSSs do not benefit economically from clicks on links within the CM-Shopping Unit in the same manner as Google's on-SERP-CSS

668 The above findings are confirmed by the Decision's explanation as to why clicks on Shopping Units are also clicks for Google's CSS and were calculated as such. According to recital (630):

*"clicks on links within the Shopping Unit that lead the user directly to a webpage of a merchant should be counted as visits to Google Shopping because Google's comparison shopping service **benefits economically from clicks on those links in the same manner** as if the user had taken the intermediary step of going through the standalone Google Shopping website before clicking on the product of that merchant partner". (emphasis added)*

669 The Decision uses the term "*the same*" manner, and not those of a "similar", "equivalent" or "comparable" manner. Competing CSSs, however, clearly do not benefit economically from a click on product ad in a shopping Unit in the same manner as though the user had taken the intermediary step of going through their standalone website before clicking on the product of that merchant partner.

670 The only overlap between *Google Shopping Europe* and its competitors under the CM is that a click on a PLA served by a competing CSS also triggers a payment by the relevant merchant partner. However, unlike in the case of *Google Shopping* (prior to the CM), for several reasons this does not mean that a competing CSS benefits economically from such a click in the same manner as though the user had taken the intermediary step of going through the competing CSS's website.

671 According to the Decision, "*user traffic is important for the ability of a comparison shopping service to compete in several ways.*"⁴⁶³ Yet, none of the reasons as to why "*traffic is the most important 'asset' of a [specialised] search engine*"⁴⁶⁴ listed in the Decision (recitals (445)-(449)) applies to a competing CSS if a user clicks on a link in a *Shopping Unit* that leads directly to a merchant:

- Unlike the case with Google Shopping, **traffic via a Shopping Unit to a merchant does not generate revenues "that can be used to invest in order to improve the usefulness of the services provided"**.⁴⁶⁵ Before the CM, Google Shopping did not have to pay Google for any click on a link in a Shopping Unit leading to a merchant.

⁴⁶³ Decision, recital (444).

⁴⁶⁴ Decision, recital (444).

⁴⁶⁵ Decision, recital (446).

Therefore, whether a user clicked on a link in a Shopping Unit or a link on its standalone website made no difference for Google Shopping. In both cases the acquisition costs were zero and the merchant's payment was direct profit. However, the situation is entirely different for competing CSSs at this time – they must bid and pay Google for any click on a link in a Shopping Unit. Due to the economics of auctions, such traffic acquisition costs may well reduce the profit margin of any click to nearly zero. In contrast, if a user clicks on a link within a Shopping Unit or on the standalone website, for competing CSSs a click to a merchant in a Shopping Unit is economically not comparable with a click to a merchant on the CSS's website. In other words, the bidding for PLAs reduces the commercial value of the merchant's payment significantly when the potential customer arrives via the Shopping Unit. Therefore, competing CSSs do not benefit economically from clicks on links within the Shopping Unit in the same manner as though the user had taken the intermediary step of going through the competing CSSs' website before clicking on the product of a merchant partner.

- Clicks from Google Shopping Unit to a merchant **only** *“convince merchants to provide” Google with more “data about their products”*⁴⁶⁶ – but not to provide such data to the service of competing CSSs. The Decision rightly highlights that the more traffic a CSS website generates, the more attractive it becomes for merchants and the more willing they are able to provide product data. However, if the traffic (only) comes directly via Google's Shopping Units, the merchants do not attribute such traffic (i.e., user base) to the CSS serving the ads but to Google. They will only provide more product data to appear in Google's Shopping Units, i.e., in Google's on-SERP-CSS – but there is no incentive for them to provide more data for the CSS's websites.
- Clicks directly to a merchant **do not** *“allow machine learning effects”*:⁴⁶⁷ The Decision rightly points out that user traffic to a website is important to *“improve the relevance of the results of [CSS] and the usefulness of the service they offer”*. However, none of these advantages may materialise based upon clicks from a Shopping Unit directly to merchant. This is because in this scenario, Google alone – and not the competing CSS serving the particular ad – gets all the data about the user behaviour that is relevant for the matching (and Google is the only one carrying out such matching). The competing CSS will not know the search query for which

⁴⁶⁶ Decision, recital (445).

⁴⁶⁷ Decision, recital (447).

its ad appeared, let alone the decisive factors for appearing. Moreover, while “*the selection of paid product results displayed in the Shopping Units presents many common technological features and mechanisms with the selection of results on the standalone Google Shopping website*”,⁴⁶⁸ this is not the case for the websites of competing CSSs. Lacking any data sharing and compatibility, competing CSSs learn nothing from clicks directly to merchants.

- With links leading directly from Google to merchants, competing CSSs cannot “*carry out experiments aimed at improving their services*” (recital (448)).
- Competing CSSs are also **not able to “suggest other search terms that may be of interest for users”**⁴⁶⁹ if the user is led directly from Google to the merchant. Only in the event that a user arrives at the website of a CSS, may the CSS suggest alternative search terms or additional filters. The Shopping Units also do not allow competing CSSs to suggest alternative or complementary products to those products searched for (for example, a sleeping bag or a camp stove if a user searches a “tent”). Presenting such complements, however, is an important feature of a CSS website, often leading to several click-outs of one and the same user on different products (thereby triggering additional payments). In contrast, in the case of the Shopping Units, only Google is able to present users alternatives and complements. Shopping Units only allow one single click-out on a certain product offer of any given CSS.
- Clicks from a Shopping Unit to a merchant **do not “generate more original user reviews”**⁴⁷⁰ for competing CSSs. If users do not end up on the websites of a CSS, they cannot submit any reviews for any product offer on the website or otherwise engage with it. All interaction takes place on Google’s website. Google has expanded the review function so that users may submit reviews (with their own pictures) directly in the Shopping Unit and thus on Google’s own pages.⁴⁷¹

672 It was not an alternative for the Decision to count clicks on links within the *Shopping Unit* as visits to *Google Shopping*, because all the positive effects of user traffic exclusively benefited Google as the operator of the Shopping Units. However, following

⁴⁶⁸ Decision, recital (415).

⁴⁶⁹ Decision, recital (449).

⁴⁷⁰ Decision, recital (450).

⁴⁷¹ *Marvin*, “New Google Shopping program enables customer photos to show with their product reviews”, Search Engine Land, 11 July 2019, <https://bit.ly/3ckjUAB>.

the CM, for a company that may merely bid for the inclusion of individual *Shopping Ads* or CLAs in Shopping Units, none of these positive effects of user traffic materialise. The reason for this ultimately lies in the above finding that Google's *Shopping Units* directly serve as a CSS. This makes all the difference:

- If a user clicks on (any) product offer in a Shopping Unit that contains several product offers, the user has already consumed the CSS – provided by Google – because such a click is only the final act of its use of Google's on-SERP-CSS.⁴⁷² The user starts its comparison shopping journey by entering a product-related search query into Google. Google only triggers Shopping Units in return of search queries that suggest a demand for a CSS (see recitals (23), (24), (26) of the Decision). If Google identifies such demand, it now (more than ever) satisfies this demand directly on its general search results pages by compiling and displaying Shopping Units that contain product items that fully match the search query and allow the user to compare products and prices. This integration of vertical search services into the general search service is one of the main reasons why, at this point, more than 50 percent of Google search queries do not lead to clicks on search results.⁴⁷³ The user does not care who has placed the product items into the Shopping Unit (or how they were chosen). Rather, the user uses the Shopping Units to compare the products and prices and thereby satisfies its relevant demand. The user will attribute this CSS experience to Google alone – where s/he is consuming the service – not to any merchant or CSS acting on its behalf. Consequently, the Decision counts any click on a link in a Shopping Unit not as traffic to the merchant but traffic to Google's own on-SERP-CSS.⁴⁷⁴
- A user clicking on a product offer in a Shopping Unit that is placed by a competing CSS and leads the user directly to a merchant, does not see any indication of this competing CSS, and thus does not consume or experience any of its service. A user that clicks on a link leading directly to the merchant of a competitor CSS can neither see the CSS's website, nor experience its matching abilities or price ranges, nor see any additional product information. Once a link in a Shopping Unit is clicked, the user has made its choice entirely based upon the CSS provided by Google's

⁴⁷² See also *Marsden*, "Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (an How to Fix it)", *Journal of European Competition Law & Practice*, 17 September 2020, p. 4: "*Google remains the only service which the user has viewed in their shopping journey*".

⁴⁷³ *Nguyen*, "Now, more than 50% of Google searches end without a click to other content, study finds", *Search Engine Land*, 14 August 2019, <https://bit.ly/3hSLWnR>.

⁴⁷⁴ Decision, recitals (630), (420) et seq.

Shopping Unit. The competing CSS (that served the product offer) never gets a chance to convince the user of its superior service. Yet, this is indispensable in building any lasting customer relationships. Consequently, it would be legally, economically and logically incorrect to count such clicks as traffic to competing CSS.

673 The only company that benefits meaningfully from any clicks in Shopping Units in the aforementioned sense is Google – as the operator of both, the Shopping Units and the general search engine results pages. This is certainly no improvement on the prohibited self-preferencing.

2. Excursus: Would (more) CLAs suffice to remedy the infringement?

674 In March 2019, Google started to ‘*voluntarily test*’ CLAs outside of the remedy (see above at ¶¶151 et seq.). Thus far CLAs do not play any role. This is because “*Google displays it only for a fraction of Shopping Units*” in only a few countries and “*only few users click on the CSS button*”.⁴⁷⁵ According to the data of some CSSs, in rare circumstances where Google does display a CLA, clicks on CLAs account for less than 1%. This demonstrates the failure of CLAs to have any realistic impact.

675 However, even if Google were prepared to roll them out more widely they are unlikely to have an impact, for several reasons.⁴⁷⁶ CLAs do not alter the fact that Google continues to be the only company that is entitled to compile, display and thus monetise its own CSS directly on the general search results pages. The concept of CLAs recognises the importance of a remedy sending traffic to competing CSSs. This is fundamental to an effective remedy in this case. In this regard, CLAs are far closer to a feasible solution than product ads in Shopping Units. However, for several reasons, CLAs do not ensure equal treatment of CSSs on Google’s general search results pages. In a best case scenario, they provide for some equal treatment at a level of the value chain far below Google’s general results pages. It treats CSSs equally within a system that, as a whole, favours Google’s own on-SERP-CSS.

⁴⁷⁵ Google, Response to the Court’s Questions for written answers of 19 December 2019 in Case T-612/17 *Google and Alphabet v Commission*, 22 January 2020, para. 6.14.

⁴⁷⁶ See also *Marsden*, “Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (an How to Fix it)”, *Journal of European Competition Law & Practice*, 17 September 2020, pp. 5 et seq.

2.1 **If integrated in a Google-powered CSS interface, CLAs suffer from similar flaws as Shopping Ads**

- **The design of CLAs does not mitigate the issue that the powering of CM-Shopping Units creates an on-SERP-CSS:** CLAs do not solve the main issue which is that Google's on-SERP-CSS (running in the CM-Shopping Unit) acts as a substitute for rival CSSs. Since Google designed CLAs as the default, they are unable to have any meaningful impact on traffic, even if Google were to display them more frequently within its Shopping Units. There is no need for searchers to go to a competing third-party CSS. In addition, user clicks on Shopping Ads or CLAs cost the CSSs so much that no margin remains. Users will still see the Google CSS (running in CM-Shopping Units) at the top of each relevant results page, and the Google CSS will continue to claim a big share of user traffic. By setting the Google CSS as the default option, any possibility of CLAs providing meaningful traffic is eliminated.
- **The CSS has no influence on the matching of query and display and appearance of CLAs:** Google selects CLAs not on the basis of the merit of the CSS but based upon an auction. Since the auction-based CPC system also applies for CLAs, the user cannot influence if and which CLAs appear in return of a search query. Sometimes CLAs are shown together with Shopping Ads; sometimes they are not.
- **The tab's title of "Comparison Sites" gives users the wrong impression of a 'one-stop shop' with all CSSs.** Hence, they will consider generic search results even less – the consequence is a further drop in traffic for CSSs: In the past, when a user did not find what s/he was looking for in the Shopping Unit (because either the Shopping Unit had not included the right product or the right price OR the user was educated enough to look for a CSS directly), the user must revert to the generic search results. The CLAs will change that, since the tab's title of "Comparison Sites" and the new design educates users that the boxes are a 'one-stop shop' encompassing all CSSs in existence. Thus, users may assume that they will conveniently find their way to another CSS by clicking on top of the SERP. If they do not find a CSS there, they will no longer bother to also go through the generic results. As a result, even more traffic is diverted from generic search into a Google ad format, and ultimately, CSSs will also have to pay Google for pure brand traffic (e.g., people searching for idealo).

2.2 **Being inferior by design, CLAs cannot provide compensation for the substation effect that Google's Shopping Units have**

- Unlike CM-Shopping Units, CLAs do not allow users to search for products and compare their prices and characteristics; they just show simple 'rival links':** Showing CLAs on the general search results pages does not lead to an equal treatment of Google's own on-SERP-CSS and competing CSSs. CLAs do not work for queries for specific products – i.e., they do not show product results. Instead, they just show simple "rival links". CLAs do not contain any specific product or price information. In short, the Shopping Unit is an actual CSS on the SERP, whereas the CLAs are merely links to CSSs. This is not akin to equal treatment.
- The CLA tab is hidden behind the PLA tab, benefitting from a salience bias and creating a status quo bias for Google:** The "Products tab" is the default selection; i.e., searchers always see Google's on-SERP-CSS and are able to compare the products and prices directly in this tab. Conversely, the "Comparison Sites tab" with the list of competing CSSs is much less visible. Users first need to click on the "Comparison Sites" button; otherwise, they will never see the CLAs and the "rival links". Since the "Products tab" is the default selection, Google's on-SERP-CSS will get much more attention than any CSSs listed in the "Comparison Sites tab". This leads to a status quo bias.⁴⁷⁷ For as long as users find all the desired product information in the Products tab, it may be assumed that users will not click on the Comparison Sites tab and the CLAs. Therefore, it is very likely that competing CSS will not gain much traffic with the help of the CLAs. Yet, this goes to the heart of the Decision – the diversion of search traffic from competing CSSs to Google's own CSS by self-preferencing.
- CLAs are less visible than the "rival links" that Google had offered in its third remedy proposal** – and the Commission rightly rejected even those. In its third Commitment Proposal in 2014, Google suggested that it would show product results from competing CSSs as "rival links" in a section entitled "Alternatives". Google would display such links beside the product results drawn from its CSS, Google Shopping:

⁴⁷⁷ A "status quo bias" is evident when people prefer things to stay the same by doing nothing or by sticking with a decision made previously, see "Status quo bias", [behavioraleconomics.com, https://bit.ly/2Epb3B1](https://bit.ly/2Epb3B1).

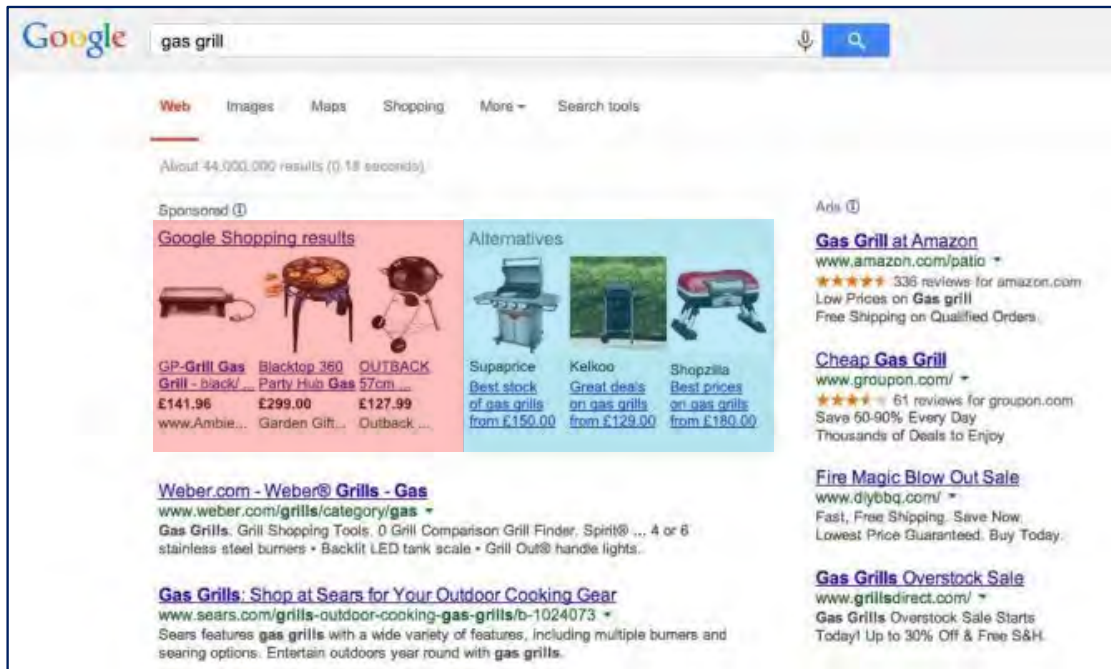


Illustration 90: Screenshot of integration of “Alternatives” in Google’s 3rd commitments proposal (2014)

676 Following negative feedback from the market survey, the Commission rejected this proposal. One of the points heavily criticised was the fact that consumers would first focus on the product results on the left-hand side (powered by Google Shopping) before considering the “rival links” on the right-hand side of the box. Yet, compared to this rejected solution, CLAs are now substantially less visible, as they are not visible at all on the first results page. Rather, they become visible only after a click. If the Commission rejected the ‘rival links’ concept offered in the third commitment proposal, it cannot possibly accept the current weaker solution of *Shopping Ads* and CLAs. At the same time, this comparison illustrates the cat-and-mouse game that Google is playing with the Commission. It appears that, thus far, the Commission’s fines have had little disciplinary or deterrent impact upon Google.

- **For searchers, CLAs are less relevant and appealing than Shopping Ads, and have an inferior design:** Searchers have learned the general rule that Google will present the most ‘relevant’ search results at the top of the results page. If a user enters a search query, Google’s algorithms will determine which results are most relevant. Google has explained that its decision when to display Shopping Ads in a Shopping Unit depends upon the users’ search query.⁴⁷⁸ If the search query relates to a product search, Shopping Ads are shown. Conversely, by hiding CLAs behind the layer of Shopping Ads, Google has made the conscious decision that for a non-

⁴⁷⁸ Google Ads Help, “Why you’re seeing an ad”, <https://bit.ly/3iWFfT2>.

product-related search query may any competing CSS be more relevant than Google's CM-Shopping Unit with its Shopping Ads. Google's algorithm automatically and systematically considers any CLA – any ad for a CSS – as less relevant than any *Shopping Ads*. What is surprising at first glance is that Google hides CLAs behind Shopping Ads even in more general search queries. In return of such queries, Google always gives Shopping Ads first priority by showing the “Product tab” in front of the “Comparison Site” tab. One reason for this may be the very weakness that Google attached to CLAs – that they do not contain any relevant information corresponding to the actual query. Google knows that, without product images and price information relating to the query, CLAs are unappealing to a user. When considered in this light, it is only consistent for Google to hide such inferior results behind its richer Shopping Ads – powered by its on-SERP-CSS. However, in pursuing such strategy, Google only degrades CLAs further, and along with this Google also degrades competing CSSs as compared to its own CSS (thus, powering the richer Shopping Ads).

- **Irrespectively, the auction-based CPC system also applies to CLAs:** According to recital (700)(d) of the Decision, a payment requirement may not have the same effect as the prohibited favouring. Yet, like *Shopping Ads*, CLAs are also subject to an auction-based CPC system,⁴⁷⁹ which may reduce the margins to an unprofitable level. All competing CSSs are limited to the ‘right’ to bid for a slot (i.e., paid result) within a favoured results box. As already explained above, the economics of auction systems in over-subscribed pools tend to drive prices up to a point where Google will become the main beneficiary of any profit resulting from clicks. Contrary to recital (700)(d), this has the same effect as the prohibited self-preferencing conduct. Ultimately, Google will once again be the only economic beneficiary of the CM's access solution. This could potentially be overcome with a modified auction mechanism (such a redistributive auction) to determine slots; however, any such mechanism must ensure that the effect is not to drive as much margin back to Google as to remain anti-competitive in effect.

C. Google's failure to refrain from a conduct having the same or an equivalent object or effect as the infringement pursuant to Article 3 para. 2

677 Pursuant to Article 3 para. 2 of the operative part of the Decision, Google must refrain from “*any act or conduct having the same or an equivalent object or effect*” as the

⁴⁷⁹ Google Ads Help, “About Comparison Listing ads”, <https://bit.ly/35WJevw>.

infringement. Similarly, according to recital (697) of the Decision, Google should “*bring the infringement established by this Decision effectively to an end and henceforth refrain from any measure that has the same or an equivalent object or effect*”.

678 This means, in particular, that any measure which Google chooses to comply must not have the same anti-competitive effect as the identified conduct. Regarding the anti-competitive effects, the Decision's ultimate concern is that Google expanded its dominance from the national markets for general search services into the national markets for CSSs. Accordingly, an “*equivalent object or effect*” is given, in any case, if the chosen conduct is similarly capable or likely to extend Google's dominance in general search into the markets for comparison shopping services. This appears to be the case here, given that Google merely exchanged one leveraging conduct (i.e., self-preferencing) with another, even more effective, leveraging conduct (i.e., technical tying). Under the CM, Google has technically tied its general search service with its “on-SERP-CSS”. The effects are the same, as will be explained below.

1. Google's CM constitutes a technical tying between Google's general search service and its CSS – with even stronger anti-competitive effects

679 It goes without saying that any CM that Google implements must conform with the limits set by competition law. In particular, the CM must not introduce measures that, as such, constitute an abuse of dominance.

680 Moreover, in terms of the anti-competitive leveraging effect, even absent any restorative remedy, the CM must not have the “*same or an equivalent object or effect*” as the identified infringement. To assess such equivalent object or effect, it is worth to recall the theory of harm that the prohibition decision relied upon. The Decision found that the

*“conduct [is] consisting in the use of a dominant position on one market to extend that dominant position to one or more adjacent markets”,*⁴⁸⁰

i.e., Google used its market power on the national markets for general search services to gain advantages in the separate national markets for CSSs. It is ultimately this form of leveraging that causes the competition concerns underlying the Decision.⁴⁸¹

⁴⁸⁰ Decision, recitals (334), (649).

⁴⁸¹ See in detail Hoppner, “Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leverage Abuse”, *European Competition and Regulatory Law Review* (CoRE) 2017, p. 208, 208-221; Hoppner/Schaper and Westerhoff, “Google Search (Shopping)

681 Consequently, since Google must refrain from any “*measure that has the equivalent object or effect*”, it must also refrain from any solution that involves a leveraging of dominance in a general search into the separate market for comparison shopping services. In this regard, it is important to note that there are several closely related commercial manners with which dominance can be anti-competitively extended from one market into another. One of the classic leveraging-type abuses of dominance is tying. ‘Tying’ usually:

*“refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product).”*⁴⁸²

682 This may also take place on a technical basis, i.e.,:

*“when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors).”*⁴⁸³

683 According to the Commission’s priority guidelines:

*“the Commission will normally take action under Article [102] where an undertaking is dominant in the tying market and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure.”*⁴⁸⁴

684 Google’s chosen CM fulfils the above criterion of technical tying. With the rich Shopping Units that Google introduced as frontends of its comparison service, Google is active on the market for CSSs.⁴⁸⁵ The CSS market is distinct from the market for general search services⁴⁸⁶ and so is Google’s on-SERP-CSS from Google Search as Google’s general search service.⁴⁸⁷ There are two distinct products at play. Following the launch of Google’s CM, searchers are unable to use Google’s general search service (the tying product) without also using Google’s CSS / Shopping Units (the tied product), and *vice-versa*. Given that (unlike previously the case with *Google Shopping*) there is no standalone website on which searchers may use the new aggregation service for Shopping Units (under the CM), searchers are unable to use this service without also

as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs”, *Journal of European Competition Law & Practice* 2018, p. 627, 629 et seq.

⁴⁸² Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 48.

⁴⁸³ *Ibid.*, footnote 33.

⁴⁸⁴ *Ibid.*, para. 50.

⁴⁸⁵ See above Chapter 4, A.1.3 (¶¶446 et seq.) and illustrations 3-4 (¶¶40 et seq.).

⁴⁸⁶ Decision, sections 5.2.1.2.2. and 5.2.2.2.

⁴⁸⁷ See above ¶Chapter 4, A 1.3.6 (¶¶492 et seq.).

using Google's general search service. They need to go through Google Search to use Google's Shopping Units. Thus there is a technical tie. This tying practice is also likely to further foreclose competition – akin to the favouring of Shopping Units for Google Shopping prior to the CM and condemned in the Decision.⁴⁸⁸ Such tie is not objectively justified because by allow competing services to provide their comparison services on Google Search as well, all alleged benefits of showing rich Shopping Units could be achieved as well. This would even increase the quality of such service and hence the benefits for consumers and merchants further, as specialised competing CSSs have larger product catalogues and product indexes as well as better product search algorithms. Such infrastructure would improve the matching of the query with suitable product offers within any Shopping Unit or an equivalent grouping of results. In lack of on objective justification for the technical tie, Google's CM constitutes an independent abuse of dominance in the form of tying.

- 685 The technical tying of Google's general search service to its CSS has the same anti-competitive objects and effects regarding the foreclosing of rivals as the prohibited favouring of Google Shopping. That is the diversion of users from its dominant general search service to its specialised search service operating on a separate market. Google simply made a slight technical modification to the manner in which it achieves the same effects. This exceeds the limits of its discretion for the remedy because, contrary Article 3 para. 2 of the Decision prohibits any CM that has the same object and effect.
- 686 Google's conduct fulfils the criteria of an abusive tying even if one were to assume that the service it has created under the CM does not fall under the Decision's definition of a CSS. This is because this definition would play no role when assessing such a tie. According to the case-law, the question of whether a product is "distinct" is determined from a user's perspective (not from the perspective of the supply):

*"Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply".*⁴⁸⁹

- 687 This is the case here: Searchers are using CSSs separately from general search services. The fact that Google has now incorporated a comparison shopping

⁴⁸⁸ See below at 2.1 (¶¶690 et seq.) in greater detail.

⁴⁸⁹ Ibid., para. 51.

functionality into its general search service does not alter the fact that Google in doing so serves two different customer demands with one bundled product – SERPs with Shopping Units that compare products and prices.

2. Tying is the most drastic form of self-preferencing

688 Google introduced CM-Shopping Units that are designed in such a way that allows consumers to compare products and prices directly on Google's general search results pages. The providing of Shopping Units is nothing other than the provision of a CSS website placed in a smaller frame (see above Chapter 3, B.2., ¶¶261 et seq.).

689 Google's technical tying of its CSS with its general search service constitutes just another form – and a more drastic form – of Google's preferencing of its own service. During the abuse, Google 'merely' used prominently displayed links within its general results pages to divert consumers to the interface of its specialised CSS, i.e. the standalone Google Shopping website. Instead, Google now overtly integrates such interface of its own CSS directly into its general search results pages. This leaves consumers and merchants with even less choice to use a CSS other than Google. Thus, the CM failed in all aspects.

2.1 Comparison with the Microsoft Windows Player case

690 The abusive tying element becomes apparent if one compares the case with that of Microsoft's bundling of its dominant PC operating system with its Windows Media Player. The main reasons that the General Court identified such bundling to constitute an abuse of dominance under Article 102 TFEU also apply *mutatis mutandis* to Google's current practice under the CM. To pick out a few:

- Google's on-SERP-CSS enjoys an unparalleled presence on Google's general search service throughout the world, because it automatically achieves a level of market penetration corresponding to that of the de-facto monopoly Google Search. It also does so without having to compete on the merits with competing services on the downstream CSS market.⁴⁹⁰

⁴⁹⁰ Case T-201/04, *Microsoft*, ECLI:EU:T:2007:289, para. 1038: "*it is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of market penetration corresponding to that of the Windows client PC operating system and did so without having to compete on the merits with competing products.*".

- No third-party CSS is able to achieve such a level of market penetration without having the advantage in terms of distribution that Google's on-SERP-CSS enjoys as a result of Google's use of its omnipresent general search service.⁴⁹¹
- It is clear that securing such a distribution advantage for the favoured on-SERP-CSS unrelated to the merits it this product inevitably has significant consequences for the structure of competition on the downstream markets for CSSs.⁴⁹²
- It is clear that users that find a favoured Google CSS on Google's dominant general search platform are generally less likely to use alternative services. This is because they already have a solution to compare products and prices that satisfies their demand.⁴⁹³
- In the absence of such favouring consumers that are interested in the respected downstream product comparison service would be inclined to choose from others on the market.⁴⁹⁴
- Google's CM prevents other CSSs from competing with the favoured on-SERP-CSS on the intrinsic merits of the service. This is because the favouring stifles the competitive process and results in significant additional costs.⁴⁹⁵
- Alternative methods to distribute the digital offerings of CSSs other than through their findability on Google's general search service, do not offset Google's search ubiquity. There is a reason why users go to Google's general search service. Alternative ways to find relevant services are less effective. Thus, the very success

⁴⁹¹ Ibid., para. 1039: *"no third-party media player could achieve such a level of market penetration without having the advantage in terms of distribution that Windows Media Player enjoys as a result of Microsoft's use of its Windows client PC operating system."*

⁴⁹² Ibid., para. 1054: *"securing [such] a distribution advantage for the favoured product unrelated to the merits of such products inevitably has significant consequences for the structure of competition on the respective downstream market."*

⁴⁹³ Ibid., para. 1041: *"it is clear that, as the Commission correctly states at recital 845 to the contested decision, '[u]sers who find [Windows Media Player] pre-installed on their client PCs are indeed in general less likely to use alternative media players as they already have an application which delivers media streaming and playback functionality'."*

⁴⁹⁴ Ibid., para. 1041: *"The Court therefore considers that, in the absence of the bundling, consumers wishing to have a streaming media player would be induced to choose one from among those available on the market."*

⁴⁹⁵ Ibid., para. 1049: *"the Court finds that the Commission was also correct to find that methods of distributing media players other than pre-installation by OEMs could not offset Windows Media Player's ubiquity (recitals 858 to 876 to the contested decision)."*

of Google's general search service shows why alternative distribution channels are not viable alternatives.⁴⁹⁶

- Securing a distribution advantage for the favoured Google CSS unrelated to the merits of such product inevitably, has significant consequences for the structure of competition on the respective downstream CSS market.⁴⁹⁷
- It is unnecessary for a CSS to be integrated in a general search service in order to be able to provide such service. In particular, contrary to the impression that Google would give, the absence of such integration does not have the consequence that consumers or merchants would have a less efficient experience or would lose time clicking. A large number of consumers and merchants use comparison shopping services more effectively than on Google without such services being integrated in any general search service. In any case, the interest of saving consumers time for an extra click would not justify to just integrate Google's own comparison service. If competing services were to provide equivalent boxes, the objectives could be achieved without any anti-competitive effects.⁴⁹⁸

691 Similar parallels exist to other tying practices that have been found to abuse competition law. For instance, in *Google Android* the Commission found that it is irrelevant if users are able to theoretically use other platforms and channels to access content that is not disadvantaged by an intermediary, provided that the users do not in fact sufficiently do so to counter the distorting effects on competition that tying causes.⁴⁹⁹ The same must apply to Google's CM: The fact that, in theory, users may click on the "By CSS", "view more" links or – where displayed CLAs – to get to competing CSSs, is irrelevant,

⁴⁹⁶ Ibid., para. 1049: "*the Court finds that the Commission was also correct to find that methods of distributing media players other than pre-installation by OEMs could not offset Windows Media Player's ubiquity.*"

⁴⁹⁷ Ibid., para. 1054: "*the Commission demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs.*"

⁴⁹⁸ Ibid., para. 1158: "*It is wholly unnecessary for a streaming media player to be integrated in a client PC operating system in order to be able to provide such platform services. In particular, contrary to the impression that Microsoft would give, the absence of such integration does not have the consequence that software developers must write the requisite software code. [A] large number of software developers and Internet content providers develop their products using APIs exposed by RealPlayer even though that is not integrated in any client PC operating system.*"

⁴⁹⁹ Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*, OJ 2019/C 402/08, paras. 916 et seq., 923.

provided that they are not sufficiently doing so in order to counter the effects of Google's tying of its on-SERP-CSS to its general search service.

2.2 Self-preferencing and tying as two closely linked, and partially overlapping elements of abusive leveraging of intermediation power

- 692 Self-preferencing and tying practices are both sub-categories of the overall category of abusive leveraging.⁵⁰⁰ They are therefore very closely related. An outright tie can be seen as the most extreme form of self-preferencing.⁵⁰¹ In case of a favouring act, the dominant service 'only' increases the chances of its downstream service to benefit of the undertaking's upstream market penetration. In case of a tie, in contrast, the dominant company confers the benefit of its upstream penetration directly upon its downstream service. As may be seen from a comparison with the *Microsoft* (WMP) case (see above), it is rather straightforward that any tying of one's own downstream service (i.e., here for CSSs) to a dominant upstream intermediation service (i.e., here a general search service) constitutes an abuse of market power, in particular of intermediation power.
- 693 A downstream service that is integrated into an upstream platform with intermediation power automatically achieves a level of market penetration, particularly in terms of access to single-homing customers⁵⁰², corresponding to that of the upstream platform, and does so without having to compete on the merits with its downstream competitors.⁵⁰³ The difference between an intermediary preferencing a separate service (on the one hand) and an intermediary technically tying to or integrating such service into its platform (on the other) may be marginal and just a matter of a slight technical modification.

⁵⁰⁰ In detail *Hoppner*, "Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leverage Abuse", *European Competition and Regulatory Law Review* (CoRE) 2017, p. 208, 210 et seq.

⁵⁰¹ *Hoppner/Schaper* and *Westerhoff*, "Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs", see also Google's advisers "*In Microsoft (WMP), Microsoft's coercive tie of Windows Media Player (WMP) to Windows OS (a form of self-preferencing)*" *Graf and Mostyn*, "Do We Need to Regulate Equal Treatment?", *Journal of European Competition Law and Practice*, 18 September 2020, p. 12.

⁵⁰² The core of a multi-side platform's market power are single-homing users, i.e. those that only use this platform. This is because, the platform then constitutes the single channel for the other intermediated user group (or groups) to access such single-homing users 'on the other side'.

⁵⁰³ Commission Decision of 24 March 2005, Case COMP/C-3/37.792, paras. 978-984 – *Microsoft*; confirmed by CFI, decision of 17 September 2007, Case T-201/04, *Microsoft*, ECLI:EU:T:2007:289, para. 1088.

694 This example shows that 'self-preferencing' must not be seen in isolation. What matters is the prevention of the expansion of dominance in one market into another market by means that are not available for other market participants. In this case, the tool used by Google is the incontestable intermediation power it enjoys by controlling the omnipresent general search service through which users use CSSs. In such a scenario, all forms of conduct that deviate from an intermediation neutrality must be prohibited, and consequently any remedy imposed must ensure that not one version of intermediation bias is exchanged with another, or, as in this case, a 'mere' self-preferencing is turned into an outright tying.

D. Another look to Turkey: adopting the Commission Decision's rationale, the Turkish Competition Authority rejected Google's EU Compliance Mechanism as "not a solution"

695 The findings above regarding Google's non-compliance are confirmed by the decision of the TCA in its Google Shopping investigation of 13 February 2020.⁵⁰⁴

696 The TCA Decision is based upon the same rationale as the Decision. The imposed remedy is also largely identical: Just like the Commission, the TCA obliged Google to set up a mechanism to ensure that competing CSSs are treated equally. Pursuant to the central remedy imposed, Google shall

*"provide conditions where competing comparison shopping websites are not put in a less advantageous position than its own relevant services on the general results page"*⁵⁰⁵

697 To comply with this remedy, Google proposed the very same mechanism that it is applying in Europe to implement the Decision.⁵⁰⁶

698 However, having analysed Google's proposal, the TCA concluded that such mechanism was not the solution. In particular, the TCA found that, since the provision of Shopping Units constitutes a CSS in itself,⁵⁰⁷ simply inviting rival CSSs to place bids in a Google-

⁵⁰⁴ TCA Decision of 13 February 2020, 20-10/119-69 – *Google Shopping*.

⁵⁰⁵ Ibid., para. 435.

⁵⁰⁶ See Google Türkiye Resmi Blog Sitesi, 20 August 2020, "An update on Shopping ads in Turkey", <https://bit.ly/3mZthdN>: "In response, we have offered a series of remedies to the Turkish Competition Authority (TCA), including implementing a solution that would have given CSSs the same opportunity to show Shopping ads from merchants as we give to Google Shopping in Turkey".

⁵⁰⁷ Ibid., para. 283.

powered Shopping Unit does not create equal treatment. The TCA's findings on this could not be any clearer, for example:

*"As part of the defence, it is claimed that giving placement to competing CSSs in the Shopping Unit will eliminate the competition law concerns raised in the case file and provide an adequate solution. However, while placement of competing CSSs in this area with conditions equal to Google could be considered as a partial solution to the issue that Google gives its own services advantageous placement, it cannot provide a solution to the issue of Google offering conditions that won't put their competitors at a disadvantage. This is because while Google offers a comparison-shopping service via Shopping Unit, competing enterprises are only able to offer an equivalent service when AdWords (text) ads and the organic links located below are clicked. Google is able to provide this service via Shopping Unit without requiring consumers to click a link. Furthermore, while Google can compare the offers selected by itself or competing CSSs when competitors enter this space, competing CSSs can be listed in this space with only one or a limited number of offers. At this point, it is critical to note that competitors will be charged by Google. Therefore, **merely giving placement to competitors in this space is not considered a solution that will enable competitors to compete under equal conditions as Google.**"*⁵⁰⁸

*"A study submitted by an enterprise [...] demonstrates how difficult it is for competitors which have become dependent on Google's paid traffic to compete effectively. The study examines the sustainability of efforts to compete with Google in terms of price and quality while trying to achieve traffic by paying Google more. In this context, **it is understood that getting placed in Google Shopping Unit alone will not eliminate this dependence.**"*⁵⁰⁹

*"In the defence, it is argued that getting placed in the shopping unit would provide CSSs with a "risk-free" and "attractive" profit opportunity. As explained above, the current cost-per-click in the Shopping Unit exhibits an increasing trend; therefore, **the fact that competitors earn a profit on an presumptive calculation significantly in favour of the competitors based on the current costs does not mean that they will be able to profit in the long term.** Moreover, the main concern addressed in the file is not whether competitors will earn profit, but the anti-competitive effects created by Google giving prominence to its own service by means of the aforementioned actions. **Again, due to the reasons mentioned above, it does not seem possible to eliminate the effects in question simply by allowing competitors to enter this space.**"*⁵¹⁰

699 As a result of the TCA's rejection of Google's EU compliance mechanism as a feasible solution, Google stopped displaying Shopping Units in Turkey from 24 August 2020.⁵¹¹ In other words, Google drew the correct conclusion that, in order to grant equal treatment, it either has to provide every CSS with the opportunity to compile Shopping Units – or cease displaying them altogether.

⁵⁰⁸ Ibid., para. 298 (emphasis added).

⁵⁰⁹ Ibid., para. 307 (emphasis added).

⁵¹⁰ Ibid., para. 310 (emphasis added).

⁵¹¹ Duvar English, "Google to remove shopping ads from search results in Turkey", 29 July 2020, <https://bit.ly/2G2dbzm>.

Chapter 5: Consequences for Google and the Commission

700 The economic and the legal assessments as explored above arrive at the same conclusion – there is no serious doubt that Google’s chosen CM fails to comply with the Decision.

701 Considering the high profile of the case, it is the responsibility of both Google and the Commission to amend the mechanisms in order to finally bring the infringement to an end.

A. Remaining options for Google to implement the remedy imposed by the Decision

702 As the Decision rightly pointed out,

“there is more than one way in conformity with the Treaty of bringing [Google’s] infringement effectively to an end, it is for Google and Alphabet to choose between those various ways”.⁵¹²

703 The CM does not bring the infringement to an end. It would be erroneous, however, to say that there are no alternatives left for Google to pursue. Based upon the legal assessment in Chapter 4, Google would have, at least, the following three options to cease the abuse:

1. **Offering competing CSSs to display their own Shopping Units akin to those of Google’s on-SERP-CSS in Google’s general search results pages.** If Google were to grant its own on-SERP-CSS a preferential positioning and display on its general search results pages, the equal treatment obligation requires it to also make such Shopping Units or another equivalent form of grouping of results available to competing CSSs (see Decision, recital (699)). It would be down to Google to decide how it intends to allocate such Shopping Units, i.e., whether based upon the generic relevance of the CSS, any fixed price or auction mechanism for the display of Shopping Units (within the limits of recital (700) (d)), or any other method. Google only has to ensure that it treats competing CSSs no less favourably than its own on-SERP-CSS. For a CSS to power a grouping of specialised search results in response of a query that has been entered on a third-party website, is a common market practice.⁵¹³ There are several technical options available to implement such

⁵¹² Decision, recital (698).

⁵¹³ See Decision, recital (613)(a)(3)(4) and above at Chapter 4, A.1.2.4.2 (¶¶376 et seq.).

a solution. To upload the relevant data, amongst others, Google could use APIs⁵¹⁴ or its existing crawling and indexing technology used to upload structured product data in real-time.⁵¹⁵

2. **Excluding all product and price comparison elements from Shopping Units.**

Google may favourably position and display a box with a grouping of search results and rich features if the underlying service does not operate on the market for CSSs

⁵¹⁴ APIs are currently used by several CSSs to provide Product Listing Units on third-party websites.

⁵¹⁵ Most CSSs do not produce their own product search result pages ad-hoc, that is in real time once a search query is entered. Instead, they use technology to automatically pre-create millions of sub web pages, with their own URLs, in anticipation of any possible corresponding future search request. So for instance, if a merchant sells a particular product in two different colours, a CSS will create two separate web pages, with their own unique URLs. These daily updated pages then contain the best offers, from various merchants, for these two particular models. This technology then allows a CSS to display the most specific, pre-created, and this important, results page in response to any query entered on their site. In other words, the results pages exist in advance of any possible search query. For 20 years now, Google has crawled and indexed these millions of pre-created results pages of CSSs. By doing so, Google saved all the results pages on its own servers. Thus, they were always readily available for any matching with a query. And for 20 years now Google's generic algorithm has determined which of these millions of pre-created and Google-indexed web pages of any given CSS best matches a particular search query entered on Google. This system is above all criticism. The most straightforward solution would therefore be to use the rich, structured product data that Google can crawl and index on its servers, such as prices, stock availability and product images in order to fill any Shopping Units or any other grouping that Google's 30.000+ engineers may decide to design. This solution would Google literally cost nothing because Google crawls and indexes all CSSs web pages anyway – for its generic results. Since the results are based on pre-existing data, Google would not first have to ask all CSSs to run an internal search, then send their responses and assess them again. Contrary to such claims raised by Google before the General Court, there is no need for such back and forth. Google has already crawled and indexed all web pages for all commercially relevant queries from all CSSs. Since these results are already saved on Google's server, there also simply is no latency issue. As main reason against such a solution, in fact any solution, Google has repeatedly claimed that it could not know what is on the landing pages of indexed CSSs. Google even called these landing pages a 'black hole', giving the impression that they are beyond Google's view. Yet, the reality is that for 20 years now it is Google's daily business to ensure that the generic and paid results that it displays in fact lead to a landing page that still contains the promised information. Google does that all the time. If a landing page has changed, Google may just not show it, just as it does not show an ad to a merchant offer that is not up to date anymore. Google could crawl such sites as frequently as it desires. Already today, Google crawls websites of CSSs more often than those of merchants because Google requires their content to attract consumers. Moreover, the very same topicality issues also arise in relation to merchants that have uploaded data-feeds to Google in order to appear in Shopping Units. For them too, Google first needs to check if the product feed still leads to a landing page that is up to date. Google has the technology, and this is part of their core technology, to ensure quality and relevancy, and to prevent fraud by websites that just want to pretend to have some relevant content. Google does that by checking the indexed target URLs on a regular basis. And this is entirely independent of whether these URLs are uploaded via a feed, indexed by a Google crawler or used by advertisers in their campaigns.

because, at that juncture, such box would not favour a CSS operated by Google. This would be the case once Google has eliminated all features from the Shopping Unit that enable consumers to compare prices and characteristics of offers across several merchants in return of a corresponding search query. If Google refrained from comparing products directly on its general search results pages, the leveraging effect that the Decision condemns would cease. This would not mean the end of graphically rich results boxes, or any path to just 10 ‘blue links’. Google could continue to display rich features, it would only have to design such boxes in a way that does not directly compare products or prices, but merely serves as a genuine link/result to lead the consumer to specialised search services. This would bring the general search service back to what Google designed it for: a platform that provides the most relevant links as a ‘teaser’ to lead the user to the most useful destinations as quickly as possible.

3. **Ceasing the display of Shopping Units altogether and subjecting GSE to the same methods as any other CSS.** The current abuse is based upon the fact that Google reserves the display of Shopping Units to its on-SERP-CSS. By ceasing the display of such Shopping Units and equivalent forms for its own CSS, Google would bring the abuse to an end. It would then be up to Google to develop alternative general search results that could provide the benefits expected from Shopping Units. This solution was chosen by Google in Turkey following the Turkish competition authority’s rejection of Google’s Europe-style compliance mechanism.⁵¹⁶

B. Options for the Commission to bring the abuse to an end

704 The Commission is obliged to ensure that the infringement is brought to an end. It appears that the Commission has several options to achieve this objective.

1. Investigation for non-compliance since the launch of the CM

705 As outlined in Chapter 4 (A.1., ¶¶317 et seq.), the Decision presupposes that the provision of all Shopping Units (including pre-Decision Shopping Units) constitutes a CSS, provided it allows the comparison of several product offers. Consequently, from the very outset, the CM was non-compliant, as Google reserved the on-SERP-CSS to itself. Therefore, the Commission could enforce its ‘equal treatment’ provision and force Google to find a new mechanism.

⁵¹⁶ See above at Chapter 4, D. (¶¶695 et seq.).

2. Investigation for non-compliance since the launch of richer Shopping Units

706 If the Commission is not prepared to follow our argument that Shopping Units always formed a CSS (but believes that the Decision left this issue open), then it may issue a Statement of Objections for non-compliance since the time that Google released Shopping Units that (clearly) fulfil all criteria of a CSS (including filter and sorting options). To this end, the Commission could:

- concentrate on the *prima facie* CM-Shopping Units (i.e., those going too far) and build the case and the non-compliance decision on such grounds;
- leave open the issue of whether or not the pre-Decision Shopping Units also fulfilled the criteria of a CSS – however, this would not be relevant, as the current Shopping Units fulfil such criteria (this would spare the Commission from having to re-interpret its Decision or to broaden its scope);
- impose a (second) remedy in the non-compliance decision that goes further than the original remedy, for example by clarifying that Google may not “*display any type of Shopping Unit directly on its general search results pages that allow users to compare products and prices there directly.*” In this manner, the Commission could use the (strongest) *prima facie* cases as a foundation but prohibit even less detailed forms of CM-Shopping Units.

LIST OF ABBREVIATIONS

The following terms and definitions are used throughout this study:

Application	Google's Application in Case T-612/17 <i>Google Inc. and Alphabet Inc. v. European Commission</i> , 11 September 2017
CM	Google's Compliance Mechanism to implement the Decision, as of July 2020; originally launched in September 2017, since then modified by Google several times
CM-Shopping Unit	Google's Shopping Units as used since the launch of the CM
Comparison Listing ad (CLA)	Paid search results for groups of products from CSSs' websites, first introduced in March 2019
CSS(s)	Comparison Shopping Service(s)
Decision	The European Commission's prohibition decision of 27 June 2017, case AT.39740
Defence	The European Commission's Defence in Case T-612/17 <i>Google Inc. and Alphabet Inc. v. European Commission</i> , 31 January 2018
ECJ	European Court of Justice
General Court	General Court of the European Union
Google Shopping	Google's CSS until the launch of the CM as described in the Decision, recitals (28)-(31)
Google Shopping Europe (GSE)	Google's CSS for the placement of <i>Shopping Ads</i> in Shopping Units powered by Google's on-SERP-CSS since the launch of the CM in September 2017
LoF	The European Commission's Letter of Facts in Case AT.39740 – Google Search, 28 February 2017
LoF Response	Google's Response to the LoF in Case AT.39740 – Google Search, 18 April 2017
on-SERP-CSS	Google's CSS responsible for the powering of Shopping Units as introduced under the CM. The on-SERP-CSS is to be distinguished from <i>GSE</i>
OneBox	Grouping of specialised search results; used to cover both Product Universals and Shopping Units – see Decision, recitals (23)-(24)
Product Universal	Grouping of specialised search results for products used by Google until 2012 – see Decision, recital (29)

LIST OF ABBREVIATIONS

Rejoinder	The European Commission's Rejoinder in Case T-612/17 <i>Google Inc. and Alphabet Inc. v. European Commission</i> , 20 July 2018
Reply	Google's Reply in Case T-612/17 <i>Google Inc. and Alphabet Inc. v. European Commission</i> , 7 May 2018
Shopping Ad	Specialised paid search result for one particular product item displayed in a Shopping Unit; commercially also referred to as <i>Product Listing Ad (PLA)</i> – see Decision, recital (32)
Shopping Unit	Grouping of specialised search results for products used by Google since 2012 – see Decision, recital (32)
SO	The European Commission's Statement of Objections in Case AT.39740 – Google Search, 15 April 2015
SO Response	Google's Response to the SO in Case AT.39740 – Google Search, 27 August 2015
SSO	The European Commission's Supplementary Statement of Objections in Case AT.39740 – Google Search, 14 July 2016
SSO Response	Google's Response to the SSO in Case AT.39740 – Google Search, 3 November 2016
TCA	Turkish Competition Authority
TCA Decision	TCA Decision of 13 February 2020, 20-10/119-69 – Google Shopping

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LIST OF ILLUSTRATIONS

#	Title / Description	Page(s)
1	Digital value chain of a comparison shopping service	36, 130, 201
2	Google's CSS before the Decision	38, 152, 190
3	Google's (on-SERP) CSS after the Decision	40, 153, 191
4	Zoom on the Google CM-Shopping Unit	42, 154
5	Google's abuse of dominance before the Decision	44
6	Google's continuing abuse after the Decision	46
7	Sections of the CSS digital value chain that the 'Compliance Mechanism' (1) reserves to Google's own CSS vs. (2) opens up to competition from rival CSSs	48, 163
8	Calculation - Development of total generic search traffic from Google's general results pages to rival CSSs	50
9	Calculation - Development of profitability of generic search traffic and leads from Shopping Ads for CSSs combined	52
10	Decision's consistent treatment of intermediaries that place product ads in Shopping or Product Listing Units	54, 298
11	Traffic attribution to the providers of Shopping and Product Listing Units according to the Decision	56
12	Google's only defence: "the Shopping Unit is not a CSS in itself"	58, 207
13a	The established infringement (situation until 2017)	60, 168
13b	The situation as of today – the abusive favouring of Google's own CSS continues	60, 169

LIST OF ILLUSTRATIONS

14	Difference between Google's general search results pages and CM-Shopping Unit	68
15	Difference between Google's general search pages and Shopping Unit, Google's on-SERP-CSS	68
16	Shopping Units on desktop before the Decision	80
17	Shopping Units on desktop after the Decision	81
18	Product View of Shopping Unit – Desktop View	82
19	Product View of Shopping Unit – Mobile View (upper part)	82
20	Product View of Shopping Unit – Mobile View (lower part)	83
21	“New” Showcase Shopping ad – organised by merchant	85
22	How merchants could place Shopping Ads before the CM	85
23	How merchants can place Shopping Ads under the CM	86
24	Auction mechanism for Shopping ads	87
25	Screenshot of website of Shoparade.de	98
26	Screenshot of Shoparade.de, product category “electronic”	98
27	Google CM-Shopping Unit suggests Shoparade as most relevant CSS	99
28	Default Shopping Ads tab with ‘Comparison Sites’ tab in background	104
29	Comparison Listing Ads after a click on the ‘Comparison Sites’ tab	105
30	Calculation – Overview of assessed traffic data	110
31	Calculation – Development of total generic SEO traffic	111
32	Calculation – Development of total generic search traffic - desktop	112
33	Calculation – Development of bounce rate for generic search traffic	114

LIST OF ILLUSTRATIONS

34	Calculation – Development of bounce rate for generic search traffic and AdWords traffic	115
35	Calculation – Development of generic search profitability	117
36	Calculation – Development of clicks on “By CSS” links	119
37	Calculation – Development of Shopping Ads leads	120
38	Calculation – Development of Profitability – Shopping Ads	121
39	Calculation – Development of leads – generic search and Shopping Ads	124
40	Calculation – Development of profitability – generic search traffic and Shopping Ads	125
41	Calculation – Development of profitability – generic search traffic and Shopping Ads combined	126
42	Calculation – Development of average Shopping Ads ad spend	128
43	Comparing the infrastructure and functionalities of established CSSs with Google’s on-SERP-CSS and fake ‘CSSs’	142
44	Google Shopping Europe (GSE) allowing merchants to upload their product feeds and to perform the bidding for Shopping Ads	151
45	How merchants bid for ads on Google’s on-SERP-CSS’	153
46	Effects of equal treatment on single- vs. multi-homing of consumers and merchants	160
47	Effects of self-preferencing on single- vs. multi-homing of consumers and merchants	161
48	Screenshot of a Shopping Unit at recital (32) of the Decision.	174
49	Product Universals / Shopping Units are a “part of” Google’s own CSS, where a corresponding website exists	175
50	Product Universals / Shopping Units are “all of” Google’s own CSS, where no corresponding website exists	176

LIST OF ILLUSTRATIONS

51	Screenshot of Bing Product Listing Unit - desktop	184
52	Screenshot of Bing Product Listing Unit - mobile devices	184
53	Merchants and aggregators feeding Product Ads in Bing Product Listing Units	186
54	Merchants and CSSs feeding Product Ads into Google Shopping Units	187
55	Bing's Product Listing Units (2013) – a CSS according to Google and the Decision	189
56	idealo' Product Listing Units displayed on third-party site (mydealz) – a CSS according to Google and the Decision	194
57	Google illustration of a Shopping Unit, used in oral hearing and in Google's Application in case T-612/17, para. 4	202
58	Screenshot of a results page on idealo for a product search that would not constitute a CSS according to Google's logic	204
59	Screenshots of a typical customer journey on Google's on-SERP-CSS illustrating how CM-Shopping Unit “allow users to search for products and compare their prices and characteristics across the offers of several different online retailers”	205
60	Thirty product items in one CM-Shopping Unit at top of the site	220
61	Nine product items in one CM-Shopping Unit at right side	221
62	Screenshot of product information in standard Shopping Ad	221
63	Screenshot of link structure of standard Shopping Ad	222
64	Screenshot of a CM-Shopping Unit with choice of product colour and type for “Silver” or “64” GB”	223
65	Screenshot of CM-Shopping Unit with option to compare (even more) prices	224
66	Screenshot of a pop-up window with further filters if user clicks on the price filter within a CM-Shopping Unit that opens up after a click on the price filter	224

LIST OF ILLUSTRATIONS

67	Screenshot of a standard Shopping Unit on mobile device with various filter and sorting options	225
68	(Screenshots of (i) a Shopping Unit before the Decision for “Nike free”; (ii) a CM-Shopping Unit with Showcase Shopping Ad for the same search query and no mentioning of a CSS after the Decision	226
69-70	Screenshots of a single-product CM-Shopping Unit (“Product View of Shopping Unit”) on mobile device without various filters, reviews, information and search functionalities	227
71	Screenshot of new CM-Shopping Unit with even more filter options Google’s experiment with additional filters in CM-Shopping Units	229
72	Screenshot of a single-product CM-Shopping Unit illustrating filters and search functionalities	230
73	Screenshot of a single-product CM-Shopping Unit – “details” button and pop-up window with all relevant product details a CSS could possibly provide	231
74	Screenshot of a single-product CM-Shopping Unit – “Reviews” button and pop-up windows with ratings, reviews and customer Q&As – all CSS functionalities	232
75	Screenshot of a single-product CM-Shopping Unit – “Shops” button and pop-up windows with product offers and further filters – all CSS functionalities	233
76	Uploading of product data to Google’s CSS before the Decision	234
77	Uploading of product data to Google’s CSS after the Decision	235
78	Google’s toolbar serving as a joint software frontend of several Google online services	241
79	Google’s general search results pages as a “software framework”	245
80	Screenshot of Google’s auto complete product filter) function	252
81	Product filtering on Google’s on-SERP-CSS in response to a pre-filtered query	253

LIST OF ILLUSTRATIONS

82	Google's on-SERP-CSS with sub-unit after clicking on "compare prices"	254
83	Screenshot illustrating various filters on general search results page that interact with Google's SERP-CSS	255
84	Screenshot illustrating interaction of brand search filter and Shopping Unit	256
85	Screenshot illustrating the interaction between the "similar product" filter and Shopping Units	257
86	Slide from presentation of Google advisor M. Dolmans in Google Shopping case, "Reflections on the Google Shopping Decision", 30 November 2017, CCIA Conference	264
87	Traffic attribution to the provider of Shopping Units (Google Shopping) according to the Commission's Shopping Decision	293
88	Traffic attribution to the provider of Product Listing Units according to the Decision	294
89	Traffic attribution to the provider of CM-Shopping Units (Google) according to the Decision	295
90	Screenshot of integration of "alternatives" in Google's 3 rd commitments proposal (2014)	306

ANNEX 1 – SCREENSHOTS OF VARIOUS SHOPPING UNITS


Desktop

Multi-product CM-Shopping Unit



Multi-product CM-Shopping Unit

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Samsung
Waschasc...
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A+++ (D bis A+...
Von shoppin...



Bosch WAB
28270...
279,00 €
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IQ300
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Energie: A+++
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Waschmaschine
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galeria.de
Versand gratis
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Gorenje
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Beko
Waschmaschine
Freistehend
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Hanseatic
Waschmaschine
HWM510A2, 5
kg, 1000 U/Min
219,00 €
OTTO
+29,95 € Vers...
A+++ (D bis A+++)
Von shoppin...

Samsung
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Freistehend
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899,00 €
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









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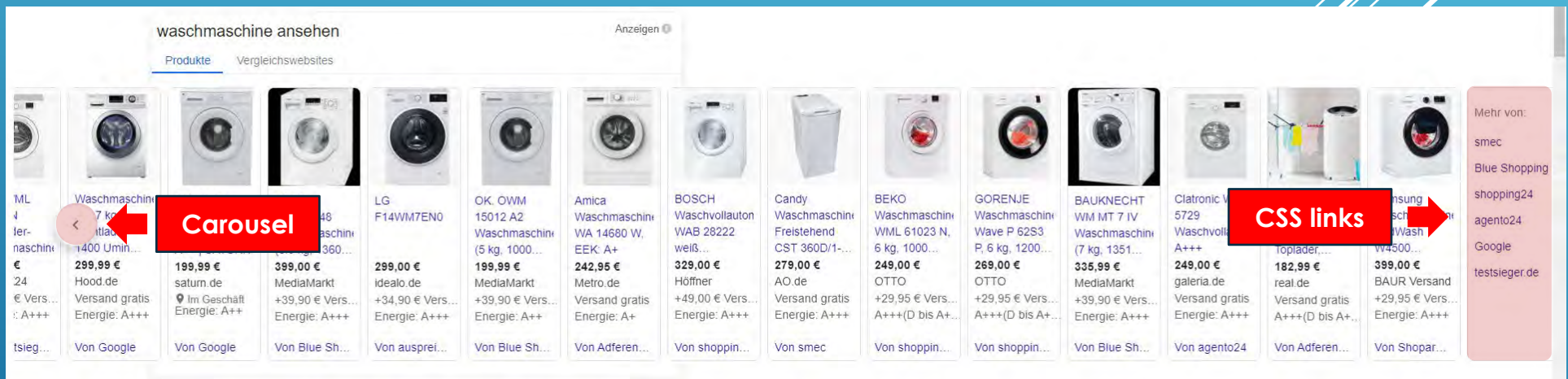
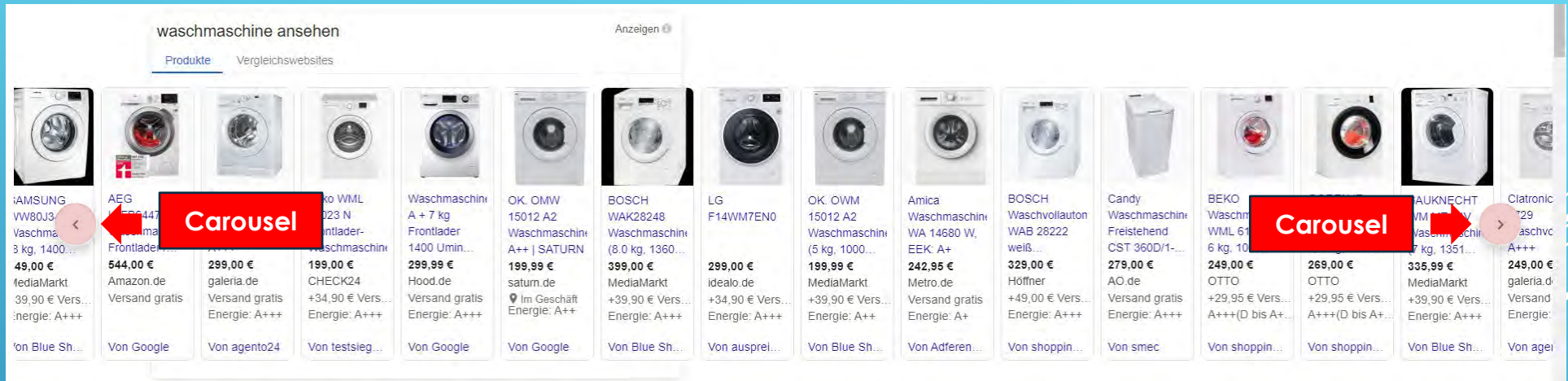
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Multi-product CM-Shopping Unit, enabling users to compare 30 different products and prices; with product information and high-quality images

Desktop

Single-product CM-Shopping Unit

Single-product CM-Shopping Unit

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 Bildschirmdiagonale (cm/Zoll): 7,7 cm / 3 Zoll Sensor-Auflösung: 25.8 Megapixel
 ★★★★★ Bewertung: 4,9 - 67 Ergebnisse

Anmelden

Canon EOS 200D
 ★★★★★ 1.301 Rezensionen

[Details](#) [Rezensionen](#) [Onlineshops](#)



Einkaufen [Anzeigen 8](#)

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Marke: Canon
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 Auflösung: 24,2 MP
 Sensortyp: CMOS

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Nutzerrezensionen

4,7
 ★★★★★
 1.301 Rezensionen

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 ★★★★★ vor einem Jahr
 Der Canon EOS 750 D ähnelt optisch seinen Vorgängern. Das sagt aber nicht viel aus. Befasst man sich näher mit der Kamera, so stellt man fest, dass die Mittelklasse Kamera auch mit teureren Geschwister der Canon Familie konkurrieren könnte.

Ein entscheidender Vorteil ist, dass man mit ...
 Stefan R. Rezension auf mediamarkt.de

[→ Weitere Rezensionen](#)

Canon EOS 200D

★★★★★ 1.301 Rezensionen

Details

Rezensionen

Onlineshops ...



Einkaufen

Anzeigen

EF-S 18-55mm IS STM-Objektiv

Filter functions

469,00 € · Kamera Express · Von Google

Erneuert, Versand gratis

501,99 € · cleverdeals.de · Von Adference Shopping

Gebraucht, Versand gratis

437,99 € · Technik Beast · Von Google

Versand gratis

467,31 € · Eclipsa · Von Google

Versand gratis

→ Preise vergleichen

Compare prices

Single-product CM-Shopping Unit, enabling users to compare prices for a single product; with filter options, product images and information, reviews, as well as links to similar products

Mit ihren intuitiven Bedienelementen und einem Touchscreen wie ein Smartphone ist die EOS 200D von vorn herein ganz ... [MEHR](#) ▾

Marke: Canon

Typ: Spiegelreflexkamera

Auflösung: 24,2 MP

Sensortyp: CMOS

→ [Weitere Informationen](#)



[More information](#)

Nutzerrezensionen

4,7



1.301 Rezensionen



Sehr super Kamera für sehe schöne und scharfe Bilder

★★★★★ vor einem Jahr

Der Canon EOS 750 D ähnelt optisch seinen Vorgängern. Das sagt aber nicht viel aus. Befasst man sich näher mit der Kamera, so stellt man fest, dass die Mittelklasse Kamera auch mit teureren Geschwistern der Canon Familie konkurrieren könnte

Ein entscheidender Vorteil ist, dass man mit...

Shaher R · Rezension auf mediamarkt.de

→ [Weitere Rezensionen](#)



[More reviews](#)

Canon EOS 200D

Mit ihren intuitiven Bedienelementen und einem Touchscreen wie ein Smartphone ist die EOS 200D von vorn herein ganz einfach zu bedienen. Sie können mit dem optischen Sucher arbeiten, der die Welt so darstellt wie sie wirklich ist oder Ihre Aufnahmen mit dem dreh- und schwenkbaren Display gestalten und damit Ihre Aufnahmen aus ganz ungewöhnlichen Blickwinkeln machen.

Marke	Canon
Typ	Spiegelreflexkamera
Auflösung	24.2 MP
Sensortyp	CMOS
Funktion	WLAN-Fähig, Mit Videofunktion, Mit Bildstabilisierung
Kamerabildtyp	Eingebaute Blitz, Aufsteckblitz
Allgemein	
Produkttyp	Digitalkamera - 1080p - SLR mit Live View-Modus, Filmaufnahme
Farbe	Schwarz
Gesamtanzahl Pixel	25.800.000 Pixel
Größe des optischen Sensors	14.9 x 22.3 mm
Brennweite - Crop-Faktor	1.6
Bildrate (max. Auflösung)	10 Bp/s
ISO (Max)	51200
Sensor zur Staubreduzierung	Ja
Sensormerkmale	EOS-integriertes Reinigungssystem, Selbstreinigende Sensoreinheit
Optisches Zoom	3x
Bildprozessor	DIGIC 7
Gesichtserkennung	Ja
Druckstandard	Druckdruck, DPOF-Unterstützung, Exif-Druckunterstützung, PictBridge-Unterstützung
Autofokus	Dual Pixel CMOS AF / TTL-Phasenerkennung
Anz. Fokussierungspunkte (Zonen)	9
AE/AF Control	Proactive Ai Servo AF, Ai Focus AF
Gesichtserkennung	Automatic Face Tracking Technology
Digital-Video-Format	H.264, MOV
Bildaufnahmeformat	JPEG, RAW, RAW + JPEG
Max. Videoauflösung	1920 x 1080
Autofokus-Funktionen	ProActive Fokussierung
Schnittstelle	Composite Video/Audio, HDMI, USB 2.0, IEEE 802.11b/g/n, Bluetooth 4.0, NFC (Near Field Communication)
Computerkompatibilität	Mac, Windows
Belichtung und Weißabgleich	
Filmempfindlichkeit	ISO 51200, ISO 100-20600, ISO Auto (100-25600)
Belichtungsmessung	Auswertelens, Center-Weighted, partial (9%), Spot (2,6%)
Belichtungsmessungszonen	63
Belichtungsfunktionen	Programm, Einzel, automatisch, manual, Aperturpriorität, Verschlusspriorität, S-TTL-i-Programm, Flash
Aufnahmeprogramme	Quartformat, Hochformat, Nahaufnahme, Nachtaufnahme, Essen, Sportmodus, Karaoke, Kids, Gegenlichtkompens. HDR, Nachtaufnahme ohne Stativ, Gruppenfoto
Spezialeffekte	Neutral, Fischauge, Soft Focus, Originalgelb, einfaches, Quartformat, Portrait

Product details (SERP-overlaying popup)

Product reviews (SERP-overlaying popup)



Canon EOS 200D

★★★★★ 1.301 Rezensionen

EF-S 18-55mm IS STM-Objektiv

☐ Versandkostenfrei

☐ Geschäfte mit Top-Bewertung

☐ Generalüberholt oder gebraucht

Anzeigen

Filter functions

Verkauft von	Produktinformationen	Details und Sonderangebote	Artikelpreis	
Kamera Express	Canon EOS 200D Silber + 18-55mm f/3.5-5.6 III STM Outlet	Versand gratis · Erneuert	469,00 €	Zur Website · Von Google
cleverdeals.de	Canon EOS 200D digitale Spiegelreflexkamera 24,2MP EF-S 18-55 mm Objek	Versand gratis · Gebraucht	501,99 €	Zur Website · Von Adference Shopping
Technik Beast	Canon EOS 200D Kit mit EF-S 18-55mm f / 4-5.6 IS STM Objektiv...	Versand gratis	437,99 €	Zur Website · Von Google
Eclipsa	CANON EOS 200D Kit Spiegelreflexkamera 24.2 Megapixel Full HD 1855 mm Objekti...	Versand gratis	467,31 €	Zur Website · Von Google
eBay	Canon EOS 200D digitale Spiegelreflexkamera 24,2MP EF-S 18-55mm Objektiv 853633	Versand gratis · Gebraucht	506,99 €	Zur Website · Von Twenga

Product offers, with several filter functions
(SERP-overlaying popup)



Canon EOS 200D

★★★★★ 1.301 Rezensionen

EF-S 18-55mm IS STM-Objektiv

☐ Versandkostenfrei ☐ Geschäfte mit Top-Bewertung

Anzeigen

☐ Generalüberholt oder gebraucht

Verkauft von	Produktinformationen	Details und Sonderangebote	Artikelpreis	
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cleverdeals.de	Canon EOS 200D digitale Spiegelreflexkamera 24,2MP EF-S 18-55 mm Objek	Versand gratis · Gebraucht	501,99 €	Zur Website ← Merchant link
Technik Beast	Canon EOS 200D Kit mit EF-S 18-55mm f / 4-5.6 IS STM Objektiv...	Versand gratis	437,99 €	Zur Website · Von Google
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Product offers, merchant links
(SERP-overlaying popup)



Canon EOS 200D

★★★★★ 1.301 Rezensionen

EF-S 18-55mm IS STM-Objektiv

☐ Versandkostenfrei ☐ Geschäfte mit Top-Bewertung

Anzeigen

☐ Generalüberholt oder gebraucht

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eBay	Canon EOS 200D digitale Spiegelreflexkamera 24,2MP EF-S 18-55mm Objektiv 853633	Versand gratis · Gebraucht	506,99 €	Zur Website Von Twenga

Only reference /
link to CSS



Product offers, CSS links
(SERP-overlaying popup)

Canon EOS 200D

★★★★★ 1.301 Rezensionen



Product images
(SERP-overlaying popup)


Mobile

Single-product CM-Shopping Unit

Single product CM-Shopping Unit Overview

← Microsoft Xbox One X
★★★★★ 9.817 Rezensionen

ÜBERSICHT ONLINESHOPS & GESCHÄFTE DETAILS



Anzeigen · EINKAUFEN

Paket ▾

Filter

1

Deutschland 260,00 € gebraucht
Xbox One X 1TB Versand gratis
Konsole

Von Google

Saturn 399,99 €
MICROSOFT Xbox One X 1TB – Star Wars... Versand gratis
14-tägiges Rückgaberecht
Von shopping24

242,99 € gebraucht
X 1tb Versand gratis
Spleekonsole Gaming Schwarz...
Von Shopping.com

refurbed.de 292,95 € erneuert
Gebraucht: Microsoft Xbox One X | Versand gratis
schwarz
Von shopping24

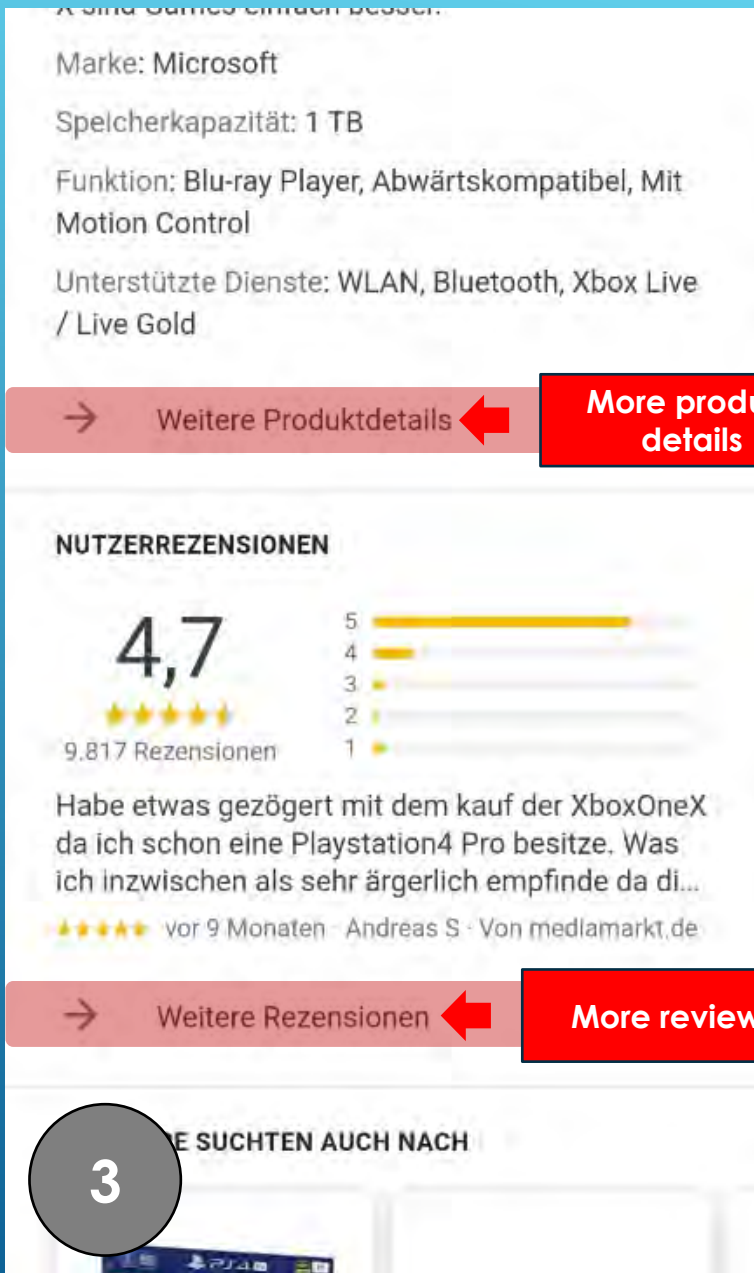
real.de 349,93 €
Microsoft Xbox One X USK 18 Versand gratis
Battlefield V Gold Rush Special
Von Adference Shopping

→ Mehr Verkäufer und Preise ←

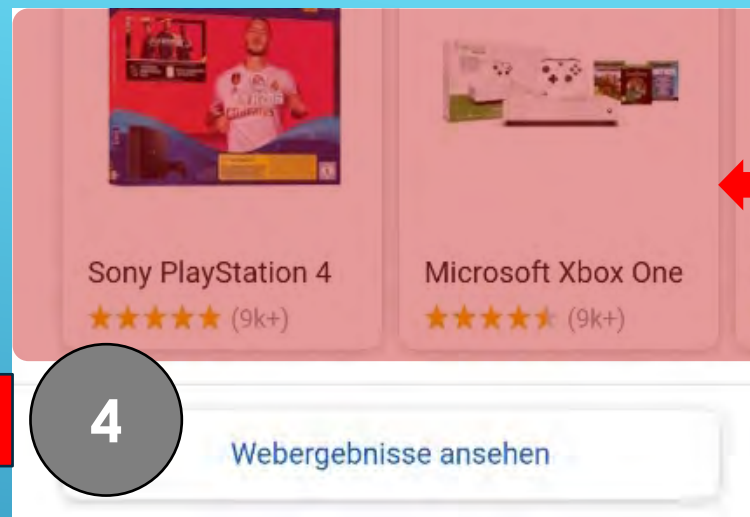
2

Leindruckendes True-4K-Gaming mit 40 %
leistung als andere Konsolen. Auf Xbox One
X sind Games einfach besser

More merchants
and prices



More product details



Similar products

Single product CM-Shopping Unit, enabling users to compare prices for a single product; with filter options, product images and information, reviews, as well as links to similar products

11:40 38%

google.com/search?q=

← Microsoft Xbox One X
★★★★★ 10.028 Rezensionen

ÜBERSICHT **ONLINESHOPS & GESCHÄFTE** DETAILS

Anzeigen · EINKAUFEN

Paket ▾

GameStop Deutschland **260,00 €** gebraucht
Microsoft Xbox One X 1TB
Konsole
Versand gratis
Von Google

eBay **242,99 €** gebraucht
Microsoft Xbox One X 1tb
Spielekonsole Gaming Schwarz...
Versand gratis
Von Shopping.com

Saturn
Microsoft Xbox One X 1TB
Star Wars...
14-tägiges Rückgaberecht
Von CHECK24

1 **swipe**

Proshop.de **286,70 €** gebraucht
Microsoft *Demo* Xbox One X -
1tb - (Forza Horizon 4 + Lego...
+4,99 € Versand
Von Comlyn

CHECK24 **339,00 €**
Microsoft Xbox One X Schwarz
1TB Xbox
Versand gratis
Von testsieger.de

real.de **449,90 €**
Microsoft Xbox One X 1TB Metro
Saga Bundle USK 18
Versand gratis
Von Adference Shopping

Back Market **469,99 €** erneuert
Konsole Microsoft Xbox One X 1
TB + Joysticks - Project Scorpio...
Versand gratis
Von Google

Amazon.de
Console Videogames Microsoft
Xbox One X
Versand gratis
Von Google

2 **more offers**

Microsoft Xbox One X 1TB
Konsole 1TB
+5,99 € Versand
30-tägiges Rückgaberecht

11:41 37%

google.com/search?q=

Microsoft Xbox One X

★★★★★ 10.028 Rezensionen

ONLINE SHOPS & GESCHÄFTE DETAILS REZENSIONEN

Erlebe beeindruckendes True-4K-Gaming mit 40 % mehr Leistung als andere Konsolen. Auf Xbox One X sind Games einfach besser.

Marke: Microsoft

Speicherkapazität: 1 TB

Funktion: Blu-ray Player, Abwärtskompatibel, Mit Motion Control

Unterstützte Dienste: WLAN, Bluetooth, Xbox Live / Live Gold

Allgemein

Produkttyp Spielkonsol

1

swipe

Blu-ray

AMD Scorp

- 2.3 GHz - 8 K

RAM	12 GB GDDR5 SDRAM bei 326 GB/s
Videospeicher	GDDR5 SDRAM
Gleitkommazahlen-Operation	6 TFLOPS
Besonderheiten	IR-Blaster 4K Spiele-Festplattenrecorde
Sofortige inhaltliche Unterstützung	Amazon Video, Netflix
Surround Sound unterstützt	DTS, Dolby Atmos, Dolby Digital, Dolby TrueHD, DTS:X
HD Streaming	Ja
Farbe	Schwarz
Medien-Player	
Videoformate	MPEG-1, MPEG-2 MPEG-4, WM H.264, VC-1 H.265, VP9
Audioformate	MP3, AAC
2	gang
TV-Verbindung	HDMI

more details

11:41 37%

google.com/search?q=

← Microsoft Xbox One X
★★★★★ 10.028 Rezensionen

ONESHOPS & GESCHÄFTE DETAILS **REZENSIONEN**

4,7
★★★★★
10.028 Rezensionen

5
4
3
2
1

4k Gaming / 4k BlurayPlayer / XboxOneX
★★★★★ vor 9 Monaten
Habe etwas gezögert mit dem kauf der XboxOneX da ich schon eine Playstation4 Pro besitze. Was ich inzwischen als sehr ärgerlich empfinde. Die XboxOneX ...
Andreas S · Rezension von mediamarkt.de

Ein wahres Powerhouse!
★★★★★ vor 9 Monaten
1 mir dieses Bundle im Januar 20... und den Kauf seither nicht ein... Warum ich mich im "PlayStation"-L... Deutschland (bzw ...

swipe

s4lkman · Rezension von saturn.de

Umstieg von PS4 auf Xbox One X - ein Segen
★★★★★ vor 3 Wochen
Bin von einer PS4 aus 2015 jetzt auf Xbox one X umgestiegen bzw. setze Sie jetzt als Hauptgerät, trotz noch fehlenden 4K Tv ein. Selbst mit FullHD ist schon ...
Frank K. · Rezension von mediamarkt.de

Gelungenes Design. Leise
★★★★★ vor 7 Monaten
Die Konsole wird fast nur zum Spielen verwendet und eher sehr selten zum Ansehen einer Disc bzw. streamen. Bisher liefen alle Spiele flüssig und ohne ...
Alex · Rezension von saturn.de

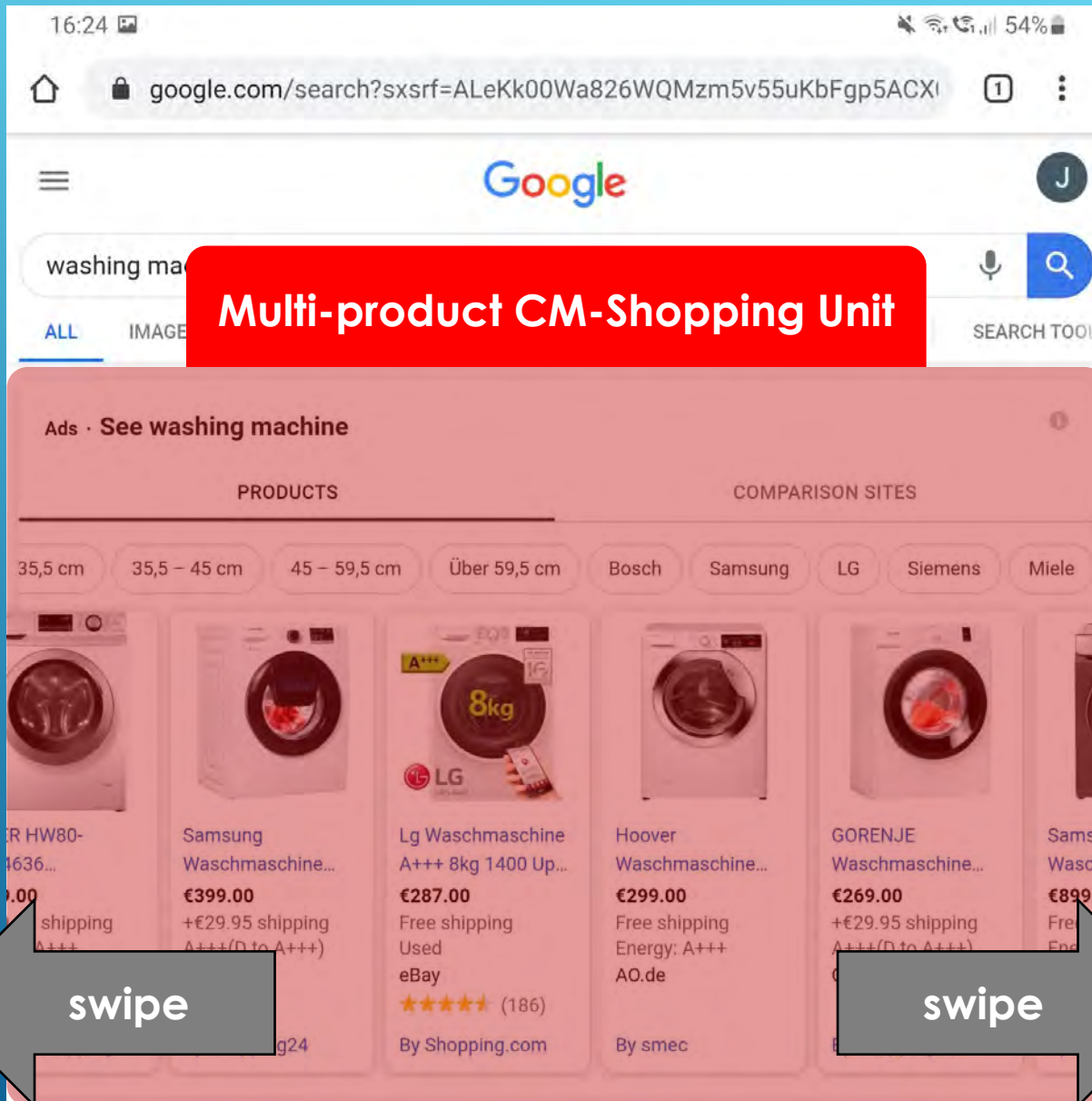
Eine Konsole die man sich wünscht
★★★★★ vor einem Jahr
Die Bezeichnung "leistungsstärkste Konsole der Welt" kommt nicht von ungefähr. Die Xbox brilliert mit ihrer Technik. Neben einem integrierten 4k UHD ...
Yuan Ji Ken · Rezension von saturn.de

2

more reviews

Mobile

Multi-product CM-Shopping Unit



16:24 54%

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Google

washing machine

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Ads · See washing machine

PRODUCTS COMPARISON SITES

35,5 cm 35,5 – 45 cm 45 – 59,5 cm Über 59,5 cm Bosch Samsung LG Siemens Miele

Product	Price	Shipping	Energy	Source
HW80-4636...	0.00	7.90 shipping	A+++	Market
Samsung Waschmaschine...	€399.00	+€29.95 shipping	A+++ (D to A+++)	OTTO
Lg Waschmaschine A+++ 8kg 1400 Up...	€287.00	Free shipping	Used	eBay
Hoover Waschmaschine...	€299.00	Free shipping	Energy: A+++	AO.de
GORENJE Waschmaschine...	€269.00	+€29.95 shipping	A+++ (D to A+++)	OTTO
Samsu Wasch...	€899.00	Free sh	Energy	AO.de

PLA and CLA tab

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Ads · See washing machine

PRODUCTS COMPARISON SITES

35,5 cm 35,5 – 45 cm 45 – 59,5 cm Über 59,5 cm Bosch Samsung LG Siemens Miele

Filter functions

Product	Price	Shipping	Energy	Brand	Source
HW80-4636...	0.00	90 shipping	A+++		ue Shopping
Samsung Waschmaschine...	€399.00	+€29.95 shipping	A+++ (D to A+++)	OTTO	By shopping24
Lg Waschmaschine A+++ 8kg 1400 Up...	€287.00	Free shipping	Used	eBay	By Shopping.com
Hoover Waschmaschine...	€299.00	Free shipping	Energy: A+++	AO.de	By smec
GORENJE Waschmaschine...	€269.00	+€29.95 shipping	A+++ (D to A+++)	OTTO	By shopping24
Samsu Wasch...	€899.00	Free sh	Energy	AO.de	By sme

16:27 52%

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Google






washing machine

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Ads · See washing machine

PRODUCTS COMPARISON SITES

Bosch Over €450 **Filters selected**

Product Image	Product Name	Price	Shipping	Energy Rating	Source
	Bosch HomeProfessional...	€699.00	Free shipping	Energy: A+++	AO.de
	Bosch Serie 8 Waschmaschine...	€679.00	Free shipping	Energy: A+++	AO.de
	Bosch Serie 6 Waschmaschine...	€579.00	Free shipping	Energy: A+++	AO.de
	BOSCH WLT24440 Serie 6...	€489.99	+€39.90 shipping	Energy: A+++	MediaMarkt
	BOSCH Waschmaschine...	€999.00	+€29.95 shipping	A+++ (D to A+++)	OTTO

By smec By smec By smec By Blue Shopping By shopping24

16:24 54%

google.com/search?sxsrf=ALeKk00Wa826WQMzm5v55uKbFgp5ACXl

Google

washing machine

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Ads · See washing machine

PRODUCTS COMPARISON SITES

35,5 cm 35,5 – 45 cm 45 – 59,5 cm Über 59,5 cm Bosch Samsung LG Siemens Miele

Product	Price	Shipping	Energy	Rating	Merchant
ER HW80-4636...	0.00	90 shipping	A+++		Markt
Samsung Waschmaschine...	€399.00	+€29.95 shipping	A+++ (D to A+++)		OTTO
LG 8kg	€287.00	Free shipping	Used	★★★★★ (186)	eBay
	€299.00	Free shipping	Energy: A+++		AO.de
GOENJE Waschmaschine...	€269.00	+€29.95 shipping	A+++ (D to A+++)		OTTO
Samsu Wasch...	€899.00	Free sh	Energy		AO.de

By shopping24 By Shopping.com By smec By shopping24 By sme

Merchant link

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google.com/search?sxsrf=ALeKk00Wa826WQMzm5v55uKbFgp5ACXl

Google

washing machine

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Ads · See washing machine

PRODUCTS COMPARISON SITES

35,5 cm 35,5 – 45 cm 45 – 59,5 cm Über 59,5 cm Bosch Samsung LG Siemens Miele

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ER HW80-4636...	0.00	90 shipping	A+++	Markt
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Lg Waschmaschine A+++ 8kg 1400 Up...	€287.00	Free shipping	Used	eBay
Hoover Waschmaschine...	€299.00	Free shipping	Energy: A+++	AO.de
GORENJE Waschmaschine...	€269.00	+€29.95 shipping	A+++ (D to A+++)	OTTO
Samsu Wasch...	€899.00	Free sh	Energy	AO.de

By shopping24

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Ads · See washing machine

PRODUCTS

COMPARISON SITES

LG Siemens Miele Toplader Frontlader Up to €150 €150 - €350 Over €350 Nearby



Bauknecht
Waschmaschine...

€319.00

Free shipping

Energy: A+++
AO.de



Beko
Waschmaschine...

€249.00

Free shipping
Energy: A+++
AO.de

By smec



Amica
Ablufttrockner...

€199.00

Free shipping
Energy: C
AO.de

By smec



Hoover
Waschtrockner...

€399.00

Free shipping
Energy: A
AO.de

By smec



HAIER HW80-
BP14636...

€299.00

+€39.90 shipping
Energy: A+++
MediaMarkt

By Blue Shopping



Samsung
Waschmaschine...

€399.00

+€29.95 shipping
A+++ (D to A+++)
OTTO

By shopping24



Lg Waschmaschine
A+++ 8kg 1400 Up...

€287.00

By Shopping.com



Hoover
Waschmaschine...

€199.00

Free shipping
Energy: A+++
OTTO

By smec



GORENJE
Waschmaschine...

€269.00

+€29.95 shipping
A+++ (D to A+++)
OTTO

By shopping24



Samsung
Waschmaschine...

€899.00

Free shipping
Energy: A+++
AO.de

By smec

swipe



Samsung
Waschmaschine...

€899.00

Free shipping
Energy: A+++
AO.de



7,8 km away

WA 6010-3

€199.99

Energy: A++
Medimax

By Google



SIEMENS
WM14N121 IQ300...

€399.00

+€39.90 shipping
Energy: A+++
MediaMarkt

By Blue Shopping



Waschtrockner
Waschen 9kg / ...

€287.00

Free shipping
Used
eBay
★★★★★

By Shopping.com



Privileg
Waschmaschine...

€299.00

By shopping24



Waschmaschinenstf
JUTAS - weiß...

€19.99

+€50 shipping
eBay

By Google



Display4top 3,2 Kg
Waschmaschine...

€67.80

Free shipping

Amazon.de

By Google



BOSCH WAK28248
Waschmaschine (8...

€399.00

+€39.90 shipping
Energy: A+++
MediaMarkt

By Blue Shopping



8,3 km away

Easymaxx Mini-
Waschmaschine

€25.00

Kaufland

By Google



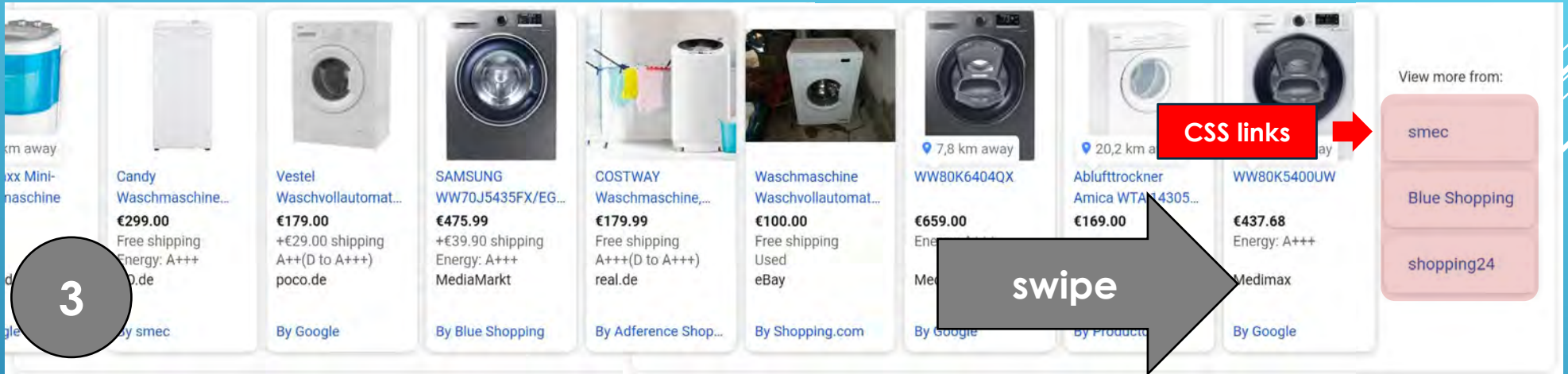
Candy
Waschmaschine...

€299.00

Free shipping
Energy: A+++
AO.de

By smec

swipe




Multi-product CM-Shopping Unit, enabling users to compare 26 different products and prices; with product information and high-quality images

Multi-product CM-Shopping Unit, with merchant filter

Anzeigen · puma schuhe sneaker ansehen


OTTO ZALANDO JD SPORTS DEUTSCHLAND DEICHMANN DEFSHOP GALERIA.DE



Puma Future Rider
PLAY ON Unisex...

87,68 €
Versand gratis
Zalando


Von Shoptail



Puma CALI Sport
MIX Sneaker low...

96,95 €
Versand gratis
Zalando


Von Shoptail



Puma CALI Sneaker
low white/black,...

87,45 €
Versand gratis
Zalando


Von Shoptail



PUMA Future Rider
Game On Herren -...

65,00 €
+4,00 € Versand
JD Sports Deutsc...

★★★★★ (88)
Von Google



PUMA
Black/P...

110,00 €
Versand
JD Spo...

Von Go...

Zalando | Damen Sneaker


Wage den ersten Schritt mit Deinen neuen Lieblingsneakern. Kostenfreie Lieferung und Rückgabe.

Multi-product CM-Shopping Unit, with age and price filter

Anzeigen · lego city ansehen

PRODUKTE VERGLEICHSWEBITES


Unter 4 Jahre 4 – 7 Jahre 7 – 14 Jahre Über 14 Jahre Unter 50 € 50 €–150 € Über 150 € Star Wars



Mitsubishi
Mitsubishi 6D24-T...

23.695,00 €
+136,85 € Versand
ATX-motorparts


Von Google



Teknotoys Active
Bricks RC Panzer...

109,99 €
Versand gratis
myhobby24.de


Von Google



LEGO City 60266
Meeresforschung...

92,99 €
+3,95 € Versand
myToys.de


★★★★★ (50)
Von shopping24



LEGO Achterbahn

321,67 €
Versand gratis
LEGO.com

★★★★★ (423)
Von Google



Lego City Abo


48,40 €
Versand gratis
Lorenz Leserse

Von Google

Multi-product CM-Shopping Unit, with drop-down brand filter

Anzeigen · stereo receiver ansehen


Marke Bluetooth WLAN Ethernet AirPlay Unter 200 € 200 €–500 € Über 500 € 5.1-Kanal 7.1-Kanal



Ultima 20 Kombo,
Stereoanlage mit...

487,39 €
+14,62 € Versand


Teufel DE
★★★★★ (36)
Von Google



Teufel Stereoanlage
Kombo 11 mit CD-...

243,00 €
+14,62 € Versand


Teufel DE
★★★★★ (38)
Von Google



Bose Solo 5 -
Generalüberholt

149,95 €
Versand gratis
Erneuert
bose.de

Von Google




Im Geschäft

YAMAHA R-S202D
Stereo-Receiver (2...

189,24 €

MediaMarkt
★★★★★ (427)
Von Google



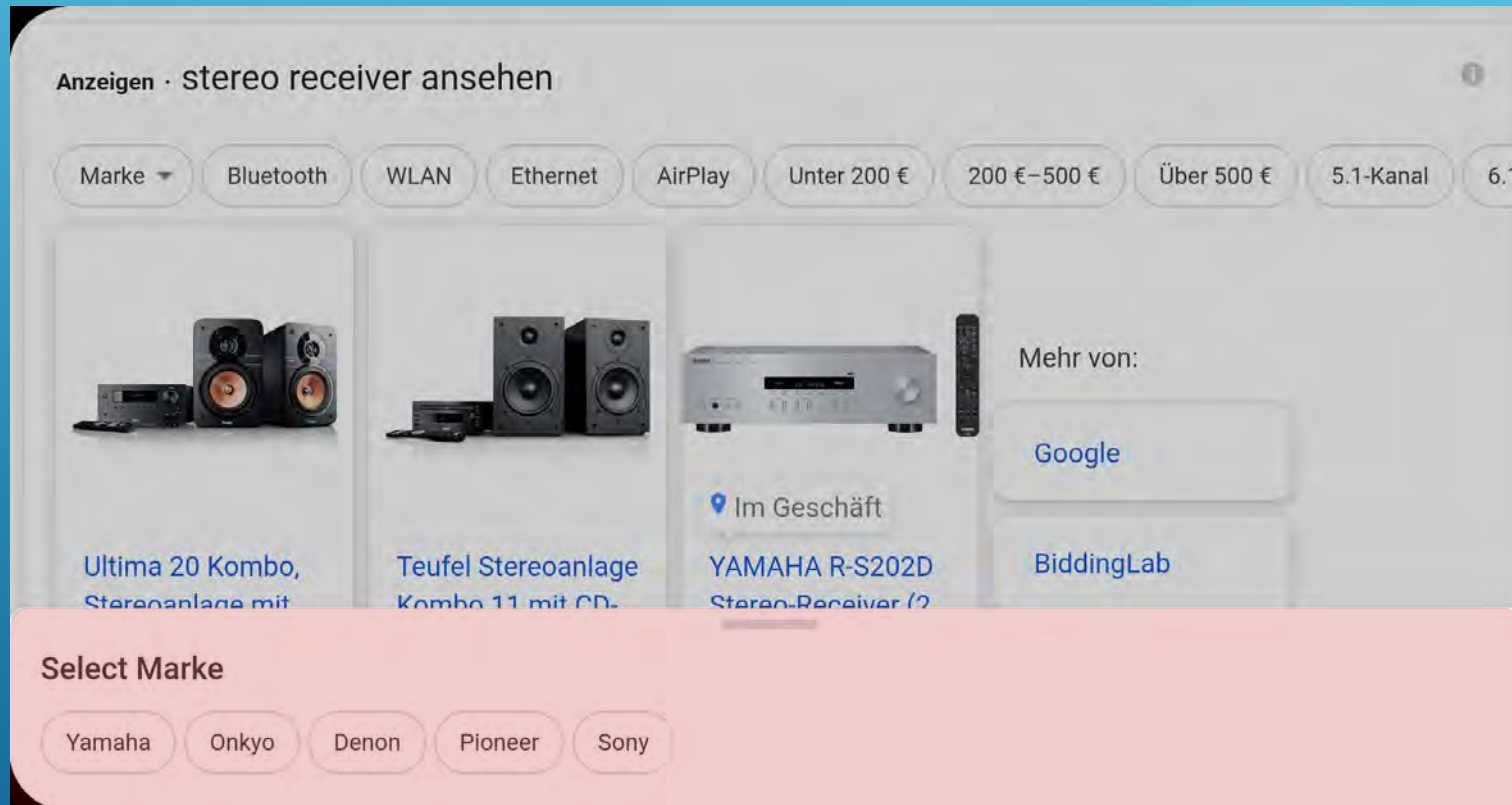
Im Geschäft

YAMAHA A-S20
Verstärker in...

194,00 €

saturn.de
★★★★★ (189)
Von Google

Multi-product CM-Shopping Unit, with activated drop-down brand filter



Mobile

Comparison Listing Ads

16:22 55%

google.com/search?sxsrf=ALeKk00Wa826WQMzm5v55uKbFgp5ACXl

Google


washing machine


ALL IMAGES

Comparison Listing Ads

Ads · See washing machine


PRODUCTS COMPARISON SITES




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 preis.de

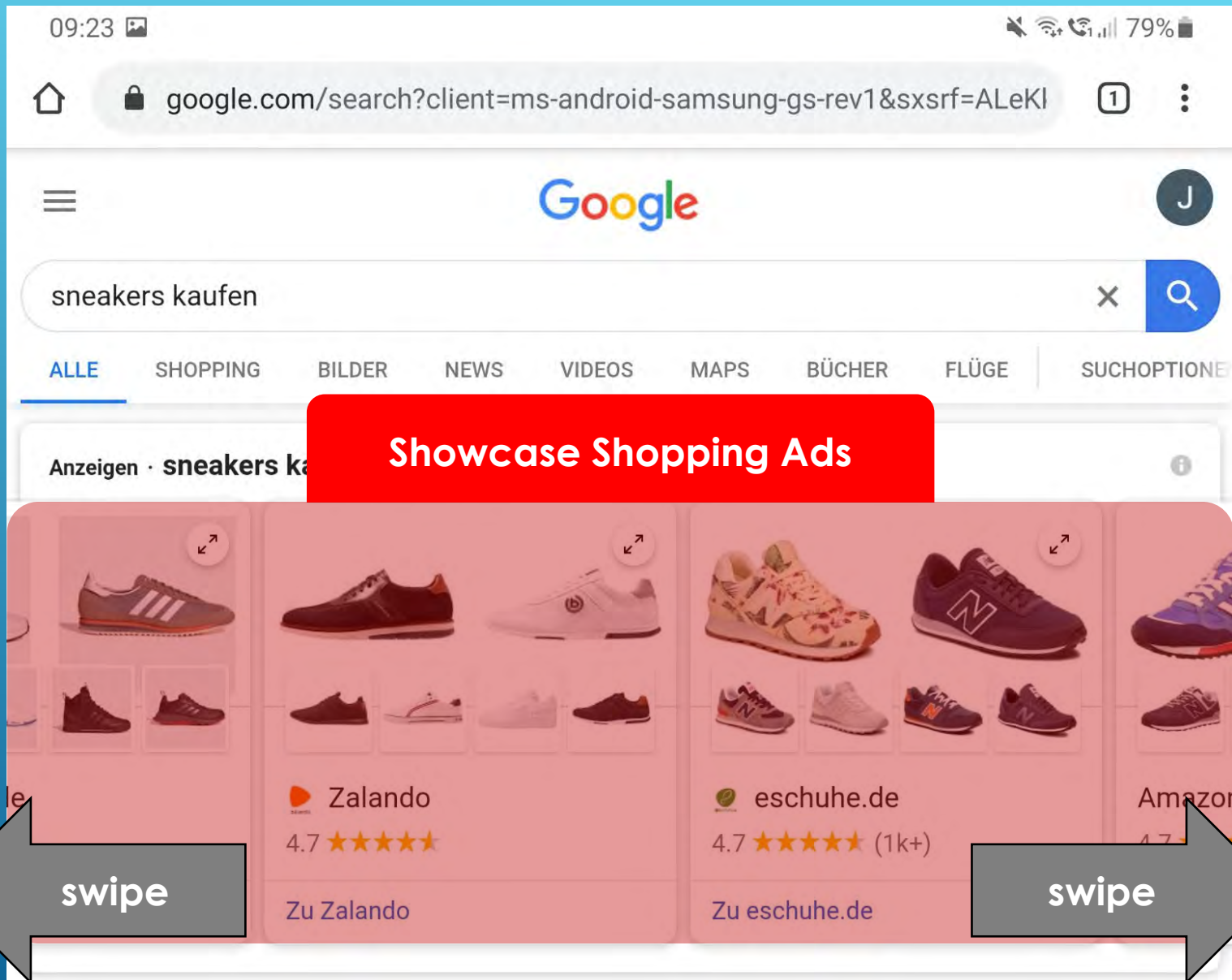
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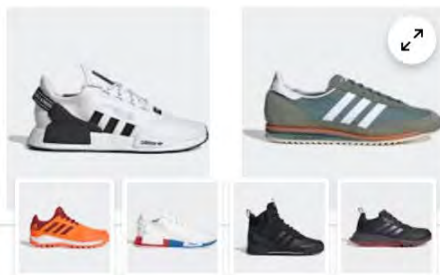
swipe

Mobile

Showcase Shopping Ads



Anzeigen · sneakers kaufen ansehen



adidas.de

★★★★★

1

as.de



Zalando

4.7 ★★★★★

Zu Zalando



eschuhe.de

4.7 ★★★★★

Zu eschuhe.de

swipe



Amazon.de

4.7 ★★★★★

Zu Amazon.de



OTTO

4.7 ★★★★★

2

OTTO



Nike Offiziell

4.7 ★★★★★

Zu Nike

swipe



MandMDirect.de

4.7 ★★★★★ (4k+)

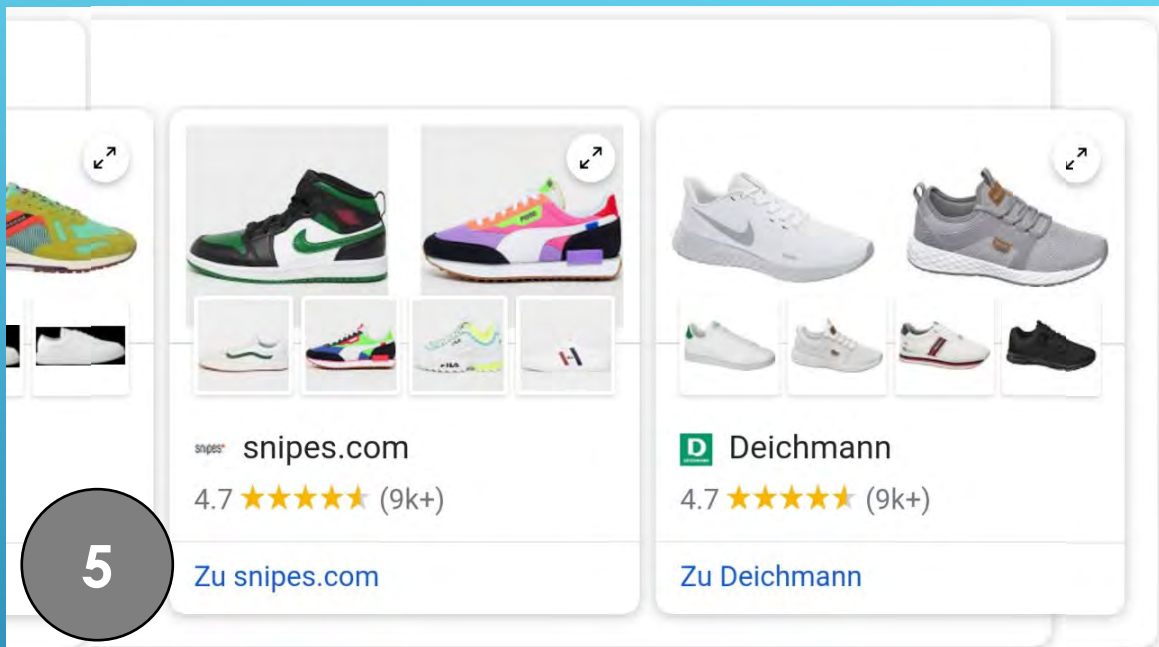
Zu MandMDirect.de



Giesswein

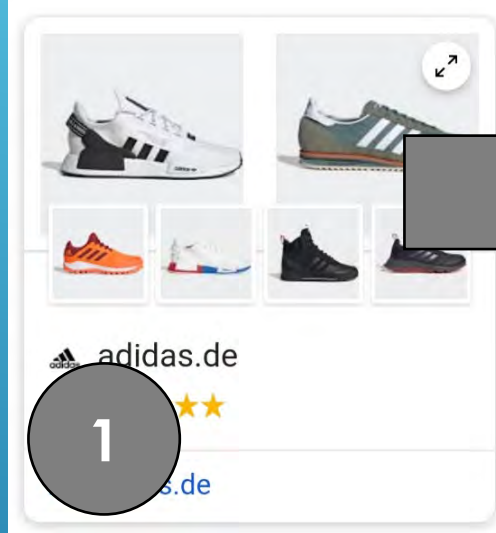
4.7 ★★★★★

Zu Giesswein

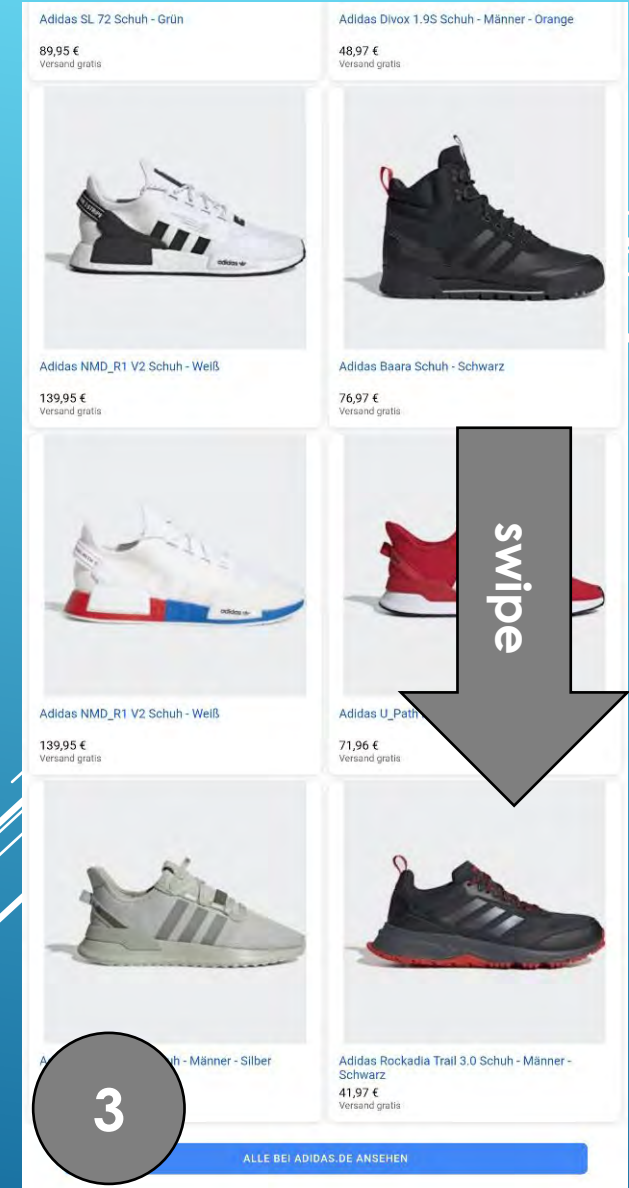
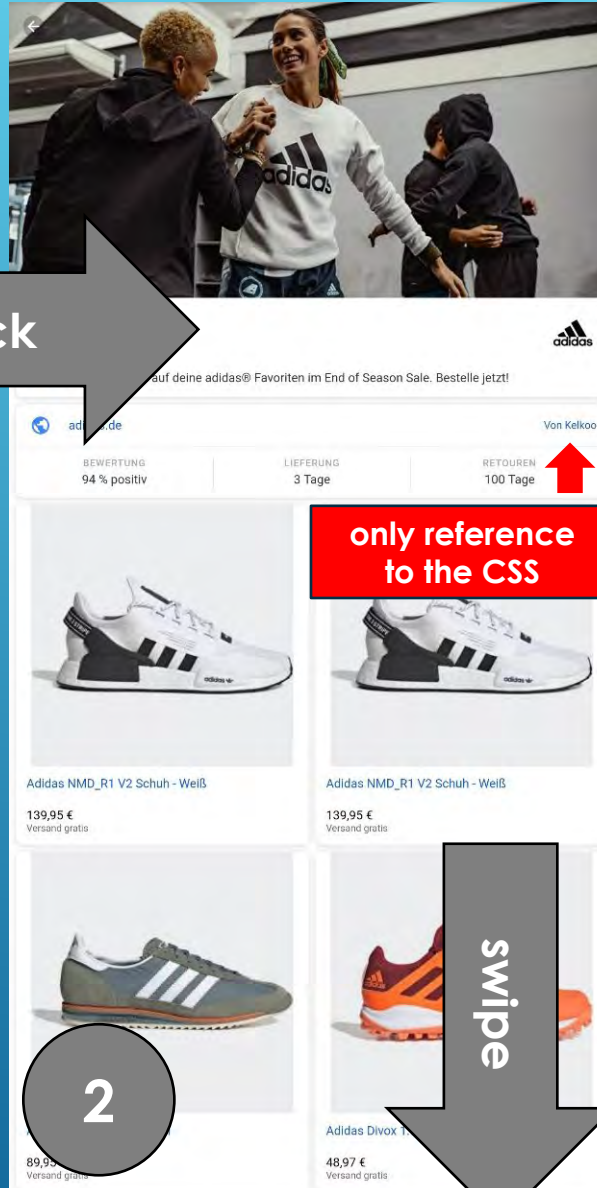


18 Showcase Shopping Ads, enabling users to compare hundreds of products and prices of different merchants, directly on Google's SERP

Showcase Shopping Ad



Click on a single
Showcase
Shopping Ad
opens a new
window, showing
several products
and prices



ANNEX 2 – ANALYSIS OF ‘CSSS’ TAKING PART IN GOOGLE’S CM

Annex 2 – Analysis of ‘CSSs’ Taking Part in Google's CM

France CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	15
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	25
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	17
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	9
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	7
Fake CSS	X	✓	X	✓	22
Fake CSS - but not visible	X	X	X	✓	12
					107

United Kingdom CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	25
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	23
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	12
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	11
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	9
Fake CSS	X	✓	X	✓	24
Fake CSS - but not visible	X	X	X	✓	12
					116

Germany CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	26
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	25
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	13
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	10
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	15
Fake CSS	X	✓	X	✓	17
Fake CSS - but not visible	X	X	X	✓	20
					126

Italy CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	8
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	29
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	16
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	6
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	7
Fake CSS	X	✓	X	✓	9
Fake CSS - but not visible	X	X	X	✓	12
					87

Sweden CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	15
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	16
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	4
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	4
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	6
Fake CSS	X	✓	X	✓	10
Fake CSS - but not visible	X	X	X	✓	7
					62

Norway CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count
Genuine CSS	✓	✓	✓	Some	5
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	20
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	7
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	2
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	3
Fake CSS	X	✓	X	✓	4
Fake CSS - but not visible	X	X	X	✓	6
					47

Netherlands CSS Sumary (based on YTD 2020 Data)	> 50 Merchants	> 1,000 Impressions	Google Partner	Affiliate or Agency	Count	
Genuine CSS	✓	✓	✓	Some	18	
Google Partners with less than 50 merchants bidding on PLA	X	✓	✓	Some	28	
Google Partners with less than 50 merchants on PLA - but not visible	X	X	✓	Some	7	
Same as Fake CSS but not Affiliate or Agency	X	✓	X	X	3	
Same as Fake CSS but not Affiliate or Agency - but not visible	X	X	X	X	5	
Fake CSS	X	✓	X	✓	16	
Fake CSS - but not visible	X	X	X	✓	9	
					86	
Total CSS count participating in Google's CM					631	
Total genuine CSS					112	17,70%