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PROHLÁŠENÍ

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LIST OF ABBREVIATIONS

Art./Arts.	Article/Articles
para. /paras.	paragraph/paragraphs
Commission	European Commission
Google	Google LLC.
EEA	European Economic Area
EU	European Union
P2B Regulation	Regulation 2019/1150

INTRODUCTION

In case one needs to look up something online, she needs to "google" it. This phrase is being used by millions of people around the world nowadays, something that no one could have initially anticipated. Founded in 1998, Google LLC. a subsidiary of Alphabet Inc. is currently one of the biggest multinational tech companies in the world focusing on internet-related services and products. Originally a research project of two PhD. students at Stanford University is currently gaining over $182,527 billion in revenue in the fiscal year of 2020, which is up by 12% from $161,857 billion in the fiscal year of 2019.[1] Although its primary objective as a search tool was to "*organize the world's information and make it universally accessible and useful*"[2], Google's business model has extended to other spheres as well – such as internet browsers (Chrome), operating systems (Android), hardware (Nexus) or household technology (Nest). Thus, over the time, Google has become what academics refer to as "*multi-product ecosystem*"[3], because it offers various products and services, which are often interconnected.

Its flagship product - search engine Google Search - is nowadays being used mostly "for free"[4], while receiving revenue from online advertising, which forms the biggest part of Google's overall revenue.[5] This business model is not unusual in the digital economy build on online platforms – on the contrary, it is very common.[6]

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[1] ALPHABET INC. (2020). *Alphabet Announces Fourth Quarter and Fiscal Year 2020 Results* (https://abc.xyz/investor/static/pdf/2020Q4_alphabet_earnings_release.pdf?cache=9e991fd, last accessed on 7 July 2021).

[2] GOOGLE. *From the garage to the Googleplex* (https://about.google/our-story/, last accessed on 27 June 2021).

[3] Google ecosystem consists of Android, Google Search, Chrome, Google Docs, Google Play, Google Drive, Google Translate, Gmail, Google Maps, Google Shopping, Google Jobs, Google Home, YouTube etc.; See FLETCHER, Amelia (2020). *Digital competition policy: Are ecosystems different?* Organisation for Economic Co-operation and Development, Hearing on Competition Economics of Digital Ecosystems, (https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf, last accessed on 27 June 2021) page 2, para. 6.

[4] Users pay with their data. See EUROPEAN COMMISSION, Press Release (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021). Similarly, in case AT.39740 *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 320.

[5] ROSENBERG, Eric (2020). *How Google makes money*. Investopedia, (https://www.investopedia.com/articles/investing/020515/business-google.asp, last accessed on 27 June 2021).

[6] EVANS, David S. (2016). *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-based Firms*, Coase-Sandor Institute for Law and Economics Working Paper No. 753, (https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2468&context=law_and_economics, last accessed 27 June 2021), page 10.

The impact of Google's presence worldwide is undisputed and enormous, which is also demonstrated by Google.com being the most visited website in the world, with knowledge of over 130 trillion webpages.[7] When focusing only on Europe, Google Search is the most used search engine with about 90% of search quarries in the majority of EU countries.[8]

Nonetheless, with great power comes great responsibility. In 2010 the European Commission ("the **Commission**") has initiated antitrust investigation into Google's conduct after receiving rival search service providers' complaints. Little did Google know that this is only the beginning of what turned out to be several years of investigations followed by unprecedented fines.

The objective of this thesis is to assess the Commission's approach towards Google in its antitrust investigations, focusing on qualitative side of the theory of consumer harm. More precisely, it will be determined whether it is the conduct of Google that diminishes, firstly, consumer choice and secondly, innovation or whether it is the allegedly interventionist approach of the Commission established through the remedies stipulated in the decisions. I have chosen to focus particularly on consumer choice and innovation, because these two criteria play an essential role in modern competition law, as will be further explained below.

The above-mentioned objective of this thesis will be achieved by analysing three relatively recent cases regarding the abuse of dominant position by Google within the EU. Firstly, the case of Google Search[9] will be discussed in Chapter 3, subsequently the case of Google Android[10] in Chapter 4 and finally the case of Google AdSense[11] will be addressed in Chapter 5. The three separate studies of these cases will focus on two key elements - firstly, the actual conduct of Google and its consequences and secondly, the assessment by the Commission and its impact, while keeping in the spotlight the concept of consumer choice and innovation as the key principles. These studies of the case law coupled with the current

[7] SCHWARTZ, Barry (2016). *Google's search knows about over 130 trillion pages*, Search engine land (https://searchengineland.com/googles-search-indexes-hits-130-trillion-pages-documents-263378, last accessed on 27 June 2021).

[8] EUROPEAN COMMISSION (2016). *Commission Staff Working Document on Online Platforms, accompanying the document "Communication on Online Platforms and the Digital Single Market"* (COM (2016) 288), (https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms, last accessed on 27 June 2021).

[9] Case AT.39740 - *Google Search (Shopping)*, Commission Decision C(2017) 4444.

[10] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761.

[11] Case AT.40411, Google Search (AdSense), Commission Decision, C(2019) 2173.

situation, shall deliver answers to the research question above. The studies will be construed to address the factual background, followed by a short summary and finally an analysis followed by a conclusion. Lastly, in Chapter 6, I will address Regulation 2019/1150[12] and proposal of Digital Market Act[13] in connection with the potential development of Google's position as well as the position of online platforms in general, to establish a broader outlook on this topic.

However, to provide a complex understanding of the research issue, it is essential to firstly establish the economic specifics of Google ecosystem as primarily ad-centric[14] platform-based business, because one of its main products - Google Search, plays a specific role as a multi-sided platform in all of the analysed decisions. Thus, firstly the economic specifics of online platforms will be discussed in Chapter 1, followed by the stipulation of consumer harm present in the digital markets in Chapter 2.

[12] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57, 11.7.2019.

[13] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[14] BOURREAU, Mark (2020). *Some Economics of Digital Ecosystems*, OECD, Hearing on Competition Economics of Digital Ecosystems, page 5, para. 20.

1. Economic specifics of multisided platforms

Platforms are two-sided or multi-sided markets, established by platform operator, which facilitate interactions between users.[15] Multi-sided markets have been a highly discussed topic amongst researchers and practitioners for some time now.[16] Although a vast part of these discussions are nowadays focused on digital economy and internet platforms, multi-sidedness is by no means a new phenomenon. Various "offline" markets – such as markets for credit cards, TV and newspapers were found to be multi-sided in the past.[17] Indeed, influence of the internet and related technologies has enabled creation of new (online) platform business models, which are no longer geographically or physically limited, compared to the "offline" ones like newspapers and thus are even more complex.

It is not an easy task to determine whether a market is multi-sided, as there is no consensus on the definition of multi-sided market. However, the essential principles could be summarized to characterize a multi-sided market as: "*a market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer depends on the demand from the other group(s)"*.[18] Therefore, there have to be at least two different interdependent groups of customers for multi-sidedness to occur.

It is crucial for the competition authorities to distinguish between "one-sided" and "multi-sided" markets, because (online) multi-sided markets have their economic specifics which need to be taken into consideration when deciding whether to intervene and how. This is reflected by multiple recent works concerning the issue of (online) platforms, which recognize and

[15] EUROPEAN COMMISSION (2016). *Commission Staff Working Document on Online Platforms, accompanying the document* "*Communication on Online Platforms and the Digital Single Market*" (COM (2016) 288), (https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms, last accessed on 27 June 2021).

[16] WISMER, Sebastian, BONGARD, Christian, RASEK, Arno (2017). *Multi-Sided Market Economics in Competition Law Enforcement*, Journal of European Competition Law & Practice, Volume 8, Issue 4, pages 257–262.

[17] Case B6-98/13 - *Funke/Springer Programmzeitschriften* Bundeskartellamt Decision 25 April 2014, para. 138; Case B6-150/08 - *Zeitungsverlag Schwäbisch Hall* Bundeskartellamt Decision 21 April 2009, para. 33; Case AT.39398 - *Visa MIF*, Commission Decision, C(2019) 3034., para. 16.

[18] PIKE, Chris (2018). *Rethinking Antitrust Tools for Multi-Sided* Platforms, *Part I. Introduction and key findings*, OECD, (www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm, last accessed on 27 June 2021), page 10.

further analyse these specifics.[19] In the following paragraphs I will address the most important of these specifics.

1.1. Network effects

One of the characteristic features of multi-sided markets, which is not present in the one-sided markets, is network externalities between different users (consumer groups) in the market.[20] This feature is relevant for antitrust purposes only if its magnitude is significant and the nature of investigation suggests so.[21] Nevertheless, if one decides not to take it into consideration when assessing a multi-sided platform, a reason must be given.[22]

There are different network externalities, which will be further on referred to as positive, negative, direct and indirect network effects. Direct network effects are not as important for platform businesses, as they are same-side effects and essentially mean that "*the value of a product or service for a user of one customer group depends on the presence of other users of the same customer group*."[23] A good example of such an effect is one of having a phone. To put is simply – it is more attractive to own a phone if more people own a phone.

On the other hand, indirect network effects are often used as a characteristic of multi-sided platforms. Indirect network effects occur in situations when "*the value of a product or service for a user of one customer group depends on the presence of users of another customer*

[19] BUNDESKARTELLAMT (2016). *The Market Power of Platforms and Networks,* Working Paper - B6-113/15, (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2, last accessed on 27 June 2021); See also MONOPOLKOMISSION (2015). *Competition policy: the challenge of digital markets*, Special Report No. 68 (http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf, last accessed on 27 June 2021).

[20] PIKE, Chris (2018). *Rethinking Antitrust Tools for Multi-Sided* Platforms, *Part I. Introduction and key findings*, OECD, (www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm, last accessed on 27 June 2021), page 10.

[21] PIKE, Chris (2018). *Rethinking Antitrust Tools for Multi-Sided* Platforms, *Part I. Introduction and key findings*, OECD, (www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm, last accessed on 27 June 2021), page 10.

[22] PIKE, Chris (2018). *Rethinking Antitrust Tools for Multi-Sided* Platforms, *Part I. Introduction and key findings*, OECD, (www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm, last accessed on 27 June 2021), page 11.

[23] WISMER, Sebastian, BONGARD, Christian, RASEK, Arno (2017). *Multi-Sided Market Economics in Competition Law Enforcement*, Journal of European Competition Law & Practice, Volume 8, Issue 4, pages 257–262.

group."[24] To demonstrate this notion in case of Google Search - the more content providers (websites) join the platform, the more value it has for consumers, because they have wider choice. *Vice versa*, more consumers attract more advertisers, and more advertisers attract more content providers. The interdependency between different customer groups is evident, which leads platforms to notorious "chicken and egg" issue as described by Evans.[25] This issue can be summarized as meaning that there needs to be enough Type A customers on the one side of the market to attract more Type B customers and vice versa.

In case strong networks effects are present, they can create what is referred to as "feedback loops". Within these loops, any action triggers a set of reactions, which increase the scope of the consequences of the actions.[26] Taking Google as an example, if Google made its users pay for using its services, there would be less users, which would make it less attractive for advertisers to pay for the ads. This would lead to content providers earning less when their content is viewed and result in less quality content. Eventually, the decrease in the quality of the content would give less value to the users.

1.2. Multi-homing

Sometimes users use more than one of the rival multi-sided platforms simultaneously. This is referred to as multi-homing and can have effect on the overall competition. The more users tend to multi-home, the less competition for the customers there is. On the contrary, if there is a high number of users who single-home, it is an indicator that the competition for these customers is intense.[27] Multi-homing can have several effects on competition, one of them

[24] WISMER, Sebastian, BONGARD, Christian, RASEK, Arno (2017). *Multi-Sided Market Economics in Competition Law Enforcement*, Journal of European Competition Law & Practice, Volume 8, Issue 4, pages 257–262.

[25] EVANS, David S. (2016). *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-based Firms*, Coase-Sandor Institute for Law and Economics Working Paper No. 753, page 7.

[26] PIKE, Chris (2018). *Rethinking Antitrust Tools for Multi-Sided* Platforms, *Part I. Introduction and key findings*, OECD, (www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm, last accessed on 27 June 2021), page 11.

[27] WISMER, Sebastian, RASEK, Arno (2017). *Market definition in multi-sided markets*, Directorate for Financial and Enterprise Affairs Competition Committee, OECD, (http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FINAL&docLanguage=En, last accessed on 27 June 2021).

being that it can reduce the impact of network effects.[28] It is thus essential to establish whether consumers are prone to multi-homing when assessing the market power in particular market.

1.3. Pricing

The structure of pricing within multi-sided platforms is specific, as there is a need to get two customer groups on board, even though one group of the customers might be more price sensitive than the other one. This creates an interesting phenomenon, when in "*multisided markets, one group of agents using the platform is usually subsidized by the platform, whereas the other group(s) of users pays for the services provided by the platform*".[29] Taking Google Search as an example, consumers do not provide monetary compensation for using it (however, we can deduce that they are „paying" with their data and attention), while advertisers are paying Google to promote their products and services.

1.4. Tipping

In general, tipping of the market occurs, when one player (multi-sided platform) finally dominates it.[30] According to the literature, there are various factors which are facilitating market tipping – such as positive network effects, single-homing and switching costs.[31] There are also factors which mitigate market tipping – such as negative network effects, multi-homing and innovation.[32] As of now, there are no rules in place, which would directly address the issue of tipping and how to prevent it, on European Union level.[33] One of the reasons why it is quite

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[28] WISMER, Sebastian, BONGARD, Christian, RASEK, Arno (2017). *Multi-Sided Market Economics in Competition Law Enforcement*, Journal of European Competition Law & Practice, Volume 8, Issue 4, pages 257–262.

[29] GÜRKAYNAK, Gönenç, İNANILIR, Öznur, YAŞAR, Ayşe G. (2017). *Multisided markets and the challenge of incorporating multisided considerations into competition law analysis*, Journal of Antitrust Enforcement, Volume 5, Issue 1, April 2017, Pages 100–129.

[30] BEDRE-DEFOLIE, Özlem, NITSCHE, Rainer (2020). *When Do Markets Tip? An Overview and Some Insights for Policy*, Journal of European Competition Law & Practice, Volume 11, Issue 10, Pages 610–622.

[31] BEDRE-DEFOLIE, Özlem, NITSCHE, Rainer (2020). *When Do Markets Tip? An Overview and Some Insights for Policy*, Journal of European Competition Law & Practice, Volume 11, Issue 10, Pages 610–622.

[32] BEDRE-DEFOLIE, Özlem, NITSCHE, Rainer (2020). *When Do Markets Tip? An Overview and Some Insights for Policy*, Journal of European Competition Law & Practice, Volume 11, Issue 10, Pages 610–622.

[33] EUROPEAN COMMISSION, Press Release (2020*). Antitrust: Commission consults stakeholders on a possible new competition tool*, (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977, last accessed on 27 June 2021).

difficult to create regulation which would address the issue of tipping, is the nature of multi-sided markets, which is very dynamic and prone to constant changes.

1.5. Transaction and non-transaction multisided platforms

In competition law literature, there is an established theoretical dichotomy between multisided platforms. One of the categories of multisided platforms is referred to as transaction and the other as non-transaction platform. Essentially, the difference stems from the way these platforms operate their business. Transaction platforms "*are characterised by the presence and observability of a transaction between the two groups of platform users*"[34] whilst non-transaction platforms "*have no such transaction between the two sides*".[35] This dichotomy has been used as a tool to access what comprises a relevant market[36], however, nowadays, it is generally agreed among academics, that this dichotomy is no longer relevant for the assessment of the relevant market.

Both categories, transaction and non-transaction multisided platforms, can have zero price side. Therefore, with regard to the definition of the relevant market especially in case of multisided markets where "one side" pays zero price[37], such as Google, both sides of the multisided market and their effect on each other must be analysed.[38] In order to establish relevant market in these conditions, hypothetical monopolist test may be used, even though the side of the market where the price is zero is present. This is possible when "*competition on that side of the platform is on dimensions other than price*" and it is possible to observe what happens on the market in case there are changes to these dimensions – for instance via SSNDQ

[34] GUNNAR, Niels (2019). *Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition*, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438913, last accessed on 27 June 2021), page 2.

[35] GUNNAR, Niels (2019). *Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition*, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438913, last accessed on 27 June 2021), page 2.

[36] GUNNAR, Niels (2019). *Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition*, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438913, last accessed on 27 June 2021), page 2.

[37] More precisely, one side of the multisided market is subsidized by the other one – in case of Google by advertising. Moreover, users pay by data and their attention, but no monetary compensation is present, therefore "zero price".

[38] GUNNAR, Niels (2019). *Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition*, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438913, last accessed on 27 June 2021), page 23.

test (small but significant and non-transitory decrease in quality)[39]. Indeed, a quantification of these dimensions is undisputedly difficult, however, possible with enough experience and data.

[39] OECD, COMPETITION COMMITTEE (2013). *The role and measurement of quality in competition analysis*, Policy roundtables, (https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf, last accessed on 27 June 2021).

2. Consumer harm in the digital markets

The era of digitalisation has brought up multiple challenges not only for the competition law as such, but for the society as a whole. With "zero-price" markets on the rise, the understanding of consumer harm became much more complicated and complex. As already explained in Chapter 1, majority of the services offered on the digital market which often seem free are in reality "paid" by consumer's personal data and advertising revenue.[40] Therefore, analysing these new, fast-developing markets using solely – or – mainly price tools, may lead to the incorrect outcomes. Various academics argue that to evaluate consumer harm in these digital markets through non-price manner is the only right way, because "*a competition analysis that is mainly or solely concerned with price, disregards elements that drive demand and supply in the digital economy*."[41]

This is mainly because, when a service is perceived to be free by a consumer, price competition should not be of the greatest concern for competition authorities, as it will not be a criterion which will influence consumers. Therefore, the focus of (not only) competition authorities has shifted to non-price dimensions instead. However, when non-price dimensions are taken into the consideration when assessing consumer harm, it is quite difficult to quantify it. Some would even argue that when consumers are not complaining and service is offered "for free", there should be no competition law enforcement necessary. However, this argument is clearly lacking any merit. Just because consumer harm is difficult to quantify in non-monetary dimension, or service is liked by the consumers, this does not mean that abusive conduct should not be examined and sanctioned – "*[F]acts cannot be ignored simply because present methods do not permit them to be described and measured with full scientific rigor*."[42]

Although it may seem like the Commission has shifted its focus from efficiency and price-based competition to non-price criteria when accessing the anti-competitive conduct just fairly recently, that is not the case. The reason why it may appear so, is that the Commission often steers away from non-price dimension in its decisions, because these are difficult to quantify and thus non-price argumentation in these analyses may appear "weaker" or "less persuasive".

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[40] EVANS, David, S. (2019). *Attention Platforms, the Value of Content, and Public Policy,* Review of Industrial Organization, Volume 54, page 776.

[41] LUNDQVIST, Björn (2019). *Competition Law For The Digital Economy*. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, page 265.

[42] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 96.

Nevertheless, the Commission has addressed non-monetary competition throughout the years in various instances. For example, already in 2001 Mario Monti, as former EU Commissioner for Competition Policy, spoke on the importance of innovation and consumer choice as objectives of competition law. the Commission also stresses out in its Guidance with regard to the application of Art. 102 TFEU that "*wider choice*" and "*improved goods and services*"[43] are of the essence during its enforcement activity. The importance of assessment of these exact non-price criteria has been also recently raised by the current EU Commissioner for competition policy Vestager, who stated that the Commission must apply EU antitrust rules to ensure that companies "*do not artificially deny European consumers as wide a choice as possible or stifle* innovation."[44]

To sum up, in case consumer is not providing monetary compensation for the product or service offered, it is not possible to micro-economically calculate consumer surplus and therefore it is impossible to use SSNIP tests in a competition law analysis. This is the reason why test such as SSNDQ tests[45] have emerged, which instead of the quantitative criteria focus on qualitative criteria in the competition analysis. Thus, due to the reasons established above, in our further analyses I will focus on qualitative criteria when establishing consumer harm - namely consumer choice and innovation. To do so, it is essential to first elaborate on these concepts while keeping in mind digital economy environment, which Google ecosystem is an impactful part of.

2.1. Reducing consumer choice

For the purposes of this thesis, it is understood that a consumer is the individual ultimate consumer, although the concept of consumer choice benefits the intermediate customers as

[43] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, para. 11.

[44] EUROPEAN COMMISSION, Press Release (2015). *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android*, (https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780, last accessed on 27 June 2021); EUROPEAN COMMISSION, *Why is competition policy important for consumers?*, (https://ec.europa.eu/competition/consumers/why_en.html, last accessed on 27 June 2021).

[45] SSNDQ tests are tests which focus on Small but Significant Non-transitory Decrease in Quality, instead of Small but Significant and Non-transitory Increase in Price (SSNIP tests) when considering substitutability of the demand-side or stipulating market definition. See OECD, COMPETITION COMMITTEE (2013). *The role and measurement of quality in competition analysis*, Policy roundtables, (https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf, last accessed on 27 June 2021).

well.[46] Consumer choice includes both, efficiency and price approach. It embodies the idea that "*consumers want books that reflect their interests, not just cheap books*"[47] – meaning that consumers are interested in more criteria when choosing a product or a service, not only price, but also non-price criteria - like quality or innovation. The notion of consumer choice is often misunderstood when used as a tool to assess anti-competitive behaviour, because it usually raises concerns that competitors instead of competition are meant to be protected by it. However, to maximize the number of options would be undesirable, as this approach would only overwhelm consumers with multitude of choices and lead to the poor allocation of resources. Concept of consumer choice is not meant to protect or raise the number of competitors or options - it is meant to "*prohibit business conduct that harmfully and significantly limits the range of choices that the free market, absent the restraints being challenged, would have provided*."[48] Therefore, it is not too concerned about the calculation of optimal number of choices, rather it focuses on whether the choice, which is of "*practical importance*" [49] for the consumer, is present. the Commission itself specifies that it does not have to prove that "*there would have been greater competition*"[50] has the anticompetitive behaviour not been present. Literature[51] suggests that, due to the vast differences between the industries, the optimal consumer choice in general sense cannot even be established. According to Averitt and his colleagues, there are three areas where consumer choice is far superior for the analysis than price.[52] For the purposes of this thesis only one of them is relevant – the sphere,

[46] AVERITT, Neil W., LANDE, Robert H. (2007). *Using the "Consumer Choice" Approach to Antitrust Law.* Antitrust Law Journal, Volume 74, page 183.

[47] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 44.

[48] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 49.

[49] AVERITT, Neil W., LANDE, Robert H. (2007). *Using the "Consumer Choice" Approach to Antitrust Law.* Antitrust Law Journal, Volume 74, page 183.

[50] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761 final, para. 988.

[51] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 56.

[52] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 60.

where "*independent decision making and creativity, rather than price, are the main forms of competition*."[53] This definition is applicable to Google in all the cases that will be discussed below, mainly because Google does not compete in terms of price in those cases.

When quantifying the optimal consumer choice, "*short-term considerations (involving the current array of choices on the market) as well as long-term goals (involving the optimal level of innovation)"*[54], must be considered. With regard to the number of choices present on the market, in general, consumers are able to pick what suits their demand in case there is more to choose from – in terms of quality, price, type etc. Nonetheless, to maximize the amount of choices is not desirable, as this would not be beneficial to the consumers, due to the poor allocation of resources, "buyers' remorse" and ultimately higher prices. However, in case the competition in the market is not affected by the anticompetitive conduct, free market will create this "*optimal level of consumer choice*"[55] on its own. The importance of innovation will be discussed below.

2.2. Stifling innovations

Generally, the importance of innovations for economic growth and competition law is undisputed. It is therefore not surprising Schumpeter argued that „*innovation and economic growth are essentially the same thing*"[56]. Despite this, competition authorities in their analyses often focus primarily on static efficiency instead of dynamic efficiency, as it is much easier to quantify and therefore leads to a "clearer" analysis. From economic standpoint, economists' opinions vary when it comes to competition in connection with innovation. Some argue that innovative effort increases when the market is less competitive and more concentrated – for instance Schumpeter[57] - claiming that when competition decreases, companies can "*focus more*

[53] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 60.

[54] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 59.

[55] ANDERMAN, Steven, AVERITT, Neil W., BEHRENS, Peter, DE GHELLINCK, Elisabeth, GINSBURG, Douglas H., LANDE, Robert H., NIHOUL, Paul, ROSCH, Thomas J., STUCKE, Maurice, WRIGHT, Joshua D. (2016). *Choice – A New Standard for Competition Law Analysis?*. Concurrences Review, page 57.

[56] WU, Tim (2012), *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, Antitrust Law Journal, Vol. 78, page 313.

[57] SCHUMPETER, Joseph A. (1976). *Socialism, capitalism and democracy*, Harper and Brothers (5th edn, George Allen & Unwin Ltd).

on post-innovation and research and development processes rather than price and output competition in the market."[58] On the other hand, economists like Arrow argue that it is the competitive pressure that incentivizes companies to innovate as monopolists are less keen to invest in product innovations, because it would cannibalize their own product.[59]

As the nature of internet itself holds great potential to innovate, competition in digital markets works differently than in traditional markets. Unquestionably, innovation plays a key role in digital economy where incumbents often possess significant market shares, because it can be used as a tool to overcome barriers to entry created on the market by network effects and data.[60]

2.3. Factors influencing consumer choice and innovations

For the purposes of the upcoming analyses, I have chosen following criteria, which, when present on the market together, seem to lead to the consumer harm exhibited in terms of stifling innovations and reducing consumer choice.

2.3.1. Acquisitions

The topic of "killer acquisitions", especially in connection to the anti-competitive practices of big tech companies, has been a subject of many rather heated debates throughout the previous years. Especially with regard to the "*killer acquisitions*" [61]. To my knowledge, there is no statistic regarding the number of "killer acquisitions" which took place in the digital market sphere, however there is one in pharmaceutical sector, which estimates that "*more than 6% of acquisitions every year in that sector are „killer acquisitions.*"[62] Nevertheless, the number of

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[58] KOKKORIS, Ioannis (2020). *Innovation considerations in merger control and unilateral conduct enforcement*, Journal of Antitrust Enforcement, Volume 8, Issue 1, page 58.

[59] EUROPEAN COMMISSION (2016). *EU Merger Control and Innovation*, Competition Policy Brief, (http://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf, last accessed on 27 June 2021).

[60] BUNDESKARTELLAMT (2016). *The Market Power of Platforms and Networks,* Working Paper - B6-113/15, (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2, last accessed on 27 June 2021), page 56.

[61] Acquisitions of (mostly) start-ups carried out by the incumbent firms with the intent of discontinuing the acquired product or service in order to ease the innovative pressure.

[62] Understandably, the nature of pharmaceutical sector is way different, so this number is only illustrational. See COYLE, Diana, FLETCHER, Amelia, MARSDEN, Philip, MCAULEY, Derek, FURMAN, Jason (2019). *Unlocking digital competition*, Report of the Digital Competition Expert Panel,

these acquisitions is not that important, because even one acquisition which would contain significant disruptive innovation could be hugely harmful to the incentives to innovate and innovation and/or consumer choice.

Only in the past 10 years, five biggest tech companies Google, Amazon, Microsoft, Facebook and Apple have acquired over 400 other companies.[63] Since 1987 until 2019, out of all of the acquisitions of these five companies, Google has the biggest share on completed acquisitions, around 32%.[64] This is slightly alarming when considered in the light of the fact that out of 175 acquisitions made by Google, Amazon, Facebook, Amazon and Microsoft that have been analysed by Gautier and Lamesch „*in 105 cases the brand of the target firms was discontinued within a year of the acquisition*"[65]. Indeed, this does not mean that the competition concerns do not arise even when the product or service is not discontinued after the acquisition[66], however that it is a usual "killer acquisition" strategy. Lowering of incentives to innovate caused by the nascent acquisitions is apparent already, as there is "*a decline in Venture Capital funding for starts ups in the 'same space' as the companies acquired by Google and Facebook*".[67]

The necessity to intervene and address these "killer acquisitions" has been recently partially satisfied by the new guidance[68] provided by Commission on 26 March 2021, which focuses on

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, last accessed on 27 June 2021), page 48.

[63] COYLE, Diana, FLETCHER, Amelia, MARSDEN, Philip, MCAULEY, Derek, FURMAN, Jason (2019). *Unlocking digital competition*, Report of the Digital Competition Expert Panel, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, last accessed on 27 June 2021), page 91; MOSS, Diana L. (2019). *The Record of Weak U.S. Merger Enforcement in Big Tech*, American Antitrust Institute, (https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf, last accessed on 27 June 2021), page 5.

[64] MOSS, Diana L. (2019). *The Record of Weak U.S. Merger Enforcement in Big Tech*, American Antitrust Institute, (https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf, last accessed on 27 June 2021), page 5.

[65] GAUTIER, Axel, LAMESCH, Joe (2020). *Mergers in the Digital Economy*, CESifo Working Paper No. 8056, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012, last accessed on 27 June 2021), page 23.

[66] GAUTIER, Axel, LAMESCH, Joe (2020). *Mergers in the Digital Economy*, CESifo Working Paper No. 8056, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012, last accessed on 27 June 2021), page 16.

[67] OECD (2020). *Start-ups, Killer Acquisitions and Merger Control*, (http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf, last accessed on 27 June 2021), page 35.

[68] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final.

the amendment of the application of the referral mechanism established in Article 22 EUMR[69]. In short, this guidance enables National Competition Authorities to refer to the Commission even the mergers which do not meet the national merger thresholds. This shift in regulation is especially important in innovative fields, such as big tech, where start-up companies usually did not have time to generate significant turnover yet and therefore the acquisition of these new companies would not be caught under the turnover threshold. This amendment seems like one step closer to the elimination of acquisitions which are a threat to the competition on the merits.

However, not all acquisitions performed by big tech are anticompetitive – it is well-known that "*being acquired is an important exit strategy for technology start-ups.*"[70] Assuming all acquisitions by big tech are anticompetitive or harmful to consumers would highly likely only stifle innovation, as many start-ups would lose incentive to innovate and new start-ups would not appear so often. Therefore, only time will show whether this shift in the assessment of the mergers will negatively influence the number of mergers and perhaps even the numbers of start-ups present in the EEA market, because companies may see this shift as an element of legal uncertainty.

2.3.2. Exclusionary conduct

To keep the competitive pressure in the digital sector, it is essential to protect innovations. While promoting innovations by monopolists or oligopolists is important, it is suggested by the literature[71] that it is mainly the innovation created by small players which must be encouraged the most, because those are more likely to bring disruptive innovation rather than a planned one.[72] This is one of the reasons why exclusionary conduct is "*the real supreme evil*"[73] – it discourages external disruptive innovations. According to Wu, "*exclusion, if cheap enough, is*

[69] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[70] COYLE, Diana, FLETCHER, Amelia, MARSDEN, Philip, MCAULEY, Derek, FURMAN, Jason (2019). *Unlocking digital competition*, Report of the Digital Competition Expert Panel, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, last accessed on 27 June 2021), page 101.

[71] BAKER, Jonathan (2007). *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, Antitrust Law Journal, Volume 74, Issue 3, page 588–601.

[72] Nelson, R. R., WINTER, S. W., An Evolutionary Theory of Economic Change, (1982).

[73] WU, Tim (2012), *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, Antitrust Law Journal, Volume 78, page 316.

actually an alternative to innovation, particularly for a monopolist."[74] Thus, competition authorities must make exclusionary practices expensive in order to protect innovation incentives.[75]

Moreover, in case exclusionary conduct takes place on the market, consumer choice takes a blow, because instead of the market itself establishing the optimal consumer choice, it is the exclusionary conduct which influences the number and overall variety of choices present on the market.

2.3.3. High barriers to entry

Barriers to entry prevent new entrants from accessing the market, which is beneficial for the incumbents, because competitive pressure is diluted. However, this inevitably stifles innovation and hampers consumer choice, because new entrants are unable to join the market.

There are various notions which are regarded as barriers to entry, however in the analyses below I will focus specifically on data and network effects as barriers to entry.

Incumbents in the digital sectors, using their first mover advantage, were already able to obtain vast amounts of data, which created an advantage over their competitors. This advantage is usually very difficult to compensate for, even though it is often argued that data is not a finite source and therefore cannot pose as a barrier to entry, when the data collection is substantial and the competitors are unable to get access to the same kind of data as incumbents, or it is too expensive for them to buy that collection of data, it is a different story.

Furthermore, indirect network effects often serve as barriers to entry. In case of Google Search, the higher is the number of consumers using the search engine, the higher is the number of advertisers. This leads to a higher revenue and Google can afford to invest more into the development of the search engine, to make it even more attractive for users. Moreover, data that are provided by the consumers in exchange for "free" usage of the search engine can be used by Google to improve its services.[76] Therefore, due to the network effects creating feedback loops, it is much more difficult for new competitors to enter the market.

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[74] WU, Tim (2012), *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, Antitrust Law Journal, Volume 78, page 319.

[75] WU, Tim (2012), *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, Antitrust Law Journal, Volume 78, page 316.

[76] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 158.

3. First case study – Google Shopping[77]

3.1. Factual background

When searching for information via Google Search, two types of results appear in front of its users. Firstly, there are unpaid - or so called "organic" search results[78] – these are the "blue links" redirecting users to third party websites. Secondly, at the top of the page, there are specialised search results[79], which provide users with specific results grouped intentionally by product, service or information (for instance "Google Maps", "Google Finance" or "Google Video"), depending on the original user's query.

In 2002, Google introduced a new specialised search service, called Froogle (since 2012 rebranded to Google Shopping), which is a comparison-shopping service that allows consumers to compare prices and products across the online world. In general, it is a well-known fact, that comparison-shopping services are highly dependent on the amount of traffic they receive from users.[80] It is a simple equation – more traffic means more clicks, which leads to the higher revenue. Moreover, higher traffic is more attractive to retailers interested into listing their offers with a given comparison-shopping service. Additionally, the number of searches helps to improve the accuracy of the search results – because algorithm is "learning".

All the above-mentioned facts lead to the conclusion that Google holds nowadays a very unique position, as a "gatekeeper of the internet" since it is dominant in general internet search and majority of user's queries pass through its search engine. Therefore, majority of users will most likely get to the individual comparison-shopping services through Google Search.

When Froogle entered the market, there already have been other price comparison-service providers established on the market. Initially, Froogle encompassed multiple types of retailers – manufacturers, re-sellers and platforms – all of them initially did not have to pay to be listed in it.[81] Google's internal document from 2006 proves that Froogle did not perform well at first.[82]

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[77] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444.

[78] Further referred to as organic search results.

[79] So-called vertical search results.

[80] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, paras. 444-461.

[81] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 28.

[82] EUROPEAN COMMISSION, Press Release (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

Not only was it not gaining traffic, but it was also losing traffic.[83] However, this has changed, when Google changed its design of Froogle through the introduction of Product Universal and intense algorithm adjustments.

At first, in April 2007 Froogle has been renamed to "Google Product Search". On top of that, as mentioned above, Google created "Product Universal" – now rebranded to "Shopping Unit"[84] - which "*comprised specialised search results from Google Product Search*, *accompanied by one or several images and additional information such as the price of the relevant items.*"[85]

Then it all began in 2008, when Google has significantly changed its business strategy, pushing its comparison search service in front of the ones of the competitors via algorithm.[86] This strategy was feasible and successful because of Google's dominance in general internet search market.[87]

In 2010 the Commission initiated antitrust investigation into Google's conduct, after receiving complaints from two rival vertical search service providers, claiming that Google is treating their comparison search services unfavourably, while preferentially displaying its own services.[88]

Meanwhile, in 2012 Google changed both Google Shopping and Shopping Unit to purely commercial (paid) listing model, with only merchants being able to sign up to be listed (not comparison-shopping services).[89]

Since the beginning of the investigation, the Commission was very clear that it was trying to reach a binding commitments decision instead of taking more restrictive measures.[90] Google

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[83] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 490.

[84] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444 para. 31.

[85] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 29.

[86] EUROPEAN COMMISSION, Press Release (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

[87] EUROPEAN COMMISSION, Press Release (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

[88] EUROPEAN COMMISSION (2010). *Opening of Proceedings*, (://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_502_8.pdf, last accessed on 27 June 2021).

[89] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 31, 220/2.

[90] ALMUNIA, Joaquín (2013). *The Google antitrust case: what is at stake?* Speech, (https://europa.eu/rapid/press-release_SPEECH-13-768_en.htm, last accessed on 27 June 2021).

offered several rounds of commitments, which were further subjected to the market tests.[91] Although from the statement of former Commissioner Almunia in October 2013[92] and February 2014[93] it seemed like these commitments were able to address all the competition concerns, complainants and politicians intensely critiqued them. The strongest opposition entailed commitment regarding paid listings in Google's specialised search service, as the competitors would have to participate in dedicated auction mechanism to appear in the paid results.[94] These circumstances and overall dissatisfaction with commitments from the complainants, combined with new market data and further considerations by competitors, led the Commission to the decision of continuing with the investigation.

In April 2015, the Commission sent Statement of Objections to Google regarding abuse of its dominant position in general internet search market by treating preferentially its own vertical search service (Google Shopping) in its general search results.[95]

After 7 years of antitrust investigation into Google Shopping, in June 2017, the Commission imposed an unprecedented fine of €2.42 billion on Google for abusing its dominant position in the relevant market for general search in the EEA.[96]

3.2. Summary of the decision

The Commission has found that Google has been using its dominant position in the market of general search as a leverage in vertical search market – more precisely - in comparison shopping service market, by two types of conduct: 1) assigning a prominent placement to its own comparison-shopping service whilst 2) demoting rival comparison-shopping services in

[91] BUTTÀ, Antonio, (2018). *Google Search (Shopping): An Overview of the European Commission´s Antitrust Case*, Italian Antitrust Review, N. 1, page 48.

[92] ALMUNIA, Joaquín (2013). *The Google antitrust case: what is at stake?* Speech, (https://europa.eu/rapid/press-release_SPEECH-13-768_en.htm, last accessed on 27 June 2021).

[93] ALMUNIA, Joaquín (2014). *Statement on the Google investigation*, Press Conference, (https://europa.eu/rapid/press-release_SPEECH-14-93_en.htm, last accessed on 27 June 2021).

[94] BUTTÀ, Antonio, (2018). *Google Search (Shopping): An Overview of the European Commission´s Antitrust Case*, Italian Antitrust Review, N. 1, page 48.

[95] EUROPEAN COMMISSION (2015). *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android*, Press release (https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780, last accessed on 27 June 2021).

[96] EUROPEAN COMMISSION (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, Press Release, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

its search results.[97] According to Commissioner Vestager, this conduct denied competitors the opportunity to compete on the merits and innovate, and, more importantly – denied European consumers "*a genuine choice of services and the full benefits of innovation*".[98]

3.3. Analysis

Although the majority of academic contributions focus on how the dominance has been established in this case, in the following paragraphs I will address a little bit less-discussed topic of consumer harm. I will try to establish whether it was Google's conduct that has stifled innovation and limited consumer choice, or whether it was the allegedly interventional approach of the Commission.

3.3.1. The abusive conduct

The conduct, which has been found to be abusive, consists of Google displaying its own comparison-shopping service prominently at the top of the page in its general search results pages with pictures and in rich text format (in Shopping Unit). Meanwhile, other comparison-shopping services were only allowed to appear in its generic search results[99], which are subjected to different ranking algorithms. These algorithms however never applied to Google's own comparison-shopping service, which eventually influenced how the comparison-shopping services were further displayed in Google's general search. Due to this conduct, diversion of traffic occurred, as Google's behaviour decreased traffic from its general search results to other comparison-shopping services, while increasing traffic from Google's general search results to its own comparison-shopping service. This conduct was found to be out of the scope of competition on the merits and the Commission held that it is "*capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services.*"[100]

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[97] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 344.

[98] EUROPEAN COMMISSION (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, Press Release, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

[99] Case AT.39740 - *Google Search (Shopping)* Summary of Commission Decision C(2017) 4444, para. 13, Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 344.

[100] Case AT.39740 - *Google Search (Shopping)* Summary of Commission Decision C(2017) 4444, para. 10.

Thus, it was decided that Google has foreclosed its rivals in comparison shopping service market, which according to the Commission stifled innovation and limited consumer choice.[101] The reasoning behind this conclusion is that innovations may be less likely, as competing comparison services may be less incentivized to invest into their development, when they are being made artificially less visible and therefore losing much needed traffic. Regarding the consumer choice, the Commission held that it has been negatively influenced, as instead of providing the most relevant results, Google promoted its own comparison-shopping service, displaying it at the top of the page no matter whether it consisted of the most relevant results.

Google objects to these conclusions, claiming that Shopping Unit is an innovative tool that is supposed to provide "*highest quality information*"[102] to consumers.

3.3.2. Consumer harm

Competition enforcement is well acquainted with the price related consumer harm violations with regard to the specific product or service. It is necessary to acknowledge here, that while price is traditionally undoubtedly very important criterion in the competitive analysis, it is simply not to be solely or primarily focused on in our case – because "*while in other industries reducing costs can be a major source of competitive advantage, this is often less the case in the digital world.*"[103] This notion is also observable from Google Shopping case as such. In this decision, the Commission´s attention has refocused from price related criteria towards non-monetary parameters in multiple instances – for example – when establishing whether Google is dominant, it did not look into whether Google is able to "*profitably increase prices above the competitive level for a significant period of time*"[104], instead, it was the finding that "*a significant number of users would not switch to competing*

[101] EUROPEAN COMMISSION (2015). *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android*, Press Release (https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780, last accessed on 27 June 2021).

[102] WALKER, Kent (2016). *Improving Quality Isn't Anti-Competitive, Part II* (https://blog.google/around-the-globe/google-europe/improving-quality-isnt-anti-competitive-part-ii/, last accessed on 28 June 2021)

[103] CRÉMER, Jacques, DE MONTJOYE, Yves A., SCHWEITZER, Heike (2019*). Competition Policy for the digital era*, Final report, Publications Office of the European Union (https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf, last accessed on 28 June 2021).

[104] LUNDQVIST, Björn, GAL, Michal S. (2019). *Competition Law For The Digital Economy* (Cheltenham, UK; Edward Elgar Publishing), page 272.

providers were Google to degrade the quality of its general search service"[105], which the Commission based its reasoning on. This shift is understood by several authors[106] as perhaps necessary in case of digital markets, which are highly innovative in their essence.

In Google Shopping decision, one of the Commission´s greatest concerns regarding the consumer harm was that when Google displays results to the consumers´ queries, they might not get the most relevant results when searching for a product, because the most relevant comparison-shopping services would not be displayed so prominently (as they could not appear in Shopping Unit). This conduct leads to the hampering of consumer choice as consumers assume that the higher the result appears on the webpage, the more relevant it is[107] and thus do not click on the results which are displayed less attractively. Therefore, because of the Google's exclusionary conduct, consumers do not see the results which are the most relevant displayed most prominently, only the results that Google wants them to see. This causes the diversion of traffic from other comparison-shopping services to Google's.

Even though in its decision, the Commission does not precisely use the words "consumer choice", these words are used later by Commissioner Vestager during the Press Conferences when describing the anti-competitive effects which Google´s conduct had.[108] By contrast, the wording of the decision describes Google´s conduct as "*likely to reduce the ability of consumers to access the most relevant comparison-shopping services*"[109]. And that is one of the meanings of what limiting consumer choice means. Protecting consumer choice is not about creating and keeping as many options as possible, or quantifying the optimal or ideal number of choices, it is about refraining from any activity which would impact the way consumer choice is exhibited and thus optimal consumer choice established.[110] It was known to Google that

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[105] LUNDQVIST, Björn, GAL, Michal S. (2019). *Competition Law For The Digital Economy* (Cheltenham, UK; Edward Elgar Publishing), page 272.

[106] KOKKORIS, Ioannis (2020). *Innovation considerations in merger control and unilateral conduct enforcement, Journal of Antitrust Enforcement*, Volume 8, Issue 1, page 72.

[107] COMPETITION AND MARKETS AUTHORITY (2017). *Online Search: Consumer and Firm Behaviour*, (https://www.gov.uk/government/publications/online-search-behaviour-literature-review, last accessed on 28 June 2021), para. 1.6(c).

[108] EUROPEAN COMMISSION (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, Press Release, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 28 June 2021).

[109] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 597.

[110] MARSDEN, Philip (2014). *Exercising choice: some reflections on competition enforcement in online markets*, Competition and Markets Authority, (https://www.gov.uk/government/speeches/philip-marsden-speaks-about-competition-enforcement-in-online-markets, last accessed on 28 June 2021).

consumers preferred and clicked more often on the results which were displayed higher in the general search result page[111], while assuming that they are clicking on the most relevant result to their query. Using this knowledge, Google not only promoted its own comparison search service by displaying its results above general search, but also demoted other comparison services by algorithms which did not apply to its own comparison tool. Therefore, because of Google's clearly exclusionary conduct, optimal consumer choice of comparison-shopping services could not be present in the market.

In its submission[112], Google claimed that consumer choice is not influenced, because consumers, due to the algorithms applied, still get the most relevant results within Shopping Unit just as they would be getting the most relevant results within generic search results, however, that is not even disputed by the Commission.[113] As can be deducted from the words of the decision itself: "*The Commission does not object to Google applying certain relevance standards but to the fact that Google's own comparison shopping service is not subject to those same standards as competing comparison shopping services*."[114] Although, in any event, the Commission further concludes that Google has never demonstrated that these relevancy standards have been put in place and upheld in case of Shopping Unit.[115]

What Google seems to be consciously ignoring is that not all the offers available on the market were allowed to participate in the Shopping Unit (which has the most prominent display), at the time of anti-competitive conduct, and until recently only merchant platforms could partake in the Shopping Unit (which was unavailable to comparison-price service providers). Thus, Google has effectively reduced optimal consumer choice, which would have been present in the market, in case its exclusionary conduct would have been absent.

Subsequently, according to the decision, the very same conduct of Google also lowered competitors´ incentives to innovate. Although the Commission and Commissioner Vestager[116] herself considers innovation to be one of the very important non-price factors to be taken into

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[111] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444., footnote 333.

[112] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 406.

[113] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 440.

[114] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 440.

[115] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 441.

[116] VESTAGER, Margrethe (2020). *Shaping a digital future for Europe*, Speech at Symposium on Digitalisation, The Hague, (https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/shaping-digital-future-europe_en, last accessed on 28 June 2021).

account when assessing anti-competitive effects of abusive conduct, Google Search decision provides almost no in-depth evaluation of this criterion. Only three paragraphs out of total 755 deal directly with the issue of innovation, thus the analysis is anything but extensive in this regard. The Commission also does not stipulate clear criteria to follow when innovation considerations arise.

However, the reason why rival comparison-shopping services were less incentivized to invest and innovate in this case is being reasoned by the visibility argument. The Commission held that even if rival product would be the most relevant, it would not be displayed as prominently as Google´s Shopping Unit, ultimately leading to gaining less traffic.[117] This argumentation is supported by "the eye-tracking tests"[118], one of which found that "*[o]n average, the first three links seem to account for 40-65% of the total clicks on desktop devices. On mobile devices, this tendency is even more accentuated, with the top three links on average accounting for more than 70% of the total clicks. The evidence suggests that […] consumers seem to display an inherent bias to click on links in higher positions*".[119] Thus, the Commission argues in its decision, that comparison shopping services will have incentive to innovate only if „*they can reasonably expect that their services will be able to attract a sufficient volume of user traffic*".[120] The Commission also admits that there are ways for a traffic to be artificially increased by simply purchasing it, however, that would lead to lower revenues and less available resources to be further invested in innovations and improvement of quality overall.[121]

When challenged with the alleged stifling of innovation, Google´s reaction was that there is "*a ton of innovation*"[122] in the market, arguing that if there was no competitive pressure and the market would be dominated by Google, there would be none.[123] This approach comes

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[117] EUROPEAN COMMISSION (2013). *Commission seeks feedback on commitments offered by Google Search (Shopping) to address competition concerns – questions and answers*, (https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_383, last accessed on 28 June 2021).

[118] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444, para. 375.

[119] COMPETITION AND MARKETS AUTHORITY (2017). *Online Search: Consumer and Firm Behaviour*, (https://www.gov.uk/government/publications/online-search-behaviour-literature-review, last accessed on 28 June 2021), para. 1.6(c).

[120] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 595.

[121] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 595.

[122] SINGHAL, Amit (2015). *The Search for Harm*, Google Europe Blog (https://blog.google/topics/public-policy/the-search-for-harm/, last accessed on 27 June 2021).

[123] SINGHAL, Amit (2015). *The Search for Harm*, Google Europe Blog (https://blog.google/topics/public-policy/the-search-for-harm/, last accessed on 27 June 2021).

as no surprise, because even in the past, Google´s position used to be that "*competition is just one click away*".[124] Nevertheless, this rather controversial statement can be easily debunked using the argumentation provided in the Google Shopping decision which found that consumers are unlikely to multi-home even if Google degrades its quality[125] and the fact, that there are high barriers to entry. These barriers to entry are quite specific in Google Shopping case, because as established above, Google has been using its acquired data and pre-existing feedback loops from the general search engine market to gain an advantage in the comparison-shopping market. Therefore, no other comparison-shopping service could have the same starting position because it would not have either the amount of data necessary either the feedback loops from network effects working in its favour.

While Google´s 100-page response to the Commission´s Statement of Objections is completely confidential, in its blogposts Google´s former vice president and current senior vice president argue that all that Google did was to simply innovate and improve quality for the benefit of consumers. Arguing that even the introduction of Shopping Unit stems from its "*commitment to quality*"[126] and that its conduct does not qualify as "favouring" of its own service, but rather as "*listening to its customers*".[127] This approach is visible from almost all the statements provided by Google´s representatives – using its customers as a defence. However, it is difficult to accommodate the notion that this conduct benefits consumers, mainly because the so-called innovation is eliminating competitors by hampering their traffic and discouraging them to innovate, which leads to the consumers being deprived of the benefits of choice and innovation. Benefit to consumers is even more questionable when put into the context of a research which shows approximately 55 % of consumers are unaware of which links provided as results to a query are ads.[128] Moreover, only 50% of all adults know

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[124] SCHMIDT, Eric (2011). *Hearing before the Subcommittee on Antitrust, Competition policy and Consumer rights of the Committee on the judiciary United States Senate* (https://www.govinfo.gov/content/pkg/CHRG-112shrg71471/html/CHRG-112shrg71471.htm, last accessed on 27 June 2021).

[125] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, final, para. 312.

[126] WALKER, Kent (2016). *Improving Quality Isn't Anti-Competitive, Part II* (https://blog.google/around-the-globe/google-europe/improving-quality-isnt-anti-competitive-part-ii/, last accessed on 28 June 2021).

[127] WALKER, Kent (2016). *Improving Quality Isn't Anti-Competitive, Part II* (https://blog.google/around-the-globe/google-europe/improving-quality-isnt-anti-competitive-part-ii/, last accessed on 28 June 2021).

[128] *OFCOM (2019). Adults: Media use and attitudes report 2019*, (https://www.ofcom.org.uk/__data/assets/pdf_file/0021/149124/adults-media-use-and-attitudes-report.pdf, last accessed 28 June 2021), page 2; See also CHARLTON, Graham (2016). *55% do not recognise paid ads in Google SERPS: stats*, Search Engine Watch (https://www.searchenginewatch.com/2016/08/11/55-dont-recognise-paid-ads-in-google-serps-stats/, last accessed on 28 June 2021); See also VAUGHTON, Tom (2018). *VARN Original Research: Almost 60% of People Still Do Not Recognise Google Paid Ads When They See Them.*,

advertising is the main source of funding for search engines.[129] It seems difficult to accommodate the idea that consumers benefit from a system which they do not have an essential grasp on.

Additionally, Google acquired in the previous years at least two comparison-site companies in the comparison-site market, which ceased to exist shortly after their acquisition. In 2010 Google acquired Like.com and in 2015 this comparison-shopping site became defunct. Afterwards, in 2011 Google acquired only 1 year old comparison-shopping site Sparkbuy and, as a part of the purchase deal, site was closed. Now, these may have surely been only talent or technology acquisitions, but they still raise concerns. And while many would argue that since Alphabet spent from 2006 until 31 March 2021 over 28.238 billion USD in research and development[130], it is a huge innovator, however, incumbents are unlikely to bring "disruptive" new innovations, especially if it could hurt their already existing business model. Therefore, there is still a risk, that these companies with billions in revenue could always rather acquire these (disruptive) innovators (and perhaps even discontinue the nascent product) which could sabotage their business model, than try to compete with them.

3.3.3. Problematic implementation of the remedy

To allow Google´s competitors in comparison-shopping services to at least have a chance to compete, the Commission ordered Google to treat these competitors´ comparison-shopping services equally as Google treats its own. More precisely, the Commission held that "*Google has to apply the same processes and methods to position and display rival comparison-shopping services in Google's search results pages as it gives to its own comparison-shopping service*."[131] Google decided that it will therefore create an auction-based system where all the comparison-shopping sites could compete via bidding, including Google´s new business unit

(https://varn.co.uk/01/18/varn-original-research-almost-60-people-still-dont-recognise-google-paid-ads-see/, last accessed on 28 June 2021).

[129] OFCOM (2020). *Online Nation 2020 Report*, (https://www.ofcom.org.uk/__data/assets/pdf_file/0027/196407/online-nation-2020-report.pdf, last accessed on 28 June 2021), page 5.

[130] MACROTRENDS, *Alphabet Research and Development Expenses 2006-2021 | GOOGL*, (https://www.macrotrends.net/stocks/charts/GOOGL/alphabet/research-development-expenses, last accessed on 28 June 2021).

[131] EUROPEAN COMMISSION (2017). *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service*, Press Release, (https://europa.eu/rapid/press-release_IP-17-1784_en.htm, last accessed on 27 June 2021).

with its own budget, which was supposed to run Google Shopping in Europe. However, this has not been met with positive reactions from other comparison-shopping sites, which argued that Google´s new business unit is nothing more than internal accounting stunt and nothing has changed, because the lucrative placement within the search results is yet again not achieved by the relevancy criteria (and competition on the merits), but rather by the fact who can pay the most. Therefore, it seemed that the Commission's remedy did not restore the competition on the merits, and it appeared that the rival comparison-shopping sites were still disincentivized to innovate and consumer choice was still harmed, as the relevancy rating has not been established.

Since 21 April 2020 Google implemented changes which allowed merchants to advertise via Google Shopping tab[132] (Shopping Unit) for free under the "Products" slot. However, the change of the conditions did not apply to the comparison-shopping sites, which nowadays have a dedicated slot within Shopping Unit and still have to participate in an auction in order to appear in this dedicated "Comparison sites" slot.[133] Therefore, it is questionable whether this new change will benefit comparison shopping sites at all, because they still have to bid in an auction, however, consumers now have to counterintuitively click on the "Comparison sites" slot displayed in Shopping Unit (which is displayed within the general search results at the top of the page) in order to even see their ads. I suspect that this implementation of the remedy will yet again be met with a lot of criticism, because I assume that traffic will be diverted to merchant websites via Google's Shopping Unit and other comparison-shopping services will go without being noticed by the majority of the consumers. Moreover, merchants will highly likely rather pay Google to appear in the "Products" slot within the Shopping Unit, than pay other comparison-shopping services to appear on their "Comparison sites" slot, which is less likely to be seen by the consumers. This implementation therefore likely reduces the choice of merchants and consumers to use other comparison-shopping services than Google Shopping even more.[134] Only time and shifts on the market will show whether this assumption is true.

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[132] READY, Bill (2020). *It's now free to sell on Google*, (https://blog.google/products/shopping/its-now-free-to-sell-on-google/, last accessed on 2 July 2021).

[133] Shopping Unit nowadays consists of two slots – „Products" slot and „Comparison sites" slot. However, „Products" slot is the one which displays ads fully in Shopping Unit as a default and in order to see the ads which are in „Comparison sites" slot, one needs to click on the slot for the ads to appear. See GOOGLE. *About Comparison Listing ads*, (https://support.google.com/css-center/answer/9262823?hl=en, last accessed on 2 July 2021).

[134] HOPPNER, Thomas (2020). *Google's (Non-) Compliance with the EU Shopping Decision, a study based upon empirical data of 25 comparison shopping services*,

3.3.4. Conclusion

In the analysis above, I have considered the argumentation of both sides present in Google Search decision in the light of the facts and came to the conclusion that not only Google´s conduct does not promote innovations on the market for comparison-shopping services, but it is also able to contribute to stifling them. This determent of innovations further hampers consumer choice, as competition through innovation, which is especially important in the digital markets, is almost impossible for the competitors. Moreover, absent the anti-competitive conduct of Google, consumer´s access to the most relevant results could have been present and consumer choice not affected. Thus, due to its anti-competitive conduct Google has effectively restricted consumer choice and reduced rivals' incentives to innovate, which inevitably led to consumer harm.

Therefore, it can be determined, that when there is a dominant platform which enters a new adjacent market where barriers to entry are high and this dominant platform engages in anti-competitive (exclusionary conduct) on this new market (perhaps even carries out acquisitions which are concerning from the competition law point of view) consumer harm in terms of stifling innovation and reducing consumer choice seems inevitable.

Although the interference of the Commission was necessary in order to amend the competition on the merits in the market of comparison-shopping services, it does not seem like the behavioural remedy which was set out in the decision delivered the desired results. However, it does not appear like it is the Commission to blame for the unsatisfactory outcome, it seems like it is Google who voluntarily disregarded the criteria stipulated by the decision and implemented them in a way which did not restore the competition on the merits, ultimately leading yet again to consumer harm. Since April 2020 Google tweaked its implementation of the remedy, however, so far it seems like competition on the merits has not been restored and comparison-shopping sites still do not enjoy equal treatment – if anything, their position seems to have worsened.

Google has appealed this decision; the first hearing has taken place at the General Court in Luxembourg from 12-14 February 2020. The main argumentation of Google was based on the notion that decision of the Commission was a refusal to supply case and that the

(https://www.hausfeld.com/uploads/documents/googles_(non)_compliance_with_google_search_(shopping).pdf, last accessed on 4 July 2021).

Commission "*had failed to satisfy the applicable legal tests for such a determination*".[135] This argument rises an interesting debate with regard to the rethinking of the essential facilities doctrine within the digital space, however many argue that "*Google's duty to supply argument relies upon an incorrect interpretation of the decision*"[136], as the decision does not oblige Google to provide technology to its competitors. Nevertheless, there are still other claims on which Google could prevail and persuade the panel of judges, one of them being a lack of causal link between its alleged anti-competitive behaviour and the loss of traffic of its competitors.

[135] HANNAH, Lesley, WENZLER, Claus (2020). *The Google Shopping Decision and Whether Digital Platforms Can Constitute Essential Facilities*, Lexology, (https://www.lexology.com/library/detail.aspx?g=4f12917e-3a7a-4c29-9442-3c30afb4dabe, last accessed on 28 June 2021).

[136] HANNAH, Lesley, WENZLER, Claus (2020). The Google Shopping Decision and Whether Digital Platforms Can Constitute Essential Facilities, Lexology, (https://www.lexology.com/library/detail.aspx?g=4f12917e-3a7a-4c29-9442-3c30afb4dabe, last accessed on 28 June 2021).

4. Second case study – Google Android[137]

4.1. Factual background

Back in the early 2000s there was a rather significant change in the dynamics of how people began to browse the internet, essentially because consumers started to prefer to use mobile devices instead of the desktop PCs. Google realized already back then, that in order to stay relevant in general search and thus keep the Google Search still relevant, it needed to prepare for this shift in preferences of its users. Google Search is an essential tool for Google, because via this tool Google generates massive revenues. Presumably, with this anticipation in mind, Google acquired the developer of Android mobile operating system in 2005. Android is "*an open-source operating system for mobile devices*"[138], therefore its code is available to everyone for free. In case anyone decides to download this code and modify it, a so-called Android fork is created.[139]

Since 2008, Google provides an app store for Android, called Play Store. The specific characteristic of Play Store is that it cannot be downloaded like other apps, it needs to be pre-installed. It is essential to have an app store installed on a device, in order to be able to download other apps, which were not pre-installed. Therefore, Play Store is visited by the consumers quite often.[140] And while pre-installation of other app stores is not prohibited by Google, it is not possible for developers to use Play Store for the distribution of the different app stores.[141]

Approximately since 2011, Google went ahead and pre-installed Google Search application "*on practically all Android devices sold in the EEA"*.[142] Similarly, as of 2012, Google decided to pre-install, on basically all Android devices which were sold within the EEA, its web browser Google Chrome, with its default search engine being Google Search. As a result of this practice, manufacturers were able to obtain Google's mobile applications only as a

[137] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761.

[138] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 124.

[139] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 124.

[140] FROMMER, Dan (2014). *These are the 25 most popular mobile apps in America*, Quartz, (http://qz.com/481245/these-are-the-25-most-popular-2015-mobile-apps-in-america/, last accessed on 28 June 2021).

[141] GOOGLE (2020). *Google play developer distribution agreement*, (https://play.google.com/intl/All uk/about/developer-distribution-agreement.html, last accessed on 28 June 2021), section 4.5.

[142] EUROPEAN COMMISSION (2018). *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search* engine, Press release, (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581, last accessed on 28 June 2021).

bundle including app store Play Store, Google Search app as well as Google Chrome web browser.

Around the same time period, Google reached out to several big manufacturers and mobile network operators ("**MNOs**"), and offered them financial benefits, in case of exclusive pre-installation of Google Search app on their Android devices. Furthermore, Google has informed manufacturers that if they wanted to pre-install Google's proprietary apps (like Play Store or Google Search), they could not do so on Android forks.

Ten years after the acquisition of Android by Google, in April 2015, the Commission has sent Statement of Objections to Google, informing it of the initiation of its investigation regarding Android in connection with its alleged anti-competitive agreements, which were supposed to constrain the market for operating systems and applications.[143] One year later, in April 2016, the Commission decided to engage in formal antitrust proceedings.

This time it took the Commission "only" two years to conclude, that Google abused its dominant position. And in case the fine for the breach of competition rules in Google Shopping case has been eyebrow-raising for some, this time it was almost breath taking for majority – as a fine of 4.34 billion euros has been imposed on Google.

4.2. Summary of the decision

The Commission has found that Google abused its dominant position when it imposed various restrictions on manufacturers as well as on MNOs. Google's conduct has led to the increased usage of Google Search, which allowed Google to secure its dominant position in the general search. The conduct in question consisted of three separate practices constituting one infringement. These practices are: 1) tying Google Search app and Google Chrome with Android operating system, 2) financial compensation to the manufacturers for the exclusive pre-installation of Google Search app and 3) prohibition of the pre-installation of Google apps on Android forks.

[143] EUROPEAN COMMISSION (2015). *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android*, Press Release (https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780, last accessed on 27 June 2021).

4.3. Analysis

4.3.1. The abusive conduct

As mentioned above, the conduct which constituted an infringement of competition law in the eyes of the Commission consisted of three separate practices. All three of these practices are in their nature contractual restrictions.

Firstly, Google engaged in two instances of illegal tying of its applications, which resulted in Google offering its applications for Android only as a bundle including Play Store, Google Search app as well as Google Chrome browser. First instance of tying occurred when Google tied Google Search app to Play Store, which in practical terms meant that in order to have Play Store pre-installed on an Android device, Google Search app had to be pre-installed on the device as well. This pre-installation leads to the so-called "*status quo bias*"[144] which essentially means that although consumers are not forced to use pre-installed apps and can install new and different apps, they are highly unlikely to do so.[145] Second instance of tying occurred when Google decided to tie Google Chrome browser with Play Store and Google Search app. In practise this meant that Play Store and Google Search app could not have been installed without Google Chrome browser being pre-installed as well. This was one of the essential steps, because Google Chrome's default search engine is Google Search. The above-mentioned conduct according to the Commission's conclusions harms the competition because it "*provides Google with a significant competitive advantage*" and helps Google to cement its dominant position in general search. Moreover, it increases barriers to entry[146], reduces incentives to innovate of other general search service providers[147] and directly or indirectly harms users, who "*as a result of Google's interference with the normal competitive process, may see less choice of general search services available*".[148]

Secondly, Google engaged in exclusivity payments towards MNOs and largest device manufacturers. These payments were granted as a compensation for the exclusive pre-installation of Google Search on all Android devices, while no other rival general search engine

[144] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, paras. 780-781.

[145] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 781

[146] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 861.

[147] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 862.

[148] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 863.

could have been pre-installed. The payments were "*revenue-based portfolio payments*"[149], and the Commission found them to restrict competition, which led to the deterrence of innovation – not only in competing general search services, but Google Search was not incentivized to improve its quality as well. This anti-competitive conduct also actively resulted in less choice[150] of general search services present on the market on Android devices, because there were very few devices with other general search service than Google Search available.

Lastly, Google imposed anti-fragmentation agreements (AFAs) on those who wanted to pre-install either Google Search app or Play Store on Android devices. Although there is no definition of what actually "fragmentation" constitutes within the meaning of AFAs[151], in practice it means that none of Google's proprietary apps (like Google Search app or Play Store) could have been installed on devices running on Android forks[152]. The Commission has found that these AFAs are restricting competition, mostly because Android forks, which were perceived as a gateway to innovation and "*credible competitive threat*"[153] have been effectively eliminated from competition. This is mainly because Android without its proprietary apps – such as Play Store – is unattractive for consumers. In conclusion, the Commission determined that this conduct helps Google to reinforce its dominant position in general search, "*deters innovation, and tends to harm, directly or indirectly, consumers*."[154]

4.3.2. Consumer harm

As well as in the analysis of Google Search decision, in the analysis of Google Android decision, I will be addressing innovation and consumer choice as two important qualitative factors which are affected by the anti-competitive conduct of Google. I will address all the above-mentioned anti-competitive practices in an order which we have established in the previous paragraphs.

[149] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 1200.

[150] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 1314.

[151] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 1167.

[152] Alternative versions of Android. Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, supra note 108.

[153] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 1036 (1).

[154] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 1036 (6).

Firstly, regarding the two instances of tying Google Search with Play Store, the Commission established, similarly to Google Search decision, that it is very important for rival general search services to obtain as much traffic (generated by users' queries) as possible, in order to have incentive to innovate and be able to improve their services. It is an easy equation - the more data general search services gain, the better user experience they can provide later on.[155] However, due to the obligatory pre-installation of Google Search app and Google Chrome, it was highly unlikely for competitors to gain a sufficient amount of traffic. In its defence, Google claimed that users are not forced to use already pre-installed Google Search app, because nothing is stopping them from downloading a different general search application. In reaction to this argument the Commission concludes that even though there is no obligation or necessity to use pre-installed service, there is an empirically proved "*status quo bias*"[156], meaning that consumers are "*unlikely to look for, download, and use alternative apps, at least when the app that is pre-installed* […] *already delivers the required functionality*."[157] Therefore, by tying Play Store with Google Search app as well as Google Chrome browser, Google used an exclusionary tactic to successfully avoid and dilute the innovative pressure. As already established, the innovative pressure is of great importance especially in the digital markets. Therefore, the Commission concluded, that in case tying has not been taking place even "*Google may have improved Google Chrome to a greater degree.*"[158]

Moreover, restricting competition by this conduct leaves consumers with less choice of general search services and less choices of mobile web browsers.[159] The reasoning behind this is that devices running on Android without Play Store pre-installed are unattractive for the consumers. And in case MNOs or device manufacturers wanted to keep their devices attractive for its user base, they needed to pre-install Play Store, which meant that Google Search app and Google Chrome browser had to be pre-installed as well. The effect of pre-installation is even more concerning in the light of the fact that it is not possible to uninstall Google Chrome or

[155] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 862.

[156] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, paras. 781-800.

[157] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 782.

[158] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, para. 980.

[159] Case AT.40099, *Google Android*, Commission Decision C(2018) 4761, paras. 863, 971.

Google Search app on GMS devices.[160] Therefore, consumer choice has been negatively affected by this conduct of Google, because it "*deprived consumers of the prerogative to choose and was thus contrary to the ideal of 'competition on the merits'.*"[161] In short, optimal consumer choice could not been established on the market, because of the exclusionary anticompetitive conduct.

Secondly, the above-mentioned payments, which manufacturers and MNOs received in case of exclusive pre-installation of Google Search on Android devices constituted, are, according to the Commission, exclusivity payments. These payments significantly restricted chances of other general search services being pre-installed on devices included in the portfolio. As a result, competitors were not able to gain enough traffic, data and revenue as Google Search. All of these factors are crucial for an incentive to innovate to arise. Moreover, this conduct, which effectively excluded other general search services from being pre-installed, provided Google with an advantage which allowed Google not to feel the pressure of innovation inflicted on it by its competitors. Therefore, yet again, exclusionary conduct replaced innovation, which inevitably harmed the consumer.

Additionally, these payments "*prevented the launch of Google Android devices pre-installed with general search services other than Google Search*"[162], which influenced the choices that were present for the consumers to choose from on the market – whether quality-wise or "just" in the number of choices. Therefore, the optimal consumer choice could not be established by the market.

As already mentioned above, Android is an open-source operating system, which allows anyone to download and modify its code to create Android forks. This feature provides a great innovative potential, however, Google decided to eliminate it. With the help of AFA, Google effectively destroyed this innovative potential which the nature of open-source format provides. Indeed, Google argued that this conduct was crucial in order to prevent "fragmentation" of Android and that if it had not intervened, it could have resulted in technical difficulties and troubleshooting, which would ultimately damage the reputation of Android operating system. To counter this argument, the Commission stated that "*Google could have ensured that Android*

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[160] "*Smart mobile devices which in addition to running on Google Android also pre-install the mandatory Google apps […] are referred to as ´GMS devices"*". See Case AT.40099, *Google Android* - Commission Decision C(2018) 4761, para. 131.

[161] SICILIANI, Paolo (2019). *On the Law & Economic of the Android Case*, Journal of European Competition Law & Practice, Volume 10, Issue 10, page 641.

[162] Case AT.40099 - *Google Android*, Commission Decision C(2018) 4761, para. 1314.

devices using Google proprietary apps and services were compliant with Google's technical requirements, without preventing the emergence of Android forks."[163]

Therefore, yet again Google used exclusionary tactic to avoid competitive and innovative pressure, which could have arisen in case manufacturers were able to pre-install Google's proprietary apps on forked Android devices. Even in this case, the restriction imposed on competition by Google, leads to the detriment to the incentives to innovate, which is ultimately harmful to the consumers.

Moreover, the Commission concluded, that "*it was Google – and not users, app developers and the market – that effectively determined which operating systems could prosper*."[164] Therefore, the lack of competition on the merits inevitably led to the inability of consumers to perform their own choice. The elimination of "*credible competitive threat*"[165] in form of the devices which were functioning on "alternative" Android operating system left manufacturers as well as consumers without the possibility to reach optimal consumer choice.

The acquisition of Android operating system in 2005 did not make it to the headlines back then, mostly because Android Inc., which developed Android, was merely a start-up company founded in 2003. Google acquired Android for only 50 million USD, which is a rather low amount, considering the fact that Google has since the acquisition earned over 31 billion USD in revenue and 22 billion USD in profit from Android operating system.[166] Therefore, even though the acquired operating system is still on the market and has not been discontinued after the acquisition, the competition concerns were still valid. As mentioned above, in case dominant undertakings acquire new companies, competition concerns arise, even if the acquired service or product is still on the market and has not been discontinued. This is especially concerning in the markets which have high barriers to entry (which is definitely the case of Android app stores´ market) because new competitors are less likely to appear.

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[163] EUROPEAN COMMISSION (2018). *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, Press release, (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581, last accessed on 28 June 2021).

[164] EUROPEAN COMMISSION (2018). *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, Press release, (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581, last accessed on 28 June 2021).

[165] Case AT.40099 - *Google Android*, Commission Decision, C(2018) 4761, para. 1036 (1).

[166] ROSENBLATT, Joel, CLARK, Jack (2016). *Google's Android Generates $31 Billion Revenue, Oracle Says*, Bloomberg (https://www.bloomberg.com/news/articles/2016-01-21/google-s-android-generates-31-billion-revenue-oracle-says-ijor8hvt, last accessed on 27 June 2021).

4.3.3. Problematic implementation of the remedy

The Commission ordered Google to cease the anti-competitive conduct within 90 days after the decision. Vestager explained the application of the remedy in Android decision stating "*decision stops Google from controlling which search and browser apps manufacturers can pre-install on Android devices, or which Android operating system they can adopt.*"[167] Furthermore, Commissioner specified that "*decision does not prevent Google from putting in place a reasonable, fair and objective system to ensure the correct functioning of Android devices using Google proprietary apps and services, without however affecting device manufacturers' freedom to produce devices based on Android forks*."[168]

However, this behavioural remedy has been implemented by Google in a similar "pay-to-play" way as in Google Search decision. Google established an auction system for search engines which will appear as an option in front of the consumers on preference menu when setting up new Android device. Therefore, it came as no surprise that this solution has been criticized not only by Google´s competitors, but also by commentators, who claim that behavioural remedies are not enough, because the competition on the merits is not restored and instead structural remedies should be taken.

Due to the unsatisfaction regarding Google's compliance with the remedy and constant pressure of the Commission, on 17 June 2021 Google posted an announcement claiming that it will no longer be necessary for search engines to pay in order to appear in its choice box.[169] Instead, search engines can submit their application to appear on the choice screen which will consist of 12 randomly displayed search engines. Therefore, it seems like a welcomed change will happen on 1 September 2021 when this adjustment should be implemented. Perhaps the Commission's approach will soon yield the desired results and consumer choice and innovations will thrive in this sphere again.

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[167] EUROPEAN COMMISSION (2018). *Statement by Commissioner Vestager on Commission decision to fine Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, (https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_18_4584/STATEMENT_18_4584_EN.pdf, last accessed on 28 June 2021), page 3.

[168] EUROPEAN COMMISSION (2018). *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, Press release, (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581, last accessed on 28 June 2021).

[169] GOOGLE, (2021). *About the choice screen,* (https://www.android.com/choicescreen/, last accessed on 2 July 2021).

4.3.4. Conclusion

Argumentation of the Commission as well as argumentation of Google were taken into the consideration when analysing Google Android decision. It has been established that Google, through a variety of anti-competitive conduct, restricted consumer choice and stifled incentives to innovate of its competitors. The Commission had to take an interventionist approach in order to amend the competition on the merits in the market for Android app stores and the national markets for general search services, although it does not appear like it has been successful in restoring competition on the merits, due to the yet again curious implementation of the remedy by Google. However, it seems like since September 2021 Google will adjust its implementation and innovations and consumer choice will thrive in this sphere again.

Therefore, it has been demonstrated, that when there is a dominant undertaking on the market and it partakes in anti-competitive (exclusionary) conduct in the newly acquired market which has high barriers to entry, consumer choice will suffer as well as the innovative incentives of the rivals. To sum up, it seems as when these conditions are present competition authorities must be cautious.

Google has appealed this decision as well, asking for its annulment. The hearing has yet to take place, however its pleas in law and main arguments are public already since 9 October 2018. In its application, Google argues even the basis of the decision – the fact that Android is dominant or even the fact that Google Play is dominant. [170] However, the plea which I think will be one of the most interesting to see analysed is that "*the preinstallation conditions are objectively justified because they enable Google to provide the Android platform for free*"[171], as this plea aims at the fact, that if manufacturers had to pay Google to obtain Android platform, the ones who would end up paying in the end would be the consumers and thus consumer harm would be inevitable.

[170] Case T-604/18 *Google and Alphabet v Commission*.

[171] Case T-604/18 *Google and Alphabet v Commission*.

5. Third case study - Google AdSense[172]

5.1. Factual background

As already mentioned in the chapters above, Google's business model is relying predominantly on the revenue from online advertising. This notion is also demonstrated by the fact, that only in 2020 alone, Google's advertising revenue was 146.92 billion dollars out of 181.69 billion US dollars revenue overall.[173] This should come as no surprise, because Google has been dominant in the market of online advertising intermediation since at least 2006 until 2016.[174]

Many websites allow consumers to search through their content through a search button. The result to a consumer's search query appears alongside advertisements. Using its tool called "AdSense for Search", Google is offering advertisements to the owners of websites (publishers), where these ads will eventually be published. Therefore, Google poses as "*an advertising broker, between advertisers and website owners*".[175] In short, the Commission recognizes Google's AdSense as "*online search advertising intermediation platform*".[176]

Throughout the years, Google entered into multiple agreements regarding intermediation of advertisement with large publishers (website owners). Since 2003 Google included in these agreements a clause - "*Exclusivity clause*"[177]- which stipulated exclusivity of Google as an online search advertisement provider, worded as "*publishers were prohibited from placing any search adverts from competitors on their search results pages*".[178]

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[172] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173.

[173] JOHNSON, Joseph (2021). *Advertising revenue of Google from 2001 to 2020*, (https://www.statista.com/statistics/266206/googles-annual-global-revenue/, last accessed on 28 June 2021).

[174] EUROPEAN COMMISSION (2019). *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*, (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770, last accessed on 28 June 2021).

[175] EUROPEAN COMMISSION (2019). *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*, (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770, last accessed on 28 June 2021).

[176] EUROPEAN COMMISSION (2019). *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*, (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770, last accessed on 28 June 2021).

[177] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 82.

[178] EUROPEAN COMMISSION (2019). *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*, (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770, last accessed on 28 June 2021).

Nevertheless, since 2009, these provisions on exclusivity were slowly replaced in some of the agreements with "*Premium Placement*"[179] and "*Minimum Google Ads Clause*"[180] clauses. In essence, this change meant that Google's competitors could now place their ads on web owners' webpages, however, Google's adverts still had to be placed at the most visible, most attractive and most attention-grabbing place. Moreover, publishers had to publish certain (minimal) number of ads.

Since March 2009, these agreements between Google and web owners additionally stipulated that in case web owners wanted to change the placement of adverts of competitors of Google, they were obligated to get a written consent from Google, which would allow them to change the position of the ads.

All these above-mentioned strategies pre-empted Google's competitors from competing on the merits, because at first, Google completely excluded its competitors, and after that Google reserved all the most attractive advertisement placements with the highest amount of "clicks" to itself. The result of this conduct was that Google generated the highest revenue and discouraged other online advertisement intermediators from competing with Google. Indeed, Google also created great network effects.

On 20 March 2019 the Commission found Google has abused its dominant position on the market of online search advertising intermediation by involving the anti-competitive clauses in its agreements with third-party websites, which cemented Google's dominant position in online search advertisement brokerage. Thus, this anti-competitive conduct, in words of Ms. Vestager "*denied consumer choice, innovative products and fair prices*".[181]

5.2. Summary of the decision

The Commission has found that since 2006 until 2016 Google abused its dominant position in the market for online search advertising intermediation by breaching the competition rules in three different instances, amounting to one "*single and continuous infringement*".[182] In all of these instances Google stipulated contractual obligations for website owners (publishers). First

[179] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 91.

[180] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 91.

[181] VESTAGER, Margrethe (2019). Twitter, (https://twitter.com/vestager/status/1108323633364168704, last accessed on 28 June 2021).

[182] Case AT.40411 - *Google Search (AdSense)*, Summary of Commission Decision, C(2019) 2173, page 2, para. 10.

obligation was „*to source all or most of their search advertising (the "search ads") requirements from Google*"[183], second obligation was to provide Google´s ads with the most attractive placement and third obligation forced publishers to receive approval from Google in case of the change of placement of competitors´ search ads.

5.3. Analysis

5.3.1. The abusive conduct

Google is an entire digital ecosystem, which offers multitude of various services, products and platforms which are interconnected. One of these platforms which Google offers since 2003 is Google AdSense - a platform which "*delivers Google ads on the websites of publishers*"[184]. In the contracts concluded between Google and publishers of search ads since 2006, one of the provisions, titled as Exclusivity clause[185] prohibited publishers from "*implementing*"[186] or "*providing access*"[187] to "*any services which are the same as or substantially similar to any of the services being supplied by Google*".[188] Therefore, Exclusivity clause prevented competitors from the access to the significant part of the market for intermediation of online search ads in the EEA. This conduct was found to be abuse of dominant position of Google on the market for intermediation of online search ads within the EEA by the Commission.

Since mid-2009 Google slowly began to replace its Exclusivity clause from some of its agreements with the Premium placement clause and Minimum Google Ads Clause. Therefore, instead of total exclusivity reserved for ads provided by Google, publishers gained two new obligations. Firstly, they could not place competitors´ ads higher than those of Google or even too close to them. The purpose of this obligation was to ensure that Google´s ads had the most prominent display and therefore were noticed first by the consumers. Secondly, publishers had to request a certain number of ads for one search query. Both of these new obligations deterred website owners from sourcing search ads from other providers, because it was more convenient to source ads just from one provider – Google.

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[183] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 4.

[184] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 21.

[185] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 82.

[186] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 82.

[187] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 82.

[188] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 82.

Moreover, since 2009, agreements between website owners and Google contained Authorising Equivalent Ads Clause which forced publishers to obtain written approval from Google, prior to any changes in the positioning of its competitors´ ads and overall display. The agreement between Google and publishers contained pre-approved screenshots, which were negotiated beforehand and contained exact position and overall display of Google´s search ads.

Therefore, according to the Commission, Google´s anticompetitive conduct consisted of "*three separate infringements of Article 102*"[189], overall amounting to one single and continuous infringement.

5.3.2. Consumer harm

In my final analysis of this thesis, again, I will focus on the notion of consumer harm, in the light of qualitative criteria - consumer choice and innovation, when analysing Google's anticompetitive conduct established in Google AdSense decision.[190] As described in the paragraphs above, the anti-competitive conduct of Google presented in this decision consisted of three infringements, all of contractual nature, which amounted to one single infringement.

The first infringement of competition law in this case was the implementation of Exclusivity clause into the contracts concluded between Google and third-party websites (publishers). According to the Commission, this clause "*may have deterred innovation*"[191], because it was forbidden for the publishers to get search ads from Google´s competitors in the online advertisement intermediation market, which further deterred innovative incentives of these competitors. Moreover, not only were the competitors due to Google's conduct unable to access large portions of the market of online ad intermediation services, but they were also unable to gain revenue which could have been later invested in the innovation of their services. This essentially exclusionary conduct inevitably harmed consumers, which were further deprived of innovations.

Regarding the consumer choice, the Commission found that Exclusivity clause restricted the choice of search ads present in the market for the consumers, "*as competing providers of online search advertising intermediation could have served or developed different search*

[189] Case AT.40411 - *Google Search (AdSense),* Commission Decision, C(2019) 2173, para. 3

[190] Case AT.40411 - *Google Search (AdSense),* Commission Decision, C(2019) 2173.

[191] Case AT.40411 - *Google Search (AdSense),* Commission Decision, C(2019) 2173, para. 403.

ads“[192] if they were able to access the market and compete on the merits. This has been opposed by Google, which argued, that consumer choice has not been restricted by Exclusivity clause, because „*a number of ad formats competed for advertising space on the websites*“[193] of publishers, and even if the contracts with publishers did not include Exclusivity clause, competitors could not provide greater choice of search ads, because they “*were likely to have access to the same portfolio of search ads as Google.*“[194] The Commission´s counterargument to this objection of Google is quite logical – it states that even if consumers already had a wide choice of search ads and the competitors of Google in the market of intermediation of online search advertisement had access to the same portfolio of search ads, this does not negate the fact that, absent the Google´s anti-competitive conduct, ad intermediators may have provided even wider choice of these search ads and thus consumers may have had even wider choice of search ads. Therefore, Google yet again used exclusionary conduct to avoid innovative pressure.

The second infringement of competition law in this case, was the incorporation of Premium Placement and Minimum Google Ads Clause into the agreements concluded between Google and publishers, as these clauses were “*capable of restricting competition.*“[195] Moreover, the Commission held that both of these provisions “*may have deterred innovation*”[196], because publishers were discouraged to conclude parallel contracts with other online search ad brokers. In turn, these brokers, if there was a demand, could have provided various different search ads. Additionally, this conduct discouraged Google’s competitors in online search intermediation market from “*investing in the development of innovative services, the improvement of the relevance of their existing services and the creation of new types of services*.“[197] This, yet again, ultimately may have harmed consumers, because if the Premium Placement and Minimum Google Ads Clause were not present in the contracts with the publishers, consumers could have enjoyed wider range of choice of search ads, as other intermediators of online search ads could have provided publishers with different, innovative search ads.

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[192] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 418.

[193] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 419 (1).

[194] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 419 (2).

[195] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 461.

[196] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 529.

[197] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 531.

Lastly, in the contracts concluded with the publishers, Google began to include Authorising Equivalent Ads Clause. Just like in case of the other above-mentioned provisions, even in case of this clause, the Commission concluded that it constituted an abuse of dominant position of Google on the market for online search advertising intermediation within EEA. The Commission went on to establish that this restriction of competition also "*may have deterred innovation*"[198] The reasoning behind this conclusion is similar to the reasoning above, as the Commission held that due to the anticompetitive conduct of Google publishers lost incentive to get search ads from multiple providers at the same time. Therefore, as there has not been demand from (mainly big) publishers, brokers of search ads have been deterred from investing into innovation. Finally, this conduct further contributed to the consumer harm, more precisely to the negative influence of consumer choice. Commission found that absent the anti-competitive clause, "*users may have had a wider choice of search ads*".

Google acquired Applied Semantics, which was a start-up company that helped Google to develop AdSense, already in 2003 for 102 million USD.[199] This acquisition is often referred to as one of the most important acquisitions for Google, because it enabled Google to greatly upgrade its advertising, similarly to the acquisition of DoubleClick. It is estimated that AdSense nowadays generates over 15 billion USD, which constitutes approximately 23% of the overall revenue.[200] And even though this could have been seen as a harmless talent acquisition, in the overall context of Google being able to use its dominant position in search engine market[201] and use the necessary data[202] and network effects created by its Google Search platform[203], it definitely raised competition concerns. These concerns were later justified by the Commission's findings of Google abusing its dominant position in online search advertising within EEA.

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[198] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 597.

[199] KARBASFROOSHAN, Ashkan (2011). *Top 10 Greatest U.S. Digital Media M&A Deals Of All Time*. TechCrunch, (https://techcrunch.com/2011/10/15/top-10-greatest-u-s-digital-media-ma-deals-of-all-time/, last accessed 28 June 2021).

[200] CREMADES, Alejandro (2019). *Google Acquired The Company Of This Entrepreneur And Turned It Into A $15 Billion Business*, Forbes, (https://www.forbes.com/sites/alejandrocremades/2019/04/04/google-acquired-the-company-of-this-entrepreneur-and-turned-it-into-a-15-billion-business/?sh=53c32b577950, last accessed on 28 June 2021).

[201] Search advertisement brokers admitted that a successful entrant into the search advertisement ad market needs to invest into the creation of search engine first. See Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 243.

[202] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, para. 246.

[203] Case AT.40411 - *Google Search (AdSense)*, Commission Decision, C(2019) 2173, paras. 249-261.

5.3.3. Implementation of the remedy

Google has removed all the above-mentioned problematic contractual obligations from its contracts with publishers. Therefore, only time will show whether this step will suffice for the competition to be restored on the merits.

5.4. Conclusion

As presented in the paragraphs above, absent Google's anti-competitive conduct, which was based on the series of anti-competitive contractual obligations, optimal consumer choice and innovative search ads may have been present in the market. The Commission had to intervene and remedy Google's behaviour, because it was Google's conduct which disabled competition on the merits in the market for online search advertisement intermediation and ultimately harmed consumers.

Therefore, as can be deducted from the analysis above, when there is a market with high barriers to entry (such as search advertisement market), which has been entered by an entrant which has a dominant position in the adjacent market and exclusionary conduct and other forms of anti-competitive conduct take place on this newly acquired market, it inevitably causes harm to the consumers.

In June 2019 Google has appealed this decision as well, the hearing in this case is yet to take place. Google has not yet publicly commented on the content of its appeal any further and the Commission simply stated that it will defend its decision in Court.[204]

[204] LOMAS, Natasha (2019). *Google appeals $1.7BN EU AdSense antitrust fine*, TechCrunch, (https://tcrn.ch/3hfkZxG, last accessed on 28 June 2021).

6. Future development in the digital sector

6.1. Regulation 2019/1150[205]

The European Union Platform to Business Regulation 2019/1150 or so called "P2B Regulation" applies since 12 July 2020 and governs online platforms such as online intermediation services and online search engines in quite a complex manner. While it mostly focuses its provisions on business users, some of the provisions are put in place with respect to the consumers as well. The main objective of P2B Regulation is that it provides "*fair and transparent treatment of business users by online platforms*".[206] This regulation includes stipulations on how terms and conditions of online intermediation services and online search engines should be drafted and what they should include. Furthermore, it provides rules for restriction, suspension and termination of these platforms, as well as the necessity of clear and accessible rules, for the ranking systems of business users, in place. Majority of these rules exist in order to improve the bargaining position of business entities, which depend on large platforms if they their business to prosper and be successful.

With regard to the online search engines, such as Google, the relevant obligations stipulated in this regulation are the ones concerning ranking and differentiated treatment. It is already deductible from Google Shopping case[207] which has been analysed in the paragraphs above, that ranking "*has an important impact on consumer choice and the commercial success of corporate website users.*"[208] Therefore, in connection to the issue of ranking, P2B Regulation establishes, that search engine platforms should "*provide a description of the main parameters determining the ranking of all indexed websites.*"[209] This obligation should help business entities, which are being ranked, with an understanding how the ranking works and perhaps even adjust their websites in order to be ranked higher. The regulation also ensures that the

[205] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

[206] DENTONS (2020). *The P2B Regulation - New EU Rules for Platform Providers*, (https://www.dentons.com/en/insights/alerts/2020/november/6/the-p2b-regulation-new-eu-rules-for-platform-providers, last accessed on 28 June 2021).

[207] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444.

[208] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/62, para. 26.

[209] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/62, para. 26.

secrets of algorithms are kept safe by a provision which states that "*online search engines should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms*."[210]

Another obligation, which, if it would have existed before Google Shopping case[211], would almost certainly affect the case, is the obligation of differentiated treatment in case of online search engines. This obligation ensures that when "*online search engine itself offers certain goods or services to consumers through its own online search engine*"[212] it "*acts in a transparent manner and provides a description of any differentiated treatment, whether through legal, commercial or technical means, that it might give in respect of goods or services it offers itself*."[213] Therefore, there is a visible difference in the approach, because while in Google Shopping case Google was ordered to treat other comparison-shopping services equally, Article 7 of P2B Regulation allows providers of search engines to treat their own product differently, however, their terms and conditions have to contain a description of such treatment.

Therefore, it is possible that P2B Regulation will increase innovation and consumer choice to a certain extent, however, this consequence will presumably emerge only as a "by-product", as the objective of this regulation is about establishing fair and transparent market of online platforms without specific focus on consumer harm in terms of innovation or consumer choice.

6.2. Digital Markets Act[214]

As already explained in Chapter 1.1, network effects are inherent characteristic features of multi-sided platforms. Although the digital sector creates space for multitude of opportunities and has great innovative potential, due to the immense network effects which several largest

[210] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/62, para. 27.

[211] Case AT.39740 - *Google Search (Shopping)* Commission Decision C(2017) 4444.

[212] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/63, para. 31.

[213] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/63, para. 31.

[214] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final.

multi-sided platforms possess, it also gives rise to so-called "gatekeepers"[215] or "gateways". These gatekeepers are large platforms, which are often a part of an entire digital ecosystem, which in the end creates even higher barriers to entry. The impact of gatekeepers on the digital market is of great importance, because they often regulate or control the access to the market, which inevitably affects the contestability of the particular market and overall fairness towards the business users, who depend on these platforms to stay relevant. Ultimately, this ability to gatekeep the market, hurts the final consumers as well. At this moment, there is no EU legislation which would address issues which arise specifically in connection to these gatekeepers. However, "*the new proposal for regulation on contestable and fair markets in the digital sector*"[216] referred to as Digital Markets Act (**DMA**) focuses exactly on these issues. Although it is a completely new regulation, it does not change current competition rules, only adds new tools to them. These new tools are necessary, in order to address the unfair practices and contestability issues, which "*lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers*". [217] Therefore, the objectives of this proposed regulation are different yet complimentary to the objectives of competition law regulation in Articles 101 or 102 TFEU. In the spirit of ex ante regulation, DMA stipulates obligations for gatekeepers which they need to adhere to, in order to avoid penalties.

One of the main reasons why gatekeepers retain their position as core platforms is primarily due to the "*access to vast amounts of data that they collect while providing the core platform services as well as other digital services*". Thus, one of the important obligations stipulated in DMA is that gatekeepers shall "*provide effective portability of data generated through the activity of a business user or end user".*[218] In connection to the business users, this obligation is intended to aid with the disproportionality of amount of data, which each platform gains when their service is used. On the other hand, in connection to the final consumer, the above-

[215] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, page 34.

[216] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, page 34.

[217] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, page 1.

[218] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, Article 6(1)h).

mentioned obligation allows for much easier multi-homing, thus providing consumers with more choices and creating innovative pressure.

Other important obligations, which would have affected for instance Google Android decision, are that the gatekeepers shall enable end-users to uninstall any preinstalled applications[219] and they also shall "*allow the installation and effective use of third-party software applications or software application stores*". There are even obligations, which would have affected Google Search case, such as obliging gatekeepers to "*refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party*"[220] – moreover, DMA stipulates that this ranking has to be fair and non-discriminatory[221].

Understandably, these are not the only obligations present in DMA, there are many more, focusing on the issues of interoperability, multi-homing and other, which enhance this already strong position and barriers to entry, which these gatekeepers providing core services created.

However, although one of the main goals of DMA is "*addressing market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice*"[222], it is currently being criticized for not actually focusing on the consumers (end users), but rather on the business users as "*end users are named as beneficiaries of the gatekeeper obligations in only 7 of the 18 obligations/prohibitions*."[223] The European Consumer Organisation has even submitted its position on DMA, asking for changes to be made to it, so it can "*fulfil its objectives for consumers*".[224] It is also being argued that, in its current wording, DMA will have exactly the opposite effect to what its objectives are, and it will "*undermine consumer choice and user protections (including security and privacy), and reduce incentives to innovate*".[225] Therefore,

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[219] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, Article 6(1)b).

[220] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, Article 6(1)d).

[221] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, Article 6(1)d).

[222] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act), COM(2020) 842 final, page 69.

[223] BEUC, (2021). *Digital Markets Act Proposal*, Position Paper, (https://www.beuc.eu/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf, last accessed on 4 July 2021).

[224] BEUC, (2021). *Digital Markets Act Proposal*, Position Paper, (https://www.beuc.eu/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf, last accessed on 4 July 2021).

[225] KIRK, Hugh (2021). *Digital Markets Act position paper*, DIGITALEUROPE (https://www.digitaleurope.org/resources/digital-markets-act-position-paper/, last accessed on 4 July 2021).

only future development of its final wording will show whether DMA actually will fulfil its potential to increase innovation and consumer choice.

6.3. Conclusion

Although the market of online platforms has been highly unregulated for years, with the use of the knowledge stemming from its experience in the field, the Commission was finally able to ascertain what are some of the main competition concerns regarding the large online platforms and how to enforce obligations which would focus on these concerns. With new regulations in place, competition law is trying to create a framework which provides gatekeepers and online platforms in general, with a set of rules which need to be followed. Indeed, these rules do not precede competition law principles and rules set-out in treaties, they merely complement them.[226]

In general, I think it will be an exciting new chapter for the Commission with regard to the enforcement of competition rules, in the light of new regulations which give online platforms a chance to adjust their business model and the way it is functioning *ex ante*. The Commission even metaphorically describes the purpose of these new regulations as a "*filter which removes some of that debris*"[227] before it gets to the Commission itself. Nevertheless, the obligations which have been drafted and implemented on the EU level do not yet seem to suffice with regard to the prevention of consumer harm in terms of stifling innovation and hampering of consumer choice.

[226] VESTAGER, Margrethe (2021). *Competition law in a digital age* (2021), Speech, European Internet Forum, (https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en, last accessed on 28 June 2021).

[227] VESTAGER, Margrethe (2021). *Competition law in a digital age* (2021), Speech, European Internet Forum, (https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en, last accessed on 28 June 2021).

SUMMARY

Based on the above presented analyses of the decisions on Google´s abuse of dominant position within the EEA, the following conclusions can be formulated with regard to the research question, which undertakes to determine whether it was the conduct of Google itself that reduced, firstly, consumer choice and secondly, innovation or whether it was the allegedly interventionist approach of the Commission, demonstrated through its remedies stipulated in the decisions, which caused it.

It can be concluded, that there appears to be an underlying pattern in all of the instances of abuse of dominant position by Google which were analysed. In all of the analysed cases Google used its dominant position in general search engine market as a tool to create an advantage for itself in the adjacent markets, which had high barriers to entry. In return, this newly acquired position on these newly entered markets again strengthened Google's already strong (dominant) position in the general search engine market. This, although concerning from the competition law perspective, would perhaps still be feasible, if Google did not decide to use anti-competitive conduct (mainly exclusionary conduct) in order to eliminate its competitors on these newly acquired markets, instead of competing on the merits with them. This anti-competitive conduct then further disabled competition on the merits almost entirely and ultimately harmed consumers, as innovative incentives have been stifled and consumer choice has been reduced. Therefore, it can be deducted that it was the conduct of Google which hampered consumer choice and stifled innovations in the analysed decisions. Thus, it has been demonstrated through my analyses, that when there is a dominant undertaking present on the market and it partakes in the anti-competitive (exclusionary) conduct in newly (entered) acquired market, which has high barriers to entry, consumer choice as well as the innovative incentives of the rivals must suffer.

As a reaction to the findings of Google's abuse of dominance in all the analysed cases, the Commission fined Google and imposed behavioural remedies upon it, in order to reinstate competition on the merits on the respective markets. Google has been ordered to cease the anti-competitive conduct and even given a list of unwanted behaviour, and it was left to create a final implementation of the criteria that were set by the Commission, as the remedy. However, so far, (perhaps except for Google AdSense decision) there is a general unsatisfaction with these remedies, because their objective (reinstating competition on the merits) has not been met in the majority of cases. Nevertheless, I do not think this dissatisfactory outcome is the issue of the remedies themselves, I would argue their wording and objectives are formulated clearly and

precisely enough to reach the restoration of the competition on the merits and therefore prevent consumer harm in terms of stifling innovation and reducing consumer choice. Rather, I think it is the manner of implementation of the remedies by Google, which, in my opinion, ignores the objectives stipulated by the remedies and essentially sabotages the purpose of them. As Google´s poor implementation fails to reach these objectives, consumer harm in terms of stifling innovation and limiting consumer choice is inevitably present. Therefore, it is not the remedies established by the Commission (and thus its approach) which further stifled innovation and reduced consumer choice, it is their implementation (or lack of) performed by Google itself.

Finally, only upcoming years will show whether the Commission will impose further fines on Google, due to its failure to implement its behavioural remedies, or whether it will eventually take more controversial steps – such as structural remedies – in order to reinstate competition on the merits of the targeted markets. Nevertheless, nowadays, the Commission focuses mainly on *ex ante* regulation of online platforms in general, using tools like P2B Regulation and DMA, which should provide a basic framework for online platforms and help them ascertain what conduct can be problematic from the competition law perspective. Moreover, these regulations stipulate obligations for online platforms, focusing primarily on the concerns which large online platforms raise. However, it seems there is currently no regulation of (large) online platforms in place on the EU level, which would suffice at preventing consumer harm in terms of stifling innovation and reducing consumer choice.

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Informační technologie jako výzva pro soutěžní právo EU

Google – zneužití dominantního postavení v EU

Abstrakt

Google je primárně platformový ekosystém zaměřený na reklamu, jehož služby jsou denně využívané miliony uživateli, mnohé bez peněžité kompenzace. I přes tento nesporný benefit, musela Evropská Komise do podnikání společnosti Google zasáhnout kvůli jejímu protisoutěžnímu jednání (zneužití dominantního postavení) v rámci EEA, uložením finančních sankcí a stanovením dalších nápravných opatření se záměrem obnovit hospodářskou soutěž na základě výkonnosti a zastavit tak další poškozování spotřebitelů.

Cílem této diplomové práce je stanovit, zda poškozování spotřebitelů v kvalitativním smyslu (prostřednictvím redukování výběru pro spotřebitele a potlačování inovací) bylo způsobeno jednáním společnosti Google na hospodářském trhu, nebo zda to způsobil údajný intervenční přístup Evropské Komise, která uložila vícero nápravných opatření v rozhodnutích vedených s touto společností, se záměrem obnovit hospodářskou soutěž. K dosažení cíle této práce, jsou nejdříve v Kapitole 1 objasněné ekonomické reálie mnohostranných platform, následně, Kapitola 2 specifikuje institut poškození spotřebitele v rámci digitálního trhu ve spojení s faktory, které ovlivňují institut poškozování spotřebitele. Kapitoly 3 až 5 obsahují tři samostatné analýzy třech separátních rozhodnutí Evropské Komise stran zneužití dominantního postavení společností Google – jmenovitě – analýzu rozhodnutí ve věci Google Shopping v Kapitole 3, analýzu rozhodnutí ve věci Google Android v Kapitole 4 a analýzu rozhodnutí ve věci Google AdSense v Kapitole 5. Všechny tyto analýzy se zabývají zaprvé skutečným jednáním společnosti Google a jeho důsledky a zadruhé hodnocením provedeným Evropskou Komisí a jeho dopadem, přičemž se v klíčových bodech pozornost soustředí na koncept výběru spotřebitele a inovací. Nakonec je v Kapitole 6 představen budoucí vývoj online platforem v digitálním sektoru s ohledem na jejich nedávno připravenou regulaci. Shrnutí poté rekapituluje všechny informace získané z analyzovaných rozhodnutí a utváří závěry z takto nabytých poznatků.

Klíčová slova: Google, zneužití dominantního postavení, poškození spotřebitele, výběr spotřebitele, inovace

Information technology as a challenge for European law

Google – abuse of dominant position within the EU

Abstract

Google is primarily an ad-centric platform-based ecosystem and its services are daily used by millions of consumers, many without any monetary compensation. However, despite this undeniable benefit, due to its anti-competitive conduct (abuse of its dominant position) within the EEA, the European Commission had to intervene and impose fines and remedies on Google in order to restore competition on the merits and cease further consumer harm.

The objective of this thesis is to establish, whether it was the conduct of Google which caused consumer harm, in qualitative terms of diminishing consumer choice and stifling innovation, or whether it was the allegedly interventionist approach of the European Commission, established through the remedies stipulated in the analysed decisions, which caused it. To reach this objective, firstly, the economic realities of multisided platforms are explained in Chapter 1. Afterwards, in Chapter 2, the specification of consumer harm in the digital markets coupled with the factors which influence consumer harm are discussed. Then, in Chapters 3 to 5 three separate analyses of three separate decisions on Google´s abuse of dominant position are presented – namely – Google Shopping decision analysis in Chapter 3, Google Android decision analysis in Chapter 4 and finally Google AdSense decision analysis in Chapter 5. All these analyses address firstly, the actual conduct of Google and its consequences and secondly, the assessment done by the European Commission and its impact, while keeping in the spotlight the concept of consumer choice and innovation as the key principles. Finally, in Chapter 6 the future development in the digital sector with regard to the online platforms´ recently stipulated regulation is introduced. Summary then encapsulates all of the acquired findings from the analysed decisions and forms conclusions based on them.

Key words: Google, abuse of dominant position, consumer harm, consumer choice, innovations