

## TWO-SIDED MARKETS AND THE ROLE OF ANTITRUST LAW – LESSONS FROM GOOGLE SHOPPING AND AMERICAN EXPRESS

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**Abstract:** In this Feature, we will analyze the EU Google Shopping case to try to identify how the two-sided nature of Google’s business has affected the European Commission’s analysis. To do this, we will keep in mind lessons from the American Express case in the US and the controversy raised by the decisions of the US Court of Appeals for the Second Circuit and the US Supreme Court, adopting a single-market and net-effect approach to that case. We hope the lessons we draw from both cases will help us reflect on the future of antitrust law enforcement in view of modern two-sided platforms.

**Key words:** Two-sided markets – Platforms – Google Shopping – American Express – Antitrust

*Mercado de dois lados – Plataformas – Google Shopping –  
American Express – Antitruste*

### **Introduction**

In June 2017, the world was astonished at the €2.42 billion fine that the European Commission (also referred to in this Feature as “Commission” or “EU”) imposed on Google as a penalty for the company allegedly abusing its dominance in the search engine market, by building its Google Shopping service. After concluding an investigation that started in 2010, the EU determined that Google had abused a dominant position in the European Economic Area (EEA) by favoring its own comparison shopping service (Google Shopping) on its search results pages to the detriment of rival comparison shopping services.<sup>1</sup>

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<sup>1</sup> Commission Press Release, IP/17/1784 (Jun. 27, 2017) and Commission Decision, case AT.39740 (Google Search (Shopping)) (Feb. 25, 1991).

According to the Commission, Google adopted the strategy of systematically positioning and prominently displaying Google Shopping on the Google general search results pages, and of not applying the same system of penalties to Google Shopping, which it used to apply to other services. Crucial to the case is the fact that competitor comparison services were not allowed to bid for space on Google Shopping, so they were subjected to Google's search algorithms that pushed them down the list of search results. That allegedly caused an artificial diversion of traffic from the rival comparison shopping services, impairing their ability to compete, and ultimately hurting consumers and innovation.<sup>2</sup>

Google tried to defend itself by arguing that the company never intended to artificially divert traffic and harm consumers; rather, its intention was to improve the quality of its shopping service and, consequently, improve the user experience.<sup>3</sup> The company is now appealing against this record fine. It has also been defending itself in other countries, regarding the same or similar issues, as is the case in Brazil and India.

Grasping the analysis of the Google Shopping case before the European Commission is challenging in a sense. The relevant product market for Google Shopping was defined as the market for comparison shopping services. Based on the literature, it can be reasonably considered a two-sided market corresponding to a two-sided platform.<sup>4</sup>

Note that, although the European Commission did not expressly refer to a two-sided platform when addressing the market for comparison

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<sup>2</sup> Commission Press Release, IP/17/1784, *supra* note 1. See, also, <https://theconversation.com/googles-defence-for-breaking-eu-law-our-users-wanted-us-to-do-it-80218>.

<sup>3</sup> As stated by Google's General Counsel on June 27, 2017 (see <https://www.blog.google/topics/google-europe/european-commission-decision-shopping-google-story/>). See also Google's appeal to the European General Court (European Commission, 'Action brought on 11 September 2017 – *Google and Alphabet v Commission*', Case T-612/17, Official Journal of the European Union (Oct. 30, 2017)).

<sup>4</sup> For instance, Sébastien Broos and Jorge Marcos Ramos (2015): "Google Search is a two-sided platform... Google Shopping is also a two-sided platform operating a vertical search engine..." *Google, Google Shopping and Amazon: The Importance of Competing Business Models and Two-Sided Intermediaries in Defining Relevant Markets*. Giacomo Luchetta (2012) and Manne and Wright (2010), for instance, have different views.

shopping services, but only when referring to general search, we understand that Google Shopping is a two-sided platform and also that the European Commission was completely aware of this while analyzing the case.<sup>5</sup> For us, the very fact that the Commission adopted a single-market approach to the relevant product market for comparison shopping services is evidence of this.

As we focus on comparison shopping services as the central market (encompassing advertisers, on one side, and users, on the other) at stake in the Google Shopping case, we wonder why, in another two-sided market case under the spotlight – *US v. American Express*<sup>6</sup> – there was so much controversy over whether there should be a single or a multiple-market approach to the two-sided platform (the credit card transaction platform). That is, why, in that case, the District Court considered that the cardholders should occupy a different market than the merchants on the other side of the platform, instead of making up a single product market for credit card services. The US Court of Appeals for the Second Circuit (“Circuit Court”) later reverted the approach and the Supreme Court affirmed the Circuit Court’s decision in *Ohio v. American Express*.<sup>7</sup>

Moreover, we also wonder how much the EU’s refusal of Google’s central argument, in that the company’s intention with Google Shopping was to improve the user’s shopping experience,<sup>8</sup> resembles the American Express (or, simply, “Amex”) controversy over whether the focus of the effects analysis should be in the “overall consumer satisfaction” (a “net-effect” analysis) or not. Our impression is that the resemblance is great, even though both situations may be significantly different in nature. We see in both cases the concern whether improvements for consumers, efficiencies, or even procompetitive effects can justify anticompetitive effects.

At the end of this Feature, we will conclude that both the Google Shopping and the American Express cases are very different from each other, requiring different rationales, even though both deal with two-sided platforms. But we also aim to show that they can be very similar in what matters most:

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<sup>5</sup> For instance, see language of paragraphs 159, 196 and 206 of the Commission Decision.

<sup>6</sup> *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

<sup>7</sup> *Ohio v. Am. Express Co.*, 138 S.Ct. 355 (2017) and *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018).

<sup>8</sup> See the public note issued by Google’s General Counsel, *supra* note 3.

the importance given to antitrust principles when addressing potential anticompetitive effects and weighing them against gains and efficiencies.

## **1. The idea of two-sided markets and how it plays out in Google Shopping and Amex**

As explained by Katz and Sallet (2018),<sup>9</sup> the scholarly definition of two-sided (or multisided) platforms (or markets) comes from Jean-Charles Rochet and Jean Tirole in their 2006 work *Two-Sided Markets: A Progress Report*.<sup>10</sup> In a nutshell, a firm is a platform if total transaction volume is affected when the structure of prices ( $p1 + p2 = P$  as the net price level) is modified while holding the net price constant. If the structure (individual prices  $p1$  and  $p2$ ) does not matter, but only the net price, thus, under the definition, the firm is not a two-sided platform.

In practice, in two-sided markets, there are two groups of consumers and a platform is needed in order to connect them. This is because there are benefits arising from the simultaneous presence of the two groups and only the platform is able to internalize them, making both groups interdependent and, at the same time, dependent upon the platform.<sup>11</sup> Some of the most important online markets can be understood as two-sided platforms, such as Google, Facebook, Amazon and EBay. Other markets, such as credit cards, video-games, shopping centers and real estate brokers, are also two-sided platforms.<sup>12</sup>

Although Katz and Sallet make it clear that distinguishing between two-sided markets and single-sided ones is not always easy – which suggests that the nature of antitrust enforcement should not differ so much based on which type of market is being addressed<sup>13</sup> – indeed, when it comes to two-

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<sup>9</sup> See Katz, Michael L. and Sallet, Jonathan, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2148, 2149 (2018).

<sup>10</sup> Rochet, Jean-Charles & Tirole, Jean. *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006).

<sup>11</sup> See Mattiuzzo, Marcela. *Propaganda online e privacidade: o varejo de dados pessoais na perspectiva antitruste*. Revista do IBRAC, v. 21, n. 26, at 5 and 6, jul./dez. 2014.

<sup>12</sup> Idem, at 5.

<sup>13</sup> See Katz and Sallet (2018), *supra* note 9, at 2148.

sided platforms, economic analysis has to take into account the relationships between the sides of a platform before drawing antitrust conclusions.<sup>14</sup>

“Two-sided” and “multisided” are usually used as synonyms. In this Feature, we will prefer “two-sided” over “multisided”. Also, most of the time, we will use “market” and “platform” interchangeably, but for the cases where “market” stands for the technical term “relevant market”, when we will prefer it over “platform”.

The credit card industry is a good example of the idea of two-sided markets. As explained by the Circuit Court in the Amex case, the cardholder and the merchant depend on the widespread acceptance of a credit card. Cardholders will not see the benefit in holding a card unless it is accepted by a wide range of merchants; likewise, merchants will not be interested in accepting a card that not many cardholders use.<sup>15</sup> To succeed, the credit card network has to strike the right price balance on the two sides of the market, although it may be difficult given the tension between the interests of the merchants and the cardholders – merchants want lower network fees, while cardholders want rewards, services and benefits that are funded by fees. A credit card company may even decide not to charge cardholders for usage (charging only merchants), given the tension.<sup>16</sup>

The tension between merchants and cardholders is at the heart of the Amex case. The complaint filed by the United States and seventeen Plaintiff States was exactly that merchants were prohibited, by the anti-steering provisions of the Amex merchant agreement, to encourage customers to use other less expensive or otherwise preferred competitors’ cards. Plaintiffs sustained that those provisions had the potential to eliminate Interbrand competition and reduce the incentives for networks to reduce credit card fees.<sup>17</sup> Amex’s interest in maintaining those fees relates exactly to the potential that merchants’ steering behavior has of interfering with the network ability to balance its two-sided net price.<sup>18</sup>

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<sup>14</sup> Motta, Massimo. Interview for the Competition Policy International (CPI Talks), May 15, 2018.

<sup>15</sup> *US v. American Express*, *supra* note 6, at 187.

<sup>16</sup> *Idem*, at 187.

<sup>17</sup> *US v. American Express*, *supra* note 6, at 192 and 193.

<sup>18</sup> *Idem*, at 193.

As for Google Shopping, as we mentioned, we believe it is a two-sided platform. Feedback effects are a powerful indication of that. We disagree with Manne and Wright (2010) in that the feedback effects in Google are usually unidirectional, which would make them attenuated, as they are very much focused on the advertisers (who want more and more users) and not on the users (who are not interested in advertisers).<sup>19</sup> But we believe that, in Google Shopping, this is simply not the case, as users looking for a product presumably want to have as many different advertisements as possible displayed on their screen for the purpose of price comparison. The more advertisers displaying the desired product on the shopping carousel, the better the users' shopping experience.<sup>20</sup> That is why we understand feedback effects in Google Shopping as being bidirectional.

In any event, and also considering that there is no consensus as to the definition of two-sided markets, one could apply the suggested concept of Katz and Sallet (2018),<sup>21</sup> based on E. Glenn Weyl (2010)<sup>22</sup>, to realize that, even if the bilateral feedback effects were absent, Google Shopping could still be considered a two-sided platform. According to this concept, a firm can be considered a two-sided platform when “*cross-platform network effects* occur in at least one direction and the firm facilitates interactions between two or more groups of users, can set distinct prices to different user groups, and has market power with respect to those groups”. Cross-platform network effects happen when members on one side of the platform make the platform more attractive to users on the opposite side. As they point out, besides being able to encompass firms commonly labeled as two-sided platforms in recent antitrust litigation (which includes, in our opinion, Google Shopping) this approach is also more helpful for the purposes of antitrust enforcement.<sup>23</sup>

Departing from the issues clearly identified by Katz and Sallet (2018),<sup>24</sup> we see two major implications when considering the comparison

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<sup>19</sup> Manne and Wright (2010), *supra* note 8, at 38.

<sup>20</sup> Obviously, provided that there is enough diversity on the carousel as to prices and types of products. This is not trivial considering that announcers bid for space on the carousel, instead of being subjected to a general search algorithm.

<sup>21</sup> See *supra* note 9, at 2150.

<sup>22</sup> Weyl, E. Glen. *A Price Theory of Multi-Sided Platforms*, 100 AM. ECON. REV. 1642, 1644 (2010).

<sup>23</sup> See *supra* note 9, at 2150.

<sup>24</sup> See *supra* note 9, at 2142 to 2146.

shopping service as a two-sided platform. The first one is to have to decide whether to adopt (i) a single-market approach, encompassing both sides of the platform as two interdependent mechanisms of one single structure, or (ii) a multiple-market approach, considering each side of the platform as a specific market. The second one is to adopt either (i) a net-effect analysis, accounting for possible benefits or efficiencies giving rise to the so-called “overall consumer satisfaction”, or (ii) a separate-effect analysis, whereby benefits or procompetitive effects on one side of the platform cannot compensate for anticompetitive effects on the other side.

Both implications are at the core of the controversy in the Amex case, as the Circuit Court (affirmed by the Supreme Court) did not agree with the District Court’s multiple-market approach (separating cardholders and merchants) and required that antitrust injury to cardholders (and not only to merchants) would also have to be proven. By adopting a net-effect approach and mentioning the need to advance the “overall consumer satisfaction”, the Circuit Court considered that the anti-steering provisions could be helpful to maintain cardholder satisfaction, which could, for its part, have positive effects on merchants’ sales.<sup>25</sup>

Regarding Google Shopping, the European Commission conceived of a single market instead of two (one market corresponding to one side of the platform: users and advertisers) and analyzed the possible anticompetitive concerns with regards to the whole platform, and not to each side separately. On the other hand, as there were no anticompetitive effects on the other side of the platform (advertisers) at issue in the case, the EU did not have to address the net or separate-effect analysis issue within the platform. In any event, the Commission was not persuaded by the idea of considering benefits or efficiencies on one side of the platform (the comparison shopping users) as possibly outweighing (and, thus, *justifying*) anticompetitive effects on competitors.<sup>26</sup>

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<sup>25</sup> *US v. American Express*, *supra* note 6, at 207.

<sup>26</sup> We believe that there were no anticompetitive effects on the other side of the platform (advertisers) at issue in the case. In Google Shopping, alleged negative effects overflow the platform to reach competing comparison shopping platforms: competing comparison shopping platforms were claiming dominance abuse, not Google’s advertisers. We will discuss this in detail in chapter 3, below.

## 2. The approaches to market and effects

The Amex case can help us reflect on the appropriateness of defining a single market when dealing with two-sided markets. We do not believe that there is a one-size-fits-all approach to relevant market in all cases, because there are markets whose relationships within the platform seem to request a single-market approach (this is the case of Google Shopping, in our view), while others should be addressed by means of a multiple-market approach (for instance, the credit card platforms, such as Amex).

The Circuit Court disagreed with the District Court's market approach, which considered that the cardholders should occupy a different market than the merchants on the other side of the platform, instead of making up a single product market for credit card services. For the Circuit Court, the District Court should have collapsed the markets for credit card issuance and credit card network services into one platform-wide market for the provision of credit card services.<sup>27</sup> The US Supreme Court adopted the same approach<sup>28</sup>. By now adopting this single-market approach, it was much easier to also adopt a net-effect analysis whereby the presence of potential procompetitive effects benefitting cardholders (including more rewards) could be deemed a legitimate reason for tolerating actual negative effects on merchants deriving from Amex's anti-steering provisions.

In Google Shopping, the Commission clearly identified two markets under its analysis – the markets for general search services and comparison shopping services.<sup>29</sup> In our opinion, however, the fact that one of the sides of the platform bore an intersection with the market for general search engines – that is, the Google Shopping platform is not exclusive inasmuch as it uses the general Google search page – does not mean that they belong to the same platform. The presence of the market for general search in the EU analysis was crucial, though, for the argument on abuse of dominance, according to which Google had tried to leverage its position in the comparison shopping market by using its established power in the general search market.

As for conduct effects, differences between both cases at issue are great. The US Supreme Court and the Circuit Court saw potential benefits

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<sup>27</sup> *US v. American Express*, *supra* note 6, at 197.

<sup>28</sup> *Ohio v. Am. Express Co.*, *supra* note 7, at 2287.

<sup>29</sup> Commission Decision, case AT.39740 (Google Search (Shopping)), *supra* note 1, paragraphs 155 and 191.

associated with the anti-steering provisions, so much that it would not be the case to disturb the way the market operates and, in its view, it was an error to focus so much on the interests of merchants while not paying attention to those of cardholders.<sup>30</sup> On the other hand, the EU totally dismissed Google's central justification that its conduct had a good effect on the users' experience and, not being abusive, should not be condemned.<sup>31</sup> For the EU, engaging in certain conduct just because consumers will react positively to it is no reasonable justification.

### 3. Why Google Shopping and Amex are so different

In Google Shopping, the EU accounted for a single market definition: the market for comparison shopping services, instead of defining two markets within the comparison shopping platform (with advertisers making up one of them, and users, another).

However, in Google Shopping, the EU ended up considering that the benefits to users, by virtue of the improvement in the users' experience, could not justify potential harm to competitors in the comparison shopping market. Those competitors, not being allowed to participate as advertisers on the other side of the Google Shopping platform, ended up being excluded from the market by Google allegedly diverting the traffic to its own service, as sustained by the EU.

This draws our attention in light of the approach of the Circuit Court and the US Supreme Court to the Amex case. There, the courts realized that procompetitive effects brought about by non-steered<sup>32</sup> cardholders, including their possibility of gaining more rewards, and that potentially stimulating their increased use of the Amex card and ultimately benefiting merchants with more purchases<sup>33</sup> could outweigh anticompetitive effects on merchants. That is, the merchants not being able to request that cardholders make purchases with

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<sup>30</sup> *US v. American Express*, *supra* note 6, at 204.

<sup>31</sup> See the Commission Decision, case AT.39740 (Google Search (Shopping)), *supra* note 1, paragraph 159.

<sup>32</sup> "Non-steered" as not being induced by merchants to use another card brand instead of Amex, as explained in chapter 1, above.

<sup>33</sup> See *US v. American Express*, *supra* note 6, at 206, for instance: "...merchants still would benefit from Amex's NDPs [nondiscriminatory provisions – the anti-steering provisions] insofar as those NDPs help attract cardholders."

cards that charge merchants less than Amex could be fine, in the eyes of the court, as long as there would be no injury to cardholders and that they actually ended up better off within the platform.<sup>34</sup>

One might think that this approach is due to the fact that both sides of the comparison shopping platform are not interdependent to the same degree as in other two-sided markets, notably, the credit card platforms. In Google Shopping, advertisers are heavily dependent on the flux of users to verify whether advertising is worth it, but users may be comparatively less dependent on the number of advertisements displayed.<sup>35</sup> In Amex, the cardholders are so highly dependent upon the number of merchants that accept the credit card, and merchants are so highly dependent on the number of cardholders using the card, that an imbalance on either side can easily ruin the functioning of the entire platform.

Considering our arguments on the existence of feedback effects from the advertisers to benefit the users of a comparison shopping platform,<sup>36</sup> we are not really persuaded by this argument. We understand that the bond between the two sides of a credit card platform may be stronger than the ties within a comparison shopping platform. It actually seems that the interdependence in the latter case is more “organic” than in the former case because, hypothetically, it might be possible for a comparison shopping platform to operate with not so many advertisements, but users would hardly use a credit card that is not accepted by that many merchants. Even so, there is also a clear – and still strong – interdependence between users and advertisers in the comparison shopping platform, and this fact makes us wonder why the effects treatment on this platform would differ so much from the treatment given to credit card platforms.

In our view, the crucial difference between both cases does not rely on the degree of interdependence within the platforms. For us, the crucial difference is the concern about direct effects on *competition* in Google Shopping, while, in Amex, the effects were on merchants (that is, within the

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<sup>34</sup> *US v. American Express*, *supra* note 6, at 205.

<sup>35</sup> Of course, users need a great number of comparison shopping results in order to find the platform useful, but there are reasonably so many results that users will look for and check out, not to mention the importance of the results quality in terms of diversity. As for advertisers, unless there is widespread use of the comparison search platform, it just may not be worth advertising.

<sup>36</sup> See *supra* chapter 1.

very platform) and not on competitors. This would render the comparison on net effects versus separate effects in each case – referring to the effects on each side of a platform – pointless, as they could not be reasonably opposed to effects borne outside the platform (i.e., by competitors) in the Google Shopping case.

It is true that the United States and the single states that sued Amex made their claim concerning possible negative effects that the anti-steering provisions could have on interbrand competition – by blocking competition from rival credit card networks. But the case made it crystal clear that central to the discussion were the interests of the merchants as opposed to those of the cardholders.<sup>37</sup>

In Amex, it is rather plausible (although incorrect from the antitrust law standpoint, in our view) to defend that competition was not at issue, because the anti-steering provisions would allegedly have the potential to *foster* competition by rewarding cardholders and giving Amex more foreseeability to calibrate the tension between both sides of the platform. As for Google Shopping, it is difficult to deny that it was a case of classical anticompetitive effects – those negative effects against *competition* – because only competitors felt hurt by virtue of Google allegedly favoring its own comparison shopping on the general search page. Advertisers continued to advertise regardless of whether Google would place the shopping engine, as long as it had a good impact on sales. Although it is possible to argue that some future or indirect negative effect could also impact those advertisers, who, because of the elimination of Google Shopping’s competitors, would be left with less supply options, the immediate burden was being borne by competing shopping platforms. In Amex, the burden was on merchants. Therefore, it is reasonable to say that Google brought about an actual *competition* concern, in the sense of something going beyond tensions within a platform, rendering it pointless to think of a net-effect analysis focusing on an anticompetitive or procompetitive balance within a single platform.

This comparison leads to another logical reasoning that may be helpful to understand the different outcomes of the cases so far, even though both deal with two-sided platforms and adopt a single-market approach. If there is so much controversy over whether the negative effects borne by

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<sup>37</sup> As stated by the court: “This analysis erroneously elevated the interests of merchants above those of cardholders.” See *US v. American Express*, *supra* note 6, at 204.

merchants in Amex (symmetrically situated, within the platform, vis-à-vis the advertisers on Google Shopping) could be justified (or not) by procompetitive effects within the single platform, what to say about anticompetitive effects extrapolating the boundaries of the Google Shopping platform, affecting *competitors*? If, for the District Court, procompetitive effects were not able to justify an issue raised within the Amex platform (negative effects on merchants), why would alleged internal efficiencies (the improvement of the user experience) justify external anticompetitive effects in Google Shopping? Our take is that Amex is a simpler case with respect to outweighing effects than is Google Shopping. Hence, if there is so much difficulty associated with accepting a possible procompetitive net-effect – internally to the platform – an even harder time should be expected in trying to outweigh external anticompetitive effects and internal efficiencies in Google Shopping.

And even though we believe that, in Google Shopping, the single-market approach was adequate under the theory of two-sided markets, we believe that the effects of the conduct on *competitors* also provided a practical reason for the single-market definition. For us, the fact that competitors were allegedly affected in Google Shopping made it easier for the EU to conceive of a single market corresponding to the shopping platform in its entirety. This is because that strategy would make it easier – and it actually it would make more sense – to put Google Shopping and its competitors side-by-side, in their entirety (as opposed to internally fragmented) to compare them. In so doing, the EU could even find that the traffic on Google Shopping increased while traffic on rival services (their whole platforms) decreased.<sup>38</sup> Addressing platforms in their entirety would thus be more practical in order to depict the allegedly abusive scenario in a more comprehensive – and convincing – way.

Also, it would be counterintuitive to try to compare only one of the sides of Google Shopping's platform with a competitor's platform in its entirety. It would be hard to consider effects on equal grounds having the EU comparing gains and efficiencies on the side of Google Shopping's users with the broad anticompetitive effect over the competitors' platforms as a whole. We also have to bear in mind that the competitors' platforms in their entirety claimed that Google Shopping's strategy was abusive. The interests of users and advertisers on those platforms were understood to converge, in the interest of the operability of the comparison shopping platforms. If that was the case with the competitors, why would it not be the case with Google Shopping; that

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<sup>38</sup> See Commission Press Release, IP/17/1784, *supra* note 1.

is, why would interests not be aligned on the Defendant's platform as well? On top of that, the alignment of interests makes us believe that it would also be hard to conceive of a comparison between gains and efficiencies restricted to the side of Google Shopping's users, weighed against negative effects restricted to the users' side of the rival platforms.

#### **4. The limits of justification: both the Google Shopping and the Amex case should converge with regards to effects analysis**

Although the theory of two-sided markets can provide a persuasive defense against anticompetitive effects arguments, focused on the idea of a single market's procompetitive "net effects" – as it could be seen in the US Supreme Court's and Circuit Court's decisions in the Amex case – that defense must be carefully scrutinized in view of the antitrust law principles and may not always prevail, as it was the case in Google Shopping. In our view, antitrust authorities around the world, when dealing with two-sided platforms, should think twice before going for the US Supreme Court's and Circuit Court's approaches in Amex and adopt the same caution that the EU adopted when dealing with the Google Shopping case, to avoid overlooking anticompetitive effects.

While in Amex it is already difficult, at least for us, to admit that merchants can really benefit from Amex's conduct, by not steering for other cards rather than Amex, in Google Shopping, it sounds particularly strange to admit that desirable effects in the users' experience could compensate for anticompetitive effects on competitors. On the other hand, in our view, it is hard to think that Google would have an obligation to share a space on its own platform with other companies engaged in the comparison shopping market. Google created a product to compete with the players the company considers its actual competitors – mainly Amazon – and now it has been required to "share the pie" with smaller players. This seems unfair, at least at a glance, because it appears that those small players would be allowed to free ride on Google's technology and efficiencies, just to become more representative competitors against Google itself.

But the fact that Google Shopping's platform actually landed on Google's general search page invites a second look and further reflection. As Google itself highlighted,<sup>39</sup> consumers are not interested in repeating

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<sup>39</sup> See public note issued by Google's General Counsel, *supra* note 3.

searches, so, if they can already obtain shopping offers at the first click, it is reasonable to believe that they will have less incentive to repeat a search to target another specific comparison shopping service or scroll all the way down on the general search results page to find it, unless the efforts are towards another highly efficient and dominant player (such as Amazon). By benefitting from the power of what Google is primarily known for – as a general search engine – Google Shopping was actually not *just Google Shopping* playing at arm’s length with other shopping services. It was Google Shopping with the Google search “plus”, which those smaller competitors could not defeat. That scenario leaves an impression that competition in comparison shopping was probably not totally on the merits regarding the shopping platform in specific. We understand that the scenario could be totally different if Google Shopping were not placed on Google’s general search page, but left at the specific shopping tab only, because the incentives to click on the tab could reasonably be counterbalanced by the incentives to look for other shopping services on the search page itself or even a quick second search targeted at another comparison service provider.

And the theory of two-sided platforms can also be helpful to explain the impression that competition was probably not totally on the merits with regards to Google Shopping. As mentioned above, it is reasonable to conceive of Google’s general search service as a separate platform in relation to Google Shopping, because the service provided on one side of the former platform is the one of bringing up search results arising from an algorithmic engine, and not comparison shopping results arising from a bidding process. On the other side, both platforms focus on selling information to advertisers and displaying ads in a certain way. We understand, though, that the essential difference regarding the results expected by users in each case makes both platforms actually different – regardless of the users’ alleged preference for a one-stop shop. Taking advantage of one platform because of the influence and power of another seems to show a way of gaining a special and unique advantage counting on merits outside the shopping platform.

Hence, the EU seems correct in both (i) adopting a single market approach (the market for comparison shopping services) and (ii) not accepting the alleged benefits for users as counting for an “overall consumer satisfaction”, to outweigh anticompetitive effects on competitors in the comparison shopping market. Both undertakings are coherent in light of the theory of two-sided markets and the particularities of the case, as the EU decision sets an important precedent regarding the antitrust analysis of two-sided Internet platforms.

Concerning Google's indication that Amazon would be its actual competitor,<sup>40</sup> we wonder why it was not Amazon, but actually smaller companies, which filed the complaint against Google Shopping. Apparently, Amazon does not bother complaining about Google's strategy. Would it be because of Amazon's established market power in the online shopping industry? Maybe, although having market power does not guarantee that such power will be forever, so a dominant company would still have incentives to protect its dominance. Or, more likely, it is because Amazon has perceived Google Shopping as an efficient channel to gain even more visibility to its own platform and increase its profits?<sup>41</sup> Note that the European Commission was more persuaded by the idea that Amazon and Google were actually business partners in a vertical relationship, and not competitors.<sup>42</sup>

## Conclusion

In this paper, our aim was to analyze the 2017 European Commission's judgment on Google Shopping in light of the theory of two-sided markets and also of lessons from the Amex case in the US. As we addressed the approaches on relevant market and effects in both cases, we tried to understand the reasons behind the different outcomes in both cases, especially regarding the single-market approach leading to a net-effect analysis in Amex, but not in Google Shopping.

We concluded that thinking of a "net-effect" versus a "separate-effect" analysis in Amex makes sense, as the alleged anticompetitive effects remain within the platform, while doing the same thing in Google Shopping does not make as much sense. However, in our view, the same antitrust principles should govern both cases and, thus, guide both reflections on whether certain positive effects to a given group of consumers justify or not anticompetitive effects on another group. Therefore, the same antitrust preoccupation which, in *Ohio v. American Express*, was expressed by the District Court (but rebutted by the Circuit Court and eventually by the US

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<sup>40</sup> Idem, *supra* note 3.

<sup>41</sup> More about Amazon's aggressive investment on Google Shopping advertisement can be found at: <http://www.cpcstrategy.com/blog/2017/10/amazon-google-shopping-plas/>.

<sup>42</sup> See the Commission Decision, case AT.39740 (Google Search (Shopping)), *supra* note 1, paragraph 220.

Supreme Court) to adopt a separate-effect analysis – in order to better fulfill the principles of antitrust law – was present in the European Commission decision of not accepting the positive effects claimed by Google in favor of its consumers. A lot of caution is needed when weighing anticompetitive effects against efficiencies, procompetitive effects or any benefits claimed to exist within certain group of consumers.

After setting the basis of our analysis, we felt comfortable to opine on whether the EU was sufficiently careful when weighing the effects in the Google Shopping case. And we reach the conclusion that not only was its assessment careful, but also its final decision was satisfactory in light of the antitrust principles.

Our view is that it was difficult for the Commission to find strong reasons for not addressing anticompetitive effects in the markets for comparison shopping, just because there could be desirable effects of quality improvement on one side of the Google Shopping platform (the users' side). On top of that, it was simply hard to stand by Google when it was not just Google Shopping, but also Google Search coming into play – exactly what was claimed as the main threat to competition by means of artificial diversion of traffic. When stakes are high, authorities should require truly compelling reasons before giving up on protecting the competition environment from clear threats in the name of other benefits, efficiencies or even procompetitive effects potentially resulting from a conduct. This approach seems to better fulfill the goals of antitrust law enforcement.

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