

**INNOVATIVE PRODUCT, INNOVATIVE REMEDY:
“ESSENTIAL FACILITY” AS A COMPROMISE FOR THE
ANTITRUST CHARGES AGAINST GOOGLE’S ONEBOX IN
THE UNITED STATES AND THE EUROPEAN UNION**

*Nicholas Elia**

ABSTRACT

Google Search—the “gatekeeper of the Internet”—holds the power to control access to information, with an 80% to 90% share of the online search market in the European Union and the United States. Whether Google should be allowed to utilize that power to implement innovative products that harm competitors was at the heart of a recent European Commission investigation. While this investigation ultimately found antitrust violations, it also demanded that Google adjust how it provides search results. After providing an overview of the pertinent facts of the investigation, as well as analyzing the legal framework of U.S. and E.U. antitrust law, this Comment advocates for antitrust enforcers to not enforce remedies that create a cooling effect on innovation when combating unfair competition, especially when there are alternative remedies available.

Google’s dominance includes gatekeeper access to comparison shopping websites, a market which includes Google’s own Google Shopping service. Antitrust law obligates Google to provide objectively relevant search results, and the controversy here lies in Google displaying links to Google Shopping within a prominent display—a OneBox—above search results for all other comparison shopping websites, thereby directing traffic to its own product. To prevent this, the European Commission chose an extreme remedy: prohibit Google Shopping from the OneBox display. Banning Google from benefitting from the use of its own innovation may discourage further innovation, or may lead Google to eliminate the OneBox. Google has asserted that the OneBox enhances the user experience and improves the quality of Google Search because it can quickly answer a user’s query. This Comment argues that enforcers should instead classify OneBox under the “essential facility” doctrine—a doctrine that prevents firms from denying reasonable access to a product or service that must be obtained to effectively compete. To meet this burden, OneBox would simply need to display the most relevant comparison shopping results, not just Google Shopping. This solution would advance goals of antitrust regulation: protect innovation; enable competition; and benefit consumers.

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I. INTRODUCTION

On April 15, 2015, The European Commission (EC) issued a formal Statement of Objections against Google for, among other things, abusing its dominant position in the online general search engine market, a violation of the European Union's (EU) antitrust laws—also known as competition laws.¹ The Statement of Objections alleges that Google prominently displayed content from its own “comparison shopping” website, Google Shopping, on its general Google search results pages.² These highlighted displays are called OneBox results.³ Appendix Figure 1 shows an example of the type of Google Search result in question. The EC considers Google's practice to be anticompetitive because the search results that link to other comparison shopping websites appear below

*J.D. Candidate, Temple University James E. Beasley School of Law, 2018; B.S., Finance, and B.S., Economics, Pennsylvania State University, 2014. Thank you to my advisor, Professor Pamela Bookman, for your support and advice; to Professor Salil Mehra for teaching me about this subject; to Professor Nancy Knauer and the Law & Public Policy Program, through which I first discovered my interest in antitrust law; and, of course, to the tireless journal editors and staff.

1. European Commission Press Release IP/15/4780, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service; Opens Separate Formal Investigation on Android (Apr. 15, 2015) [hereinafter 2015 EC Statement of Objections]; *see also* European Commission Press Release IP/16/2532, Antitrust: Commission Takes Further Steps in Investigations Alleging Google's Comparison Shopping and Advertising-Related Practices Breach EU Rules (July 14, 2016) [hereinafter 2016 EC Statement of Objections] (reinforcing the conclusion that Google abused its dominant position in the online search market).

2. 2015 EC Statement of Objections, *supra* note 1; *see generally* Comparison Shopping Engine, TECHNOPEdia, <https://www.techopedia.com/definition/1445/comparison-shopping-engine> (last visited Oct. 20, 2017) (defining comparison shopping engines).

3. Danny Sullivan, *Meet the Google OneBox, Plus Box, Direct Answers & the 10-Pack*, SEARCH ENGINE LAND (Sept. 28, 2009, 6:12 PM), <http://searchengineland.com/meet-the-google-onebox-plus-box-direct-answers-the-10-pack-26706>.

content from Google's own comparison shopping product, Google Shopping.⁴ Therefore, consumers that use Google Search to find comparison shopping websites would more often be directed to Google Shopping than to search results that may possibly be more relevant.⁵ In an attempt to avoid protracted litigation, the EC has proposed a voluntary remedy whereby Google Search would cease displaying content from Google Shopping in OneBox results and would instead include Google Shopping only in the relevance-ranked Google Search results.⁶

This is not the first time Google has been investigated for potential antitrust violations; the Federal Trade Commission (FTC)—a United States (U.S.) civil antitrust enforcement agency—concluded a Google investigation in 2013 concerning alleged “search bias” but ultimately declined to charge Google with any violations.⁷ Search bias is the practice of a search engine unfairly promoting preferred content, rather than neutrally presenting search results based on relevance to a user's search query.⁸ The FTC investigated whether Google Search ranked its own products, such as comparison shopping or flight booking, on Google Search results pages above websites that were more relevant to user queries.⁹ The FTC has since considered reopening its investigation into Google in light of the EC's Statement of Objections.¹⁰

Antitrust law seeks to protect consumers by preventing companies from using their market share to make competition in the market too difficult.¹¹ Fair competition encourages innovation, higher quality products, and lower prices.¹² Consumers lose the benefits of competition when companies engage in anticompetitive or “exclusionary” conduct, such as monopolization or price fixing.¹³ Google Search has monopoly power in the general search engine market; however, Google Shopping is just one competitor among many in the comparison

4. *Id.*; see also *How Google Shopping & Product Search Work*, SEARCH ENGINE LAND <https://searchengineland.com/library/google/google-product-search> (last visited Oct. 20, 2017).

5. Sullivan, *supra* note 3; see also *How Google Shopping & Product Search Work*, *supra* note 4.

6. 2015 EC Statement of Objections, *supra* note 1.

7. See generally FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE'S SEARCH PRACTICES IN THE MATTER OF GOOGLE INC., FTC File No. 1110163 (2013) [hereinafter 2013 FTC STATEMENT] (alleging search bias but failing to conclude that the allegation was supported).

8. *Id.* at 1.

9. See *id.* at 2 (detailing the FTC's investigation into Google).

10. Nancy Scola, *Sources: Feds Taking Second Look at Google Search*, POLITICO, <http://www.politico.com/story/2016/05/federal-trade-commission-google-search-questions-223078> (last updated May 11, 2016, 5:55 PM).

11. *Why Is Competition Policy Important for Consumers?*, EUR. COMM'N, http://ec.europa.eu/competition/consumers/why_en.html (last updated Apr. 16, 2012) [hereinafter *Why Is Competition Policy Important for Consumers?*]; see generally *What Is Competition Policy?*, EUR. COMM'N, http://ec.europa.eu/competition/consumers/what_en.html (last updated Apr. 16, 2012) (defining competition policy) [hereinafter *What Is Competition Policy?*].

12. *Why Is Competition Policy Important for Consumers?*, *supra* note 11, at 2.

13. See *What Is Competition Policy?*, *supra* note 11 (defining competition policy and explaining how it benefits consumers).

shopping market.¹⁴ For the purposes of the Google Shopping case, the European Union and United States currently regulate monopolies like Google Search in substantially similar ways, and Google would likely be found liable in either jurisdiction.¹⁵

This Comment will analyze Google's anticompetitive conduct and consider potential antitrust remedies available in the European Union and United States; specifically, extending the essential facilities doctrine to search engines. The essential facilities doctrine is an antitrust doctrine that "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."¹⁶ This remedy would allow Google Search to continue displaying OneBox results above general search results, however, instead of populating the OneBox with content from Google Shopping, Google would need to display content from the most relevant comparison shopping websites, not necessarily Google Shopping.

Part II of this Comment will examine the EC's allegations against Google, including the procedural background, relevant markets, and anticompetitive effects of Google's conduct. Part III will discuss the relevant antitrust law in the European Union and the United States, and how Google would likely be found liable in both jurisdictions under the current state of law. Finally, Part IV will consider how the essential facilities doctrine could be extended to search engines, allowing Google Search to continue displaying OneBox results, but using content from relevant comparison shopping websites, not just Google Shopping.

A brief epilogue will address relevant events and decisions which have transpired in the period of time between the authorship of this piece and its publication.

II. FACTS

A. *Procedural History*

The EC began investigating Google in 2010 concerning its practices related to the ranking and display of comparison shopping websites on Google Search results pages.¹⁷ In 2014, facing pressure from European Union member states, the EC rejected a settlement offer from Google to alter its practices and end the investigation.¹⁸ On April 15, 2015, the EC issued a formal Statement of Objections

14. See *infra* Section I.B (discussing Google's market share in the general search and comparison shopping markets).

15. See *infra* Part II (discussing the antitrust laws in the European Union and United States and their likely application to Google).

16. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).

17. European Commission Press Release IP/10/1624, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010).

18. Charles Arthur, *European Commission Reopens Google Antitrust Investigation*, GUARDIAN (Sept. 8, 2014, 12:09 PM), <https://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigation-after-political-storm-over-proposed-settlement>; see also European Commission Press Release IP/14/116, Antitrust: Commission Obtains from Google Comparable

to Google, which included allegations of anticompetitive conduct regarding Google Search's preferential treatment of Google Shopping.¹⁹

A Statement of Objections is a written communication from the EC to a company that details the allegations against them and provides notice of the EC's intent to impose an adverse judgment.²⁰ Before a judgment is imposed, the company may respond and rebut the allegations.²¹ The company may also request a hearing to present a defense.²² After considering all of the evidence, the EC may render a judgment.²³ After the EC finalizes its judgment, the company may contest it in the European General Court and appeal the matter to the European Court of Justice (ECJ).²⁴ As of the authorship of this Comment, no settlement or judgment has been reached; Google and the EC are still in the process of compiling evidence and responding to each other's arguments.²⁵

B. Relevant Markets

To understand the EC's antitrust allegations against Google, it is first necessary to understand the relevant products and markets. Google's two products at issue are Google Search and Google Shopping, which exist in two relevant markets: the general search engine market, and the comparison shopping market,²⁶ respectively. The EC defines a product market as "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."²⁷ The FTC similarly defines a product market as "all goods or services that buyers view as close substitutes."²⁸

A search engine is a website that allows users to enter a search query and be provided with a list of web pages or web results that are relevant to the query.²⁹ How well a search engine finds and provides relevant results necessarily

Display of Specialised Search Rivals (Feb. 5, 2014) [hereinafter 2014 Google Settlement Offer] (discussing Google's settlement offer).

19. 2015 EC Statement of Objections, *supra* note 1.

20. European Comm'n, *Glossary of Terms Used in EU Competition Policy: Antitrust and Control of Concentrations*, at 44, COM (July 2002) [hereinafter *EC Glossary*].

21. *Id.*

22. *See, e.g.*, 2016 EC Statement of Objections, *supra* note 1 (informing Google of its right to request a hearing to present a defense).

23. *EC Glossary*, *supra* note 20, at 44.

24. *E.g.*, Case C-95/04, *British Airways PLC v. Comm'n*, 2007 E.C.R. I-2331, ¶¶ 1–3.

25. Samuel Gibbs, *Google Dismisses European Commission Shopping Charges as 'Wrong'*, *GUARDIAN* (Nov. 3, 2016, 11:29 AM), <https://www.theguardian.com/technology/2016/nov/03/google-european-commission-shopping-charges>.

26. 2015 EC Statement of Objections, *supra* note 1.

27. Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, 5–6.

28. *Markets*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets> (last visited Oct. 20, 2017).

29. Vangie Beal, *Search Engine*, *WEBOPEDIA*, http://www.webopedia.com/TERM/S/search_engine.html (last visited Oct. 20, 2017).

corresponds to its usefulness to consumers. Search engines may be considered horizontal or vertical.³⁰ A horizontal search engine is one that provides simple, general search results, aiming “to cover the Internet as completely as possible, delivering a comprehensive list of results to any query.”³¹ Horizontal search engines primarily earn revenue by displaying advertisements alongside search results.³² A vertical search engine, on the other hand, is one that provides more detailed search results but for a narrowly defined subject area.³³ Vertical search engines may earn revenue from advertisements or from commissions from companies that choose to be included in the search results.³⁴

Google Search is a horizontal search engine.³⁵ Google operates various vertical search engine products under the Google brand name, including Google Shopping.³⁶ As of September 2016, Google Search is the leader of the general search industry with 90.36%³⁷ and 82.07%³⁸ of search engine page views in Europe and the United States, respectively.³⁹ Page views are a different, but related, measure compared to market share.⁴⁰ Market share is a measure of a company’s share of the total monetary income from sales in an industry.⁴¹ Google Search’s main competitors in the United States, Bing and Yahoo!, each have less than 10% of the general search industry’s page views.⁴²

While it does not possess a pure monopoly, Google Search has a dominant position in the general search market, serving a significant majority of search page views in both the European Union and the United States.⁴³ There is no defined market share at which a company is considered to be dominant; however, E.U.

30. See 2013 FTC STATEMENT, *supra* note 7, at 1 (detailing how search engines display relevant results).

31. *Id.*

32. See Clancy Clarke, *How Do Search Engines Like Google Make Money?*, WEBCENTRAL (Nov. 11, 2011), <https://www.webcentral.com.au/blog/how-do-search-engines-like-google-make-money/> (explaining search engines’ advertising-based revenue stream).

33. 2013 FTC STATEMENT, *supra* note 7, at 1.

34. *Id.*; see also *Comparison Shopping Engine*, *supra* note 2.

35. 2013 FTC STATEMENT, *supra* note 7, at 1.

36. See Marziah Karch, *10 of Google’s Other Search Engines*, LIFEWIRE, (Mar. 11, 2017) <https://www.lifewire.com/other-search-engines-4039631>.

37. *Top 5 Search Engines in Europe: Sept 2016*, STATCOUNTER GLOBAL STATS, http://gs.statcounter.com/#desktop-search_engine-eu-monthly-201609-201609-bar (last visited Oct. 20, 2017) [hereinafter *Top 5 Search Engines in Europe*].

38. *Top 5 Search Engines in the United States: Sept 2016*, STATCOUNTER GLOBAL STATS, http://gs.statcounter.com/#desktop-search_engine-US-monthly-201609-201609-bar (last visited Oct. 20, 2017) [hereinafter *Top 5 Search Engines in the United States*].

39. See generally *Frequently Asked Questions*, STATCOUNTER GLOBAL STATS, <http://gs.statcounter.com/faq> (last visited Oct. 20, 2017) (describing the website’s methodology in calculating page view statistics).

40. *Id.*; see also *Market Share*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/marketshare.asp> (last visited Oct. 25, 2017) (providing an example of market share and explaining its importance).

41. *Market Share*, *supra* note 40.

42. *Top 5 Search Engines in the United States*, *supra* note 38.

43. *Id.*; *Top 5 Search Engines in Europe*, *supra* note 37.

regulators generally consider it to be more than 40%.⁴⁴ In the United States, a company is considered dominant when it has a market share from 55% to 80%, depending on the court circuit.⁴⁵ Other factors used in determining whether a company is dominant in a market are its overall size, level of vertical integration, and ease of entry for new competitors into the market.⁴⁶ In the U.S. market, Google Search's market share of greater than 80% qualifies it as having "monopoly power."⁴⁷ In the European Union, the EC's Statement of Objections did not elaborate on how it determined that Google possessed a dominant position in the online search market, other than to point out that Google had more than 90% market share; Google did not dispute the finding.⁴⁸ This search market dominance makes Google's treatment of comparison shopping tool search results a significant market force.

Comparison shopping websites operate vertical search engines that allow users to enter a search query and access various providers and prices for products relevant to the search query.⁴⁹ Market competition in the comparison shopping search industry is not as lopsided as in the general search industry. Popular E.U. internet comparison retailers that Google Shopping competes with are Ciao!, Bing Shopping, Shopping.com, PriceGrabber, Shopzilla, The Find, Kelkoo, and Beslist.nl.⁵⁰ As a rule, comparison shopping sites differ by which retailers appear in

44. See *Eur. Comm'n, Competition: Antitrust Procedures in Abuse of Dominance: Article 102 TFEU Cases*, at 1 (July 2013), http://ec.europa.eu/competition/publications/factsheets/antitrust_procedures_102_en.pdf (noting that a company with a market share of less than 40% is unlikely to be dominant).

45. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT: CHAPTER 2, <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2> (last updated June 25, 2015) (exploring U.S. court approaches to determining market dominance).

46. EUR. COMM'N, *supra* note 44; see generally *Vertical Integration*, INVESTOPEDIA, <http://www.investopedia.com/terms/v/verticalintegration.asp> (last visited Oct. 25, 2017) ("Vertical integration is a strategy where a company expands its business operations into different steps on the same production path . . ."); *Assessing Market Power – What is the Best Factor to Use to Determine Market Share and Assess Dominance?*, BODY OF KNOWLEDGE ON INFRASTRUCTURE REGULATION (Oct. 2009), <http://regulationbodyofknowledge.org/faq/market-structure/assessing-market-power-what-is-the-best-factor-to-use-to-determine-market-share-and-assess-dominance/> (detailing other factors in determining dominance).

47. COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, U.S. DEP'T OF JUSTICE 21–22 (Sept. 2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [hereinafter DOJ GUIDE].

48. European Commission Fact Sheet MEMO/15/4781, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service (Apr. 15, 2015) [hereinafter 2015 EC Fact Sheet]; 2015 EC Statement of Objections, *supra* note 1; 2016 EC Statement of Objections, *supra* note 1.

49. *Price Comparison Shopping Engines in Europe*, ECOMMERCE NEWS (Jan. 18, 2013), <https://ecommercenews.eu/price-comparison-shopping-engines-in-europe/>; see *Comparison Shopping Engine*, *supra* note 2 (explaining the desired outcome of comparison shopping engines for users and how they function).

50. *Price Comparison Shopping Engines in Europe*, *supra* note 49.

their search results.⁵¹ As of June 2015, Google Shopping led the industry in North America with 355 of the top 500 U.S. e-retailers marketing their products through its service.⁵² In North America, Shopzilla, PriceGrabber, and NexTag include 230, 219, and 167 of the top 500 U.S. e-retailers, respectively.⁵³

In a second Statement of Objections to Google, released in 2016, the EC rejected Google's claim that online merchants, such as Amazon and eBay, should be considered alongside comparison shopping services in a single market.⁵⁴ The EC concluded that online comparison shopping services and online merchants are in distinct markets, and that online merchants are actually "customers rather than competitors of comparison shopping services."⁵⁵ One reason for this distinction could be that online merchants often pay commissions to appear in online comparison shopping search results.⁵⁶ This is the case for Google Shopping where, in 2012, it transitioned from an ad-supported website to a merchant commission-based model like its top competitors, meaning that merchants now compensate Google to have its products appear in Google Shopping search results.⁵⁷

C. Allegations Against Google

The EC's 2015 objections allege that Google had "abused its dominant position in the markets for general internet search services in the European Economic Area (EEA) by systematically favouring its own comparison shopping product in its general search results pages."⁵⁸ The specific behavior that the EC objected to was, since 2008, the display of content from Google Shopping in a prominent position on Google Search results pages, "irrespective of its merits,"⁵⁹ which the EC characterized as "systematic favourable treatment."⁶⁰

The favorable treatment in question occurs when a user inputs a query into

51. See Don Davis, *Two of the Biggest Comparison Shopping Sites Combine*, DIGITAL COMMERCE 360 (June 16, 2015), <https://www.digitalcommerce360.com/2015/06/16/connexity-parent-company-shopzilla-acquires-pricegrabber/> (noting that Google is not the only major player in comparison shopping retailers).

52. *Id.*

53. *Id.*

54. 2016 EC Statement of Objections, *supra* note 1.

55. See European Commission Statement STATEMENT/16/2535, Statement by Commissioner Vestager on Further Steps in Antitrust Investigations Alleging Google's Comparison Shopping and Advertising-Related Practices Breach EU Rules (July 14, 2016).

56. See also *Comparison Shopping Engine*, *supra* note 2 (explaining that comparison shopping services may receive commissions from online merchants for displaying or facilitating the sale of their products).

57. See Sameer Samat, *Building a Better Shopping Experience*, GOOGLE COMMERCE BLOG (May 31, 2012), <https://commerce.googleblog.com/2012/05/building-better-shopping-experience.html>; see also Davis, *supra* note 51 (comparing the number of merchants listing their products on various comparison shopping websites).

58. 2015 EC Statement of Objections, *supra* note 1; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (prohibiting abuse of a dominant market position).

59. 2015 EC Fact Sheet, *supra* note 48.

60. 2015 EC Statement of Objections, *supra* note 1.

Google Search that would yield results relevant to comparison shopping.⁶¹ Normally, Google Search displays results ranked according to relevance to the query;⁶² however, Google Search may also display content from Google Shopping above the search results in response to a relevant query.⁶³ For example, searching for “digital cameras” results in a relevance-ranking list of websites that offer digital cameras, but above those results, Google Search prominently displays more detailed content from Google Shopping with links to merchants that sell digital cameras.⁶⁴ These prominent content displays are a Google innovation⁶⁵ known as OneBox results.⁶⁶ Google may be compensated by a product retailer if a user clicks on or purchases a product from one of the links in a Google Shopping OneBox.⁶⁷ Appendix Figure 1 shows a screenshot of the type of Google Search result discussed. OneBox results include content from Google Shopping even when a query includes the name of a specific comparison shopping competitor, like NexTag, as shown in Appendix Figure 2.

Google Shopping OneBox results could, according to the EC, “artificially divert traffic” away from the comparison shopping websites that may appear lower on the search results page.⁶⁸ Therefore, Google Search users may not see other relevant comparison shopping websites in the search results, which is “to the detriment of consumers” and “stifles innovation.”⁶⁹ Innovation may be stifled because rival comparison shopping websites may be less incentivized to innovate given that traffic to their websites is being diminished by OneBox results on Google Search.⁷⁰

Additionally, Google Search does not apply its own “system of penalties” that contributes to the rankings determinations of other relevant results to its own

61. Alex Hern, *Google Shopping: The Search Tool at the Heart of the European Commission Case*, GUARDIAN (Apr. 15, 2015, 11:15 AM), <https://www.theguardian.com/technology/2015/apr/15/google-one-box-search-european-commission-case>.

62. See Danny Sullivan, *What Is Google PageRank? A Guide for Searchers & Webmasters*, SEARCH ENGINE LAND (Apr. 26, 2007, 1:18 AM), <http://searchengineland.com/what-is-google-pagerank-a-guide-for-searchers-webmasters-11068> (discussing Google Search’s PageRank algorithm used for ranking search results by relevance).

63. See Hern, *supra* note 61 (providing a summary of Google’s placement of its other services at the top of the search result page).

64. See *id.*; *infra* Appendix Figure 1 (an example of Google Shopping content being prominently displayed on a Google Search results page).

65. Bill Slawski, *Google Updates Their One Box*, GO FISH DIGITAL (May 4, 2017), <https://gofishdigital.com/google-updates-their-one-box-patent/>.

66. See Sullivan, *supra* note 3 (“OneBox results are when Google shows information within a special unit, often with images associated with them.”).

67. See Samat, *supra* note 57 (detailing different merchant marketing programs).

68. 2015 EC Statement of Objections, *supra* note 1.

69. *Id.*

70. See 2015 EC Fact Sheet, *supra* note 55 (“[I]ncentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google’s product.”).

Google Shopping platform.⁷¹ The EC also determined that Froogle, Google's first comparison shopping product, "did not benefit from any favourable treatment, and performed poorly," while Google Shopping "experienced higher rates of growth, to the detriment of rival comparison shopping services."⁷²

The EC's statement concluded by taking a "preliminary view" on an acceptable remedy: Google should "treat its own comparison shopping service and those of rivals in the same way" on Google Search results pages.⁷³ This would remove Google Shopping OneBox results from the Google Search results page, and include Google Shopping within the search results instead, subject to the same relevance-ranking algorithms that apply to competitors.⁷⁴

Google responded to the 2015 statement,⁷⁵ and the EC issued another Statement of Objections in 2016, following further investigation.⁷⁶ The new evidence presented to Google included data on the "impact of a website's prominence of display in Google's search results on its traffic," and the strengthening dominance of Google Shopping over its rivals.⁷⁷ This evidence supported the EC's allegations that Google Shopping negatively affects consumers and competitors.⁷⁸

In 2013, the FTC investigated Google for alleged search bias, which could be considered an unfair method of competition,⁷⁹ but concluded the investigation without issuing any formal charges.⁸⁰ As in the European Union's case, the allegations involved Google's vertical search engine products appearing in prominent positions on Google Search results pages.⁸¹ The FTC found that Google lacked the requisite intent "to impede a competitive threat posed by vertical search engines."⁸² Google's motive in prominently displaying its own vertical search

71. *Id.*

72. *Id.*; but see Danny Sullivan, *Goodbye Froogle, Hello Google Product Search!*, SEARCH ENGINE LAND (Apr. 18, 2007, 8:21 PM), <https://searchengineland.com/goodbye-froogle-hello-google-product-search-11001> (providing factors that led to Froogle's demise, including lack of brand awareness).

73. 2015 EC Fact Sheet, *supra* note 55.

74. *See id.* ("[I]n order to remedy the conduct, Google should treat its own comparison shopping service and those of rivals in the same way.")

75. Kent Walker, *Improving Quality Isn't Anti-Competitive*, GOOGLE: EUROPE BLOG (Aug. 27, 2015), <https://europe.googleblog.com/2015/08/improving-quality-isnt-anti-competitive.html>.

76. 2016 EC Statement of Objections, *supra* note 1.

77. *Id.*

78. *Id.*

79. *See* 15 U.S.C. § 45 (prohibiting unfair methods of competition); 2013 FTC STATEMENT, *supra* note 7, at 2.

80. *See* 2013 FTC STATEMENT, *supra* note 7, at 1 ("We issue this Statement to explain the Commission's unanimous decision to close the portion of its investigation relating to allegations that Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results."). The investigation ended with the FTC and Google agreeing to a consent agreement. *See generally* Decision and Order, Motorola Mobility LLC & Google Inc., Matter No. 121-0120, Docket No. C-4410, F.T.C. (2013) (outlining the FTC's jurisdictional findings and issues after the execution of the consent agreement).

81. 2013 FTC STATEMENT, *supra* note 7, at 1.

82. *Id.* at 2.

products was to enhance the user experience, and “any negative impact on actual or potential competitors was incidental to that purpose.”⁸³ In fact, the FTC considered Google’s conduct to be a common result of “‘competition on the merits’ and the competitive process that the law encourages.”⁸⁴ The data collected during the investigation—based on user “click through” activity—indicated that consumers likely benefited from Google Search’s practices.⁸⁵ The FTC ultimately gave some deference to Google in how it designed search results pages to best serve end users.⁸⁶ However, in mid-2016, news reports indicated that the FTC might be reopening its investigation into Google’s search bias amid new concerns that consumers were negatively impacted by Google’s practices.⁸⁷

D. Anticompetitive Effects of Google’s Conduct

The specific type of anticompetitive behavior that the EC alleged is anticompetitive foreclosure.⁸⁸ Anticompetitive foreclosure occurs when a company hinders the ability of competitors to reach consumers, to the detriment of consumers,⁸⁹ presuming the company does not have a sufficient justification for the conduct.⁹⁰ Evidence of harm or likely future harm to consumers arising from the behavior—including higher prices, limited quality, or reduced consumer choice—would also suggest that the conduct is anticompetitive.⁹¹ The EC’s claims that Google’s conduct has resulted in anticompetitive foreclosure may be supported by

83. *Id.*

84. *Id.*; see generally Org. for Econ. Co-operation & Dev. [OECD], *Policy Brief: What Is Competition on the Merits?* 1 (2006), <http://www.oecd.org/competition/mergers/37082099.pdf> (examining “competition on the merits,” a loosely defined term sometimes used to excuse lawful behavior by dominant companies that negatively affects rivals).

85. 2013 FTC STATEMENT, *supra* note 7, at 2. The FTC Statement did not elaborate on the values of the “click through” data or the methodology used in determining that the data suggests a benefit to consumers. *Id.*; see Vangie Beal, *Click-Through*, WEBOPEDIA, http://www.webopedia.com/TERM/C/click_through.html (last visited Oct. 2, 2017) (“The click-through rate (CTR) measures the amount of times an ad is clicked by users versus the amount of times it’s been viewed but not clicked (impression).”).

86. See 2013 FTC STATEMENT, *supra* note 7, at 3.

87. Scola, *supra* note 10.

88. See 2015 EC Statement of Objections, *supra* note 1 (alleging Google’s behavior “hinder[s] competitors’] ability to compete on the market”); see also 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 O.J. (C 45) 3, 9–10 [hereinafter EC Article 102 Guidance] (defining anticompetitive foreclosure as hampering competitors’ access to markets).

89. EC Article 102 Guidance, *supra* note 88, para. 19.

90. See *id.* para. 28 (outlining how a dominant undertaking may argue that its conduct is justified by proving several elements before the Commission makes the ultimate assessment); see generally Org. for Econ. Co-operation & Dev. [OECD], *Roundtable on the Role of Efficiency Claims in Antitrust Proceedings—Note by the Delegation of the European Union*, at 2–3, No. DAF/COMP/WD (2012) 81 (Oct. 19, 2012) [hereinafter EU NOTE ON EFFICIENCY CLAIMS] (describing how the EC assesses antitrust cases).

91. EC Article 102 Guidance, *supra* note 88, at 3.

qualitative and quantitative evidence.⁹²

A 2015 study considered whether OneBox results containing Google's own content affect consumer behavior, and whether this effect is harmful or beneficial to the consumer.⁹³ The authors of the study noted that the FTC often struggles with answering this question because it is difficult to track actual consumer preferences using observational data.⁹⁴ This study's methodology was based on observing whether consumers tended to choose the most relevant source of information provided on a Google Search results page, by controlling whether Google's proprietary content or another website's content appeared in OneBox results.⁹⁵

The study found that users were less likely to interact with OneBox results containing Google content compared to results containing content from other websites, suggesting that users may find non-Google content more useful and relevant.⁹⁶ Google was therefore "degrading its own search results by excluding its competitors at the expense of its users."⁹⁷ The study also noted that Google Search prominently displays content from third-party websites such as Wikipedia to rapidly respond to general knowledge queries, but displays its own content when search results contain a competitor in a vertical search market, such as comparison shopping.⁹⁸

The study theorizes that Google's conduct caused various harms, including (1) consumer welfare loss from choosing less relevant search results; (2) high advertising prices—the source of revenue for some Google products, including Google Search—resulting from exclusion of competitors; (3) restraint of innovation from reduced incentive to compete; and (4) suppression of information,

92. *Id.* paras. 19–20; *see also* EU NOTE ON EFFICIENCY CLAIMS, *supra* note 90, para. 19 (providing examples of relevant qualitative and quantitative evidence).

93. *See* Michael Luca et al., *Does Google Content Degrade Google Search? Experimental Evidence* 3 (Harvard Bus. Sch., Working Paper No. 16-035, 2015), <http://people.hbs.edu/mluca/SearchDegradation.pdf> (testing non-Google Shopping content in OneBox versus a Google Search-generated control). One of the study's authors, Columbia Law professor and former FTC advisor Tim Wu, initially supported the FTC's 2013 decision to decline to charge Google with antitrust violations stemming from similar behavior because the FTC did not discover actual harm to consumers. *See* Mario Trujillo & David McCabe, *Overnight Tech: Google Takes Heat During Antitrust Hearing*, HILL (Apr. 5, 2016, 6:50 PM), <http://thehill.com/policy/technology/overnights/275279-overnight-tech-debate-turns-to-google-during-antitrust-hearing> (summarizing a Senate antitrust hearing where Tim Wu testified that, in light of his research, the FTC should look at the Google case again).

94. Luca et al., *supra* note 93, at 3.

95. *Id.* at 4. In samples where a non-Google website's content was featured prominently instead of Google's, the authors of the study utilized Google's own organic ranking algorithm to choose websites that are the most relevant to the query, and then put content from those websites in the prominent position. *Id.* at 4–5. The study also considered the impact of customer reviews appearing on general search pages and their effect on users' choices, finding that users are more likely to interact with prominently displayed content that has more reviews, meaning users find content with more reviews to be more useful, even when the content is not from one of Google's products. *Id.* at 24, 26–27.

96. *Id.* at 5.

97. *Id.* at 3.

98. *Id.* at 15.

speech, and self-expression from competitors.⁹⁹

As the most popular general search provider in Europe and the U.S.,¹⁰⁰ Google Search occupies a unique online position. Google Search has been referred to as the “gatekeeper” to the internet, as it often acts as the website through which users find and access the whole of the internet.¹⁰¹ Consequently, the “gatekeeper” status influences how other websites can effectively make themselves accessible to users.¹⁰² Many websites invest in search engine optimization techniques, which involve designing websites so that they are recognized as more relevant to users by search engine algorithms, and thereby receive more internet traffic.¹⁰³ In a 2012 memo, FTC staff found that because Google placed content from its own vertical websites—including Google Shopping—in OneBox results, Google had no need to invest in search engine optimization for its vertical websites, while vertical competitors may spend substantial resources on optimization.¹⁰⁴

The FTC also found that the display of Google’s own vertical content in OneBox results negatively impacted vertical competitors’ traffic, while Google’s vertical products gained traffic.¹⁰⁵ Data from both Google and its competitors corroborated this finding.¹⁰⁶ Google’s internal documents included expectations that comparison shopping websites would experience the most negative impact on traffic.¹⁰⁷ Google Product Search—Google Shopping’s predecessor—moved from the seventh ranking in page views to the first from 2007 to 2008, which, despite Google’s acknowledgement that Google Product Search OneBox results often

99. Luca et al., *supra* note 93, at 18–23.

100. *See supra* Part II (showing Google’s page-view share in Europe and the United States to be 82.07% and 90.36%, respectively).

101. *See* Jeffrey Rosen, *Google’s Gatekeepers*, N.Y. TIMES (Nov. 28, 2008), <http://www.nytimes.com/2008/11/30/magazine/30google-t.html> (describing the challenges that Google faces as “gatekeeper” when working with countries that have varying laws on what they allow to be shown on the internet).

102. *See id.* (“With control of 63 percent of the world’s Internet searches, as well as ownership of YouTube, Google has enormous influence over who can find an audience on the Web around the world.”).

103. *See* Vangie Beal, *SEO - Search Engine Optimization*, WEBOPEDIA, <http://www.webopedia.com/TERM/S/SEO.html> (last visited Oct. 2, 2017) (defining search engine optimization as the engineering of a website to obtain higher rankings on general search results pages).

104. Memorandum from Staff of the FTC to Commissioners of the FTC 30 (Aug. 8, 2012), <http://graphics.wsj.com/google-ftc-report/img/ftc-ocr-watermark.pdf> [hereinafter 2012 FTC Staff Memo] (arguing that “Google’s vertical competitors . . . expend considerable resources on optimizing their websites in order to rank highly”). The previously cited 2012 FTC Staff Memo is a redacted memo released through a Freedom of Information Act request following the 2013 FTC investigation into Google. Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL ST. J., <http://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274> (last updated Mar. 19, 2015, 7:38 PM).

105. *See* 2012 FTC Memo, *supra* note 104, at 30 (describing how competitors’ traffic suffered while Google’s vertical websites increased traffic).

106. *Id.*

107. *See id.* at 134 n.168 (determining that comparison shopping websites are likely the most harmed by a decrease in traffic).

failed to display relevant content, Google attributes to its display in OneBox results.¹⁰⁸ Ultimately, these factors create the danger that Google's vertical competitors would have less incentive to innovate or even enter the market.¹⁰⁹

III. LEGAL ANALYSIS

This section will focus on the antitrust laws of the E.U. and U.S. that are most relevant to the allegations against Google. The E.U. and U.S. use different terminology—"dominant position" and "monopoly," respectively—but for purposes of this Comment's analysis, they regulate similar conduct.¹¹⁰ The following analysis will demonstrate that the laws of both jurisdictions would treat Google's anticompetitive conduct in substantially the same way, likely finding Google liable for abuse of a dominant position in the E.U. or attempted monopolization in the U.S.

Antitrust law seeks to prevent anticompetitive advantages because they ultimately harm consumers.¹¹¹ Both jurisdictions would probably impose a remedy that prohibits Google Search from displaying Google Shopping content in OneBox results because of the practice's anticompetitive effects. The reason for such a remedy is that if only Google Shopping is able to display content in OneBox results, but all of its competitors rely on Google Search to reach users, then Google has used its monopoly in the general search market to acquire an anticompetitive advantage in the comparison shopping market.¹¹²

The essential facilities doctrine, which exists under both jurisdictions, will form the foundation of this Comment's proposed alternative remedy for the Google Shopping case.¹¹³ The essential facilities doctrine is an antitrust doctrine which "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."¹¹⁴ Specifically, OneBox displays should

108. *See id.* at 134 n.170 (confirming that Google's OneBox acquired traffic from competitors and increased its ranking in page views).

109. *See id.* at 80 (describing how Google's harmful conduct has created an unfair advantage over competitors who struggle to retain traffic).

110. Pierre Larouche & Maarten Pieter Schinkel, *Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act*, 2013 TILBURG LAW & ECON. CTR. Discussion Paper No. 2013-020, at 2–4, <http://ssrn.com/abstract=2293141> (describing how these two definitions converged and case-law and literature has developed).

111. *See id.* at 5–8 (explaining that U.S. antitrust laws aim to protect consumer welfare by encouraging competition).

112. *See* 2015 EC Statement of Objections, *supra* note 1 (alleging that the company violated EU antitrust laws because its practices unfairly favor its own shopping products over those of competitors).

113. Andrea Renda, *Competition–Regulation Interface in Telecommunications: What's Left of the Essential Facility Doctrine*, 34 TELECOMM. POL'Y 23, 23 (2010) (discussing the existence of the essential facilities doctrine and the role it plays in telecommunication policy in the United States and European Union).

114. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991) (holding that defendant did not prevent plaintiffs from accessing an "essential facility" because defendant did not totally eliminate plaintiff's ability to compete downstream in the market). *Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 E.C.R. I-5039

be considered an essential facility. Google Search should be required to display content from the most relevant comparison shopping website in OneBox displays, which may not be Google Shopping. This remedy accomplishes the goals of antitrust law by promoting fair competition, while also allowing Google to implement product improvements, like OneBox, that benefit consumers and make Google Search a more attractive, useful, and innovative product.¹¹⁵

A. *European Union Antitrust Laws*

The E.U.'s antitrust laws are based on the Treaty on the Functioning of the European Union (TFEU).¹¹⁶ Of particular importance to the allegations against Google is Article 102 of the TFEU, which prohibits abuse of a dominant market position.¹¹⁷ Article 102 states:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹¹⁸

“The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article

(holding that “[t]he refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking, which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position.”). *See also* Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-7791 (holding that “[i]t is not an abuse of a dominant position within the meaning of Article 86 of the EC Treaty for an undertaking which has a very substantial share of the market for daily newspapers in a Member State, and which operates the only nation-wide home-delivery distribution service for subscribers, to refuse to allow the publisher of a competing newspaper access to that home-delivery distribution service.”).

115. *See* Danny Sullivan, *Why Google ‘Vertical’ Search Shouldn’t Face Antitrust Action*, CNET (Nov. 19, 2012, 1:25 PM), <https://www.cnet.com/news/why-google-vertical-search-shouldnt-face-antitrust-action/> (arguing that Google’s vertical search practices are not anticompetitive and actually benefit users).

116. *See generally* TFEU, *supra* note 58, tit. VII (governing antitrust rules in the European Union).

117. *Id.* art. 102.

118. *Id.*

[102].”¹¹⁹ Simply having a dominant market position is not illegal.¹²⁰ Generally, a dominant position has a market share greater than 40%, though market share is not determinative of dominant status.¹²¹ A dominant position may allow a company to prevent competition by making expansion or entry into the market difficult or costly, or by increasing prices above a competitive level.¹²²

While every company “is entitled to compete on the merits,” a practice that benefits consumers, every company also has “a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.”¹²³ The EC referred to this responsibility and framing as an “effects-based” approach, meaning that a company does need to intend to restrict competition in order to violate Article 102.¹²⁴ The EC may order a company to change its conduct if it is “likely to lead to anti-competitive foreclosure.”¹²⁵

The EC cited to Article 102 in its Statement of Objections against Google, although there is room for argument¹²⁶ over whether Google’s anticompetitive practices fall under this article.¹²⁷ The enumerated prohibitions of the Article are not exhaustive: for example, Google may have unlawfully abused its dominant position in a way not listed in Article 102.¹²⁸ Generally, a company may violate Article 102 by “impair[ing] effective competition by foreclosing . . . competitors in an anti-competitive way, thus . . . limiting quality or reducing consumer choice.”¹²⁹ In addition, the EC aims to investigate what it considers “anti-competitive

119. EC Article 102 Guidance, *supra* note 88, para. 9, at 2; *see generally* EUR. COMM’N, EU COMPETITION LAW: RULES APPLICABLE TO ANTITRUST ENFORCEMENT, VOLUME I: GENERAL RULES (July 1, 2013), http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf (documenting applicable provisions, rules, notices, and guidelines under TFEU). Article 82 of the Treaty Establishing the European Economic Community (TEC) was amended to become Article 102 when the treaty was succeeded by the TFEU, so Article 82 and Article 102 refer to the same article. *See Treaty of Rome*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Treaty-of-Rome> (last updated Jan. 11, 2010) (describing the history of the European Union’s controlling treaties); *see also* TFEU, *supra* note 58, art. 102 (noting the change in the Article number.).

120. *See* EC Article 102 Guidance, *supra* note 88, para. 1 (the EU permits a firm to have a controlling share of the market, provided that it is competing fairly).

121. *Id.* para. 14.

122. *Id.* para. 16–17, at 3 (noting that expansion and entry are also factors to consider when evaluating a dominant position).

123. *Id.* para. 1.

124. Press Release, European Commission IP/08/1877, Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings (Dec. 3, 2008) [hereinafter EC Article 102 Press Release]; *see also* Luc Peepkorn & Katja Viertiö, *Implementing an Effects-Based Approach to Article 82*, COMPETITION POL’Y NEWSL., no. 1, 2009, at 17, 20 (summarizing the European Commission’s guidelines and commending its preventative aims).

125. Peepkorn & Viertiö, *supra* note 124, at 19.

126. Part III of this Comment will provide an analysis of Google’s alleged search bias.

127. *See* 2015 EC Fact Sheet, *supra* note 48 (summarizing the Statement of Objections against Google, including that this statement is not dispositive of the decision).

128. *See* TFEU, *supra* note 58, art. 102 (listing potential abuses of a dominant position, though the article uses discretionary language).

129. EC Article 102 Guidance, *supra* note 88, at 19.

foreclosure[.]”

“[A]nti-competitive foreclosure” is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence.¹³⁰

The EC considers whether behavior constitutes abuse of a dominant position by considering how the behavior will affect the market in contrast to a market without such behavior, or with a realistic, pro-competitive alternative to the behavior.¹³¹ Factors relevant to the EC assessment include: (1) the position of the dominant company and its competitors; (2) barriers to entry and expansion; (3) evidence of actual foreclosure; and (4) evidence of an actual strategy to exclude competitors.¹³² The EC may consider such an analysis unnecessary when a dominant company engages in behavior that could only be anticompetitive in nature and provides no other benefit to the company other than to hinder its competition.¹³³ A company may not either engage or refuse to engage in conduct solely to avoid loss of market share.¹³⁴

Though Article 102 does not include any enumerated defenses,¹³⁵ a dominantly positioned company may assert—and has the burden of proving—that its otherwise abusive behavior is justified.¹³⁶ Behavior that is “objectively necessary” or that “produces substantial efficiencies which outweigh any anti-competitive effects on consumers” may be considered justified and excusable by the EC.¹³⁷ Efficiencies may “include technical improvements in the quality of

130. *Id.* para. 19.

131. *Id.* paras. 20–21.

132. *Id.*

133. *See id.* para. 22 (noting that a thorough assessment may not be necessary if anticompetitive conduct is obvious enough on its face).

134. *See, e.g.,* Commission Decision 92/213, *British Midlands v. Aer Lingus*, 1992 O.J. (L 96) 34, 41 (holding that Aer Lingus could not refuse to engage in a ticket-sharing industry practice that would have benefited both it and its competitors in order to maintain its market share).

135. *See* EU NOTE ON EFFICIENCY CLAIMS, *supra* note 90, paras. 24–25, at 6–7 (explaining TFEU Article 102 procedures and justifying that the dominant company should have the burden of proof because it has exclusive access to pertinent information).

136. *See* EC Article 102 Guidance, *supra* note 88, para. 30, at 5 (listing general expectations toward dominant companies when rebutting anticompetitive allegations); *see, e.g.,* Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, 4 C.M.L.R. 23, para. 42 (2012) (H. Den.) (finding that it is the dominant company’s responsibility to show that its conduct produces more benefits than harm).

137. *See* EC Article 102 Guidance, *supra* note 88, para. 30 (listing general expectations toward dominant companies when rebutting anticompetitive allegations); *see, e.g.,* Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, 4 C.M.L.R. 23, para. 42 (2012) (finding that it is the dominant company’s responsibility to show that its conduct produces more benefits than harm).

goods, or a reduction in the cost of production or distribution.”¹³⁸ The foreclosure effect resulting from the dominant company’s conduct must be balanced against the efficiency advantages to consumers.¹³⁹ If the behavior is more than what is necessary to provide the advantage to consumers, then it should be considered abusive.¹⁴⁰

In order to mount an “efficiency” defense, a dominant company must show that (1) the anticompetitive conduct will result in greater efficiency; (2) there are “no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies[;]” (3) “likely efficiencies . . . outweigh any likely negative effects on competition and consumer welfare;” and (4) “the conduct does not eliminate effective competition.”¹⁴¹ The dominant company must use objective data to demonstrate that the practices have been, or are likely to be, beneficial to consumers.¹⁴² “[C]onsumers must [also] receive a fair share of the efficiencies,” meaning that the benefits of the efficiency may not be enjoyed solely by the company in the form of higher profits, but need to be shared with consumers through lower prices or improved products.¹⁴³ Even when a dominant company’s conduct is innovative or produces greater efficiencies for consumers, if it further strengthens or increases the company’s dominant market share in the long-run, the conduct could stifle innovation and competition overall, and therefore the conduct would not be justified.¹⁴⁴

Accordingly, the EC would likely find Google liable under Article 102 for the reasons specified in the Statement of Objections.¹⁴⁵ Google Search would be considered to have a dominant position in the general search market because of its large market share, as further discussed in Section I.B below. It is not necessary to show that Google actually produced harm to competitors, only that harm was likely.¹⁴⁶ Google failed to meet its responsibility under E.U. antitrust law “not to allow its conduct to impair genuine undistorted competition on the common market”¹⁴⁷ by engaging in anticompetitive foreclosure against competitors in the comparison shopping market.¹⁴⁸ The most important factor here is quantitative

138. EC Article 102 Guidance, *supra* note 88, para. 30.

139. Case C-95/04, *British Airways PLC v. Comm’n*, 2007 E.C.R. I-2331, para. 59.

140. *See id.* (explaining that if anticompetitive harm outbalances any economic efficiency, a dominant company’s conduct must be regarded as abuse).

141. *See* Case C-95/04, *British Airways PLC v. Comm’n*, 2007 E.C.R. I-2331, para. 59 (stressing the importance of balancing efficiencies against incidental harms).

142. *See* EU NOTE ON EFFICIENCY CLAIMS, *supra* note 90, para. 19 (emphasizing that parties’ arguments must be substantiated by submitting either qualitative or quantitative evidence).

143. *Id.* at para. 17.

144. *See* EC Article 102 Guidance, *supra* note 88, para. 87 (explaining that a competitor may wish to enter a current market and introduce innovative services or goods once established in that market, but a company’s dominant position may foreclose such innovation).

145. 2015 EC Statement of Objections, *supra* note 1.

146. *See* EC Article 102 Press Release, *supra* note 124, at 2 (discussing the principles of the effects-based approach taken by the EU to investigate anticompetitive allegations).

147. EC Article 102 Guidance, *supra* note 88, at 1.

148. *Id.* paras. 19–22 (defining “anticompetitive foreclosure” and listing relevant evidence to consider when assessing allegations).

evidence of harm to competitors and consumers, which alone may be a sufficient foundation for assigning liability.¹⁴⁹ Google would be unable to justify its practices with an efficiency defense, despite the fact that OneBox displays are designed as an improvement to Google Search for consumer benefit.¹⁵⁰ Evidence shows that consumers make worse choices because of OneBox results;¹⁵¹ there are fewer anticompetitive alternatives that could be implemented;¹⁵² and consumers in the comparison shopping market are still harmed.¹⁵³ According to the EC's approach, the positive effects of product improvement cannot be outweighed by anticompetitive effects of the strengthening of a dominant position.¹⁵⁴

B. United States Antitrust Laws

The United States has three main antitrust laws: (1) the Sherman Antitrust Act, (2) the Federal Trade Commission Act of 1914 (FTC Act), and (3) the Clayton Antitrust Act.¹⁵⁵ Section 5 of the FTC Act (Section 5) prohibits “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.”¹⁵⁶ The section of law most relevant to the allegations against Google is Section 2 of the Sherman Act (Section 2), which prohibits monopolization and attempted monopolization.¹⁵⁷ Violations of Section 2 necessarily violate Section 5, giving the FTC the ability to bring civil suits against Section 2 violators.¹⁵⁸ Section 2 states:

149. See EC Article 102 Guidance, *supra* note 88, paras. 67–73 (explaining the circumstances which would increase the likelihood of the EC finding a dominant company liable).

150. See Hern, *supra* note 61 (stating that the European Commission considers Google's OneBox an abuse of its dominant position in web search); Sullivan, *supra* note 115.

151. See Luca et al., *supra* note 93, at 18 (stating that Google is making its product worse for users).

152. See, e.g., 2014 Google Settlement Offer, *supra* note 18 (discussing Google's proposal to include more competitors in OneBox results along with Google Shopping).

153. See Luca et al., *supra* note 93, at 18–23 (proposing five theories for why the OneBox harms consumers).

154. See EC Article 102 Guidance, *supra* note 88, para. 28 (explaining that a dominant undertaking can put forward a claim that its conduct is justified by “demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.”)

155. See generally *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Oct. 17, 2017) (giving an overview of the three main antitrust laws in the United States).

156. 15 U.S.C. § 45 (2012).

157. *Id.* § 2; see generally DOJ GUIDE, *supra* note 47, at 5–7 (discussing the structure and scope of Section 2).

158. See Debbie Feinstein, *A Few Words About Section 5*, FED. TRADE COMM'N (Mar. 13, 2015, 12:37 PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/few-words-about-section-5> (stating that the Department of Justice cases brought for violation of Section 2 would be brought as Section 5 violations by the FTC). However, few FTC competition cases rely solely on Section 5 authority. *Id.*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony¹⁵⁹

It is important to note that “monopoly power” under U.S. antitrust law does not often necessitate a “pure monopoly.”¹⁶⁰ Instead, “monopoly power” is defined as the “power to control prices or exclude competition,” with no requirement that a firm be the only firm in the market for there to be a monopolization violation.¹⁶¹ In the United States, merely possessing monopoly power without causing harm to consumers is not illegal because the ultimate goal of U.S. antitrust law is to protect consumers from the harmful effects of unfair competition, not necessarily to protect competitors.¹⁶² Accordingly, harming competitors as a result of fair competition (i.e., competition on the merits) without harming consumers is not illegal.¹⁶³

Monopoly power includes two elements: “(1) the firm has (or in the case of attempted monopolization, has a dangerous probability of attaining) a high share of a relevant market[,] and (2) there are entry barriers—perhaps ones created by the firm’s conduct itself—that permit the firm to exercise substantial market power for an appreciable period.”¹⁶⁴ A large market share is required to assert monopoly power, and various courts consider 70% or 80% to be the minimum.¹⁶⁵ Some courts have considered whether a company’s ability to raise prices above the competitive level or to exclude competitors, even without at least 50% of the market share, could lead to a finding of monopoly power.¹⁶⁶ However, the U.S. Department of Justice is not aware of any courts that have made such a finding.¹⁶⁷ An important factor in determining whether a company has monopoly power is its ability to exclude competitors from the market via “barriers to entry.”¹⁶⁸ It is not necessary that a company itself construct the barriers to entry; a natural monopoly can arise from consumer preferences or government regulation as well.¹⁶⁹ Though courts

159. 15 U.S.C. § 2.

160. A pure monopoly exists when a company exhibits complete control of the supply of a product or service. *Pure Monopoly*, CAMBRIDGE BUS. ENG. DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/pure-monopoly> (last visited Oct. 26, 2017).

161. *Compare* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956), with *Pure Monopoly*, *supra* note 160 (stating that a pure monopoly requires one firm to possess control over a market).

162. *See* DOJ GUIDE, *supra* note 47, at 8–9 (explaining that mere possession of a monopoly is not an offense and that harm to competitors alone does not violate section 2, but acquiring it through assaults on the competitive process harms consumers and is not allowed).

163. *Id.*

164. *Id.* at 21 (footnote omitted).

165. *See id.* (discussing the required minimum market share of three different circuit courts).

166. *Id.* at 22.

167. *Id.*

168. *See* DOJ GUIDE, *supra* note 47, at 25 (explaining the necessity of barriers to entry in a market for a firm to possess monopoly power).

169. *See* United States v. Microsoft Corp., 253 F.3d 34, 55 (D.C. Cir. 2001) (stating that a barrier to entry can stem from consumer preference).

generally give judicial deference to a firm's product innovations and are reluctant about anti-competition claims against a dominant firm's product design changes, the anticompetitive effect of a design could still outweigh the "procompetitive justification" of innovation.¹⁷⁰

A Section 2 monopolization offense requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."¹⁷¹ "[A] monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers."¹⁷² Once a prima facie case of monopolization has been made, a company may assert that its conduct has a "procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal"¹⁷³ A company does not need to intend to monopolize to be found liable for a monopolization offense.¹⁷⁴

Attempted monopolization under Section 2 requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."¹⁷⁵ A "dangerous probability of monopolization" can be found by considering the dominant company's ability to affect competition in the relevant market.¹⁷⁶ "Unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize."¹⁷⁷

A defendant may rebut alleged anticompetitive conduct by claiming "valid technical reasons"¹⁷⁸ that require the behavior, or that the behavior actually has a procompetitive justification.¹⁷⁹ A procompetitive justification is an argument that the defendant's behavior was not exclusionary or anticompetitive but actually competition on the merits.¹⁸⁰ When such a justification is claimed to rebut alleged anticompetitive conduct, the burden then shifts to the plaintiff to prove that the

170. *See id.* at 65 (stating that the government did not rebut Microsoft's procompetitive justification by demonstrating that the anticompetitive effect outweighs the justification, so Microsoft cannot be held liable for that aspect of its product design).

171. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

172. *Microsoft*, 253 F.3d at 58.

173. *Id.* at 59.

174. *See id.* (stating that regulator's focus is on the effect of the conduct rather than intent of the parties).

175. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

176. *See id.* (stating that courts take into account the relevant market and the defendant's capability to lessen or destroy competition in that market to determine whether there is a dangerous probability of monopolization).

177. *Id.* at 447.

178. *See Microsoft*, 253 F.3d at 67 (stating that Microsoft argued that it had "valid technical reasons" for integrating Internet Explorer into Windows).

179. *Id.* at 59.

180. *Id.*

behavior was not justified.¹⁸¹ If the plaintiff does not rebut the justification, and cannot show that the anticompetitive harm outweighs the procompetitive benefits, then the defendant is not liable.¹⁸²

There is no single test that the courts use in determining whether a specific type of conduct unlawfully affects competition.¹⁸³ However, there are multiple tests that courts and parties have proposed: (1) the “effects-balancing test;”¹⁸⁴ (2) “the profit-sacrifice” and “no-economic-sense” tests;¹⁸⁵ (3) the “equally efficient competitor test;”¹⁸⁶ and (4) the “disproportionality test.”¹⁸⁷ It may be true that an unfair practice could pass or fail some tests, but not necessarily all of them,¹⁸⁸ so which test a court uses could determine whether legal liability is present.¹⁸⁹ A disproportionality test is most often used in cases like the Google Shopping investigation that involve product innovation that creates both pro- and anti-competitive outcomes, as opposed to specific anticompetitive actions, such as price fixing, targeted at competitors or consumers.¹⁹⁰

If the FTC reopened its investigations against Google, it is possible that Google would be found liable for attempted monopolization of the comparison shopping market under Section 2. The European Commission has already alleged that Google engaged in anticompetitive conduct by favoring its own comparison shopping products over competitors.¹⁹¹ Google Search would be considered to have monopoly power¹⁹² because of its large market share,¹⁹³ a share so large that monopolization is “dangerously probabl[e].”¹⁹⁴ Finally, the FTC could infer an

181. *Id.*

182. *See id.* at 67 (finding that the United States did not rebut Microsoft’s proffered justification that its behavior had valid technical reasons and, therefore, Microsoft cannot be held liable for the behavior relating to integrating Internet Explorer with Windows).

183. *See* DOJ GUIDE, *supra* note 47, at 46–47 (stating that in the absence of a conduct-specific rule, the Department of Justice has been using a disproportionality test).

184. *See generally id.* at 36–38 (involving the weighing of anticompetitive effects against procompetitive benefits and the analysis of the overall impact on consumers).

185. *See generally id.* at 39–43 (explaining that the Profit-Sacrifice test looks to alternative nonexclusionary conduct to see whether the nonexclusionary conduct would have been more profitable in the short term, which, if so, indicates the existence of an exclusionary scheme; the No-Economic-Sense test is similar but essentially asks whether the questionable conduct contributed any benefits to a firm other than the exclusionary effects).

186. *See generally id.* at 43–45 (declaring a Section 2 violation when harm to competition disproportionately outweighs benefits to consumers).

187. *See generally id.* at 45–46 (involving an inquiry into whether anticompetitive effects “substantially outweigh” any procompetitive effects).

188. *See id.* at 46–47 (stating that since no one test is applicable in all situations, courts should consider the circumstances of each specific case to determine which test to apply).

189. *See* DOJ GUIDE, *supra* note 47, at 46–47 (recognizing the flaws in each test which could lead to false negative and false positive results).

190. *See id.* at 90 (discussing how the disproportionality test is preferred when conduct can produce both harm and benefits to consumers).

191. 2015 EC Statement of Objections, *supra* note 1.

192. *See* DOJ GUIDE, *supra* note 47, at 21 (explaining how to identify monopoly power).

193. *See supra* Section I.B for a discussion on Google Search’s large market share.

194. *See* 2015 EC Statement of Objections, *supra* note 1 (describing Google’s exclusionary behavior); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 447–48 (1993) (holding that unfair

intent to monopolize by observing Google's actions, such as its prioritization of Google Shopping products over other competitors.¹⁹⁵ Quantitative evidence has already shown that Google's conduct has negatively affected competition in favor of Google, and it appears that Google was aware that OneBox displays were negatively impacting competitors.¹⁹⁶ Using a disproportionality test, Google would be unable to justify its conduct as procompetitive because the "likely anticompetitive harms substantially outweigh its likely procompetitive benefits."¹⁹⁷ Though courts give deference to companies to design new products, because they want to encourage innovation,¹⁹⁸ such deference should not be given to OneBox. The substantial harm of OneBox displays to the comparison shopping market outweighs its benefits to be afforded judicial deference.¹⁹⁹

IV. PROPOSED REMEDY

If Google is ultimately found liable for antitrust violations, the EC's proposed remedy is for Google to stop displaying Google Shopping content in OneBox displays on Google Search results pages and to include Google Shopping in the listed search results as a regular link ranked according to the objective relevance measures by which other websites are ranked.²⁰⁰ This would prevent Google from using its dominant position in the general search market to unfairly inhibit competitors from reaching consumers in the comparison shopping market.²⁰¹

Some commentators have argued that Google's conduct should be deemed legal,²⁰² but if any adjustment will be implemented, that it should be to require

or predatory conduct may be sufficient to prove the necessary intent to monopolize).

195. See 2015 EC Statement of Objections, *supra* note 1 (describing Google's exclusionary behavior); *Spectrum Sports, Inc.*, 506 U.S. 447, 447–48 (holding that unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize).

196. See 2012 FTC Staff Memo, *supra* note 104, at 134 n.170 (noting that Google experienced "pretty terrible embarrassing failures").

197. DOJ GUIDE, *supra* note 50, at 45.

198. See *supra* note 170 and accompanying text (discussing deference to company design products).

199. Compare Luca et al., *supra* note 93, at 1 (concluding that Google's prioritization of its own reviews in OneBox reduces consumer welfare); *Google's Transformation from Gateway to Gatekeeper: How Google's Exclusionary and Anticompetitive Conduct Restricts Innovation and Deceives Consumers*, FAIRSEARCH, <http://www.fairsearch.org/wp-content/uploads/2011/10/Googles-Transformation-from-Gateway-to-Gatekeeper.pdf> (last visited Oct. 17, 2017) (describing Google's substantial harm to the comparison shopping market), with Sameer Samat, *Building a Better Shopping Experience*, GOOGLE COMMERCE BLOG (May 31, 2012), <https://commerce.googleblog.com/2012/05/building-better-shopping-experience.html> (describing the benefits of the OneBox).

200. 2015 EC Statement of Objections, *supra* note 1 (describing how Google gave its own products preferential treatment and proposing that Google treat its own shopping service the same as rivals).

201. See *id.* (detailing the remedies proposed by the EU to restore competition in the market).

202. See generally Sullivan, *supra* note 115 (explaining why Google's conduct should be permitted and challenging those arguing for anti-trust regulation).

Google to simply label its vertical search boxes.²⁰³ Others have advocated for stronger regulation against Google; for instance, the lobbying group FairSearch, which is made up of competing internet and technology companies, advocates for strong antitrust enforcement against Google's "unfair" practices.²⁰⁴ The main argument in favor of more lenient penalties is that Google is trying to offer a better product to its users by integrating vertical and horizontal searches into a single, more convenient product, and antitrust penalties would stifle that incentive to innovate.²⁰⁵

The last settlement offer proposed by Google involved utilizing approximately half of OneBox results to display three competitors' content alongside Google Shopping content in the other half.²⁰⁶ The offer was ultimately rejected by the EC before it issued its Statement of Objections in 2015. Presumably, the EC felt that this proposal was not sufficient to ensure fair competition and reduce harm.

A. Essential Facilities Doctrine

This Comment proposes that the essential facilities doctrine should be extended to search engines, instead of applying a typical antitrust remedy, which would prohibit Google from continuing to display Google Shopping content in OneBox results. The essential facilities doctrine exists in both the European Union²⁰⁷ and the United States.²⁰⁸ It is an antitrust doctrine that "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."²⁰⁹

Under current interpretation of E.U. case law, an essential facilities claim should require that: (1) a company has "a dominant position in the provision of facilities";²¹⁰ (2) "access to [the] facility is a precondition for competition on a related market";²¹¹ (3) "duplication of the facility is impossible or extremely

203. *Id.*

204. Danny Sullivan, *Does the FairSearch White Paper on Google Being Anticompetitive Hold Up?*, SEARCH ENGINE LAND (Oct. 11, 2011, 9:36 PM), <http://searchengineland.com/does-the-fairsearch-white-paper-on-google-being-anticompetitive-hold-up-96567>; *see generally* *Google's Transformation from Gateway to Gatekeeper: How Google's Exclusionary and Anticompetitive Conduct Restricts Innovation and Deceives Consumers*, FAIRSEARCH, <http://www.fairsearch.org/wp-content/uploads/2011/10/Googles-Transformation-from-Gateway-to-Gatekeeper.pdf> (last visited Oct. 10, 2017) (outlining FairSearch's arguments for claiming Google's conduct is anticompetitive and the need for strong antitrust enforcement).

205. Sullivan, *supra* note 115.

206. 2014 Google Settlement Offer, *supra* note 18; *see also* Arthur, *supra* note 18 (discussing EC's objections to Google's proposed settlement).

207. *See generally* Sébastien J. Evrard, *Essential Facilities in the European Union: Bronner and Beyond*, 10 COLUM. J. EUR. L. 491 (2004).

208. *See generally* Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443 (2002).

209. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).

210. Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 1998 E.C.R. I-7791, ¶ 34.

211. *Id.* ¶ 61.

difficult . . . or is highly undesirable for reasons of public policy”;²¹² (4) there are no pragmatic alternative means to compete;²¹³ and (5) the company has no “objective justification” for denying access to the facility.²¹⁴ Similarly, an essential facilities claim under U.S. law requires “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”²¹⁵

Under most circumstances, a company has the right to refuse to deal with any other company.²¹⁶ But when a company has monopoly power over a facility that is essential to competition, then that company must allow competitors to access the facility on reasonable terms.²¹⁷ “To be ‘essential[,]’ a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.”²¹⁸ The essential facilities doctrine has been applied to a multitude of areas, including railroad terminal facilities,²¹⁹ newspaper advertising,²²⁰ telephone infrastructure,²²¹ professional sports stadiums,²²² ferry routes,²²³ and the supply of chemical solvents.²²⁴

However, the essential facilities doctrine has limits. It does not apply if a company has alternative means of accomplishing its goals other than use of a certain facility, or if duplicating an essential facility is feasible, even when it may require a large investment.²²⁵ The doctrine also does “not require that an essential facility be shared if such sharing would be impractical or would inhibit the

212. *Id.* ¶ 65.

213. *Cf. id.* ¶ 67.

214. *Id.* ¶ 48 (“An undertaking in a dominant position may not discriminate in favour of its own activities in a related market.”).

215. *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (citing *Hecht v. Pro-Football, Inc.* 570 F.2d 982, 992–93 (D.C. Cir. 1977)).

216. EC Article 102 Guidance, *supra* note 88, para. 75 (“[T]he Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property”); *see also* DOJ Guide, *supra* note 47, at 119 (“Companies are generally under no antitrust obligation to sell or license their products to, or provide their assets for use by, another company”).

217. *See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 545 (9th Cir. 1991) (finding no liability under the essential facilities doctrine because defendants gave their competitors access to the disputed product for a fee).

218. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) (footnote omitted).

219. *E.g., United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912).

220. *E.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

221. *E.g., MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

222. *E.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977).

223. *E.g., Commission Decision of 21 December 1993 Concerning a Refusal to Grant Access to the Facilities of the Port of Rødby (Denmark)*, 1993 O.J. (L 55) 52.

224. *E.g., Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Comm’n*, 1974 E.C.R. 223.

225. *See, e.g., Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 1998 E.C.R. I-7791, ¶¶ 30, 67.

defendant's ability to serve its customers adequately."²²⁶

Litigation against Microsoft in the 1990s and early 2000s in both the European Union²²⁷ and the United States²²⁸ shows how this Comment's proposed remedy is a natural extension of the essential facilities doctrine. In *United States v. Microsoft*, the Court analogized Microsoft's monopoly in the computer operating system market as a "chicken-and-egg" scenario in which consumers prefer operating systems with many available applications, and developers prefer to create applications for already popular operating systems.²²⁹ With Microsoft Windows already having a natural monopoly in the operating system market, this cycle created a natural barrier to entry of which Microsoft could then take advantage.²³⁰ Microsoft's anticompetitive conduct included bundling its own internet browser software, Internet Explorer, with its operating system, Windows, effectively using its dominant position in the operating system market to compete in the "internet access software" market by "means other than competition on the merits."²³¹ Microsoft made it more difficult for internet access software companies to market their products because Windows users could immediately use Internet Explorer.²³² While other internet access software companies still had some ability to compete with Internet Explorer by offering their software through other retail means, Internet Explorer had an anti-competitive advantage.²³³ The case before the EC was similar, except that it involved Microsoft's audiovisual media application, Windows Media Player, being bundled with Windows.²³⁴ The EC's *Microsoft* decision determined that a dominant company may not "directly or indirectly ties [sic] its customer by a supply obligation since this deprives the customer of the ability to choose freely his [sic] sources of supply and denies other producers access to the market."²³⁵

Microsoft and the United States reached a settlement that did not require Microsoft to unbundle Internet Explorer from Windows, but made it easier for competitors to create software to operate with Windows and for users to remove or disable Microsoft software from Windows.²³⁶ The remedy imposed by the EC required Microsoft to offer a version of Windows that did not include Windows

226. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977) (footnote omitted).

227. *See generally* Commission Decision 2007/53, Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement Against Microsoft Corporation, 2007 O.J. (L 32) 23.

228. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

229. *Id.* at 55.

230. *Id.*

231. *Id.* at 61–65.

232. *Id.*

233. *Id.* at 63.

234. *See* Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601, ¶¶ 857, 859 (finding Microsoft liable for anticompetitive foreclosure on the media player market by bundling Windows Media Player with Windows).

235. Commission Decision 24 March 2004, Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement Against Microsoft Corporation, 2007 O.J. (L 32) 23, ¶ 835 (citing Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461).

236. *See generally* *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 32153514 (D.D.C. Nov. 12, 2002).

Media Player.²³⁷

Similar to Microsoft Windows, Google Search is a natural monopoly.²³⁸ Like Internet Explorer or Windows Media Player being bundled with Windows, Google Shopping benefits from being bundled with Google Search.²³⁹ It would be infeasible for a comparison shopping competitor to duplicate the entire enterprise of Google Search in order to acquire the same efficiencies that Google Shopping enjoys.²⁴⁰ The remedy in the Microsoft cases was not to prohibit Microsoft from ever integrating its own software with Windows, but instead to allow consumers an opportunity to choose which software they wanted to use, including the software of Microsoft's competitors.²⁴¹

V. CONCLUSION

The empirical evidence is clear that Google holds a dominant position in the general search market and that its OneBox displays of Google Shopping content harm competition in the comparison shopping market. Therefore, the antitrust laws must provide a remedy. A blind prohibition of Google's use of the OneBox, however, would not serve the guiding principles of antitrust law, which are not only to promote competition, but to promote innovation as well. To effectively remedy this case, the EC should layout a method whereby Google can continue to use its innovative product enhancements while ensuring fair competition. This would not only remedy the case, but provide guidance moving forward in understanding the antitrust laws' role in internet markets.

237. Commission Decision 2007/53 of 24 May 2004, Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement Against Microsoft Corporation, 2007 O.J. (L 32) 23, 27.

238. See *supra* Section I.B (discussing Google Search's market share and monopoly power in the general search market).

239. 2012 FTC Memo, *supra* note 104, at 30, 134 n.170.

240. See Yoni Heisler, *Google's Entire Codebase: 2 Billion Lines of Code and 86 Terabytes*, BGR (Sept. 18, 2015, 8:45 AM), <http://bgr.com/2015/09/18/size-of-google-source-code-lines/> (noting Google's codebase takes up 86 terabytes and consists of two billion lines of code); Compare Final Judgment, Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-7791 (finding no liability under the essential facilities doctrine because it would be feasible to invest in a newspaper distribution network), with Commission Decision of 21 December 1993 Concerning a Refusal to Grant Access to the Facilities of the Port of Rødby (Denmark), 1993 O.J. (L 55) 52 (finding liability under the essential facilities doctrine because construction of a new port would be infeasible), and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (finding liability under the essential facilities doctrine because competition would otherwise require creation of a new local newspaper). The current market value of Alphabet, the parent company of Google, is over \$560 billion. *Alphabet, Inc.*, GOOGLE FINANCE, <https://www.google.com/finance?q=NASDAQ:GOOGL> (last visited Oct. 4, 2017). Google Search's closest competitor, Bing, has less than 10% market share, and is owned by Microsoft, which is valued at over \$490 billion. *Top 5 Search Engines in the United States: Sept 2016*, *supra* note 38; *Microsoft Corporation*, Google Finance, <https://www.google.com/finance?q=NASDAQ:MSFT> (last visited Oct. 20, 2017).

241. See *generally* Final Judgment, *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 32153514 (D.D.C. Nov. 12, 2002).

The best remedy for the Google Shopping case would allow Google to preserve the OneBox while requiring that the content displayed within the OneBox be determined by merit and competition. This would maintain Google's incentive to innovate and offer users a better general search engine, while also promoting fair competition in the comparison shopping market. The EC, however, chose an extreme remedy that does not promote innovation: prohibit Google from displaying Google Shopping content in OneBox displays.²⁴² The EC's approach would create a disincentive to Google's pursuit of new features for Google Search because of the possibility of another adverse antitrust ruling.

A remedy that extends the essential facilities doctrine would allow Google to continue displaying OneBox results, but require that the most relevant comparison shopping website's content be used to populate the OneBox, whether it is from Google Shopping or a competitor.²⁴³ Google can prove that its intention is to create an enhanced user experience—and not just to unfairly promote Google Shopping—by providing users with the most relevant content. A further innovation may even involve displaying multiple websites' content in the OneBox results, similar to Google's proposed settlement.²⁴⁴ This remedy would effectively extend the essential facilities doctrine to search engines by treating OneBox displays as an essential facility that comparison shopping competitors in need to access in order to compete in the market. It would allow consumers to benefit from competition in the comparison shopping market without having to sacrifice the benefit of Google's continued innovations. Unlike the EC's proposed remedy, this solution would satisfy—and ultimately serve—the pro-consumer goals of the antitrust laws: fair competition and innovation.

VI. EPILOGUE

On June 27, 2017—after the original authorship of this Comment, and its acceptance for publication—the EC finalized its case against Google based on the same accusations in its Statements of Objections and imposed the largest fine in the EC's history, at €2.42 billion (US\$2.7 billion).²⁴⁵ Google subsequently lost \$5.8 billion in market value overnight.²⁴⁶ Specifically, the EC held that Google systematically placed Google Shopping results at the top of general search results pages, and when it did so, subjected other comparison shopping websites to the

242. 2015 EC Statement of Objections, *supra* note 1.

243. In fact, Google could possibly charge competitors a fee to display their contents in Onebox results similar to advertising, on “fair, reasonable, and nondiscriminatory terms,” but calculation of such terms is beyond the scope of this Comment. *See, e.g., Apple, Inc. v. Motorola Mobility, Inc.*, 886 F.Supp. 2d 1061, 1070 (W.D. Wis., Aug. 10, 2012) (discussing standard to license patents to competitors in order to avoid antitrust violations).

244. 2014 Google Settlement Offer, *supra* note 18.

245. European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017) [hereinafter 2017 EC Fine]; Mark Scott, *Google Fined Record \$2.7 Billion in E.U. Antitrust Ruling*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html>.

246. Lucinda Shen, *Google Stock Loses \$5.8 Billion After the EU's Massive Fine*, FORTUNE (June 27, 2017), <http://fortune.com/2017/06/27/google-eu-fine-alphabet-stock/>.

usual algorithm, causing them to appear much lower on the search results, drastically reducing the likelihood that users could find them.²⁴⁷

As a result of the judgment, Google must “comply with the simple principle of giving equal treatment to rival comparison shopping services and its own service.”²⁴⁸ “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.”²⁴⁹ Google can determine how it will comply with this directive and must make periodic compliance reports to the EC.²⁵⁰ Google must still comply with the ruling, or risk additional fines, while it goes through the appeals process, which it has initiated.²⁵¹

In one sense, Google is benefitting from the EC’s lack of specificity in its directive because it did not mandate a specific remedy, such as eliminating the OneBox or requiring that competitors be displayed in the OneBox. While the ruling is fair in that Google can determine its own means of compliance consistent with its business model, the ruling provides no guidance to Google or other companies for avoiding charges in future analogous situations. Therefore, a company that seeks to implement an innovation such as the OneBox cannot readily determine if their idea would be in compliance with the antitrust laws. The only way to ensure compliance would be to mirror Google’s method of compliance, because it would have already been approved by the EC.

Google announced that it will comply with the ruling by implementing a bidding process for comparison shopping websites for access to OneBox advertising space.²⁵² However, the EC has not yet publicly stated whether this strategy complies with the ruling, and has kept its determinations intentionally ambiguous.²⁵³ This presents a new challenge for Google as it spends resources trying to comply with the EC’s directive without meaningful guidance.

The effect of the EC’s ruling and Google’s compliance strategy both appear to

247. 2017 EC Fine, *supra* note 245.

248. *Id.*

249. *Id.*

250. *Id.*

251. Natasha Lomas, *Google Files to Appeal \$2.73BN EU Antitrust Fine*, TECHCRUNCH (Sept. 11, 2017), <https://techcrunch.com/2017/09/11/google-files-to-appeal-2-73bn-eu-antitrust-fine/>.

252. Arjun Kharpal & Silvia Amaro, *EU vs. Google: ‘Antitrust Issue Will Remain on Our Desks for Some Time’*, CNBC (Sept. 28, 2017, 7:47 AM), <https://www.cnbc.com/2017/09/28/google-vs-eu-antitrust-shopping-case-ad-results.html>.

253. *See id.* (“It would be premature at this stage for the Commission to take any definite positions on Google’s plans. As Commissioner Vestager said: ‘This issue will remain on our desks for some time.’”).

* *Disclosure: Source author’s relationship to Comment topic.* Various pieces written by journalist Danny Sullivan are cited throughout this Comment. On October 9, 2017—years after these cited articles were produced and published—Sullivan became a Google employee. *See* Michelle Robbins, *Danny Sullivan Joins Google, Leaves Advisor Role at Third Door Media*, Search Engine Land (Oct. 6, 2017, 1:01 PM), <https://searchengineland.com/danny-sullivan-joins-google-283977>.

be consistent with the remedy proposed by this Comment: treating the OneBox as an essential facility so that all comparison shopping websites are afforded fair access. However, EC should have expressed a clear endorsement for innovation by internet companies, and should have tried to address the uncertainty that this case created for innovative internet companies by issuing more specific guidance. A ruling that was less ambiguous and recognized the OneBox as an essential facility would be more aligned with the goals of antitrust law by promoting innovations that are implemented fairly.

APPENDIX

Figure 1

Screenshot of a Google Search results page from the query “digital cameras.”²⁵⁴ The box containing links to purchase digital cameras from various retailers is made up of content from Google Shopping. The box is also called a “OneBox” result.

254. Google Search Results Page for *Digital Cameras*, GOOGLE, <https://www.google.com/#q=digital+cameras> (last visited Feb. 7, 2017).

The screenshot shows a Google search for "digital cameras". The search bar contains the text "digital cameras" and a magnifying glass icon. Below the search bar are navigation tabs for "All", "Shopping", "News", "Images", "Maps", "More", "Settings", and "Tools". The search results indicate "About 56,200,000 results (0.51 seconds)".

A sponsored section titled "Shop for digital cameras on Google" features six camera models with their prices and ratings:

Product	Price	Rating
Polaroid 18MP Digital Still ...	\$49.99	★★★★★ (153)
Canon PowerShot ...	\$179.99	★★★★★ (67)
Sony W800/B 20MP Digital ...	\$89.99	★★★★★ (581)
Sony Cyber-shot ...	\$124.00	★★★★★ (501)
Kodak Black Pixpro Astro ...	\$154.00	★★★★★ (57)
Nikon Coolpix S3700 Digital	\$139.99	★★★★★ (637)

Below the sponsored section are two organic search results:

- Digital Camera - Shop Now & Save at Best Buy® - bestbuy.com**
www.bestbuy.com/Cameras
 Huge Selection Of Cameras At Best Buy®. Free Shipping. Buy Now!
 Price Match Guarantee · Free Store Pickup
 Ratings: Selection 9/10 - Product quality 9/10 - Shipping 8.5/10 - Prices 8.5/10 - Website 8/10
 Camera Weekly Deals · Camera Buying Guide · Geek Squad® · Photography Tips
 9940 Roosevelt Blvd, Philadelphia, PA - (215) 676-7206 - Closed now · Hours
- 2017 Top Digital Cameras - We Reviewed Every Digital Camera**
www.bestreviews.com/Digital-Cameras
 Our Top Pick Will Surprise You!

Figure 2

Screenshot of a Google Search results page using the query “digital cameras nextag.”²⁵⁵

255. Google Search Results Page for *Digital Cameras Nextag*, GOOGLE, <https://www.google.com/#q=digital+cameras+nextag> (last visited Feb. 11, 2017).

Google

[All](#) [Shopping](#) [News](#) [Images](#) [Maps](#) [More](#) [Settings](#) [Tools](#)

About 87,500 results (0.52 seconds)

Shop for digital cameras nextag on Google Sponsored ⓘ

Nikon - Coolpix S33 13.2-... \$109.99 Best Buy ★★★★★ (109)	Canon PowerShot ... \$549.99 Canon Free shipping	Sony Cyber-shot ... \$88.00 B&H Photo-Vi... Free shipping	Sony Cyber-shot ... \$84.00 Adorama Ca... ★★★★★ (893)	Sony DSC300/B ... \$179.99 Target In store	Canon PowerShot ... \$179.99 Canon Free shipping

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