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Department of Law public lecture

What Should We Do About Google?

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Suggested hashtag for Twitter users: #lsegoogle

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‘What should we do about Google?’

Martin Cave

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The Google story: a brief history

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- Google is 13 years old. Its search algorithm works by crawling over web pages and disclosing those most relevant to search terms. The Google algorithm was particularly effective.
- The next step was monetisation of search, by auctioning advertising slots on the search page, favouring firms offering high bid price and high benefits to users.
- Then activities, such as ad serving were developed or acquired; then entry into downstream activities.
- Simultaneously other services were developed such a gmail, Android, Google Books, social networks (Google+), and mobile technology (Motorola Mobility).
- Google (apart from Motorola) is almost entirely ‘ bits, not atoms’ – one of the world’s most ‘digital’ firms.

Google exceptionalism

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Googols (10^{100}) and Zettabytes (10^{21})

Stanford

The garage

The engineers

‘Don’t do evil’

The IPO and the dawning realisation – ‘Googlezon’

The diversification and the money.

See Ken Auletta, Googled*, Penguin Press 2009.*

The ‘third rail’?

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“If you have something you don’t want anyone to know, maybe you shouldn’t be doing it in the first place.”

“Google policy is to get right up to the creepy line and not cross it.”

Why we need to talk about Google

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- What has been Google's experience with competition law to date?
- Is Google's position of economic strength in search large enough to require public intervention to protect or assist its competitors? (This question is mostly addressed through the lens of European competition law.)
- To what degree would it be legitimate for Google to use its dominance in search to the benefits of its related businesses?
- Should competition policy apply differently in high tech than in low tech markets?

A preamble: The Google books episode

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In 2004, Google conceived a plan to scan any book in any language found in the world's libraries. This was for the purposes both of fair use and then of selling the book, if the copyright owner agreed

What to do about orphan books – those in copyright to an unknown person? Following a class action, in 2008, Google reached a $125m settlement (1/3 to the lawyers) with authors and publishers to channel payments from book sales

Objections to the deal

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- It creates a monopoly
- Prices of proposed institutional subscriptions may rise
- Revenue split from book sales (37%) too generous to Google
-Class action failed to take account of certain groups, such as academic authors (who don't want money, but desperately want people to read their books)
-Non US authors and publishers were disadvantaged in various ways.

Judge Chinn's 2011 ruling on the amended settlement agreement or ASA

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- Anti-trust concerns: the ASA would give Google a de facto monopoly over unclaimed works; also, 'the ASA would arguably give Google control over the search market'.
- International law concerns: foreign books registered in the US would be caught;
- Interests of class members: these have not been adequately represented;
- A matter for Congress to decide: as argued by the DoJ.

Chinn invites an amended 'opt-in' settlement.

Back to search

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Search

Organic search – the unpaid results of the search process (delivered by an algorithm or otherwise)

Paid search – search results paid for by the relevant organisation, in Google's case following a 'Vickrey' second price auction, adjusted by 'quality' factors

Vertical search engines-specialist sites, for travel, finance…

Advertising

Search advertising – expanding share of on-line

Display advertising – declining share of on-line

Google and the merger regime. 1 Double Click

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Google's acquisition of DoubleClick, a company which specialised in placing ads, was considered by the European Commission and the DoJ in 2007/8. It was a vertical merger, which the Commission usually approves, absent serious risk of foreclosure. Various foreclosure possibilities were considered and rejected.

The acquisition was approved in the US also.

2. Google/Yahoo & Microsoft/Yahoo

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Google tried to combine with Yahoo in 2008, but was blocked by the DoJ.

Microsoft subsequently acquired Yahoo's search business, and the EC reviewed the case.

It was a merger of the second and third largest firms in the paid search market, but it was allowed through on competition grounds based on Google's market share at the time:

Google's market shares in paid search in late 2009

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90-100% - Austria, Germany, Spain, France, Italy, Sweden etc

80-90% - UK, Europe

70-80% - world

60-70% - USA

3. Google's acquisition of ITA Software in 2011

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A vertical merger, not qualifying for consideration in the EU, but reviewed by Dept of Justice in the USA.

Concerns were expressed that websites using ITA software and competing with Google in airfare comparison and booking sites would be able to continue to do so.

Take-over allowed subject to strict behavioural rules:

- to develop and license travel software
- to establish internal firewall procedures
- to continue software R&D.

An example of competition law producing ex ante remedies.

4. A precursor case before the Autorité de la Concurrence

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A French vendor of devices to avoid succumbing to speed radars complained discriminatory access to AdWords, Google's search advertising service: some providers of such services were allowed to market such services on their websites, others (including complainant Navx) were not, etc.

Google responded by offering commitments to make the service transparent and objective.

5. The abuse of dominance complaint in Europe: investigation from 2010.

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Complaints from 3 small European search engines, later joined by Microsoft, allege

- unfavourable treatment of unpaid search results
- unfavourable treatment of paid search results
- preferential treatment of Google's own services
- attempts to impose exclusivity on or prevent switching by advertising partners.

The key claim is that Google uses its power in search to promote its downstream businesses by manipulating the position competitors can achieve, relative to Google's own services, in paid and unpaid search rankings.

A parallel inquiry by the FTC began in the US in 2011.

The European process

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The investigation does not imply any wrongdoing.

There is no deadline (unlike merger cases).

It may lead to no action, or to a Statement of Objections, or to binding undertakings given by Google.

Parallels with the long-running process between the Commission and Microsoft have been noted, leading to suggestions that both parties will seek to avoid the same protracted and acrimonious outcome.

Google emphasises that for it (unlike Microsoft) ‘competition is a click away’.

Conceptual issues arising – costs of doing and monetising search

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- high up-front costs of indexing trillions of web pages
- benefits of scale for providers of advertising
- faster access to servers as volume grows
- benefits from more information revealed by users: what terms they are using; how they respond when a search result appears; what subdivisions of terms are they interested in (eg, not ‘dried flowers’ but ‘dried rose petals’)
- scale effects in the networks which carry the traffic

Conceptual issues arising – essential facility

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Does this make (elements of) Google's search capability something like an essential facility? Is it in practice impossible to replicate, because Google (possibly based on a superior algorithm) enjoys a virtuous circle of:

'more customers' >> more data >> 'more refined search terms' >>'better search' >> 'more customers, inc. outsourced ones'>>…

while competitors lag behind?

Slotting search into other activities exhibiting 'structural' dominance 1

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Access to traditional physical facilities: eg ports

'the owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular by refusing to grant access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 102.'

Bronner: refusal of access makes the competitors' activities either impossible or seriously and unavoidably uneconomic.

See also earlier computerised reservation systems (CRS) competition cases and more recent electronic programme guide and API regulation

Slotting search into other activities exhibiting dominance

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2. IPR cases

- *Magill*: access to information for new, combined TV listings magazines mandated;
- *IMS Health*: it is sufficient for access to IPR can be mandated where refusal prevents the emergence of a new product valuable to consumers and excludes competition;
- *Microsoft*: emphasis on prevention of (unspecified) new products as a ground for mandating access.

Many commentators argue this has gone too far.

Where might ‘essential facility-type’ arguments take us?

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- The (arguable) proposition is that competitors in, eg, vertical search cannot duplicate Google’s general search service, and are therefore entitled to a form of access to some of it;
- Nobody has asked for the algorithm! Instead the form of access might in principle extend to the transfer of key search terms or, more plausibly, a right of equal treatment for competitors by the dominant firm’s search algorithm and bidding procedures;
- This outcome might alternatively be gained by appealing to prohibitions on discrimination.

Discrimination and the duty to protect competition

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A dominant firm may not abusively leverage its market power in a downstream market ; it also has a duty not to allow its conduct to impair undistorted competition – the doctrine of special responsibility.

The complainants allege that Google discriminates against its direct rivals, in one case a vertical (ie specialised) search engine causing them to fall in the ranking for both paid and unpaid search. (>50% click on number 1 or 2 in the list; 97% on top 10%.)

It would be possible to ‘cook’ the organic search results manually or by amending the algorithm.

Paid search results can be ‘cooked’ by altering the ‘quality scores’ which, together with the price bid for a search term, determine the paid rankings.

Google's search results

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Procedures get amended/updated very frequently in small ways;

Major changes take place more irregularly, eg in Feb 2011, producing large winners and losers;

Google generally asserts that the process is entirely automated;

However, a Google executive said in 2007: *"[When] we rolled out Google Finance, we did put the Google link first. It seems only fair, right; we do all the work for the search page and all these other things, so we do put it first. That has actually been our policy, since then, because of Finance. So for Google Maps again, it's the first link."* [repunctuated]

Also,

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One of the complainants to the European Commission – the British vertical search engine Foundem – has published some of the evidence behind part of its complaint;

It shows what happened after 2007, when the Google policy of ‘universal search’ was instituted.

I now borrow some of this material in ppt form.

NB: rebuttals must exist, but I have not seen any.

Where does this take us?

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This is only one side of the story, but on the face of it, if discriminatory conduct were proven, it would be contrary to TFEU Article 102 on the abuse of dominance;

If trust among the parties were absent, then given the complexity and secret nature of the algorithms, devising a remedy in the form of a credible commitment (cf. the French case above) would be a challenge.

The French Competition Authority's conclusion on search advertising

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'Search engines and sponsored links are of genuine use.. and have the potential to create significant added value';

'Google today has a strong dominant position in the market for search-based advertising';

'The Competition Authority does not recommend the enactment of a general regulatory framework';

'Competition law can limit Google's conduct..'

Autorité de la Concurrence, Opinion 10-A-29, 4/12/2010

The high-tech angle

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The Google chairman recently quoted Andy Grove:

"High tech runs 3x faster than normal business; government runs 3x slower. So we have a 9x gap"

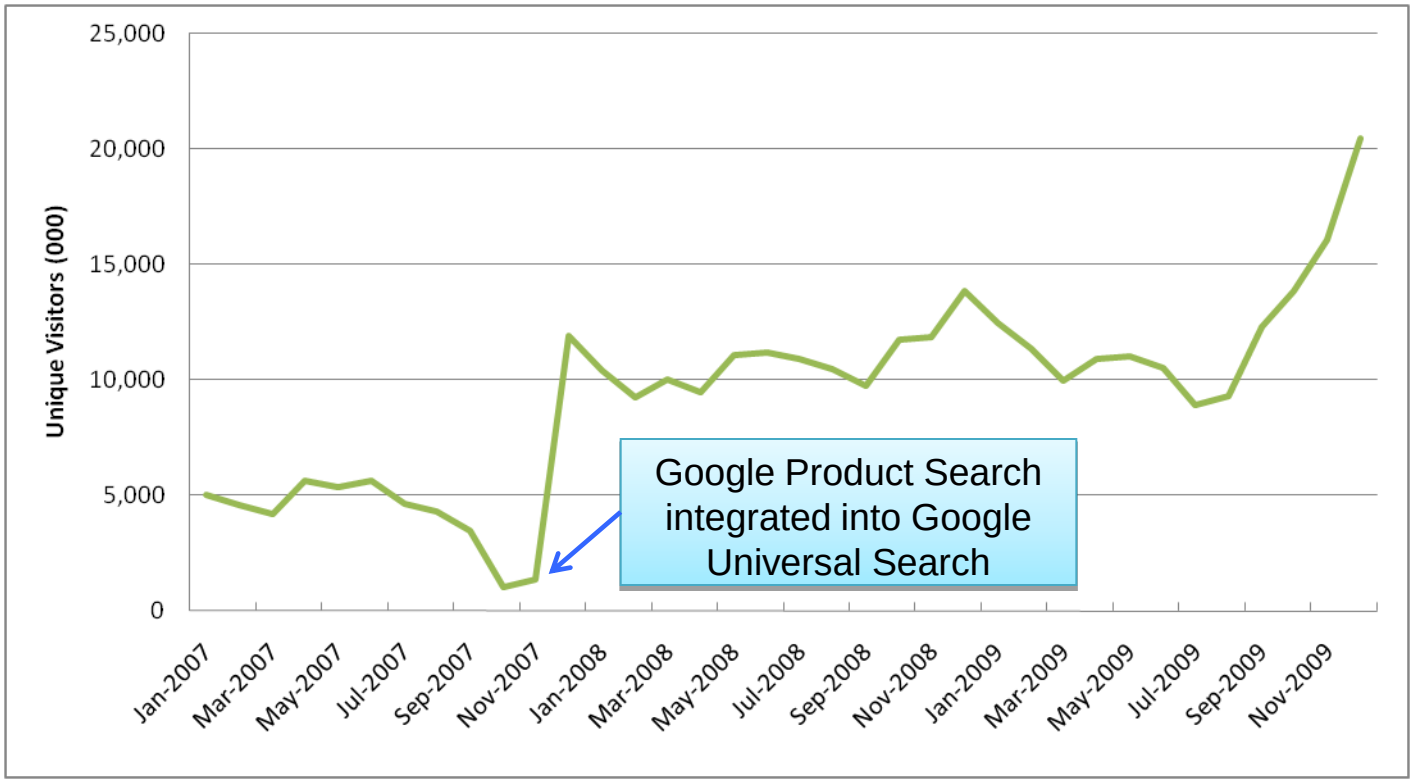
But this usefully delays immediate intervention in fast developing 'competition for the market' sectors. But even massively beneficial high tech monopolies can become a break on innovation and further end user benefits.

In Google's case, nothing is yet proven – except its great potential for economies of scale and scope. But the current competition investigations will have to produce some interim answers.

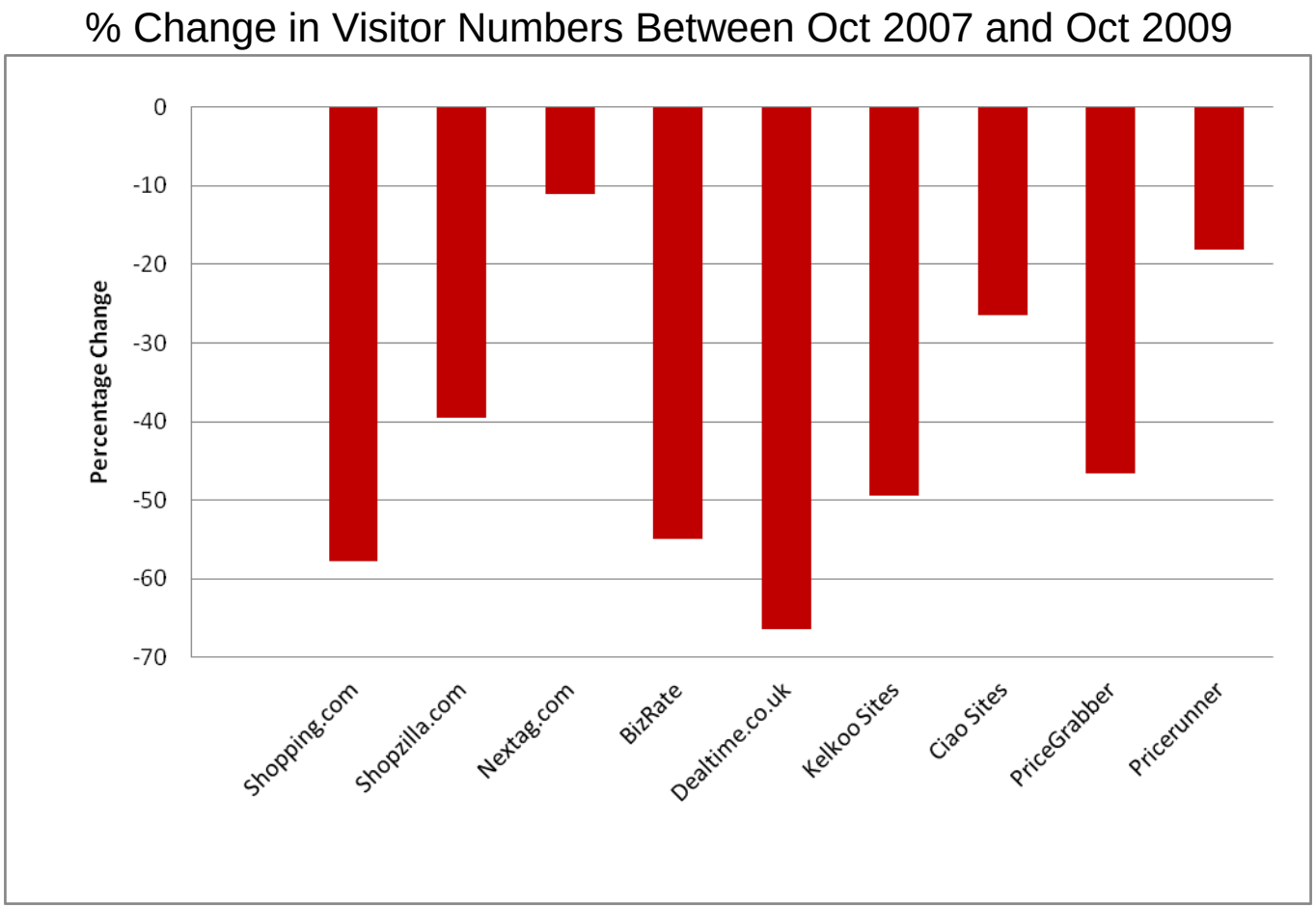
Foundem's EU Antitrust Complaint

Dominant Horizontal Search Engine + Discriminatory Penalties + Preferential Placement ("Universal Search") = Unassailable Competitive Advantage in Adjacent Markets

Traffic to Google Product Search

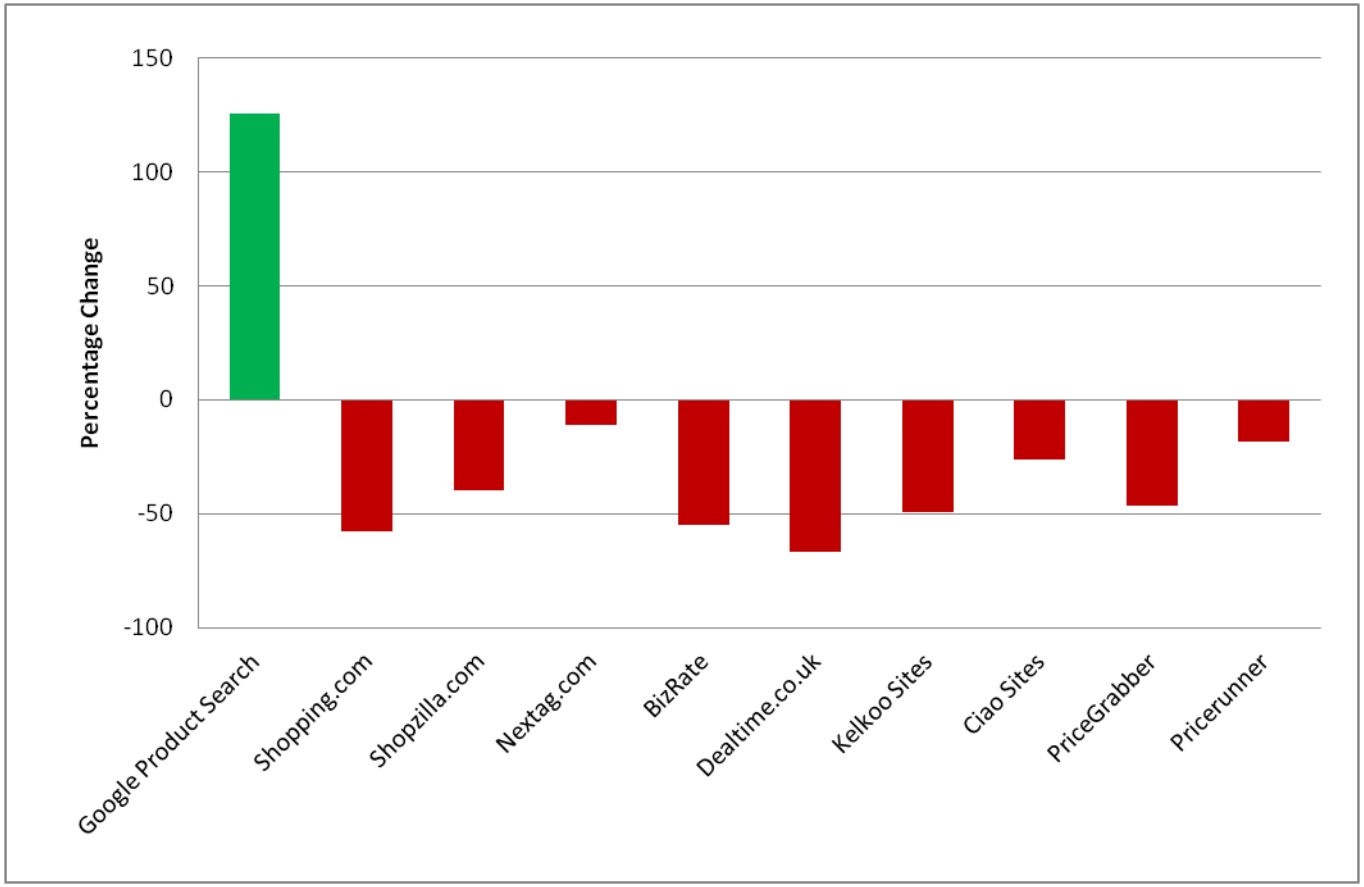


Effect on Traffic to UK Competitors



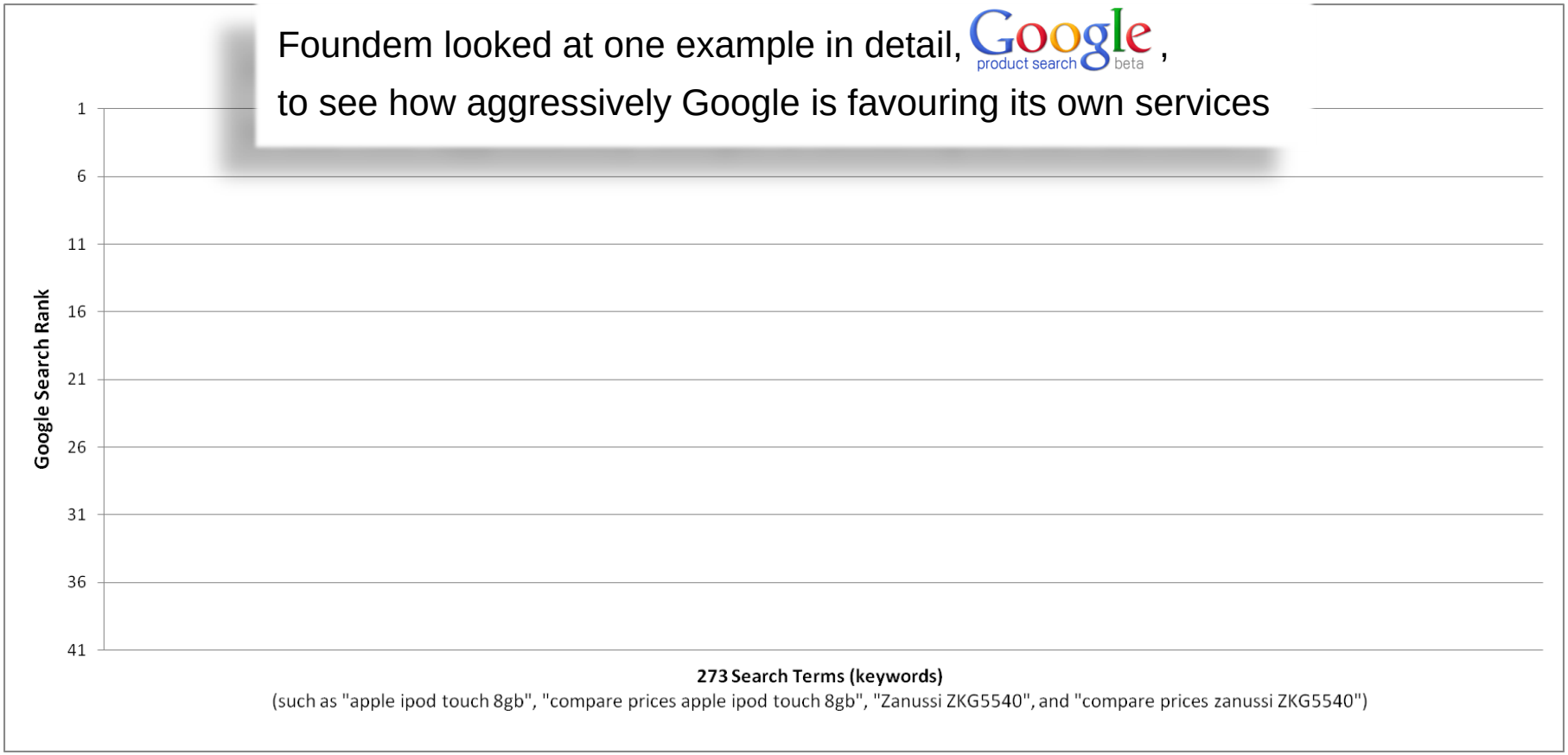
Effect on Traffic to UK Competitors

% Change in Visitor Numbers Between Oct 2007 and Oct 2009



Google Product Search (Froogle) vs. All Price Comparison Sites

Foundem looked at one example in detail, Google product search beta,
to see how aggressively Google is favouring its own services



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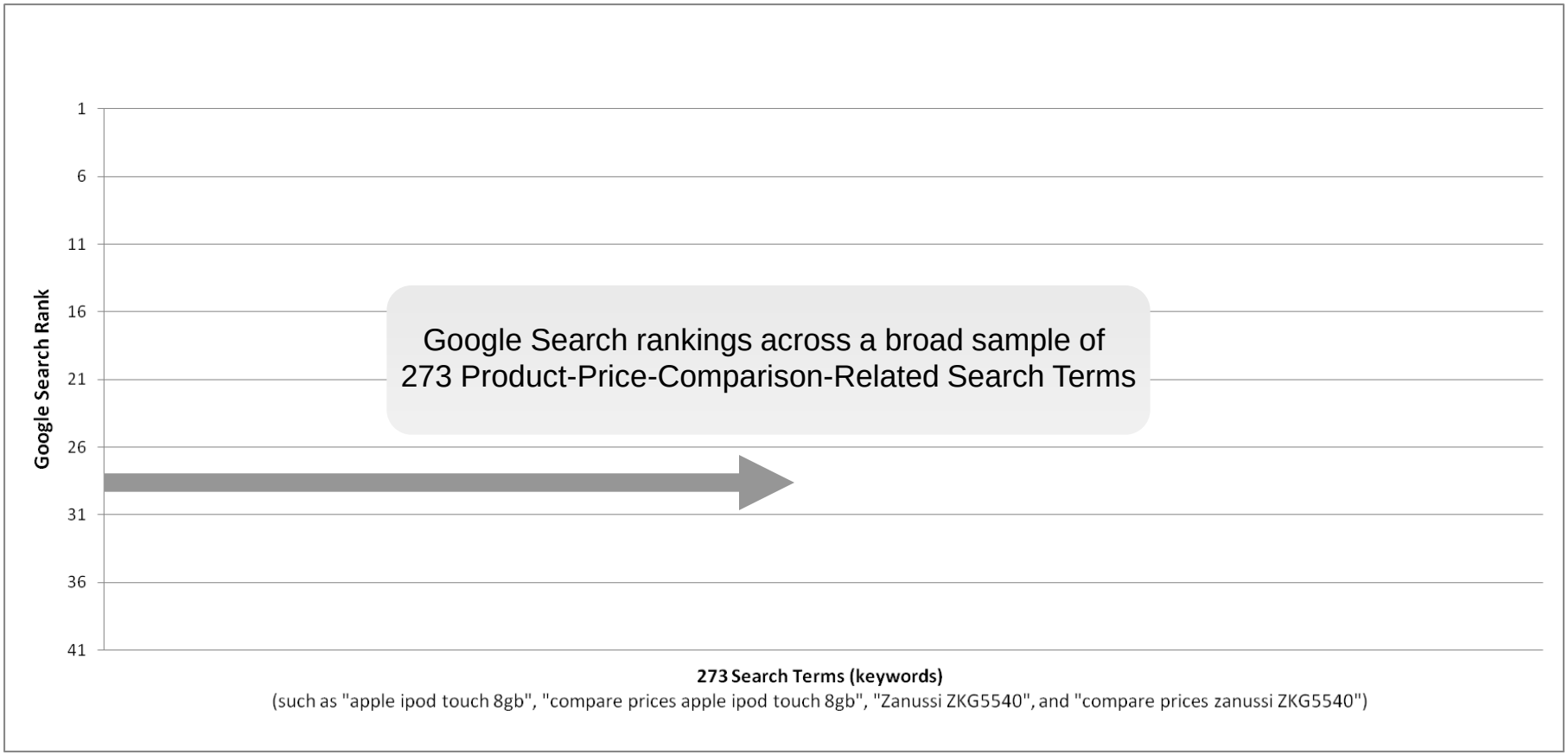

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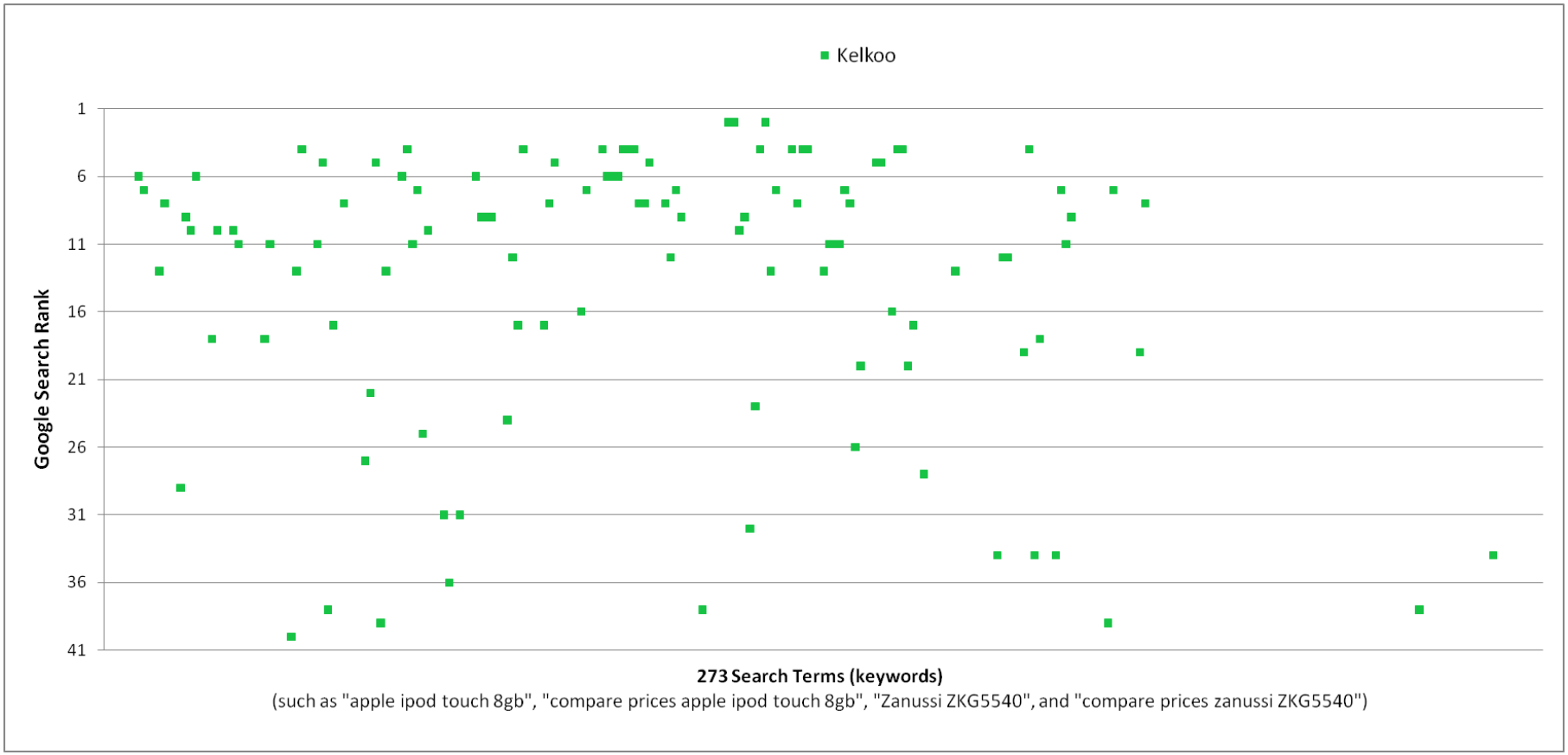

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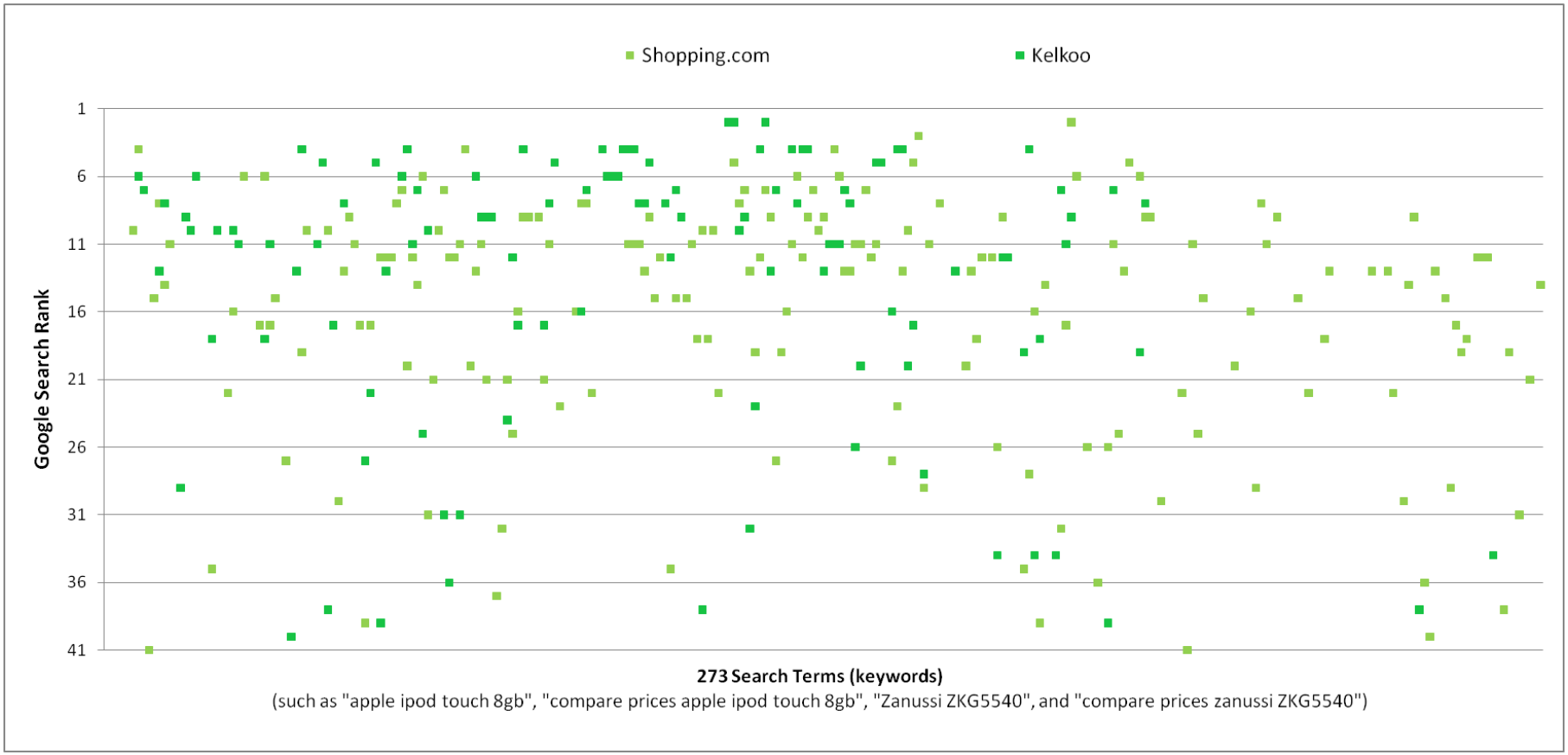

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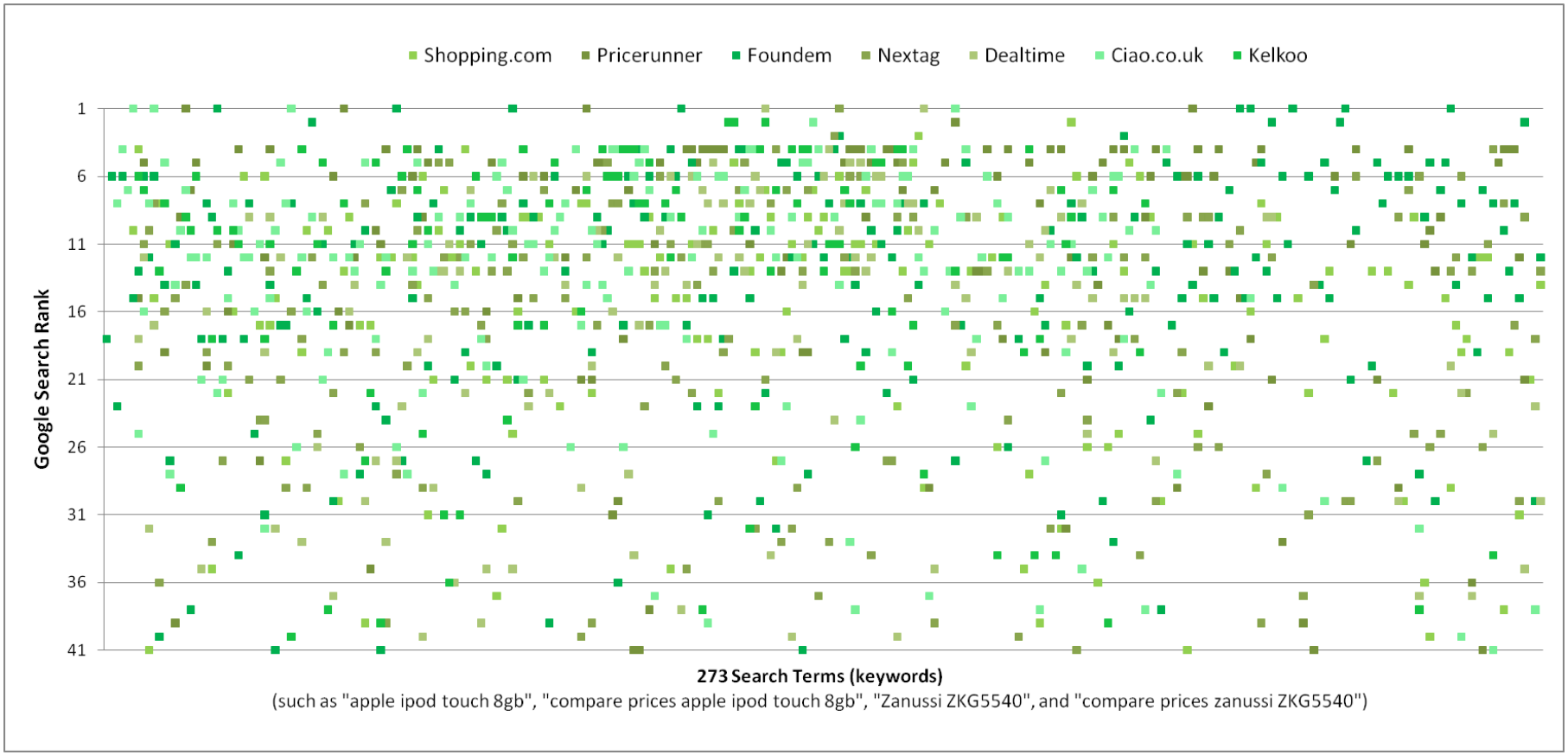

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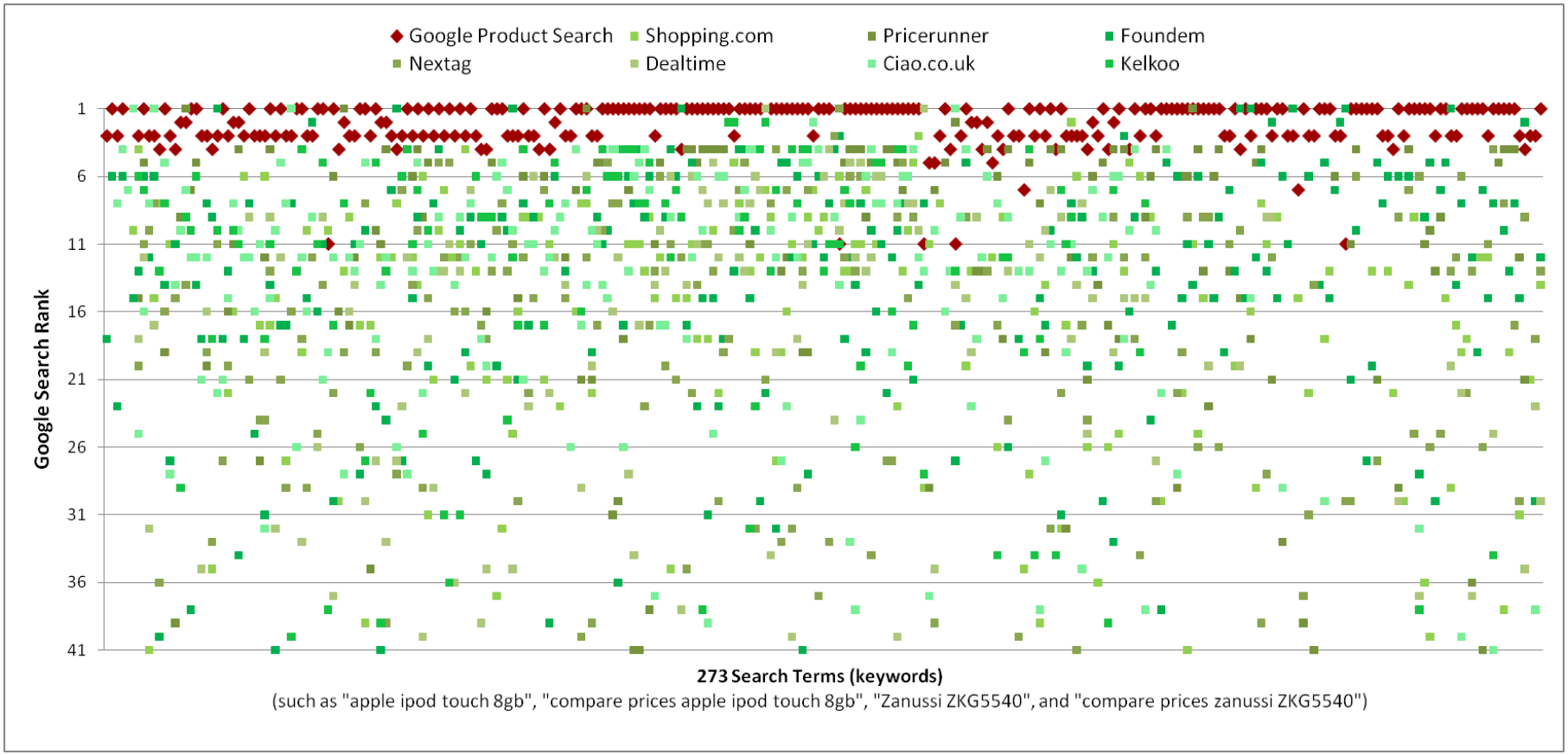

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