

Internet and Antitrust: An overview of EU and national case law

Anticompetitive practices, Abuse of dominance, Agreement, Vertical restrictions, Barriers to entry, Foreword, Clearance Phase II (merger), Clearance Phase I (merger), Internet, Information technology

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Maurits Dolmans, Henry Mostyn, e-Competitions | N° 71276, www.concurrences.com

I. Introduction

This e-Competitions Special Issue collects articles on competition law developments relating to the Internet at national and EU levels, as authorities seek to apply antitrust principles to the new world of online services. The changes brought about by the Internet cut across various sectors of the economy; hence, the cases concern numerous industries and issues.

A few key themes, however, are identifiable. Most obvious is the disruptive innovation that has challenged traditional business models and wrong-footed firms whose positions once appeared unassailable. Internet access has revolutionized our access to information, services, and even distribution of physical goods. Companies such as Airbnb, Alibaba, Dropbox, Facebook, Flickr, Khan Academy, Knewton, LinkedIn, Lyft, Netflix, Pinterest, Skype, SnapChat, Spotify, TED, Twitter, Uber, WeChat, WhatsApp, and Wikipedia—typically founded within the last decade—have challenged old businesses. And this is not to speak of Amazon, Android, Apple iTunes, Baidu, eBay, Expedia, Google, Kayak, TripAdvisor, Yandex, Yelp, YouTube, and many others. But history shows these firms are just as likely to be leapfrogged by rivals with an unexpected new angle, as they themselves displaced incumbents such as MySpace, Bebo, taxi operators, bookstores, music CDs, video rental firms, and high street stores. In a desktop-based environment, browsers were the gateway to the Internet (not search engines, considering there are many other ways to access online information and to attract users) [1]. But that environment, too, is being disrupted. Mobile online traffic now exceeds desktop-based Internet traffic, heralding the demise of the browser and the rise of the app as a means to access services, information, and communication (and threatening to make browser-based search redundant in the process).

Is this disruption to be feared? What drives this innovation and how can it be encouraged? And what

role do well-worn antitrust principles play in the online economy?

The first question is an intriguing one. Fear is clearly present amongst incumbents – for instance, the CEO of the politically powerful Springer publishing house, owner of the largest newspaper in Europe, has said he is “afraid of Google”. But while destructive creation is difficult to accept for those whom it disrupts, it creates enormous consumer welfare, not least from the availability of free and constantly improving services: *“Innovation is not just about the next whiz-bang gadget... It’s about our quest for knowledge and our humanity. From the vaccines and medicines that have saved countless lives to the invention of the lowly clothes washing machine, which helped emancipate women. It’s about economic opportunity too ... Young, fast-growing companies — the innovators — are the drivers of growth and employment. And they create a virtuous cycle, as these people are more likely to go on to start their own companies, with their own ideas, generating more economic activity.”* [2] The Swedish founder of Skype, Niklas Zennstrom, put it well: *“On balance, disruptive innovation is very positive. In an isolated environment, something is being done in a traditional way. Then innovative entrepreneurs come out and say, ‘Hey, you can do this much more efficiently for a fraction of the cost and with a tenth of the number of employees.’ For customers, it’s fantastic. But there are people who are losing jobs, which is not great for them and potentially a burden for society. Over the long term, however, if you don’t have disruptive innovation, you will become a country or a market full of incumbents and will eventually be disrupted by somebody else, which would be very bad for you. So yes, on balance, disruptive innovation is good.”* And the innovators are not immune from disruption either: *“just as invention is dynamic, so are the industries it creates.”* [3] In a dynamic environment, even supposedly dominant innovators must keep renewing, or they will be leapfrogged by newcomers.

So, to the second question, how does one foster innovation? An innovation economy needs an entrepreneurial spirit and culture, rewarding courage and risk-takers who follow their vision instead of going for job security, and allowing them to get up and start again if their business fails. Looking at the origins of the many young companies that feature in this e-Competitions edition, such as Skype, a few lessons can be learned:

- A successful technology ecosystem requires a hub, populated by a critical mass of inspiring role models. These can be individuals like HP’s William Hewlett in Silicon Valley who inspired Apple’s Steve Jobs; companies like Skype in Stockholm, Philips in Eindhoven, or Nokia in Helsinki; or universities like MIT, Cambridge or Delft. The hub attracts other innovators, creating a beneficial network effect: *“People who worked for the first-generation entrepreneur start companies. Then engineering students go to work for a start-up instead of a large corporation or a bank, and you start seeing successes. Governments can facilitate this. In the United Kingdom, for example, the government has been very focused on making the country a great place for entrepreneurs, and that has been helpful in making London a terrific tech hub* [4].”
- Access to skilled resources is crucial, requiring at least two things: an excellent education system, including academic hubs as good as MIT, that teach not only technical skills, but also critical thinking, curiosity, and creative action; and an enlightened immigration policy [5].
- Access to financial resources, risk capital, and financial markets is needed, and rules that allow investors in innovation to take risks and reap the reward if they succeed. For some fundamental research, government support can play a role, as shown by the development of the ARPANET

sponsored by the National Science Foundation, which later became the Internet. Zennstrom comments: *“What governments can do is not invest themselves but make it easier for private investors to invest—by, for example, reducing capital gains taxes for investing in start-up companies. And a start-up company doesn’t have a lot of money, so you pay employees with stock options; governments can make sure that those stock options are not too costly to administer and are taxed as little as possible.”* Perhaps surprisingly, given Sweden’s reputation, he adds, *“tax reform in Sweden has been very favorable (sic) to entrepreneurs and their investors. There is no capital gains tax when you’re investing in private companies; there is no wealth tax; there is no inheritance tax. I don’t know if there’s a correlation between that and the fact that there have been so many successful entrepreneurs coming out of Sweden, but maybe it is a reason for those entrepreneurs not to move abroad.”* Similarly, Europe would benefit from IPR (especially patent) laws strong enough to encourage innovation, but not so strict as to block new entry.

- But we also need an appropriate set of competition rules that are strong enough to prevent incumbents from stifling innovative new entrants, and not so rigorous as to stifle the new entrants in turn once they become successful.

Government would do well to keep these points in mind, even more so when there is political pressure to reduce spending on education, discourage immigration, oppose the EU, raise taxes on the rich (as opposed to fixing the broken corporate tax system), and regulate what competition law cannot address (as opposed to better focusing existing regulation and enforcement on sectors creating systemic risks, like finance).

In this context, this special e-Competitions edition seeks to answer the third question—what role do well-worn antitrust principles play in the online economy—and from the wealth of material, we select a few key themes. Section II addresses some important characteristics of competition online (although there are others) that enable innovation competition, and deserve to be protected: (i) the free nature of many online services, the low switching costs, and the frequent user multi-homing; (ii) the dynamism of the online economy, where typically the primary parameter of competition is innovation; and (iii) the lowering of barriers to entry. Section III applies these principles to what will likely be the most controversial case in 2015: the Commission’s investigation of Google. Section IV examines vertical restraints and most favoured customer clauses. Finally, Section V provides a short conclusion.

II. Competition in Online Services

Free services, network effects, and multi-homing. Many online services are free (or available at a very low price), including social networks, communication services, productivity applications, email, and search. This has important legal implications.

First, absent a trading relationship between suppliers and customers, it is questionable whether the free service is a relevant antitrust “market”. The concept of an antitrust market presupposes a trading relationship where products or services are bought and sold for a price, and where substitution is measured by reference to a small but significant increase in price [6]. In the case of ad-funded free services, therefore, the market should be defined as the market for advertising [7]. Suppliers compete in this two-sided market by improving their free service to attract as many users as they can, targeting their ads as well as they can, and thus offering advertisers a competitive

return on investment, compared to other advertising options.

Second, usage shares of a free service should not be equated with *market* shares that are calculated based on sales of paid products. Market shares based on sales serve as an indicator for market dominance because they indicate whether a firm has “*power in the sense that it can more easily pursue a pricing policy independent of competitive conditions*” and therefore is “*able to control prices*” [8]. But this does not apply to free services because: (i) the free nature of the online service is so deeply entrenched in terms of user expectation and business models that providers cannot start charging without users immediately switching to competing services; and (ii) use of a free service does not require users to make any investment or commitment, allowing users easily to switch without losing anything.

Users may not be able to switch easily when network effects exist. Network effects may arise in some—but not all—online services, when the amount that people are willing to pay for the service depends who else, and how many others, are already using it. Switching to a less popular network may not be attractive. Economists Katz & Keating note, however, that “*a network market is less likely to tip or exhibit lock in when significant numbers of users multi-home.*” [9] Intuitively, this seems correct: where users from time-to-time sample rival providers’ offerings, there is a smaller likelihood for the market to “tip” in the favour of one provider. Multi-homing is easy in the online sector, both for users and for advertisers: Sampling alternatives and switching typically requires little user effort and can be done in a matter of seconds, by, for example, clicking on a link or typing a URL into a browser. There are generally few learning costs since online services strive to be intuitive. If a provider’s quality falls behind or rivals introduce new attractive features, users can and will switch. Even if they do not, that is not proof of absence of effective competition: the threat of users’ switching drives suppliers to innovate so as to stay ahead of their rivals.

Cases in this special e-Competition edition illustrate this. The EU Commission and General Court confirmed in *Microsoft/Skype* that usage shares of a free service as high as 80-90% were not indicative of market power. “[A]ny attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge.” [10] Network effects exist in consumer communications because users derive substantial direct value from an increase in the number of other users on the network. Yet the Commission—upheld by the General Court—found that these network effects did not shield the merged entity from effective competition even when combined with very high usage shares, because many users engaged in “multi-homing” and rivals competed by constant innovation [11].

This approach was confirmed in *Facebook/WhatsApp*. The EU Commission cleared the merger even though it involved products with direct network effects. The value to users of a messaging app increases with the number of users using the app – like the telephone. Yet the Commission found that “*while network effects exist in the market for [messaging] apps, in the present case, on balance, they are unlikely to shield the merged entity from competition from new and existing consumer communications apps.*” [12] First, messaging apps are a “fast-moving sector” sector where switching costs were low. As a result, “*any leading market position, even if assisted by network effects is unlikely to be incontestable.*” [13] Second, the use of one messaging app did not “*exclude the use of competing [messaging] apps by the same user*”. Multi-homing was therefore common, and was facilitated by the “*ease of downloading a consumer communications app.*” [14] Third, users of messaging apps “*are not locked-in*” to any particular physical network [15]. In such an environment,

even a very high usage share is not indicative of market power.

Dynamic competition through innovation. In the online economy, the main parameter of competition is innovation. In free services, innovation will usually be the *only* relevant parameter. This broadens the universe of actual and potential rivals that exercise competitive pressure on a particular service. In the case of static price competition, the universe of rivals is limited by those that can respond relatively quickly to changes in prices. But where innovation is the parameter of competition, the focus is on dynamic competition, which involves a longer time horizon and a wider number of operators.

If a technology company stops or slows down its innovation, this can have irreversible long-term consequences for its competitiveness and its brand. The EU Commission emphasized this in *Microsoft/Skype* [16], where it concluded that the merged entity would remain under innovation pressure post-transaction (regardless of usage shares) because the merged entity would risk user “switching” if “innovation was stopped or slowed down” [17]. In *IBM/Telelogic*, the EU Commission held that even shares of sales data did not represent a proxy for market power in markets characterized by competition on quality and innovation, because “competitors who do not regularly upgrade their products, or who do not introduce new products meeting increasing customers’ requirements, will rapidly lose out” [18]. And in *Facebook/WhatsApp*, the Commission, as noted, found that in a “fast-moving sector” where switching costs were low “any leading market position, even if assisted by network effects is unlikely to be incontestable [19].”

Online services, therefore, face pressure to innovate not only from short-term threats but also from threats that would materialize in the longer run. Pressure to keep innovating not only comes from rivals that offer a similar service at a particular moment in time, but also from other providers that could innovate to develop their offerings in ways that may displace the service in question.

Low barriers to entry. Online technologies have lowered barriers to entry in a number of important ways. Cloud computing has enabled so-called “infrastructure as a service”, “platform as a service”, and “software as a service” models that provide businesses with computer processing capacity, storage, and software via the Internet based on a pay-as-you-go pricing. Instead of having to invest heavily in data centres, servers and other assets, firms can rent infrastructure or software, only paying for how much they consume. For example, SnapChat—the photo sharing service phenomenon—runs entirely on the cloud and has, therefore, never had to purchase services, allowing the company to focus on product development rather than infrastructure.

Moreover, the widespread adoption of open source software, available for free and under license conditions, allows licensees to study, change, and distribute the software to anyone and for any purpose (including competitive). This facilitates entry in the online economy by offering a readily available software foundation for new businesses to develop their product or service.

Finally, the Internet has dramatically expanded the geographic reach of SMEs and large firms alike, allowing them to find customers across the world instantly. Consumers buy globally with a few clicks. This opens unprecedented opportunities for SMEs. Consider, for example, the website Airbnb that allows users to rent out lodging that was founded in 2008. Its ability to connect users across the globe quickly and easily means that it now has over 800,000 listings in 33,000 cities and 192 countries. Airbnb was valued at \$10 billion in April 2014 [20].

III. The Google Case

It is interesting to apply these principles to the ongoing investigation of Google. In April 2013, the Commission published a memorandum announcing its preliminary view that Google was dominant in online search [21]. The Commission gave two reasons: (i) Google held “*market shares [in general search] well above 90% in most European countries*”; and (ii) “*network effects may lead to entrenched market positions*” [22]. The Commission cases mentioned above suggest that this view is based on four errors:

First, the purpose of a search engine, like Google, is to offer users a means to discover online content. Other than general search engines, users have many other tools for this purpose, including specialised search services (such as Amazon, Yelp, TripAdvisor, Nextag, or Kelkoo) [23], social networks (such as Facebook, Twitter, or Pinterest), and a swathe of mobile apps. This is not theoretic: the user traffic directed by social networks to third-party sites has now surpassed the amount of traffic referred by classic search services [24]. Mobile apps enable users to bypass search engines and access online services and information directly. Steve Jobs noted, “*Search is not where it’s at. ... When people want to find a place to go out to dinner, they’re not searching they’re going into Yelp ... They’re using apps to get to data on the Internet* [25].” Data show that users spend 60% of their time on mobile vs. 40% on desktop, and of that usage more than 80% of time spent by mobile users with major Internet properties occurs via apps, and less than 20% via browser-based search [26]. All of these alternative means of discovering information exercise a material competitive constraint on Google.

Second, in the *Google search* case, usage shares are said to be high (if one ignores specialised search and the alternatives above). Yet even if the analysis were limited to general search services, the *Microsoft/Skype* and *Facebook/WhatsApp* cases confirm that mere usage shares are not indicative of market power. Search is free, switching is easy, and users multi-home. The relevant parameter of competition is innovation. Market power could therefore only manifest itself in an ability to profitably reduce innovation, without users at the margin switching to competitors. Indeed, this happened in *Microsoft*, after it excluded Netscape. But there is no evidence that this is the case in online search. Far from it, Google’s innovation is rampant.

Third, neither direct nor indirect network effects arise in online search. As explained, direct network effects arise if the use of a product by one user increases the value of that product for others [27]. But the fact that a given user is searching on a particular service does not increase the value of that service for other users [28].

Indirect network effects arise where use of a product increases the value of a another product and use of that second product, in turn, increases the value of the first product, thus creating a self-reinforcing feedback loop. One example are operating systems discussed in the EU Commission’s *Microsoft* decision: Heavy use of an operating system encourages program developers to write programs for that OS; while availability of more programs for a given OS, in turn, encourages user to adopt it. Search, however, is not subject to such indirect networks. While a greater number of users may attract advertisers, advertisers do not attract users. In fact, an increase in ads above a certain level is perceived as a quality reduction and results in negative feedback effects. Besides, just as the Commission found in *Microsoft/Skype* and *Facebook/WhatsApp*, the low switching costs and user multi-homing seen in search would mean that even if network

effects were present (which they are not), Google would not be shielded from effective competition.

Finally, some have suggested that online search is subject to data scale or “big data” barriers to entry. These claims maintain that the more data or queries a search service receives, the better its quality becomes. But the primary drivers for high-quality search results are engineering capabilities that are unrelated to user data. These include, for example, indexing ability, query analysis, algorithm quality, and localization. Data, moreover, are ubiquitous. It is estimated that every few days, humanity now generates 5 exabytes worth of data, roughly the volume produced between the dawn of time and 2003 [29]. Virtually every company—large and small—has access to detailed data about their economic transactions. As a result, data are not a competitive limiting factor. Even if they were, “learning by doing” is subject to the law of diminishing returns and rival search suppliers have long surpassed any minimum critical mass of queries. Search engines like Bing, and Yahoo!, just as smaller search engines like DuckDuckGo, are well beyond the size where any scale effects would matter. And specialised search providers such as Amazon, Yelp, and Tripadvisor cherry-pick the most attractive customers, and face an even lower critical mass (if any): *“Google is a search company, but the searches it makes money from are the searches people do before they are about to buy something online. These commercial searches make up about 20% of total Google searches. Those searches are where the ads are [30].”* So, the key is to build the data systems and analytic expertise necessary to turn data into information, and that information into action. Data are for information technology like sand is for silicon chips. The *Microsoft/Skype* and *Facebook/WhatsApp* decisions suggest that a finding of dominance is difficult in such an environment.

It is interesting to compare the EU Commission’s approach—admittedly only preliminary—in Google with the dynamic analysis of the Chinese Supreme Court in *Qihoo 360 v. Tencent* [31]. As part of its review of Tencent’s alleged anticompetitive conduct, the Chinese Supreme Court carefully analysed competition in instant messaging. It found Tencent not to be dominant even after concluding that the company held a usage share above 80%. This was due to a number of factors: First, like the EU Commission in *Microsoft/Skype* and *Facebook/Whatsapp*, the Court observed that market share was a rough and misleading indicator of dominance in the Internet industry. Second, competition was based on quality and innovation, rather than price; and due to the dynamic nature of the messaging market, if Tencent lowered its service quality, users would change to other messaging services. Third, there was considerable innovation pressure in messaging services; to keep attracting users and advertisers, messaging providers needed to keep improving the quality of their services. Finally, there were no barriers to switching, and users had a wide-range of different options [32].

In April 2013, the Landgericht Hamburg examined similar issues following an action brought by the Association of German Weather Service Providers. The claimant alleged that the display of Google’s Weather “OneBox” at the top of Google’s search results page unfairly deprived them of traffic. The Court disagreed. It held that Google cannot be prevented from implementing beneficial innovation so that other companies can appear in the previously usual way in search results. Prohibition on abuses of dominance are not designed to preserve outdated business models. It was procompetitive for Google to display the Weather OneBox because it improved the overall attractiveness of Google’s service. Indeed, it was *“fundamentally legitimate”* for Google to seek to increase the quality of its results by showing innovative designs such as the Weather OneBox. Finally, the Court found that third-party sites that appear for free in Google’s search results were *“free riders”*. They had no innate right to any particular positioning or degree of prominence in Google’s search results [33].

2015 will likely see the Commission's next steps in *Google*, and it remains to be seen whether the Commission's approach will be consistent with the analysis in these recent cases.

IV. Internet Sales and Vertical Restraints

Another example of disruption is seen in the distribution sector, where online sales are displacing brick-and-mortar stores, and price comparison websites interpose themselves between buyers and suppliers. The Commission favours online sales, to the extent of prohibiting suppliers from imposing limitations on Internet sales by distributors, even in selective distribution.

Online platforms compete with suppliers, and with other platforms, which gives rise to further complications. The *Apple e-books* case is an example [34]. Amazon's Kindle spawned a market for e-books, but at the expense of book publishers' and authors' long-term interests. Amazon seized control over pricing, and priced bestsellers low, so as to make the Kindle a more attractive platform. Amazon saw content as the "gasoline that drove the car (Kindle)", whereas the publishers saw content as the "fine wine in the bottle." The cheaper the books, the more readers would be attracted to the Kindle, and become locked-in to Amazon's platform. From the publishers' perspective, Amazon's approach not only lowered the perceived value of content, but also created a dependency on Amazon, as physical bookstores closed and Amazon came to dominate both e-books and online sales of physical books. They saw a threat of monopsony, a threat to their ability to develop authors and support a range and variety of content beyond bestsellers, a lack of direct contact with the customer (with Amazon controlling transaction data), and stagnation resulting from a lack of competition to the Kindle, which did not accommodate rich content (e-books with colour, video, audio, games and other features).

When Apple announced the iPad, and offered an agency model (with the publisher setting the price for the e-book), publishers gratefully accepted the chance to keep their fate in their own hands. The agency model gave them control over pricing and a chance to develop dynamic pricing tools for inter-publisher competition (whereas in the Kindle model, Amazon set the price for all publishers), access to customer and sales data, and a media platform for rich content. Unfortunately, US authorities and the EU Commission found evidence of some horizontal contacts between some publishers, which eventually led to a commitment decision requiring the publishers to water down the agency model for some time. The result was to reinforce Amazon's position even further.

The *Apple e-books* case also shone a light on MFN clauses. Apple had asked for a "most favoured customer" clause to ensure that its iBookstore would offer the cheapest prices online. It argued that it needed non-discrimination to justify its investment in eBooks for the iPad (to protect against opportunism), and to give consumers comfort that they benefited from the best price. The Commission took the position that MFN clauses created pricing rigidity because they discouraged publishers from discounting elsewhere (since they would have to pass on the discount to Apple too). The Article 9 Commitment therefore removed MFN clauses, allowing publishers to discount as they please (while also allowing agents to pass on their commission to give further discounts).

MFN clauses continue to be an area of attention also at the national level: The French, Italian, and Swedish competition authorities are conducting market tests on commitments offered by Booking.com (a vertical travel search site) to remove price parity clauses from its contracts, with the Commission coordinating [35]. Seven competition authorities (France, Germany, Sweden, UK, Italy,

Austria, and Ireland) have now opened investigations in online booking, raising similar issues as in the Commission's e-Books investigation and the Bundeskartellamt's *Amazon and HRS* cases: i.e., parity clauses in contracts between Booking.com and hotels that oblige the hotel to offer Booking.com the same or better room prices as the hotel offers on all other online and offline distribution channels. The concern is that these clauses may restrict competition between Booking.com and other vertical travel sites, and hinder new sites from entering the market. A puzzling aspect of the hotel booking cases is the apparent inconsistency with the EU *Google* investigation. On the one hand, hotel booking sites (i.e., vertical travel search services) are alleged to have been foreclosed by Google's favouring of links to its own vertical search services. On the other hand, the sites have been so successful that they are being pursued for anticompetitive practices by numerous national authorities. In the UK, the OFT (now the CMA) has even emphasized that vertical travel search is a dynamic, innovative sector that is characterized by frequent new entry [36].

V. Conclusion

The articles in this special e-Competitions issue throw light on EU and national competition authorities' efforts to apply antitrust principles to the novel situations created by the advent of the Internet.

In general, these cases show that the online economy has promoted and continues to promote competition and innovation to an unprecedented degree, paving the way for a broad range of new competitors, new business models, and new products and services. Online technologies have lowered barriers to entry. Information and services can now be disseminated and accessed almost instantaneously across the globe, which in turn stimulates further competition and innovation. It is hard to think of any other area of the economy that is so vibrant, dynamic, and competitive.

New business models and technologies raise questions about how they fit within existing legal frameworks. Competition law may be useful to prevent incumbents from raising barriers to online competition. But the use of competition law should not go so far as to undermine dynamic competition, from incumbents (like book publishers, who were adapting to the new environment) and newcomers alike (as might happen in the Google case). Consumers would lose out twice if Google were prevented from designing its search services in the way it thinks best to meet users' needs: a "must carry" remedy would discourage innovation by Google, since these improvements would immediately benefit rivals; and it would equally reduce rivals' incentive to innovate, since they could free ride on Google's attempts to attract users. 2015 will likely provide some fascinating new insights in this area, as well as demands for sector-specific non-competition regulation. Regulation would affect every supplier, however, and could even raise barriers to entry. Competition law rules as they stand today provide the best framework for addressing possible competitive problems as they arise, provided they are applied with care and nuance.

The authors have been involved in a variety of the cases included in this special edition, including a string of Microsoft cases, the eBooks (Apple) case, several Google cases, various telecom matters. These comments, however, are the authors' personal views, and do not bind the firm of its clients

[1] Bild, for instance, the most widely read newspaper in Europe, gets around 70% of its traffic

directly, because people bookmark the site or type www.bild.de straight into their browser. A little over 10% of their traffic comes from search and just under 10% comes from social sites like Facebook and Twitter. See “The New Gründergeist”, Eric Schmidt, October 13, 2014, <http://googlepolicyeurope.blogspot.....>.

[2] “The New Gründergeist”, Eric Schmidt, October 13, 2014, <http://googlepolicyeurope.blogspot.....>

[3] “The New Gründergeist”, Eric Schmidt, October 13, 2014, <http://googlepolicyeurope.blogspot.....>

[4] “*The Nordic Model; A Conversation With Niklas Zennstrom*” (the founder of Skype), Foreign Affairs, Jan 2015.

[5] “*The Nordic Model; A Conversation With Niklas Zennstrom*” (the founder of Skype), Foreign Affairs, Jan 2015.

[6] For this reason, the EU Commission and German Bundeskartellamt have held that free services do not constitute relevant antitrust markets, including in cases involving TV and radio services, advertising papers (“Anzeigenblätter”), or online encyclopaedias. See, e.g., Bundeskartellamt Decision of April 29, 2009, B 6 - 09/09, Bertelsmann/Brockhaus, ¶ 63; Bundeskartellamt Decision of January 19, 2006, B 6 - 103/05, Springer/ProSiebenSat.1, ¶ 23, about this case see [Porter Elliott, The German Federal Court of Justice finds that merger prohibition decisions can still be appealed even after the parties abandoned the transaction \(Springer, ProSiebenSat.1 Media\), 25 September 2007, e-Competitions Bulletin September 2007, Art. N° 44887](#), [Max Klasse, The German Federal Court of Justice acknowledges the right to a declaratory judgement on blocked mergers \(Springer/ProSiebenSat.1\), 25 September 2007, e-Competitions Bulletin September 2007, Art. N° 14294](#), and [Tomasz Krzywicki, The German Federal Court confirms the dismissal of an appeal against a media merger prohibition \(Axel Springer / ProSiebenSat.1 Media\), 8 June 2010, e-Competitions Bulletin June 2010, Art. N° 32068](#) ; Bundeskartellamt Decision of April 12, 2000, B 6-20/00, akzent, ¶ 8. Case IV/M.1889, *CLT-UFA / CANAL+/VOX*, Commission decision of February 18, 2000, ¶ 12; Case COMP/M.5121, *News Corp/Premiere*, Commission decision of June 25, 2008, ¶ 15, about this case see [John Gatti, Mary Loughran, The European Commission conditionally clears an acquisition in the market for production and distribution of TV programs, TV satellite and cable broadcasting \(News Corp/Premiere\), 25 June 2008, e-Competitions Bulletin June 2008, Art. N° 37699](#) ; Case IV/M.553, *RTL/Veronica/Endemol*, Commission decision of September 20, 1995, ¶ 17, about this case see [Jon Denness, Karen Williams, The European Commission carries out a detailed inquiry in a Dutch TV proposed joint venture \(RTL/Veronica/Endemol\), 22 May 1995, e-Competitions Bulletin May 1995, Art. N° 39619](#), and [John Gatti, Jon Denness, The European Commission prohibits a joint venture in the Dutch television market \(RTL/Veronica/Endemol\), 20 September 1995, e-Competitions Bulletin September 1995, Art. N° 39592](#) ; Case COMP/M.566, *CLT/Disney/RTL*, Commission decision of May 30, 1995, ¶ 14; Case COMP/M.4504, *SFR/Tele 2 France*, Commission decision of July 18, 2007, ¶ 45, about this case see [John Gatti, Mary Loughran, The European Commission clears, subject to conditions, an acquisition in the fixed and mobile telephony markets \(Tele 2 France/SFR\), 18 July 2007, e-Competitions Bulletin July 2007, Art. N° 37766](#).

[7] Ibid.

[8] Case C-62/86 AKZO [1991] ECR I-3359, opinion of Advocate General Lenz, ¶ 111, 114

[9] Katz, M. & Keating, B. (2012), "Network Effects, Switching costs, and Competition in Unified Communications."

[10] Case COMP/M.6281, *Microsoft/Skype*, paras. 78, 99, 121. The Commission explained that this is because "if a provider starts charging for a service which was used for a long time free of charge and there exist alternative services offered for free, it can be expected that consumers would immediately switch to these competing services" (para. 77), see [Nicolas Petit, The EU Commission decides not to oppose the notified operation and declares it compatible with the internal market and the EEA Agreement \(Microsoft / Skype\), 7 October 2011, e-Competitions Bulletin October 2011, Art. N° 60765](#). Case T-79/12 *Cisco Systems v. Commission*, judgment of the General Court delivered December 11, 2013, ¶ 73, see [Gabriele Accardo, The EU General Court confirms that the merged parties are not dominant in the internet visual communications market and rejects interoperability issues raised by appellants \(Microsoft / Skype\), 11 December 2013, e-Competitions Bulletin December 2013, Art. N° 62231](#).

[11] Case COMP/M.6281, *Microsoft/Skype*, Commission decision of October 7, 2011

[12] Case COMP/M.7217, *Facebook/WhatsApp*, Commission decision of October 3, 2014, para. 135, see [Pablo González De Zárate Catón, The European Commission unconditionally clears an acquisition in the social media sector \(Facebook - WhatsApp\), 3 October 2014, e-Competitions Bulletin October 2014, Art. N° 70606](#).

[13] *Ibid.*, para. 132.

[14] *Ibid.*, para. 133.

[15] *Ibid.*, para. 134.

[16] Case COMP/M.6281, *Microsoft/Skype*, ¶¶ 81-88, 122.

[17] Case COMP/M.6281, *Microsoft/Skype*, ¶ 122.

[18] Case COMP/M.4747 *IBM/Telelogic*, ¶ 152.

[19] *Ibid.*, para. 132.

[20] TPG-Led Group Closes \$450 Million Investment in Airbnb Wall Street Journal, April 23, 2014.

[21] See [Thomas Graf, The European Commission carries out a market test of commitments in its investigation of online search service provider \(Google\), 26 April 2013, e-Competitions Bulletin April 2013, Art. N° 54833](#)

[22] See Commission seeks feedback on commitments offered buy Google to address competition concerns - questions and answers, Brussels, April 25, 2013.

[23] Specialised or "vertical" search services are search services that focus on one or a few specific search topics, such as local information, travel, or shopping. Specialist search services constrain generalist search services because competition in search takes place for individual queries. For example, if a user searches for a [restaurant in Hamburg], that user can turn not only to generalist

search services, but also to specialised search services for local information, such as Yelp, TripAdvisor, or Ortsdienst.de. While the scope of an individual specialised search service may be limited (*i.e.*;, just local information or just product search), there are specialised search services for all major content categories. What ultimately matters is therefore the competitive constraint that all specialised search services exercise in aggregate. See e.g., Case T-342-99 Airtours [2002] ECR-II 2585, ¶ 213, 277: “*the issue here is not whether a small tour operator can reach the size necessary for it to compete effectively with the integrated tour operators by challenging them for their places as market leaders. Rather, it is a question of whether, in the anti-competitive situation anticipated by the Commission, the hundreds of small operators already present on the market, **taken as a whole**, can respond effectively to a reduction in capacity put on to the market by the large tour operators to*” (emphasis added).

[24] “How Technology Is Changing Media”, BuzzFeed, <http://insights.buzzfeed.com/indust...>, based on Shareaholic analysis.

[25] Steve Jobs’ Keynote Address at an Apple event on 8 April 2010. Available online at: <http://www.youtube.com/watch?v=YuQW...>

[26] See <http://www.comscore.com/Insights/Pr...>; and http://www.comscore.com/Press_Event...

[27] Massimo Motta, „Competition Policy: Theory and Practice”, 2006, p. 82-83, § 2.6.3.3; Robert O’Donoghue/A. Jorge Padilla, The Law and Economics of Article 82 EC, 2006, p. 293.

[28] See “The New Gründergeist”, Eric Schmidt, October 13, 2014, <http://googlepolicyeurope.blogspot....>; See also Jürgen Kühling/Nicolas Gauß, “Expansionslust von Google als Herausforderung für das Kartellrecht?”, MMR 2007, 752

[29] See “La concurrence dans l’économie numérique”, Fabien Curto Millet, A Quoi Sert La Concurrence, [book and e-book available on the Concurrences online shop](#).

[30] Carlson, “The Single Most Terrifying Trend Facing Google”, Business Insider UK, December 18, 2014, <http://www.businessinsider.com/the-...>

[31] See [Zhan Hao, Xiang Li, The Supreme Court of China sets up the standard for antitrust private litigation with detailed analysis method in regard to market definition and dominance establishment \(Qihoo / Tencent\), 16 October 2014, e-Competitions Bulletin October 2014, Art. N° 70673](#) ; [Susan Ning, Kate Peng, The Chinese Supreme Court elaborates detailed fundamental principles of anti-monopoly law, in particular in the context of abuse of dominance on the internet market, in its first anti-monopoly case \(Qihoo 360 / Tencent\), 16 October 2014, e-Competitions Bulletin October 2014, Art. N° 70054](#)

[32] See generally, David S. Evans & Vanessa Yanhua Zhang, *The Qihoo v. Tencent Landmark Decision, Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court*, CPI Asia Column (Oct 21, 2014).

[33] An unofficial English translation is available here: <http://www.taylorwessing.com/filead...>

[34] See [Pola Karolczyk, The European Commission opens formal proceedings to investigate sales](#)

[of e-books \(Hachette Livre, Harper Collins\), 6 December 2011, e-Competitions Bulletin December 2011, Art. N° 41873](#)

[35] See Antitrust: Commission announces the launch of market tests in investigations in the online hotel booking sector by the French, Swedish, and Italian authorities, December 15, 2014, IP/14/2661.

[36] Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents, OFT Final Decision, January 31, 2014, para. 6.38.

Maurits Dolmans | Cleary Gottlieb Steen & Hamilton (London) | mdolmans@cgsh.com

Henry Mostyn | Cleary Gottlieb Steen & Hamilton (London) | hmostyn@cgsh.com