



Academic Year 2014-2015

BRUSSELS SCHOOL OF COMPETITION
SPECIALISED STUDY PROGRAMME (LL.M.)
COMPETITION LAW AND ECONOMICS

GOOGLE AND EU COMPETITION LAW: A CASE STUDY

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Intro

- What is a search engine?
- Horizontal v vertical search engines
- Background to the European Commission's investigation

Market definition/ Dominance

- General introductory questions on market definition
- Problem: how do you apply the SSNIP test in two-sided market where there is no price?
- Is the service really given away for free?
- Can there be dominance in a market where services are provided for free?
- Is a 90% market share meaningful in the case of Google? (see *Microsoft/Skype*)
- "Gales of perennial destruction"?
- Role of network effects as barriers to entry? (Here and past cases; Why could Google take over Yahoo? What is minimum viable scale? Are network effects equally important when they only play on one side?)
- In what circumstances can network effects lead to monopoly? What are the reasons why powerful network effects may not lead to monopoly?

- Ability to switch (“competition is one click away”): compare with (i) Msft cases; (ii) Microsoft/Skype (and [Cisco& Messagenet/Commission](#)); Contestable market?
- Are there other barriers to entry?
- Does Google have power to keep price above competitive level or to slow down innovation? How can you gauge innovation?
- Look at other side of market; can Google price ads supra-competitively?
- Online v offline? Search v non-search?
- Hypothetical: even under the assumption of a natural monopoly for searches, would that be a competition law problem?
- Takeaway: is Google dominant? If so, in what market?

Conduct assessment

- Leave aside alleged exclusivity and portability restrictions and focus on search-related practices + scraping
- Several other alleged violations reportedly brought to EC’s attention; some don’t appear to be self-standing violations but some argue that several non-violations put together=violation (N. Petit: Karate competition law); What do you think? How can this conceptually be framed in EU competition language?

Scraping:

- Explain complaints
- Snippets: excerpts originating from publicly available content not subject to copyright
- Useful for users and use legitimate under IP; should/can competition law create a 2nd layer of protection in addition to copyright law?
- Relate discussion to recent debates on privacy and data protection?
- Read [discussion about scraping](#) on Chillin’Competition:
- Explain FTC’s statement + Commissioner Rosch’s dissenting opinion
- Explain commitments
- Discuss parallel development by law in Spain, where newspapers forced to collect money from Google News as compensation for showing their snippets below the links. Against this background, Google has closed down News in Spain, thereby leading news

sites to lose a significant number of visits; editors have publicly stated that this move also constitutes an abuse of dominance on the part of Google; what do you think?

Search-related practices:

- Imposing search neutrality principle through competition law: Brainstorming; under which classic theories of harm could rivals claim to have neutral access to Google's search results?
- Is there a closed category of abuses? Is this a problem?
- Can we develop a novel theory of harm by reference to its effects: if effect is "diversion of traffic", could the abuse be "diversion of traffic"?
 - o **Essential facilities/Refusal to deal:**
 - Premised on assumption that search engines are essential facilities, that neutral access to Google is "indispensable"; are these circumstances met?
 - Gunther Oettinger, the European Commissioner for the Digital Economy, has recently declared that 'a search platform needs to be objective and neutral'. What do you think of this statement? Is neutrality feasible; what does it mean? What's neutral, e.g. when it comes to results of searches for restaurants (quality of page, number of previous visits, cross references, reviews, quality of food?) Are rankings (e.g. Chambers & Partners) ever neutral? Lack of human intervention?
 - Is it a problem of deception or perception? Role of consumer protection laws?
 - Would it make sense to impose an across-the-board neutrality obligation?
 - Is competition law well-suited to impose any such obligation?
 - o **Discrimination as a theory of harm**
 - In what conditions can discrimination be a competition law infringement?
 - Conceivably a theory of harm *in casu* if it were proved that Google overrode algorithms to disadvantage rivals without an efficiency justification; has this happened?
 - Organic results (FTC saw no evidence; does not seem to be an EC concern)

- Sponsored links (where Google makes the money to recoup costs incurred in providing organic search; does not seem to be an EC concern)
- **Universal search? Most interesting**
 - Explain alleged problem
 - From complainants viewpoint
 - From Google's viewpoint
 - Is this typical leverage?
 - Tying? Two products or one way of responding to users' queries? Foreclosure? Objective justification?
 - Apparent effect on rivals?
 - Evidence of foreclosure? What is foreclosure?
 - Effect on consumer welfare?
 - To what extent can a dominant company favor its own products/services? Can favoring without more be an abuse? Do companies have the obligation to generate competition for themselves?
 - Can/should competition law impose parity on the distribution of a dominant company's own products/services?
 - Should we condemn practices that harm rivals but which have a positive effect on, at least, short-term consumer welfare?
 - Second-guess innovative product design? (Compare with FTC's stance: "*Product design is an important dimension of competition and condemning legitimate product improvement risks harming consumers*")
 - Role of objective justification in Art. 102?
 - Is it legally relevant that other non-dominant search engines do the same?

Procedure, competition law as an element of business strategy and politics

- Business strategy: number and timing of complaints; game of perceptions.
- Explain procedure for rejection of complaints
- When is a market test necessary?
- Should complainants have access to preliminary assessments?
- Could the Commission now impose a sanction after 4 years negotiating commitments?
- Pros and cons of commitment decision in rapidly evolving markets?
- What would happen in Luxembourg in (a) a commitments scenario; (b) an infringement decision scenario?
- Discuss the role of politics in competition law enforcement and the Commission's decision-making process
- Substantive convergence at the international level? Race to the bottom in standards?

On the sufficiency of the proposed commitments? Factual matter, but show students for them to have own opinion