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Competition Law Issues in the Online World•

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A. Characteristics of Internet Markets and Antitrust Rules

1. Overview

Some 15 years ago, the internet markets were not a major concern for competition authorities. Since then, competition authorities have begun to monitor the internet sectors more carefully.[1] However, the Swiss and EU competition agencies and courts have not yet established a clear policy on defining the markets for internet businesses.[2]

According to Swiss and EU competition law, three anti-competitive challenges are at stake, namely, concerted practices, abusive behavior by market dominant enterprises and merger control.

- Concerted practices are coordination strategies which have as their object or effect the restriction of competition. Such practices are unlawful unless they are exempted by economic benefits.[3]
- Monopolists or market dominant undertakings are not allowed to abuse their market power, either through exclusionary or through exploitative behavior. Exclusionary conduct consists of actions by dominant undertakings to protect or extend their dominant position. Exploitative conduct describes practices through which dominant undertakings exploit consumers or the other side of the market in general.[4]
- Merger control is the third pillar in most competition laws. Horizontal mergers may have anticompetitive effects if the resulting firm has a dominant market power or an oligopoly is created through the merger. Also, vertical and conglomerate mergers may exclude or impair rival competition.[5]

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1 European Commission, Information Communication technologies, overview, http://ec.europa.eu/competition/sectors/ICT/overview_en.html.

2 See GÜRKAYNAK GÖNENÇ/DURLU DERYA/HAGAN MARGARET, Antitrust on the internet: a comparative assessment of competition law enforcement in the internet realm, business law international, Vol. 14/1, January 2013, p 51, 53.

3 WHISH RICHARD/BAILEY DAVID, Competition Law, 7th Edition, Oxford University Press, 2012, p. 3.

4 ELHAUGE EINER/GERADIN DAMIEN, Global Competition Law and Economics, 2nd Edition, Hart Publishing, Oxford 2011, p. 270.

5 ELHAUGE/GERADIN (supra note 4), p. 3.

Electronic copy available at: http://ssrn.com/abstract=2341978

2. Specific Features of Internet Markets

Since competition law is economic law, its application depends to a large extent on economic considerations. As a result and also from a legal point of view, it is important to understand the economic dimensions of competition law. Therefore, as an introduction, some economic principles with relevance to the online world are given here.

2.1. Two-Sided Markets and Network Effects

A very important feature of high-tech markets is their multi-sided nature. Two-sided markets exist where a platform caters for two distinct groups who provide each other with some kind of benefit. Typical two-sided markets are media markets in which the publishers earn most of their revenue from selling advertising space. Publishers try to attract readers as a higher number increases the value of their advertising space.

In two- or multi-sided markets, internet service providers enable the realization of gains from interaction between market participants by reducing the transaction cost of finding each other. This usually leads to network effects which can be of a direct and/or an indirect nature. Direct network effects mean that the more customers use the same service, the more the value of the service increases.[6] Classic examples are telecommunication networks, for example Skype, which are more attractive to users if the application is used by a larger number of users. Consequently, more possibilities to communicate exist.[7]

Indirect network effects arise if the attractiveness for one side of the market rises with the increasing number of users on the other side of the market since this increase may attract more potential transaction partners.[8] Indirect effects are characteristic of two-sided markets.[9]

A particular characteristic of internet markets is the fact that the offered services are typically free of charge to users. Revenue is only generated from one side of the market, more precisely, from the advertisers' side. To be attractive to advertisers, the website has to

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6 WHISH/BAILEY (supra note 3), p. 11; FATUR, ANDREJ, EU-Competition Law and the Information and Communication Technology Network Industries, Oxford/Portland 2012, p. 82.

7 HAUCAP JUSTUS/HEIMESHOFF ULRICH, Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization, Discussion Paper, Dusseldorf, 2013, p. 3.

8 HAUCAP/HEIMESHOFF (supra note 7), p. 3.

9 WHISH/BAILEY (supra note 3), p. 11.

Electronic copy available at: http://ssrn.com/abstract=2341978

generate as much traffic as possible. The more users visit a website, the more valuable is its advertising space.

2.2. The 'Winner-Takes-It-All' or Concentration Effects

Network effects may cause strong concentration effects, these are also referred to as 'winner-takes-it-all' effects. This means that the biggest player will receive most of the revenues. However, these concentration effects depend largely on the type of network and are not equally pronounced.[10]

The explained network effects of two-sided markets may lead to a kind of pulling effect because all users of a market will decide to use the same provider or product. For users, the existence of one single marketplace may be efficient because it reduces searching costs and ensures price transparency. The concentration effect is not limited to the affected market but will also yield consequences for up- and downstream markets. As the *Microsoft* case shows, the ubiquity of a technical standard, such as the computer operating system of Microsoft, may mean that all software applications must be written to be compatible with this system.[11] A self-reinforcing dynamic arises as both users and software application developers are required to follow certain standards and this enhances the attractiveness of the system based on this standard even more.

The mentioned 'winner-takes-it-all' effect is reduced by certain facts, for instance, capacity restraints may naturally limit the size of a network. Furthermore, its degree depends on the heterogeneity of a market; the more other providers differentiate their offerings, the higher is the added utility in case of a new provider.[12] Finally, the concentration effect is put into perspective through multi-homing possibilities.

2.3. Switching Costs and Multi-homing

Switching costs and multi-homing possibilities can have an influence on network effects and concentration. Switching costs are hurdles which may prevent customers from changing supplier. There are potential switching costs in internet markets, not just learning costs for

10 HAUCAP/HEIMESHOFF (supra note 7), p. 3.
11 WHISH/BAILEY (supra note 3), p. 186.
12 FATUR (supra note 6), p. 96; HAUCAP/HEIMESHOFF (supra note 7), p. 7

new services but also psychological, emotional and social costs which may prevent users from changing to another provider. If switching costs are high, users might stay with their original provider rather than switch to another one with better products or services; a situation referred to as the 'lock-in' effect.[13] Switching costs can be either inherent, i.e., they arise from the nature of a product or a market, or strategic, i.e., they are created by an undertaking to keep users from changing providers.[14]

Multi-homing refers to the possibility of consuming different services together.[15] The possibility of multi-homing depends substantially on the switching costs and the form of payment, i.e., whether user-based or flat rates are charged.[16]

2.4. Free Services for One Market Side

As mentioned above, most online services are offered for free to the users' side. Therefore, users are highly price sensitive and will tend to resist any attempt to impose charges for internet services. If a provider starts to charge a service which was free for a long time, the users will cease to use this service and immediately switch to an alternative service that is still free.[17] The freedom of costs for the users' side is one characteristic of the internet market which differentiates it from most traditional markets.

The free-of-charge mentality has two main consequences: firstly, as one side of the market is not willing to pay for the service, the other has to fund the whole service; and secondly, the freedom of costs for the users' side means that other features in a service take on an increasing importance. A significant parameter for competition in internet markets is the quality of a service.[18] Therefore, service providers may only attract users if they are constantly increasing the services provided. The users will not accept poor services since a reduction in quality cannot be adjusted by a lower price.[19] The fact that price is not a

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13 EDLIN AARON/HARRIS ROBERT, The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google, Yale Journal of Law and Technology 15 (2013), p. 9.

14 EDLIN/HARRIS (supra note13), p. 9.

15 *Microsoft/Skype,* Case No. COMP/M.6281, from 07.10.2011, available at <http://ec.europa.eu>, para. 33.

16 HAUCAP/HEIMESHOFF (supra note 7), p. 7.

17 *Microsoft/Skype* (supra note 15), para. 75 et seq.

18 *Microsoft/Skype* (supra note 15), para. 81.

19 GERADIN DAMIEN/KUSCHEWSKY MONIKA, Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue, availabe at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088>.

competition parameter in internet markets also leads to the consequence that undertakings are not able to challenge competitors on price but have to replace their products entirely.[20]

2.5. Entry or Exit Barriers

Existing or non-existing entry or exit barriers to markets are important for the assessment of market power. Entry barriers may result from a variety of factors such as investment costs, licensing requirements or customer loyalty.

In general, anybody can easily start doing business on the internet; all that is required is a good idea and a website. Capital costs are usually minimal, only in technically complex market segments can the required technology be costly, both in development and maintenance. The most significant barrier consists of the mentioned network effects since most of the users are captured by the leading provider. Further, network effects constitute barriers because the platform requires a certain size to be efficient.

Exit barriers are obstacles which make it difficult for undertakings to leave a market. On the one hand, exit barriers can intensify competition because they may actually force undertakings to stay in the market. On the other hand, exit barriers can create entry barriers since undertakings already fear the losses of a market exit; the 'just-give-it-a-try' strategy will not work. Exit costs may consist of asset write-offs, closure costs or the loss of customer goodwill.

3. Assessment of the Relevant Markets

The definition of the relevant market is the starting point of each antitrust analysis; anticompetitive behavior always relates to a specific product/service market and geographical market. The relevant market directly determines the size of the market share of certain competitors and, consequently, the issue of a monopolistic behavior and the issue of a competition restraining merger.

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20 DEVINE KRISTINE LAUDADIO, Preserving Competition in multi-sided innovative markets: How do you solve a problem like Google (2008), available at <http://works.bepress.com/kristine_devine/1>, p. 5.

3.1. Product and Service Market

An initial difficulty consists in the definition of the relevant product or service market comprising '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'.[21]

The determination over whether products are interchangeable includes the products which are - from a consumers' perspective - viewed as substitutes, but actual consumer preferences as well as functional aspects of interchangeability are also taken into consideration.[22]

A particular problem in defining the relevant market for online products and services is their lack of costs since most of the models used for this purpose, for example, the SSNIP-test, are price based. An additional difficulty lies in the two-sided character of the relevant market. To delineate the relevant markets in online industries, one must pay attention to the particularities of the network effects: firstly, both sides of the market have to be taken into consideration when distinguishing the relevant market; secondly, the relationship between the two market sides as well as the resulting effects also has to be taken into account.[23]

One of the special issues with regard to the market definition is the question of whether bricks-and-mortar substitutes in the offline world are available. If both traditional bricks-and-mortar businesses and internet businesses are included, then markets are delineated much more broadly than in areas in which only internet businesses exist.[24]

3.2. Geographical Market

The definition of the geographical market relates to the question of whether consumers can effectively acquire any substitutes. In the offline world, the geographical market might be limited through transportation costs, national preferences of consumers or language barriers. Furthermore, the requirement of local support or local sales networks may restrict the

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21 Form CO relating to the Notification of a Concentration pursuant to Regulation (EEC) No. 4064/89, Section 6.

22 KAGAN JARED, Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies, New York Law School Law Review, Vol. 55, 2010-2011, p. 285, p. 280.

23 THÉPOT FLORENCE, Market Power in Online Search and Social-Networking: a Matter of Two-Sided Markets, CLES Working Paper Series 4/2012, p. 12.

24 KAGAN (supra note 22), p. 284.

geographic market as well as different prices or conditions, depending on the location of the consumer.[25]

Internet markets can be considered to be worldwide if a product is only available over the internet. Most of the internet based services are provided globally, they are not limited through technical or legal standards and users' habits are almost identical worldwide.[26] Because the services are mostly free - irrespective of the location of the consumer - price differences are also irrelevant. However, some authors and courts require a real 'physical place' which cannot exist without outer boundaries.[27] In the previous decisions, the European Commission left open the exact geographic scope of 'pure' internet services, i.e., products or services which require neither local support nor a sales network.[28]

As soon as bricks-and-mortar substitutes are available, the geographic market will also include these alternatives and the market has to be defined in a manner that accounts for these offline locations of all physically available substitutes.[29]

4. Legal Framework and Particularities of the Online World

4.1. General

As shown above, the three pillars of both EU and Swiss competition law affect unlawful agreements (cartels), the abuse of a dominant market position and merger control. Due to the special characteristics of internet markets, including network and concentration effects, the internet industry is dominated by big players with high markets shares. Therefore, most of the complaints heard in internet markets are based on non-compliance with competition law caused by monopolistic conduct.

4.2. Assessing Market Power and Abusive Behavior

Market power is defined as the possibility of behaving independently vis-à-vis competitors and consumers. The assessment of market power depends on actual and potential competitors as well as the strength of the undertakings.[30]

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25 *Microsoft/Skype* (supra note 15), par. 64, 66.
26 *Microsoft/Skype* (supra note 15), par. 64 ed seq.
27 KAGAN (supra note 22), p. 283.
28 *Microsoft/Skype* (supra note 15), par. 68.
29 KAGAN (supra note 22), p. 283.

With regard to actual competition, the market shares of the undertakings are of utmost importance. Although market shares should only be 'a useful indication' of market power, in practice, both the European Commission and the Swiss competition authorities attach great importance to market shares. Normally, an undertaking with a market share of less than 40% is not held to be dominant. In contrast, undertakings with market shares above 60% are presumed to be dominant in the absence of exceptional circumstances indicating the contrary.[31]

However, the fact that a firm possesses market power does not, by itself, infringe competition law; the undertaking also has to behave in an abusive way. In this context, the question that raises the most difficulties is the distinction between abusive conduct and normal aggressive and pro-competitive business strategies. Even among economists, there is disagreement over which activities are harmful and which are not.[32] Therefore, competition law in the EU and Switzerland state that abusive conduct can be legitimated through objective justification and economic efficiency.

5. Insight into Characteristic Online Markets

5.1. Search Engine Markets

5.1.1. Market Characteristics

The revenues of a search engine depend on advertising. Normally financing comes from so called search advertising, meaning that search related advertisements are shown next to the results page of the users' search. Search engine markets are typical two-sided markets as the more people use a search engine, the more advertisers are attracted.

Market entry barriers include high fixed costs since the development and maintenance of an effective search algorithm is very expensive. More importantly, the network effect builds up market entry barriers because it might be hard to attract users to a new search engine.[33] Users seem to remain loyal to the search engine they use.[34]

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30 WHISH/BAILEY (supra note 3), p. 181.

31 WHISH/BAILEY (supra note 3), p. 182.

32 CRAIG PAUL/DE BÚRCA GRÁINNE, EU Law – Text, Cases and Materials, 14th Edition Oxford 2008, p. 1020.

33 DEVINE (supra note 20), p. 26.

34 THÉPOT (supra note 23), p. 21.

At the same time, switching costs in the search engine business are trivial because other providers are only 'one click away' and users will change to another search engine if they have a poor search experience. Normally, they will not face any learning costs as most of the search engines work in the same way and are very easy to operate.

Google is almost synonymous with the term search engine; it is currently the most popular search engine and maintains a market share of 90% in Europe. Google offers other services to users, such as maps and email, but in this paper, only its search tool will be focused on.

5.1.2. User-side – Market for Search Engines

Google provides a general search engine which indexes a large amount of the internet through web crawlers and thereby tries to map the whole content of the world wide web.[35] General search engines must be distinguished from vertical search engines that provide information on specific segments such as travel or books. Vertical search engines use a special crawler which only indexes sites that are relevant to their topic or set of topics.[36] Social networks might also help a user to find information but this 'social search' only covers the content of the particular website, such as the 'social graph' provided by Facebook.

It seems that the European Commission does not see vertical or social searches as substitutes for general search engines and, therefore, tends to define the market for internet searches in a narrow way, only including the general search engines.[37]

5.1.3. Advertising-side – Market for Search Advertising

Advertising is the most common source of financing for internet service providers. There is a wide diversity of internet advertising, ranging from traditional banners or pop-ups to context sensitive search advertising.[38] Usually, the relevant product or service market for internet advertising is distinguished from offline advertising.[39] Furthermore, different markets for 'direct sales' and 'intermediate sales' by publishers of web space to advertisers can be differentiated. The online advertising platforms pool the advertisers' demand for web

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35 *Microsoft/Yahoo! Search Business*, Case No COMP/M.5727, available at <http://ec.europa.eu>, par. 30.

36 *Microsoft/Yahoo* (supra note 35), lit. 31.

37 See *Microsoft/Yahoo* (supra note 35), n 32.

38 KAGAN (supra note 35), p. 285.

39 *Google/DoubleClick*, Case No COMP/M.4731 from 11.03.2008, available at <http://ec.europa.eu>, par. 44 – 47 and 56; *Microsoft/Yahoo*! (supra note 35), par. 61.

space on one side and they acquire the advertising space on websites through agreements with the publishers on the other side.[40]

Google's advertising model is referred to as 'search advertising'. Search advertising describes a special form of advertising where advertisements appear in association with the search term the advertiser bought (keyword).[41] 'Search ads' might be distinguished from 'non-search ads' which can appear on any web page, either according to the content of the website (contextual ads) or not (non-contextual ads).[42] In this context, the question arises over whether 'search ads' and 'non-search ads' belong to the same market.

From the advertiser's perspective, search and non-search ads can be considered substitutable to a certain extent, especially since the borders between the different forms of ads are increasingly blurred. The reason for the popularity of 'search ads' is that they seem to provide a better way to target advertising. However, 'non-search ads' can also target customers in different ways.[43] Two of the propitious trends in the online advertising industry are behavioral targeting and data analytics. Through these methods, online entities are able to gather data on the online behavior of people, such as the websites they visit and the purchases they make online. This data might be matched together with other information and used to target advertisements at people.[44]

The same applies to publishers that might have to add a search tool on their website to provide 'search advertising' but are also able to provide other forms of targeted ads. From an economic point of view, as long as the publishers are able to sell the advertising space on their website, it makes no difference whether the advertisements are search based or not.

However, to date, an established court practice for the distinction of search and non-search advertising does not exist.[45]

40 *Google/DoubleClick* (supra note 39), par. 68 and 56; *Microsoft/Yahoo*! (supra note 35), par. 82

41 Weber, Competition Law, p. 12 (forthcoming).

42 *Google/DoubleClick* (supra note 39), par. 11.

43 *Google/DoubleClick* (supra note 39), par. 54.

44 EVANS DAVID S., The Online Advertising Industry: Economics, Evolution, and Privacy, Journal of Economic Perspectives, 3/2009, p. 37 et seq, p. 50.

45 *Google/DoubleClick* (supra note 39), par. 48 – 56; *Microsoft/Yahoo*! (supra note 35), par. 75.

5.2. Social Network Markets

5.2.1. Market Characteristics

Apart from search engines, social networks are the other internet phenomenon that the public has embraced. The current market leader in this area is Facebook, a private network which enables users to build up a profile and to interact with friends and relatives.

Social networks are characterized by strong network effects, since the attractiveness of the network increases the more users are part of the same network. Although the entry into the social networking market does not involve substantial investment, such as the development of a search algorithm, the network effects in social networking markets have built up certain entry barriers for potential market players. However, since different networks, such as private or business networks exist, users tend to multi-home and the concentration level is lower than in search engine markets.

In the past, Facebook came under criticism because it was very complicated to delete an account. Some commentators saw this conduct as an attempt by Facebook to build up strategic switching costs to prevent users from switching to other social networks. Furthermore, since it is not possible to move data such as contacts, applications or pictures to another service, users might feel obliged to stay with Facebook. Due to this, switching costs arise as well as entry barriers for possible new competitors.

5.2.2. User-side – Market for Social Networking

The primary problem for the market definition lies in the understanding of the term 'social network'. Different descriptions are used; the key features are the possibility to create a profile which enables people to connect and socialize with friends, relatives and other individuals. From a US perspective, social networks can be said to constitute an independent market since they have unique organic and interactive qualities and offer consumers the unique opportunity to organize and control the content and structure of the social network.[46] However, the lines are blurred in the online world and it is not clear whether other interactive websites which enable users to generate and share content also count as social

46 LiveUniverse Inc. v. MySpace Inc., Case CV 06-6994 AHM, From June 4, 2007, p. 6.

networks.[47] However, there seems to be no doubt that social networks are a rare online phenomenon with no bricks-and-mortar substitute.

5.2.3. Advertising-side – Market for Non-search Advertising

Social networks also earn revenue from advertising. Facebook provides different forms of advertisements: undertakings might create their own page; they can display normal ads on Facebook's website; or they might buy 'sponsored stories' which connect users with the advertising undertaking by showing an advertisement in the network of a friend of the user, thus, interacting with the undertaking.

Through their services, in particular through the provided possibility to build up a profile including personal features, such as age, domicile, etc., social networks have access to a vast amount of personal data of their users and this can be used to improve advertisement targeting.

Through 'sponsored stories', Facebook can take advantage of the social interactions between its users and the fact that users pay more attention to recommendations from friends than from undertakings. However, as mentioned above, courts have so far not delivered any final ruling on the definition of online advertising.

B. Reactions of Competition Authorities

1. Previous Practice

Although internet based services have been in existence for the best part of two decades, most competition authorities have taken a hands-off approach with regard to the internet industry and internet businesses.

The only internet company whose practices have been the object of major competition investigations is Microsoft. In a first case, the European Court found that Microsoft had tied special software - its Media Player - to its own computer operating system.[48] In a second case,

47 WEBER WALLER SPENCER, Antitrust and Social Networking, North Carolina Law Review, 2012, available at <http://papers.ssrn.com>, p. 7.

48 For the case see WHISH/BAILEY (supra note 3), p. 693.

some years later, Microsoft was accused of tying its internet browser to its computer operating system. The case ended with a commitment from Microsoft to change its ways.

2. Recent Developments

In recent years, this situation has begun to change and competition authorities now view internet markets with more suspicion. Google has recently become a target of antitrust regulation. In 2010, the European Commission opened an investigation following a number of complaints from Google's competitors. The FTC also began an investigation in 2011. In the US, the investigation was closed after 20 months with minimal consequences for Google.

A different and more restrictive strategy was pursued by the European Commission; the reason for this could lie in the fact that Google's market share is even higher in Europe than in the US - 90% compared to 70%. Shortly after the announcement from the FTC that it was closing its investigation into Google, the EU's Competition Commissioner Joaquin Almunia, asked Google to put forward proposals on how it could change the presentation of its search results.

In early April 2013, Google committed itself in legally binding admissions to change the presentation of its search results. The undertaking promised to clearly label the search results of its own vertical service providers and to show at least three results of rival services. The remedies proposed by Google were assessed through a market test which was concluded at the end of June 2013. According to Google's competitors as well as some experts, the proposed measures were not sufficient and will have a minimal effect on the affected markets.[49] It appears that Joaquin Almunia agrees with this assessment since he announced in a press briefing that he had asked Google to improve its proposals because the remedies did not go far enough to overcome the existing competition concerns. Google seems not to have escaped yet from the watchful eyes of the European antitrust authorities.

49 HÖPPNER THOMAS/DAVIES LUCY J., The EU Competition Investigation of Internet Search, Computer Law Review International (2013), p. 107 et seq.

The *Google* case may show that competition authorities, in particular in Europe, are putting more emphasis on the development of internet markets. It is difficult to predict whether this sets a general new trend in this area since the search engine market seems exceptional, with regard to the discussed gatekeeper function, and findings from search engine markets may not be adequate to be applied to other markets.

However, this is not the end of the story. Google's competitors have already alleged further anticompetitive behavior, this time in connection with its mobile operating system, Android. Although this complaint nicely illustrates the increasing importance of mobile markets as well as the continuous shifting of interests to this sector, it seems rather unlikely that Google's rivals will succeed with their claim since a very big player, in the form of Apple and its iPhone, is also active in the mobile phone market.

C. New Approaches to Consider

1. New Market Definitions

1.1. New Trends in Online Markets

Recently, competition authorities seem to be observing the online industry more closely. Google's example also shows that they are not only monitoring it but are also willing and able to conduct investigations in this area. However, the recent developments also show that official interventions might become superfluous. Although Google is, at least currently, the clear market leader in the online search business, there is a trend in the online industry towards web portals which offer a variety of services, including not just search services but also networking, information and communication services.[50] The first to take this step was Facebook itself, by providing its users with a 'social graph' which they can use to follow the activities of their friends and relatives. Furthermore, Facebook collaborates with the search engine provider Bing which returns general web results if the search based on the social graph has not been successful.

The same applies to social networks; Google has tried to build up its own social network, called Google+, and other services have begun to appear that focus on the interactions

50 DEVINE (supra note 20), p. 41.

between their users. There is also new competition from combined business models, such as Whatsup, a service combining elements of text and social networking. Moreover, the increasing tendency towards cooperation and mergers or joint ventures, between undertakings from different fields of internet business, supports the development of combined and comprehensive services.

1.2. Market for User Attention

The number of users and their attention are important for the advertisers because the attending users constitute an audience tool for the advertisements.[51] Therefore, the market for user attention should be taken into account as it is relevant.

The variety of internet services in the last few years has increased dramatically, with novel services appearing daily. These services all vie for the attention of the users. This is not only the case with online services; offline services such as newspapers and television are also trying to attract users and gain their attention. Furthermore, the time spent online is limited through natural needs such as sleeping. Assuming that the maximum daily time which users spend online has been reached, internet providers are thus forced to compete with other providers for this limited time.

Running a business on the internet depends largely on the possibility of selling advertising space to advertisers, since - as mentioned above - users are not willing to pay for content or services. Therefore, internet service providers need to remain attractive to the users, either in delivering a useful service, such as Google with its search tool, or an entertaining service, such as Facebook.

1.3. Market for User Data

A website is attractive to advertisers not only because of the amount of users but also because of the available advertising forms. Given that the success of a commercial measure depends to a large extent on the possibility of reaching the persons who might belong to the target group of the advertised product or service, advertisers believe that it is very important

51 THÉPOT (supra note 23), p. 8.

to know as much as possible about the persons they will reach with their advertisement. This is the reason why they need as much personal data as possible.

The acquisition of personal data is not only important for the advertisers' side but also for the users' side, since personal data are relevant for improving the quality of a service. For example, search engines collect a vast amount of user data and, through the findings gained from searches done with the search tools, they are able to improve the search function.[52]

All in all, user data is a key part of the success of internet service providers: firstly, through gained user data service providers are able to put better adverting models at the disposal of advertisers; and secondly, through the data they are able to improve their service and attract more users. This, in turn, attracts advertisers and thereby the circle is closed.

However, the collection of user data might be a two-edged sword: consumers and regulators increasingly have to grapple with privacy issues on the internet.[53] Consumers should pay more attention to their online privacy and policy makers need to make more effort to protect consumers. The reality is that many consumers still do not know enough about the extent to which their private data are collected.[54]

1.4. Changes in Online Advertising and Impact on Competition Issues

As shown above, the market for online advertising is developing as fast as internet services. At one time, Google's search based advertising model seemed to be the cream of the crop but now other internet players have caught up and have launched new models of online advertising.

To date, although courts have not taken a final view with regard to the question of whether 'search advertising' and 'non-search advertising' both belong to the same product market, there are many reasons for the assumption that these forms can be attributed to the same market and that only one market for online advertising exists.

52 DEVINE (supra note 20), p. 6; GERADIN/KUSCHEWSKY (supra note 19), p. 3.
53 EVANS (supra note 44), p. 56.
54 EVANS (supra note 44), p. 57.

Since internet service providers only normally gain money from the advertisers' side of the market, they are concerned to respond to their wishes in the best possible way. Advertisers are interested in potentially attractive advertising and they associate this with targeted messages that reach as many of the targeted users as possible. However, search advertising is not the only way to target advertisements; other forms, such as data analytics and combinations of behavioral targeting, may enable advertising to be targeted in the same way.

Therefore, for internet service providers, two main goals have to be achieved: firstly, a link between the user and the advertisement must be established, either referring to actual needs (e.g. search requests) or to the personality of a person (e.g. user profile). Secondly, as much user traffic as possible must be generated. To put it simply, the perfect internet service combines three things: it should direct as many users as possible to its own website; it should induce them to spend as much time as possible there; and it should encourage them to give as much personal data as possible.

A special feature of the online advertising market is its pricing structure since advertisers do not pay for the placing of an advertisement on a website unless a consumer clicks on it.[55] This might reduce the indirect network effects as the number of users visiting a website is not the ultimate goal as long as the earning value exceeds the costs of an advertisement. However, practice shows that multi-homing varies across advertisers and smaller advertisers tend to stay with one publisher.[56] One of the reasons for this lies in the fact that the fixed costs of running a campaign, such as the costs of learning how to use a platform and its software or the costs of monitoring a campaign, are independent of the number of clicks and this doubles the chances of an undertaking placing ads on more than one website.[57] However, the pricing structure promotes multi-homing advertising strategies, at least for bog standard advertisers, since they have the possibility of benefiting from some economies of scale in their advertisement business.

55 EVANS DAVID, The Economics of the Online Advertising Industry (2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086473>, p. 21.

56 EVANS (supra note 55), p. 16 et seq.

57 EVANS (supra note 55), p. 23 et seq.

If one comes to the conclusion that 'search advertising' and 'non-search advertising' belong to the same market and are substitutes, Google and Facebook can be considered to be competitors in the market for online advertising.

1.5. Rethinking the Importance of Market Shares

In the European Union as well as under Swiss law, market shares are central for determining whether an undertaking has market power or not. Although there are no market share thresholds set out in the relevant legislation above which a firm can be presumed to be dominant, the assessment of the market share seems to be the focal point for the assessment of dominance.[58]

Hitherto, potential competition has not played a decisive role in the analysis of monopolistic behavior.[59] With regard to the abovementioned characteristics of online markets, it seems that greater emphasis should be placed on potential competition and the disciplinary effects caused thereby. Since undertakings in online markets do not compete through price but, in fact, through the quality of service as well as innovation, these markets are highly dynamic. In such markets, undertakings do not compete against each other by offering lower prices and selling more products on a higher profit margin but they try to grab market share from other firms by providing new and better products than the others.[60] Thus, the 'winner-takes-it-all' effect plays a major role because the best competitor dominates the whole market.[61] If a better product appears on the market, the new market player will be able to gain market share very quickly.

That is why internet markets are often associated with the Schumpeterian vision of competition. According to the theory of the Austrian scholar Schumpeter, in innovative markets dominant market players are continually ousted by other innovative market players who will themselves be replaced by others after some time.[62] The past has shown that

58 VAN LOON SOPHIE, Chapter 2: The Power of Google: First Mover Advantage or Abuse of Dominant Position?, in: Lopez Turruella Aurelio (Eds.), Google and the Law, The Hague 2012, p. 9 et seq, p. 13.

59 RATO MIGUEL/ PETIT NICOLAS, Abuse of Dominance in Technology-Enabled Markets: Established Standards reconsidered?, European Competition Journal 2013, pp. 1 et seq, p. 13.

60 DEVINE (supra note 20), p. 27.

61 VAN LOON (supra note 58), p. 14.

62 DEVINE (supra note 20), p. 6, 35 et seq.

internet markets share much of the Schumpeterian vision of competition in that earlier dominant firms have disappeared from the market.

The reasons mentioned above lead to the conclusion that, in dynamic online markets, particular account should be paid to potential competition. With regard to market shares, the focus should lie in the temporal component and high market shares might only be relevant if they were held for a longer time.

D. Conclusion

Internet markets are characterized by their two-sided nature and this causes concentration and 'the-winner-takes-it-all' effects. Furthermore, this fact might constitute a barrier to market entry. The potentially resulting competitive effects might be put into perspective through low switching costs and multi-homing possibilities which are considered to be factors that lower market barriers.

From the perspective of competition law, the question arises as to whether the traditional approaches are still appropriate for assessing the competition problems in this area. Looking at two of the current market leaders in the online market, Google and Facebook, it seems that new ideas should be considered, particularly with regard to the market delineation and the assessment of abusive behavior of dominant firms.

A closer inspection of the two market sides that the two providers are active in could suggest that they are direct competitors in both markets because they compete against each other (and with other competitors) to gain user attention and personal user data on the user market and they try to provide the advertisers' side with the best possible targeted advertising.

These facts could lead to the conclusion that competition authorities should not hurry to make a decision but should keep monitoring the internet industry carefully. In the light of the points made above and assuming that there is only one market for online advertising, user attention or user data and that, therefore, neither Google nor Facebook are dominant in any of those markets, strict legal intervention does not seem necessary at the moment.

However, such an assessment does not mean that competition law should not play any kind of role in the internet industry and that competition authorities should not intervene at all. They may only need to step in if problems are not solved by market dynamics and the preventive effect of competition law should also be borne in mind. As long as the big market players are aware that they are being watched by the competition authorities and they might be the object of an investigation if they abuse their market power, this might encourage them to act more carefully with regards to their compliance with competition regulations.


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