Antitrust on the Internet: a Comparative Assessment of Competition Law Enforcement in the Internet Realm

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Web-based businesses have become potential targets of antitrust concerns across the world with the proliferation of information, the growth of internet-related businesses and over two billion users of the internet worldwide as of the end of 2011.[1] As a result of the use of this exponentially growing medium, the internet industry witnessed dramatic growth over the past decade alone, which has made this sector susceptible to unanswered questions regarding competition law. Legal frameworks and enforcement tools may require a more flexible approach to address antitrust issues in this rapidly expanding sector. Accordingly, there are unique parameters that competition law authorities may have to tackle in the context of e-commerce that have not found their way yet to the courtroom.[2]

From an American perspective, the Federal Trade Commission (FTC), which is the primary competition law enforcement agency dealing with internet issues in the US, is encouraging companies voluntarily to self-regulate their internet practices. The FTC believes this will provide 'a more prompt, flexible, and effective means for ensuring lawful behaviour than government legislation or regulation'.[3] Prior self-regulatory initiatives,

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1 World Internet Usage Statistics (2,267,233,742 users as of 31 December 2011), **http://internetworldstats.com/stats.htm**, accessed 17 October 2012.

2 Jared Kagan, 'Bricks, Mortar and Google: Defining the Relevant Antitrust Market for Internet-Based Companies' (2010–2011) 55 NYL Sch L Rev 271, 272–273 (hereafter 'Kagan').

3 John Graubert and Jill Coleman, 'Consumer Protection and Antitrust Enforcement at the Speed of Light: The FTC Meets the Internet' (1999) 25 Can-US LJ 275, 285–286.

to promote competition and protect consumers online, have been successfully implemented in internet industries.[4] However, self-regulation may be insufficient if firms intend to behave anti-competitively.

From the European perspective, the European Commission's Directorate-General for Competition is closely monitoring the internet sectors, along with the information industry, and consumer electronics, to ensure that market players comply with EU competition law.[5] The European Commission's close scrutiny of some of the biggest web-based platforms across the world over the past few years may have prompted a soar in cooperation between antitrust authorities and undertakings.

This article aims to address internet-related businesses and activities under the three pillars of antitrust law – monopolisation, concerted practices and merger control – in US antitrust law and EU competition law frameworks. First, key definitions utilised in the assessment of competition law issues will be addressed, followed by a discussion of the antitrust pillars. Each pillar will evaluate recent cases while providing an insight into the enforcement approaches and practices of antitrust authorities as well as courts. The article will also address the underlying theoretical understanding of this developing interaction between internet law and antitrust.

Antitrust definitions in the internet age

Defining the relevant market, within which concentration and, subsequently, competitive effects are determined is recognised as a 'necessary predicate' by US courts,[6] and of 'essential significance' by European Community courts.[7]

4 *Ibid* 286.

5 European Commission, Information Communication Technologies, Overview, **http://ec.europa.eu/competition/sectors/ICT/overview_en.html**, accessed 17 October 2012.

6 Cf *Bacchus Industries, Inc v Arvin Industries, Inc*, 939 F 2d 887 (10th Cir 1991) (competition enforcement agencies must define the relevant product market for the product being sold to determine if a seller has violated antitrust laws); also cf *Tanaka v Univ of S Cal*, 252 F 3d 1059, 1063 (9th Cir 2001) ('Failure to identify a relevant market is a proper ground for dismissing a… claim'); *United States v Oracle Corp*, 331 F Supp 2d 1098, 1110 (ND Cal 2004) ('in determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed. This is a "*necessary predicate*" to finding anticompetitive effects' (emphasis added)); also cf *Federal Trade Commission, Plaintiff, v Whole Foods Market, Inc, and Wild Oats Markets, Inc* (United States District Court for the District of Columbia, Civ No 07-cv-01021-PLF, FTC File No 071-0114); *FTC v Arch Coal, Inc*, 329 F Supp 2d 109 (DDC 2004) (see *In the matter of Arch Coal, Inc, a corporation; New Vulcan Coal Holdings, LLC, a limited liability company; and Triton Coal Company, LLC, a limited liability company* (FTC File No 031-0191, Docket No 9316)).

7 Cf *Europemballage Corporation and Continental Can v Commission*, Case 6/72 [1973] ECR 215, para 32; importance reaffirmed in *British Airways plc v Commission*, Case T-219/99 [2003] ECR II-5917, para 91 ('the definition of the relevant market is of *essential significance*' (emphasis added)).

A government agency must be able to define the relevant product and geographical markets in which the violation occurred before charging an undertaking with a competition law violation. Under the defined market, the monopoly or market power of the alleged violator will be assessed and the parameters of a merger transaction will be determined. In a broadly defined market, it is generally difficult for a company to exercise market power; monopoly power can be more easily found in narrowly defined markets. Obtaining meaningful information on the defined parameters of the relevant market enables competition agencies to better understand the market power that a firm has or that merged parties will acquire, as well as how competition operates on the market and the assessment of competitive effects.[8]

The search to define the relevant product market and the relevant geographical market for internet businesses can be complicated and unpredictable. However, the agency (or private plaintiff) must at least define the 'rough contours' of the relevant market.[9] The US and EU competition agencies and courts have not yet established a clear policy on defining the market for internet businesses. Analysing recent case law, in conjunction with the standard method to define a relevant market in competition law, indicates how product and geographical markets may be defined in the internet context.

Relevant product and service market

A product market is defined by the product or service, or smallest group of products or services, where a monopolist could profitably charge a price above the competitive price for a significant time period.[10] If the commodities are reasonably interchangeable by the customers, then they constitute the

8 Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2011), 913 (hereafter 'Jones and Sufrin').

9 As FTC Commissioner Rosch has explained, 'While I have said that in merger cases, market definition is not a "gating" or threshold issue in the sense that the agencies have to prove a relevant market before it can look at a merger's competitive effects, I do not believe that the agencies in merger or conduct cases can avoid defining a relevant market altogether. In the Section 7 context, the statute plainly requires that we define a relevant market. And in conduct cases, *the case law requires that we at least define the "rough contours" of a relevant market*' (emphasis added) (J Thomas Rosch, Comm'r, Fed Trade Comm'n, 'Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector', remarks at the ABA Antitrust Section Fall Forum (18 November 2010), at 3, **www.ftc.gov/speeches/rosch/101118fallforum.pdf**, accessed 17 October 2012.

10 *Nilavar v Mercy Health System-Western Ohio*, 494 F Supp 2d 604 (SD Ohio 2005), aff'd, 244 Fed Appx 690 (6th Cir 2007).

relevant market.[11] If customers can willingly, easily and quickly substitute one product for another, and the cost of substitution is low, the products will be considered in the same product market.[12] The possible substitutes include those products that may enter the market in a relatively short time, and that would constrain pricing in the reasonably foreseeable future.[13]

The European Commission notes that a relevant product market 'comprises 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'.[14] This substitution is measured by the extent to which customers of a company's product would switch to a competitor's product following a non-trivial price increase of the company's product. The products are likely to be in the same product market if such a price increase would be unprofitable for the company.[15]

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11 The main factors to determine the boundaries of a product market, coming from the 1962 case, *Brown Shoe Case Co v US*, are the products that are reasonably interchangeable with the defendant company's product, and the cross-elasticity of demand between the product itself and substitutes for it (*Brown Shoe Co v US*, 370 US 294, 325, 82 S Ct 1502, 8 L Ed 2d 510 (1962)). See also *US v E I du Pont de Nemours & Co*, 351 US 377, 76 S Ct 994, 100 L Ed 1264 (1956); *US v Visa USA, Inc*, 344 F 3d 229 (2d Cir 2003); *Tunis Bros Co, Inc v Ford Motor Co*, 952 F 2d 715 (3d Cir 1991); *Fishman v Estate of Wirtz*, 807 F 2d 520 (7th Cir 1986); *Metro Intercollegiate Basketball Ass'n v Nat'l Collegiate Athletic Ass'n*, 339 F Supp 2d 545 (SDNY 2004).

12 *FTC v Whole Foods Market, Inc*, 548 F 3d 1028 (DC Cir 2008). Since the 1980s, the US enforcement agencies have used the hypothetical monopolist test (HMT) – or, the small but significant and non-transitory increase in price test (SSNIP) – to define the relevant markets. The HMT attempts to determine the smallest relevant market within which a hypothetical monopolist could impose a significant increase in price among a certain group of products. It does this by researching whether a small increase in price would provoke a significant number of customers to switch to another product.

13 *United States v Microsoft Corp*, 253 F 3d 34, 53–54 (DC Cir 2001).

14 Commission Notice on the definition of relevant market for the purposes of community competition law, (1997) 79/C 372/03, para 7, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:372:0005:0013:EN:PDF**, accessed 17 October 2012 (hereafter 'Relevant Market Notice'); also cf *Hoffmann-La Roche & Co v Comm'n*, Case 85/76 [1979] ECR 461, at para 28 ('*The concept of the relevant market in fact implies that* there can be effective competition between the products which form part of it and this presupposes that *there is a sufficient degree of interchangeability* between all the products forming part of the same market in so far as a specific use of such products is concerned' (emphasis added)).

15 Robert O'Donoghue and A Jorge Padilla, *The Law and Economics of Article 82 EC* (Portland: Hart Publishing, 2006), 64–65 (hereafter 'Donoghue and Padilla'); see also Peter Roth QC and Vivien Rose (eds), *Bellamy & Child: European Community Law of Competition* (6th edn, Oxford University Press, 2008), §4.015 et seq (hereafter '*Bellamy & Child*') (for methodology of determining market definition).

Challenge of defining product markets related to the internet

Together with the rapid technological innovation, many innovative players and relative ease of access in the internet sector, it is difficult to understand how products and services relate to one another.[16] When technology and innovation are involved it may be difficult for competition agencies to decide whether competition or collaboration is the priority. Accordingly, the usual tools for defining a product market may not serve their purposes in such innovative markets. As one FTC commissioner found, 'antitrust principles have their limitations in this context'.[17]

Apple's iPad demonstrates the unique parameters for defining a market, addressing whether the relevant product market is 'consumer tablet computers', or 'digital media' based on available substitutes for customers.[18] Apple's device applications raise similar concerns (ie whether the market should be the 'app market' or more specifically, the sub-market of 'apps available in the App Store'). The relevant market for apps could be limited to those available on Apple devices. Alternatively, the market for apps could be considered a sub-market of the device market, rather than an independent market; the consumers who purchase the 'main market' product (ie the Apple hardware device) could also utilise the 'sub-market' product (ie apps from the App Store). The determination of these markets is crucial for assessing whether to impose antitrust liability on internet businesses, but defining internet-related products and services requires a unique approach.

Tools for defining internet-related product markets

The US agencies (ie the FTC and Department of Justice, 'DOJ') have developed some techniques to define the product market for internet products. For instance, the FTC has considered how a company

16 Cf Pamela J Harbour and Tara I Koslov, 'Section 2 in a Web 2.0 World: an Expanded Vision of Relevant Product Markets' (2010) 76 *Antitrust Law Journal* 772 ('As technologies converge, today's complements might become tomorrow's substitutes').

17 J Thomas Rosch, 'Some Thoughts on the Role of Intellectual Property in Innovation Market Cases and Refusals to License', remarks at the Conference on Antitrust and Digital Enforcement in the Technology Sector. 31 January 2011, at 3–15, **www.ftc.gov/speeches/rosch/1 1013ltechnologysector.pdf**, accessed 17 October 2012; J Thomas Rosch, 'Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector', remarks at the ABA Antitrust Section Fall Forum, 18 November 2010, at 9–10, **www.ftc.gov/speeches/rosch/101118fallforum.pdf**, accessed 18 October 2012.

18 Jones and Sufrin, note 8 above, 63.

monetises its innovation as an indicator of the product market in which the company competes.[19]

The DOJ often defines product markets narrowly when investigating technology-based antitrust issues. In *US v Microsoft*,[20] the DOJ narrowly defined the product market for Microsoft's Window OS as the market for 'operating systems for Intel-compatible personal computers'. In the Google-Yahoo deal,[21] the market was defined as 'online search advertising' where the underlying technology was Google's search-advertising technology. The DOJ could have defined broader product markets in these instances based on available substitutes to the advertising technology and operating systems. Broader market definitions could have resulted in antitrust concerns not arising because the respective companies may not be in a position of having market power.[22]

The European Commission's approach, since the publication of the Relevant Market Notice, continues to reflect the traditional approach to market definition.[23] However, market definitions may change over time, owing to the changes observed in the structure of demand or supply or as a result of technological changes,[24] which would pose challenges for the European Commission, especially when assessing the reorientation of web-based businesses in the context of merger cases.

If the relevant products and services have offline substitutes that should be included in the market definition, the market will be defined broadly and the likelihood of antitrust violations would decrease.[25] Online products without competing offline counterparts, such as social networking sites, consequently tend to have narrowly defined product markets, following suit with the approaches of both US and EU antitrust authorities. The product

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19 'In my experience *in cases involving the high-tech sector, the easiest way to define the relevant market is to figure out how the firm at issue monetizes its intellectual property or innovation.* How does Google monetize its searches? How does Apple monetize its apps and iTunes? How does Facebook monetize public profiles? And so on. Identifying how firms monetize their bread and butter enables the agencies to zero in on who the customers are, whether there is competition, and whether the absence or potential absence of competition is a result of business acumen or anticompetitive conduct' (emphasis added) (Rosch, note 17 above, 17–18).

20 *US v Microsoft* [1999] No 98-1232, 98-1233, at II/18.

21 For further information on the Google-Yahoo proposed transaction, which was abandoned, see Benjamin G Edelman, 'Google-Yahoo Ad Deal is Bad for Online Advertising' (12 August 2008), Harvard Business School Working Knowledge, **http://hbswk.hbs.edu/item/5995.html**, accessed 18 October 2012.

22 Chris Butts, 'Microsoft Case 10 Years Later: Antitrust and New Leading New Economy Firms' (2009–2010) 8 Nw J Tech & Intell Prop 275, 286.

23 *Bellamy & Child*, note 15 above, §4.017.

24 *Ibid* §4.023.

25 Kagan, note 2 above, 291.

market could cover both the online and offline products for internet companies that primarily use the internet to deliver a product or service that exists in the offline world (eg advertising or retailing). Alternatively, online businesses could be a separate product market from offline businesses. Online advertising, social networks and online retailing are each internet businesses subject to different product market parameters.

Online advertisements. Defining the relevant market for online advertising requires consideration of the extent of competition with other types of marketing (ie whether advertisers are willing to change their advertising forum). Online and offline advertisements serve the same goals, but their unique characteristics could separate them into two different markets.[26]

The US considers 'online advertising' a separate product market from the offline market with possible sub-markets.[27] The difference in product sub-markets may depend on how the advertisers purchase the advertising space. For some advertisements, content providers sell advertisements directly to companies; for other advertisements, companies use intermediation firms to place their advertisements indirectly.[28]

According to the FTC, direct and indirect advertisements are not interchangeable, and thus belong to separate product markets.[29] Furthermore, the FTC has decided that advertising space sold by search engines is a different market from advertising space sold directly or indirectly by content providers.[30] The FTC reasoned that[31] search engine advertising space is primarily purchased to implement direct response ad

26 Cf James D Ratliff and Daniel L Rubinfeld, 'Online Advertising: Defining Relevant Markets' (2010) 6 J Comp L & Econ 653, 671 (hereafter 'Ratliff and Rubinfeld').

27 The FTC, in its 2007 investigation of Google's proposed acquisition of DoubleClick Inc, suggested that while there was an overarching product market of online advertisement, there could also be other relevant product markets within that category. 'Statement of FTC Concerning Google/DoubleClick' (FTC File No 071-0170) (20 December 2007), **www.ftc.gov/os/caselist/0710170/071220statement.pdf**, accessed 18 October 2012 (hereafter 'FTC 2007').

28 The different kinds of online advertising markets may include sponsored search advertising, in which search results bring up advertisements along with it, as determined by a platform that automatically chooses the appropriate ad based on parameters set by the advertiser. The advertisers that bid higher for a keyword will receive a higher placement in the search ad results. Another market is for an intermediary that places advertisers' ads on third-party websites based on the keywords a user entered with their search query that took them to the website. The intermediary splits the revenue from the advertiser with the third-party website that hosts the advertisement.

29 FTC 2007, 4 ('[t]he evidence shows that ad intermediation is not a substitute for publishers and advertisers who place display ads into directly acquired ad inventory or vice versa').

30 *Ibid.*

31 For further discussion of the court's findings, see Ratliff and Rubinfeld, note 26 above, 677–685; Kagan, note 2 above, 285.

campaigns, as opposed to direct ad sales, which are generally purchased for brand advertising campaigns.[32] The FTC also noted that 'contextually targeted ads do not constitute a separate market; rather they are part of a broad market that includes all ads sold by intermediaries'.[33] While the FTC's findings could be regarded as a guide-post, they are nevertheless preliminary; US courts will need to delineate the parameters for online advertising product markets. The FTC seems inclined to find multiple product markets for online advertising.[34] Some courts, however, reject this approach and consider all types of internet advertising interchangeable, finding one overarching product market for online advertising.[35] Other courts define the product market more broadly, finding online advertising interchangeable with other broadcasting and paper-based advertisements, and therefore within the product market of 'advertising'.[36]

The European Commission separates online advertising and offline advertising into distinct markets.[37] The European Commission recognised potential sub-markets in advertising noting that a 'separate market for

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32 Ratliff and Rubinfeld, note 26 above, 669 (quoting Federal Trade Commission, 'Statement of Federal Trade Commission Concerning Google/DoubleClick' (FTC File No 071-0170) (20 December 2007), **www.ftc.gov/os/caselist/0710170/071220statement.pdf**, accessed 17 October 2012, at 7).

33 'Statement of FTC Concerning Google/DoubleClick', 6.

34 Ratliff and Rubinfeld, note 26 above, 668–669; FTC 2007, note 27 above; Kagan, note 2 above, 285 (referencing FTC contemplation of multiple sub-markets in online advertising during Google/DoubleClick investigation).

35 In *Person v Google*, in dismissing an advertiser's suit against Google for anti-competitive conduct, the court ruled that the relevant market for Google advertising is not the more specific 'search advertising' market, for which Google is unquestionably the dominant player, but the broader 'internet advertising' market, for which it is only a major player among many others, *Person v Google, Inc*, 2007 US Dist LEXIS 22499, at *12 (ND Cal 16 March 2007); see also *KinderStart.com, LLC v Google, Inc*, No C 06-2057 JF (RS), 2007 US Dist LEXIS 22637, at *15–16 (ND Cal 16 March 2007).

36 *Am Online, Inc v GreatDeals.Net*, 49 F Supp 2d 851, 858 (ED Va 1999).

37 Cf Case COMP/M.5727 *Microsoft/Yahoo! Search Business*, Notification of 15 January 2010 pursuant to Article 4 of Council, para 61, **http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf**, accessed 18 October 2012 (stating that 'online advertising is a distinct market from offline advertising'); Case COMP/M.4731 *Google/DoubleClick*, 11 March 2008, paras 44–47, 56, **http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf**, accessed 18 October 2012, referring to the Commission's decision in Case COMP/M.4731 *Google/DoubleClick*, 11 March 2008, paras 44–47, 56. For previous decisions, cf Commission decision in Case IV/JV.1, *Telia/Telenor/Schibstedt*, 27 May 1998; Case IV/M.1439, *Telia/Telenor*, 3 October 1999; Case IV/M.0048, *Vodafone/Vivendi/Canal Plus*, 20 July 2000.

intermediation in online advertising can be defined',[38] but did not decide whether intermediation in advertising could be subdivided into 'search ads' and 'non-search ads'.[39] The European Commission conducted a market investigation on this matter, finding that a majority of respondents (32 out of 48) consider all types of online advertising competitors.[40] However, a significant portion of respondents considered search advertising an independent market and a large portion noted that search advertising ensures direct targeting, while other methods aim to create brand awareness.[41] The European Commission's findings reflect the FTC's conclusions.

Although the EU and US agencies do not consider online and offline advertising interchangeable, studies indicate both types of advertising influence each other's prices and are closely related.[42] These studies do not suggest that the market definition should include both the online and offline advertising market, but rather recommend evaluating competition between these separate markets.

Social networking sites. Social networking sites are available online, offer no offline substitutes and are therefore considered an independent product market in the US.[43] In *LiveUniverse, Inc v Myspace, Inc*, the court upheld the plaintiff's assertion that there is a unique 'social network' market distinct from internet connectivity services (such as AOL), online dating sites and basic online communication tools (such as email). The 'social network' market offers unique products and services including interactive, user-generated features that give users control over their experience and allow them to determine the content and structure of their social network.[44]

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38 Cf Case COMP/M.4731 *Google/DoubleClick*, 11 March 2008, para 68, **http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf**, accessed 17 October 2012 ('A separate market for intermediation in online advertising can be defined in view of the fact that there is no substitute for the service provided by intermediaries for the sale of smaller publishers' inventory and for the sale of (at least) part of the remnant inventory of larger publishers that also use the direct sales channel').

39 *Ibid* paras 70–73.

40 *Microsoft/Yahoo! Search Business*, Case COMP/M.5727 (15 January 2010) para 71.

41 *Ibid* para 72.

42 For the influence of online advertising on offline advertisement pricing see Ratliff and Rubinfeld, note 26 above, 675. For the influence of offline advertising on online advertisement pricing see Avi Goldfarb and Catherine Tucker, 'Substitution between offline and online advertising markets', J Competition L & Economics, 2 February 2011.

43 This was illustrated in *LiveUniverse, Inc v MySpace, Inc*, 2007 US Dist LEXIS 43739, at 1 (CD Cal 4 June 2007) ('if MySpace suddenly were to shut down, its members would not fill the social void by turning to online dating sites. Instead, they would likely set up profiles on a different social networking website').

44 *LiveUniverse, Inc v Myspace, Inc*, CV 06-6994AHMRZX, 2007 WL 6865852 (CD Cal 4 June 2007) aff'd, *LiveUniverse, Inc v MySpace, Inc*, 304 F App'x 554 (9th Cir 2008).

As social networks evolve, different types of social networking websites, revolving around specific identities or personal interests, could be categorised as separate sub-markets (eg professional networks such as 'LinkedIn'). The relevant market for specialised social networking sites may be limited to the specific category online and exclude offline social networking as a substitute for these sites.[45]

Online retail and auction markets. In online intermediate goods markets, the product is not directly sold to consumers but the products compete with those sold in the offline retail market. In auction markets,[46] the products are communicated to the public through the internet, but the products are still competing with traditional offline sellers. Consequently, offline products may be included when defining the relevant market for intermediate goods and auction markets.[47]

It remains unclear how the US will define product markets for products and services sold through retail or auction sites online. In *In re eBay Antitrust Litigation*[48] one plaintiff alleged that online auction sites constitute an independent product market. The court did not dismiss the complaint, but responded that the definition may be too narrowly defined for antitrust purposes. However, since a customer could find the products through other online and offline means, an online auction site may not be judged as an independent product market.[49]

Relevant geographical market[50]

Determining the relevant geographical market requires evidence addressing price data, location and facilities of other producers, transport costs, delivery limitations or other relevant factors.

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45 Spencer Weber Waller, 'Antitrust and Social Networking', 24 October 2011, NCL Rev 2012, 7.

46 Robert G Harris and Thomas M Jorde, 'Antitrust Market Definition: An Integrated Approach' (1984) 72 Cal L Rev 1 22 (distinguishing between 'auction' and 'non-auction' markets; 'A "disinterested" auctioneer matches orders to buy and sell, and the terms of trade do not take account of past or future transactions between the parties involved in the trade').

47 *Gerlinger v Amazon.com Inc*, 311 F Supp 2d (ND Cal 2004), 838, 851 (holding that there is no separate market for online books and hard copy books).

48 *In re eBay Antitrust Litigation*, 545 F Supp 2d 1027, 1032 (ND Cal 2008) (quoting *Brownlee v Applied Biosystems, Inc*, No 88 20672, 1989 WL 53864, at *3 (ND Cal 1989)).

49 Kagan, note 2 above, 289–290.

50 For a more extensive insight in the importance, traditional approach, academic theories and the definition of the geographical market in the internet context, cf Charles C Eblen, 'Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on *Tampa Electric* and its Progeny' (2004) 56 Baylor L Rev 49.

Traditional means of defining the geographical market

A geographical market is typically defined by the region in which the customer would attempt to purchase the particular product, not the entire region of distribution.[51] It is the geographical area within which customers could practically turn for substitute products[52] and where suppliers could enter the market in response to the price increase.[53] Data on price, consumer preferences, geographical patterns of purchases, location and facilities of other producers, transport costs, delivery limitations and other relevant factors should be taken into consideration.[54]

Many typical boundaries for geographical markets – transport costs, language, regulation, trade barriers, customs and service availability – are undercut by the internet and can be bypassed by customers of internet businesses. Consumers using the internet can purchase products unhindered by physical, spatial and even linguistic barriers.[55] Determination of geographical markets for online products, therefore, poses a unique challenge to courts.

Defining geographical markets in the internet context

Depending on the product, the geographical market may be limited to a set of online customers, or it may include offline stores where customers can purchase the product. If the offline products are in the same product market as the online products, the relevant geographical market may include these offline locations.[56] This requires product market definitions to take

51 *Lantec, Inc v Novell, Inc*, 306 F 3d 1003, 1027 (10th Cir 2002). In regards to horizontal mergers, the US agency will look at the HMT to see what the bounds of the geographical market are; a region is a geographical market if a hypothetical monopolist's price increase would not be defeated by substitution away from the product or by arbitrage by the customers. Cf 2010 Horizontal Merger Guidelines § 4.2.2.

52 For EU cf Donoghue and Padilla, note 15 above, 91; Relevant Market Notice, para 8 ('the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficient homogeneous and which can be distinguished from because the conditions of competition are appreciably different in those area'); for US, cf *Brown Shoe Co v US*, 336–337.

53 Donoghue and Padilla, note 15 above, 91–92.

54 The European Commission categorises the types of evidence into: past evidence of divergence of orders to other areas; basic demand characteristics, views of customers and competitors; current geographical pattern of purchasers; trade flows/pattern of shipments; barriers and switching costs associated to divert orders to companies located in other areas. Cf Relevant Market Notice, paras 44–50.

55 Kagan, note 2 above, 282 ('The internet does not have any borders and is therefore present everywhere, but at the same time it is nowhere at once').

56 Kagan, note 2 above, 283.

precedence over geographical market definitions, which is common in non-internet-related cases; only once the product market is defined can the geographical market be assessed in online antitrust cases.

US courts have held that the internet itself cannot be a geographical market. This is partly because the internet lacks a physical location and partly because of its vast size. In *America Online, Inc v GreatDeals.net*,[57] the court rejected the argument that the geographical market was the entire internet. Because the internet 'cannot be defined with outer boundaries… it is not a place or a location; it is infinite', it cannot be a geographical market.[58] The European Commission defines the geographical market for online advertising along national preferences, language and cultural specificities. Similar to product market definitions, online advertising, social networks and online retailing are each subject to different geographical market parameters.

In *Google/DoubleClick*,[59] the market for online advertising was defined based on national or linguistic borders within the European Economic Area (EEA).[60] Based on the European Commission's market investigation in *Google/DoubleClick*, there are many factors that pointed to a distinction of national or linguistic sub-markets, both for advertisers and for publishers;[61] the supply or the purchasing of advertising space, according to the European Commission, is therefore differentiated on the basis of national preferences, languages and cultural specificities.[62]

If a product or service is strictly available on the internet, then the geographical market still has to be bounded, it cannot be the entire internet, but it can be broadly defined. In *LiveUniverse, Inc v MySpace, Inc*, the court accepted the geographical market for an online social network to be the entire geographical region of the United States.[63]

In auction and retail businesses, most products and services available online have offline substitutes, which should be considered when defining the

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57 49 F Supp 2d 851 (ED Va 1999).

58 *Ibid* 858 (ED Va 1999).

59 *Google/DoubleClick*, Case COMP/M. 5727 (11 March 2008).

60 *Ibid* para 90; see also Cédric Manara, 'The Italian Competition Authority examines commitments regarding the functioning of Google News (FIEG v Google)', 13 May 2010, e-Competitions, No 45694, **www.concurrences.com** (for approach followed in *FIEG (Federazione Italiana Editori Giornali) v Google*).

61 *Google/DoubleClick*, paras 82–84.

62 *Ibid* para 89.

63 *LiveUniverse, Inc v MySpace, Inc*, CV 06-6994AHMRZX, 2007 WL 6865852 (CDCal 4 June 2007) aff'd, *LiveUniverse, Inc v MySpace, Inc*, 304 F App'x 554 (9th Cir 2008). See also in the European Union, Case COMP/M.6281 *Microsoft/Skype*, 64–68, **http://ec.europa.eu/competition/mergers/cases/decisions/m6281_20111007_20310_2079398_EN.pdf**, accessed 18 October 2012.

geographical market. Accordingly, when assessing the relevant geographical market in relation to these businesses, multiple geographical markets may come into play as the location in numerous areas of production plants, warehouses or retail outlets by a single company may suggest an operation of the company's businesses across more than one geographical market.[64] While most retail markets are considered local, many are also regional or national in scope.[65] Identifying the relevant geographical market with respect to auction and retail businesses for online products and services may, therefore, entail a similar analysis, which would take into consideration the relevant geographical market from the perspective of a particular buyer group.

In light of the entrenched doctrinal understandings on market definitions, both from the US as well as the EU perspective, antitrust authorities face the challenge of properly delineating the relevant product and geographical markets, while at the same time correctly evaluating an undertaking's market power in a certain market when it comes to the internet sector in which product and geographical boundaries are yet to encroach on the established practical considerations of these authorities.

Concerted practice

In general

Concerted actions between companies that restrain or prevent competition can be illegal under antitrust law. In the internet context, several types of multi-firm conduct have been scrutinised by US and EU regulators as potentially illegal.

In general, the US and the EU diverge in their approach towards restraints of trade. In the US, the basic approach is a distinction between 'per se' cases and 'rule of reason' cases. In Europe, the basic approach is an outright prohibition on suspect conduct, although there is a possibility of exemption. American agencies and courts tend to adhere to a Chicago school of economics approach,[66] which stresses the potential efficiencies of restrictive vertical agreements. In contrast, EU agencies and courts express more concern with vertical restraints, in part as potential impediments to the development of the European Single Market.

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64 Harris, 33.

65 Derik F Abell, *Defining the Business: The Starting Point of Strategic Planning* (Englewood Cliffs, NJ: Prentice-Hall, 1980), 43–61.

66 See Richard A Posner, 'Chicago School of Antitrust Analysis' (1978–1979) 127 U Pa L Rev 925; Robert Bork, 'Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception' (1954–1955) 22 U Chi L Rev 157.

The Sherman Act, section 1, prohibits 'every contract, combination… or conspiracy in restraint of trade', while 'focus[ing] directly on the challenged restraint's impact on competitive conditions'.[67] Some common illegal horizontal restraints of trade include restraints engaged in by competitors, such as price-fixing, allocation of markets or customers and boycott or refusal to deal. There are fewer illegal vertical restraints because these arrangements are not between direct competitors. Illegal vertical restraints may include price-fixing between a seller and a buyer, exclusive selling agreements, territorial and customer restrictions, exclusive dealing agreements, tying arrangements and refusals to deal.

The broad prohibition is limited to 'unreasonable' trade restraints.[68] The 'rule of reason' considers a challenged action illegal if its expected anti-competitive consequences outweigh its business justifications and any expected procompetitive impact.

From the US perspective, for more than a decade it has been suggested that the rapidly growing e-commerce market presents several implications for antitrust policy.[69] Markets may no longer be conducive to long-term market dominance by a single firm given the increasing demand and the increasing number of new products entering into the market. On the other hand, potential competitive concerns in e-commerce may be similar to those found in more traditional markets, but tempered by a number of 'special characteristics'.[70] These characteristics warrant a sophisticated and subtle antitrust enforcement policy, designed to prevent, inter alia, collusive agreements, while also allowing innovation to proceed at its 'market-determined pace'.[71]

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67 *Nat'l Soc'y of Prof'l Eng'rs v US*, 435 US 679, 688 (1978).

68 *The Standard Oil Company of New Jersey, et al v The United States*, 221 US 1, 31 S Ct 502; 55 L Ed 619; 1911 US LEXIS 1725.

69 David A Balto, 'Emerging Antitrust Issues in Electronic Commerce' (12 November 1999), **www.ftc.gov/speeches/other/ecommerce.shtm**, accessed 19 October 2012 ('Unlike steel, oil, automobiles and other "smokestack" industries that arose in the latter part of the 19th and early part of the 20th centuries, the electronic commerce market has grown from virtually nothing to an economic heavyweight in less than a decade').

70 *Ibid*.

71 *Ibid*; see also DOJ, 'Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement between Microsoft Corporation and Yahoo! Inc' (18 February 2010), at 1, **www.justice.gov/atr/public/press_releases/2010/255377.pdf**, accessed 18 October 2012 ('Experience and expertise developed during our 2008 investigation of the proposed Google/Yahoo! search advertising agreement also informed our analysis. After a thorough review of the evidence, the division has determined that the proposed transaction is not likely to substantially lessen competition in the United States, and therefore is not likely to harm the users of Internet search, paid search advertisers, Internet publishers, or distributors of search and paid search advertising technology. In addition, the proposed agreement likely will enable more rapid improvements in the performance of Microsoft's search and paid search advertising technology than would occur if Microsoft and Yahoo! were to remain separate').

From a European perspective, the EU prohibits collusion and other anti-competitive practices between companies that affect the EEA, under Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101 prohibits all agreements between firms that restrict, prevent or distort competition within the common market in Europe. This includes informal agreements or concerted practices.[72] Coordination of behaviour in a way that 'knowingly substitutes practical cooperation between them for the risk of competition' will suffice to constitute concerted practice.[73] The concerted practice must relate to a future act, but a concrete plan does not need to be formulated.[74]

The European Commission has put an emphasis on investigating and breaking up any agreement that establishes artificial price restrictions or barriers for e-commerce within the European market.[75] In the iTunes case, the ECJ found that 'agreements between each record company and Apple that restrict music sales… consumers are restricted in their choice of where to buy music, and consequently what music is available, and at what price. The [European] Commission alleges… that these agreements violate the EC Treaty's rules prohibiting restrictive business practices (Article 81)'.[76]

Price-fixing in online sales

Price-fixing in online sales is an important focus for enforcement authorities. In order to understand the parameters with which price-fixing ought to be evaluated when internet-based businesses are involved, one must also consider the fundamental tenets within which this restriction functions in the antitrust arena.

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72 A 'gentlemen's agreement' suffices, as long as the companies involved were aware that their behaviour was restraining trade. *Van Landewyck v Commission*, Case 209/78 [1980] ECR 3125, paras 85–91.

73 *ICI Ltd v Commission*, Case 48/69 [1972] ECR 619, para 64.

74 *Rhône-Poulenc v Commission*, Case T-1/89 [1991] ECR II-867, para 121, CFI; *Stora Kopparbergs Bergslags AB v Commission*, Case T-354/94 [1998] ECR II-2111, paras 111–112.

75 Joaquin Almunia, 'Joaquin Almunia Vice President of the European Commission responsible for competition policy: Competition in Digital Media and the Internet UCL Jevons Lecture London' (7 July 2010) (Press Release. Speech/10/365), **http://europa.eu/rapid/press-release_SPEECH-10-365_en.htm**, accessed 18 October 2012.

76 European Commission, 'Competition: Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple' (MEMO/07/126, 3 April 2007), **http://europa.eu/rapid/press-release_MEMO-07-126_en.htm**, accessed 18 October 2012.

Historically, a manufacturer in the United States could not set the specific or minimum prices charged by online retailers.[77] The supplier may, however, establish the maximum prices charged by online retailers.[78] A 2007 Supreme Court decision introduced greater flexibility, holding that vertical price-fixing, where manufacturers set minimum prices for retailers, is no longer per se illegal.[79] According to the Supreme Court, minimum price agreements between manufacturers and retailers should be judged under the 'rule of reason', the agreements should be considered regarding their effect on inter-brand and intra-brand competition.[80]

An agreement to fix prices, even if there is no evidence that the target price had any influence on the actual selling price, has also been considered as constituting a restriction on competition from the European Commission's viewpoint.[81] The effect of a price-fixing may result in an 'illusion of competition' while in reality, customers are stripped away from exercising any effective choice, thereby paying higher prices.[82]

Google books as price-fixing agreement

United States' courts have assessed price-fixing allegations for internet businesses under the rule of reason. In early 2011, a federal judge in New York struck down an agreement between Google, book authors and publishers, to form Google Book Search based on antitrust and copyright grounds.[83] The court ruled that the agreement would have created a 'de facto monopoly' for online book publishing and generated profit from book sales without the permission of copyright owners.

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77 Richard M Steuer, 'Retailing on the Internet' (Summer 1998) Antitrust, at 50, 51, referencing *Business Elecs Corp v Sharp Elecs Corp*, 485 US 717 (1988).

78 *State Oil Co v Khan*, 118 S Ct 275 (1997).

79 *Leegin Creative Leather Products v PSKS*, 551 US 877 (2007).

80 *Ibid*; see also Daniel B Nixa, 'Internet Retailers and Intertype Competition: How the Supreme Court's Incomplete Analysis in Leegin v PSKS Leaves Lower Courts Improperly Equipped to Consider Modern Resale Price Maintenance Agreements' (2008–2009) 11 Vand J Ent & Tech L 461, 461.

81 See Article 101, TFEU (prohibiting agreements that 'directly or indirectly fix purchase or selling prices or any other trading conditions'); see *Bellamy & Child*, §5.015; see also *ICI v Commission*, Case T-13/89 [1992] ECR II-1021.

82 Cf *Methionine*, Case J. 37.519, OJ 2003 L255/1, (2004) 4 CMLR 1062.

83 *The Authors Guild, et al v Google Inc* (22 March 2011) No 05 Civ 8136 (DC), United States District Court, SD New York. The Google Books agreement came out of a class action filed in 2005 by a guild of authors and publishers against Google, objecting to copyright violations within the Book Search, and which led to Google having the right to display the books online and profit from them, through the sale of subscriptions to its Book Search collections and access to individual texts.

One of the DOJ's concerns was potential horizontal price-fixing from the agreement;[84] the inclusion of many competitors in a single agreement could be considered a quasi-cartel for online book publishing. Subjecting the market to a central decision-making authority rather than diverse competitors generated concerns regarding the extent of liability for price increases and innovation or competition decreases.[85] Under the proposed agreement, an algorithm would set the price of books, placing pricing power under the control of the central decision-making authority. The court addressed price-fixing and market exclusion through internet-related conduct using traditional competition law analysis, demonstrating potential flexibility in the application of traditional principles to new markets.

Apple and Amazon e-book retail

Agreements involving Apple, Amazon and several e-book publishers have faced significant scrutiny by regulatory agencies for alleged competition law violations. The US and EU are conducting separate and ongoing investigations into multiple agreements involving these internet-based products.

In August 2010, the Connecticut Attorney General's Office announced an antitrust investigation into Apple and Amazon's agreements with e-book publishers.[86] The agreements included 'most-favoured nation' clauses

84 *Ibid* at 36 et seq; see also 12, stating the other two antitrust-related objections raised by objectors to the Amended Settlement Agreement as; (1) 'the [Amended Settlement Agreement] would effectively grant Google a monopoly over digital books, and, in particular, orphan books', and (2) 'such a monopoly would further entrench Google's dominant position in the online search business'.

85 Eric M Fraser, 'Antitrust and the Google Books Settlement: The Problem of Simultaneity' (2010) 4 Stan Tech Law Rev 10–11.

86 Office of Attorney General State of Connecticut, Press Release, *Attorney General Investigates Potential Anticompetitive E-Book Deals with Amazon and Apple* (2 August 2010), **www.ct.gov/ag/cwp/view.asp?Q=463892&A=386**, accessed 18 October 2012; Maya Reynolds, *Texas AG Probes Publishing Agency Model, One Writer's View of the World* (2 June 2010), **http://mayareynoldswriter.blogspot.com/2010/06/publishers-marketplace-had-interesting.html**, accessed 18 October 2012.

(MFN),[87] requiring publishers to guarantee that no other retailer could set prices lower than the price set for Apple.[88] Given the publishers' market shares in the product market for e-book sales, the court addressed whether the respective contract clauses were effectively setting a price floor for e-books from major publishers.

In August 2011, the first of 30 class action lawsuits was launched against Apple in the United States.[89] The lawsuits alleged that Apple engaged in illegal price fixing with several prominent book publishers to increase prices for popular e-book titles and force competitors, such as Amazon, to abandon consumer discounts. Allegedly, the agreements encouraged publishers to deny Amazon access to books Amazon priced too low; publishers would then only offer those books for sale through Apple's iPad.

In early March 2011, the European Commission launched an unannounced investigation into the e-book publishing sector, concerning violations of EU competition law.[90] Formal investigations by both US and EU regulatory authorities[91] were launched in December 2011, against five publishers and Apple for colluding to raise e-book prices.

87 An MFN clause is a promise by one party to treat a buyer as well as the supplier treats its best, 'most-favoured' customer (Jonathan B Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favoured-Customer" Clauses' (1995–1996) 64 Antitrust L J 517, 519). MFN clauses can lead to price floors, and are not 'per se illegal' conduct, but they are possibly illegal if they have primarily anti-competitive effects, which must be identified and compared with efficiencies (see Baker, at 519; for DOJ challenges to MFN clauses, see *United States v Blue Cross Blue Shield of Michigan*, No 2:10-cv-15155 (ED Mich Filed 18 October 2010); cf also *United States v Delta Dental Plan*, 1995-1 Trade Cas (CCH), para 71, 048 (D Ariz 1995), *United States v Medical Mut of Ohio*, 1999-1 Trade Cas (CCH), para 72, 465 (ND Ohio 1999); for FTC challenge cf *RxCare of Tenn.*, 121 F.T.C. 762 (1996), the enforcement of MFN clauses in the healthcare industry was limited by the FTC; for facilitating collusion see *Starr v Sony BMG Music Entertainment*, 592 F 3d 314 (2d Cir 2010), *In re Brand Name Prescription Drugs Antitrust Litig*, 288 F 3d 1028 (7th Cir 2002); for exclusionary practices see *Mich Assoc of Psychotherapy Clinics v Blue Cross & Blue Shield of Mich*, 325 NW 2d 471 (Mich Ct App 1982); for evidence of market power see *Reazin v Blue Cross & Blue Shield of Kan, Inc*, 899 F 2d 951, 971 and n 30 (10th Cir 1990). For procompetitive effects of MFN clauses cf *Blue Cross & Blue Shield United of Wis v Marshfield Clinic*, 65 F 3d 1406, 1415 (7th Cir 1995), *Ocean State Physicians Health Plan v Blue Cross & Blue Shield*, 883 F 2d 1101, 1110–11 (1st Cir 1989).

88 *United States v Apple, Inc*, No 1:12-CV-2826 (SDNY filed 11 April 2012), at 6, **www.justice.gov/atr/cases/f282100/282143.pdf**, accessed 18 October 2012.

89 *Petru et al v Apple, Inc et al*, CA No 3:2011 CV03892 (ND Cal 9 August 2011).

90 Europa, 'Antitrust Commission Confirms Unannounced Inspections in the e-Book Publishing Sector' (2 March 2011), **http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/126**, accessed 18 October 2012.

91 Europa, 'Antitrust Commission Opens Formal Proceedings to Investigate Sales of e-Books' (6 December 2011), **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1509&format=HTML&aged=0&language=EN**, accessed 18 October 2012; Thomas Catan, 'Justice Department Confirms E-Book Pricing Probe', Wall Street Journal Online (18 December 2011), **http://online.wsj.com/article/SB10001424052970203501304577084331269336926.html**, accessed 18 October 2012.

While the investigation launched by the European Commission has not yet closed as of the last quarter of 2012, in early 2012, following much criticism,[92] the DOJ filed a civil antitrust complaint against Apple and five of the six largest publishers in the United States (ie HarperCollins, Hachette, Macmillan, Penguin and Simon & Schuster). The complaint alleged a per se violation of section 1 of the Sherman Act for conspiring to raise prices through collective 'agency agreements' to market e-books.[93] Hachette, HarperCollins and Simon & Schuster agreed to a proposed settlement with the DOJ.[94] Under the settlement, the publishers would have to fulfil three conditions: they must (1) terminate the anti-competitive MFN agreements with Apple and other e-book retailers; (2) refrain from entering into such deals for at least two years; and (3) abstain from retaliating against any retailer setting, altering or reducing the price of any e-book.[95]

When viewed as a whole, concerted practices among web-based businesses may increasingly pose non-traditional enforcement challenges for courts and enforcement agencies; traditional antitrust parameters would have to be modelled if enforcement policies in this fast-growing sector are to be set up and developed further in order to address these challenges in cases involving companies colluding on the electronic platform. One would naturally expect such adaptation to benefit consumers on the internet realm, rather than individual competitors.[96]

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92 See, eg, 'Letter from Scott Turow: Grim News' (9 March 2012) (The Authors Guild President, Scott Turow, writing that the DOJ 'may be on the verge of killing real competition in order to save the appearance of competition'), **www.authorsguild.org/advocacy/articles/letter-from-scott-turow-grim.html**, accessed 18 October 2012.

93 *United States v Apple, Inc*, at 2.

94 Proposed Final Judgments as to Defendants Hachette, HarperCollins and Simon & Schuster, *United States v Apple, Inc, et al*, 12-CV-2826 (SDNY 11 April 2012).

95 The State of Connecticut Attorney General, Press Release, 'Apple, Publishing Companies Charged With Illegal Price-Fixing Scheme in Marketing of eBooks' (11 April 2012), **www.ct.gov/ag/cwp/view.asp?Q=502294&A=2341**, accessed 18 October 2012.

96 See Robert H Bork and J Gregory Sidak, 'What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google' (October 2012), American Enterprise Institute, **www.aei.org/files/2012/10/05/-what-does-the-chicago-school-teach-about-internet-search-and-the-antitrust-treatment-of-google_132249480630.pdf**, accessed 9 October 2012; see also *Marrese v Am Academy of Orthopedic Surgeons*, 706 F 2d 1488, 1497 (7th Cir 1983) (citing *University Life Ins Co of Am v Unimarc Ltd*, 699 F 2d 846, 853 (7th Cir 1983) (Judge Posner expressed '***The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors***' (emphasis added)); Robert H Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (parts 1 & 2) (1965) 74 Yale LJ 775, (1966) 75 Yale LJ 373, at 66 ('The legislative histories of the antitrust statutes, therefore, do not support any claim that Congress intended the courts to sacrifice consumer welfare to any other goal. The Sherman Act was clearly presented and debated as a *consumer welfare prescription*' (emphasis added)); also cf *Brook Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 224 (1993) ('It is axiomatic that *the antitrust laws were passed for "the protection of competition, not competitors"*' (emphasis added) (quoting *Brown Shoe Co v United States*, 370 US 294, 320 (1962)).

Monopolistic conduct

A second set of illegal antitrust conduct revolves around unilateral conduct by firms with strong market positions. American antitrust policy shows some openness towards monopolies, recognising that market dominance can be a reward for successful investment and innovation.[97] EC competition policy prioritises competition and is more likely to impose significant limitations on the actions of a dominant company.[98] This section first provides an overview of the US approach to monopolies and the EU approach to monopolies. Based on these divergent approaches, it then addresses specific conduct that indicates potential monopolistic behaviour among internet businesses – exclusionary conduct, exclusive dealing and product or service tying.

US approach

Section 2 of the Sherman Act prohibits a company from monopolising, attempting to monopolise or conspiring to monopolise a market.[99] Monopolies are not per se unlawful and courts recognise a 'fundamental tension'[100] in the different settings in which monopoly should appropriately be condemned.[101] Section 2 is primarily aimed at preventing injury to competition through exclusion of rivals. Engaging in exclusionary pricing practices (eg predatory pricing, price discrimination,[102] fidelity rebates, etc)

97 See *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398, 407 (2004); *United States v Aluminum Co of Am (Alcoa)*, 148 F 2d 416, 430 (2d Cir 1945).

98 See Richard Whish, *Competition Law* (5th edn, 2004), 202–208 (discussing examples of abuse of dominance). In many of these cases the practices are essentially prohibited per se if the firm is dominant, ie has a share of an antitrust market that is higher than 40 per cent or so. See *British Airways, PLC v Comm'n* [2003] ECR II-5917, paras 211, 223–25; *Wanadoo Interactive*, Commission Decision of 16 July 2003 relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233), para 227.

99 15 USC § 2, Chapter 1 ('Monopolizing Trade a Felony; Penalty').

100 *Berkey Photo, Inc v Eastman Kodak Co*, 603 F 2d 263, 273 (2d Cir 1979).

101 William F Adkinson, Jr, Karen L Grimm and Christopher N Bryan, 'Enforcement of Section 2 of the Sherman Act: Theory and Practice', Working Paper (3 November 2008), at 1, **www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf**, accessed 19 October 2012.

102 The Robinson-Patman Act prohibits the discrimination in price between buyers of commodities of similar grade and quality, where it will probably harm competition substantially. Malicious intent is not required. If sales have occurred at two different prices, then the first element of the statute has been met. The second element is that purchase has actually been completed, and to at least two different persons. The third element, that the commodities have similar grade and quality, depends on the physical characteristics and chemical composition of the goods. The fourth and final element is that there is injury to competition, suffered either by a competing buyer or competing seller. A company has two main defences based on the statute, even if all the elements have been met: cost justification and meeting the prices of competition.

is actionable under the Sherman Act. The traditional *Grinnell*[103] formulation requires a two-prong test to determine monopolisation: (1) the possession of monopoly power in the relevant market; and (2) the wilful acquisition or maintenance of monopoly power distinct from growth or development owing to superior conduct.

Section 2 violations are difficult to identify because the standard to determine what level of conduct is anti-competitive enough to be illegal can be elusive. It can be challenging to predict what conduct by a monopolist will be considered beneficial versus adverse to its competition, and beneficial versus deleterious to its customers.[104]

The first element, described above, is determined by considering the company's power to control prices or exclude competition. Monopolistic power may be indicated by the company's share of the relevant market;[105] a market share over 70 per cent of the market is typically sufficient to infer that a company holds monopoly power.[106] Other indicia for monopoly power include the ability of a company to raise prices substantially above the competitive level and the ability to continue price increases for a significant

103 *US v Grinnell Corp*, 284 US 563, 570–571 (1966).

104 Thomas A Jr Piraino, 'Identifying Monopolists' Illegal Conduct Under the Sherman Act' (2000) 75 NYU L Rev 809, 810–11.

105 See, for example, *US Anchor Mfg, Inc v Rule Indus, Inc*, 7 F 3d 986, 999 (11th Cir 1993) ('The principal measure of actual monopoly power is market share'); *Weiss v York Hosp*, 745 F 2d 786, 827 (3d Cir 1984) ('A primary criterion used to assess the existence of monopoly power is the defendant's market share'); *Movie 1 & 2 v United Artists Commc'ns, Inc*, 909 F 2d 1245, 1254 (9th Cir 1990) ('[A]lthough market share does not alone determine monopoly power, *market share is perhaps the most important factor to consider in determining the presence or absence of monopoly power*' (emphasis added)).

106 Quoted from Piraino: see *EI du Pont de Nemours*, 351 US at 379, 391 (inferring monopoly power from 75 per cent market share); *Heatransfer Corp v Volkswagenwerk, AG*, 553 F 2d 964, 981 (5th Cir 1977) (noting that 71 per cent to 76 per cent market share supports inference); *United States v Aluminum Co of Am*, 148 F 2d 416, 424 (2d Cir 1945) (stating that 90 per cent market share supports inference); *Illinois ex rel Hartigan v Panhandle E Pipe Line Co*, 730 F Supp 826, 902 (CD Ill 1990) (observing that for market shares over 70 per cent, 'courts have simply inferred the existence of monopoly power without specifically examining... control over prices [or] competition'); *Exxon Corp v Berwick Bay Real Estates Partners*, 748 F 2d 937, 940 (5th Cir 1984) (per curiam) ('to establish "monopoly power, lower courts generally require a minimum market share of between 70% and 80%"'); cf *Rebel Oil Co v Atl Richfield Co*, 51 F 3d 1421, 1438 (9th Cir 1995) (stating that 'numerous cases hold that a *market share of less than 50 percent is presumptively insufficient to establish market power*' in a claim of actual monopolisation (emphasis added)).

period without erosion from new entry or expansion into the market.[107] Market power durability is another factor to assess the existence of monopoly power.[108]

Illegal attempts to monopolise involve companies that do not possess monopoly power but engage in anti-competitive conduct designed to achieve monopoly power. The elements of attempted monopolisation are: (1) that the company had specific intent to control prices or destroy competition; (2) that it acted in an anti-competitive manner designed to accomplish this purpose; (3) that there is a strong possibility that monopoly power would be achieved; and finally (4) that its conduct caused antitrust injury.[109] A company that engages in attempted monopolisation can still be liable under antitrust law, even if the monopolistic activity does not lead to a market monopoly.

The second element may be satisfied through conscious acts to further or maintain a monopoly, including acquisition of competitors; exclusive dealing arrangements; or unreasonably low pricing tactics with the prospect of monopolistic pricing once competition is eliminated. Wilfulness to monopolise is required, but it does not require malicious intent to drive out competitors. It is, however, legal for a company to achieve monopoly power through growth or development as a consequence of a better product, sharper business acumen or an accident of history.[110]

Most US courts evaluating innovative technology for antitrust liability adhere to a standard that resembles a 'no economic sense' test. [111] The courts may not find liability if there appears to be a valid reason for the company's conduct, or if the company can demonstrate that plausible efficiencies result from its conduct; if no valid reason or efficiency can be shown, the court may be more inclined to find the company liable for illegal monopolistic conduct.

Differentiating between anti-competitive conduct by a monopolist and a company's growth as a result of a superior product, business acumen or historical accident is an important concern. This differentiation is particularly

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107 *AD/SAT v Associated Press*, 181 F 3d 216, 227 (2d Cir 1999) (quoting 2A Phillip E Areeda et al, *Antitrust Law* (2nd edn, 2002), 501, at 90); see also *United States v Dentsply Int'l, Inc*, 399 F 3d 181, 188–89 (3d Cir 2005) ('In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share' (quoting *United States v Syufy Enters*, 903 F 2d 659, 665–66 (9th Cir 1990)).

108 See *Colo Interstate Gas*, 885 F 2d at 695–96 ('If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense'); *WilliamsburgWaxMuseum, Inc v Historic Figures, Inc*, 810 F 2d 243, 252 (DC Cir 1987) (finding that a firm did not have monopoly power when a competitor was able to supply customer's demand within a year).

109 *Rebel Oil Co, Inc v Atlantic Richfield Co*, 51 F 3d 1421, 1433 (9th Cir 1995).

110 *United States v Grinnell Corp*, 384 US 563 (1966).

111 Cf *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398, 124 S Ct 872 (2004).

challenging in a rapidly expanding internet context. A large internet-based company may pose particularly interesting regulatory questions because of unprecedented strength in different internet markets.[112]

EU approach

European competition law prohibits the abuse of dominant market positions, particularly when an undertaking uses its market power to hinder potential competitors from offering new products or services under more attractive conditions. Article 102 of the TFEU prohibits undertakings from abusing their dominant position within a substantial part of the internal market.[113] While this provision does not establish a standard for determining an undertaking as 'dominant', the European Commission, as well as national courts, generally follows the definition established by the ECJ in *Hoffmann-La Roche*.[114]

Abuse of dominance in the internet context could include unfair pricing of products or services (such as charging high prices for interconnection), access to the connection between the individual computer or network and the ISP's network (often referred to as 'local loop'), bundling (where provisions of different services are tied together)[115] and discrimination. The Directorate-General for Competition has announced that its enforcement

112 Geoffrey A Manne and Joshua D Wright, 'Google and the Limits of Antitrust: The Case Against Google' (2011) 34 Harv J L & Pub Pol'y 171, 191–192; see 'Notes: eMonopoly: Why Internet-Based Monopolies Have An Inherent "Get-Out-Of-Jail-Free Card"' (2010–2011) 76 Brook L Rev 731.

113 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts' (Article 102, TFEU).

114 *Hoffman-La Roche & Co AG v Commission*, Case 85/76 [1979] ECR 461, para 91 ('The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which… has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'); also cf *NV Nederlandsche Banden-Industrie Michelin v Commission*, Case 322/81 [1983] ECR 3461, para 70.

115 Cf *Oscar Bronner v Mediaprint*, Case C-7/97 [1998] ECR I-7791; [1999] 4 CMLR 112.

and advocacy activities in 2012 will continue to target the digital economy given its potential for growth.[116]

EC authorities have expressed a commitment to promoting interoperable systems. The intent is to support platforms that do not lock customers, suppliers or developers into specific products, which could block dealings with competitors and set restrictions on innovation.[117] When interpreting the unique dynamics of the internet market in relation to antitrust violations, the European Commission may consider: preferential treatment of particular products; excluding or disadvantaging competitors from the market; and exclusionary or exploitative practices.[118] Companies with a strong market presence in multiple internet-related sectors have been placed under the scrutiny of the European Commission for antitrust concerns.

On 30 November 2010, the European Commission announced the opening of formal antitrust investigations into Google Inc's actions, alleging abuse of its dominant position in online research, a violation of Article 102 of the TFEU.[119] The European Commission's large-scale market investigation identified four concerns warranting further scrutiny to determine whether there was abuse of a dominant position.[120]

The first concern was preferential treatment whereby Google displayed links to its own vertical search services[121] differently from links to competing search services. The second concern was content copying from competing vertical search services – the potential appropriation of benefits from a competitor's investment. The European Commission expressed concern that content copying could reduce competitors' incentives to invest in the

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116 European Commission, DG Competition Management Plan 2012, at 23, **http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp.pdf**, accessed 19 October 2012.

117 Joaquín Almunia, 'Joaquín Almunia Vice President of the European Commission responsible for competition policy: Competition in Digital Media and the Internet UCL Jevons Lecture London' (7 July 2010) (Press Release. Speech/10/365) **http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/365&format=HTML&aged=1&language=EN&guiLanguage=en**, accessed 18 October 2012.

118 David Wood, 'EU Competition Law and the Internet: Present and Past Cases' (April 2011) *Competition Law International* (IBA), 44; see Steven Hetcher, 'The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable' (2006) 13 Mich Telecomm Tech L Rev 1, **www.mttlr.org/volthirteen/hetcher.pdf**, accessed 18 October 2012 (for discussions on Google Books and arguments submitted in favour of Google).

119 Europa, Press Release, 'Antitrust: Commission probes allegations of antitrust violations by Google', **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624**, accessed 19 October 2012.

120 Joaquín Almunia, 'Statement of VP Almunia on the Google antitrust investigation' (21 May 2012) (Speech/12/372), at 2, **http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/372**, accessed 19 October 2012.

121 Vertical search services are specialised search engines with focus on specific topics, such as restaurants, news or products.

creation of original content for the benefit of internet users. The third concern focused on agreements between Google and its advertising partners that might prevent advertisers from placing certain types of ads on their own websites, resulting in de facto exclusivity. The last concern addressed contractual restrictions allegedly placed on software developers concerning the portability of online search advertising campaigns from the AdWords platform to competitors' platforms.

On 21 May 2012, the Vice President of the European Commission responsible for Competition Policy, Joaquín Almunia, announced that Google had the opportunity to offer remedy proposals by July 2012 to avoid lengthy proceedings.[122] In early July 2012, Google committed to addressing the four concerned areas, and in early October, Google offered to brand information from its in-house services that are included in search results pages. Following Google's proposal for concessions, the FairSearch coalition[123] sent an open letter to both DG Comp as well as the FTC, claiming that '[a] limited "remedy" will not prevent Google from continuing its other exclusionary conduct, such as preferencing its own services or demoting the rankings of competitive sites.… In the end, placement matters far more than labelling'.[124]

Allegations against Google's alleged anti-competitive practices in the online search market also triggered competition law experts to release a report on 5 October 2012,[125] dismissing many of the complaints against the company in antitrust investigations pursued by US and EU antitrust agencies. Released by the former Circuit Judge of the US Court of Appeals for the District of Columbia Circuit, Robert H Bork, and the Ronald Coase Professor of Law and Economics at the Tilburg Law and Economics Center at Tilburg University, J Gregory Sidak, the report examines claims brought against Google in light of antitrust principles established by the Chicago School of Law and Economics. The report notes that '[p]unishing Google

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122 See note 112 above, 3; Joaquín Almunia, 'Antitrust enforcement: Challenges old and new' (8 June 2012) (Speech/12/428), at 5, **http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428**, accessed 19 October 2012.

123 A group of businesses and organisations comprising companies including Google's competitors, such as Microsoft, Kayak, Foundem and Expedia. FairSearch.org, About FairSearch.org, **www.fairsearch.org/about-fairsearch**, accessed 10 October 2012.

124 Fair Search, 'A Letter on Restoring Competition in Online Search' (18 September 2012), **www.fairsearch.org/content-scraping/a-letter-on-restoring-competition-in-online-search**, accessed 10 October 2012.

125 Robert H Bork and J Gregory Sidak, 'What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google' (October 2012), American Enterprise Institute, **www.aei.org/files/2012/10/05/-what-does-the-chicago-school-teach-about-internet-search-and-the-antitrust-treatment-of-google_132249480630.pdf**, accessed 9 October 2012 (hereafter 'Bork and Sidak').

for being the most effective search competitor would harm consumers and thus contradict the recognized purpose of antitrust law'.[126] The report also dismisses complaints that Google's ranking methodologies and search algorithms are unfair, stating that 'Google would employ a particular ranking methodology only if it helps to attract and retain search engine users'.[127] Judge Bork and Professor Sidak comment in their report that '[a]ntitrust intervention that would prohibit or circumscribe Google's practices would punish and therefore deter the same welfare-enhancing innovations that have made Google an effective competitor'.[128]

While the proposed commitments and the European Commission's assessment of the proposals have not been publicly disclosed, one might anticipate a 'solid grounding in facts' and a 'careful application of tested antitrust analysis', given the dynamics of the fast-moving and quickly evolving[129] internet market.

Exclusionary conduct

Exclusionary conduct is of particular concern for internet-based operations. If a dominant firm structures its products and businesses intending to disadvantage its competitors and limit competition, it may be engaging in illegal conduct. Other potentially exclusionary conduct subject to antitrust scrutiny includes the 'locking in of customers', 'blocking portability of data' and 'closing platforms'.

Locking in of customers

US authorities are concerned with consumer lock-ins to internet products. Closed source code, lack of interoperability, proprietary resources or lack of exportability of data may be barriers to prevent users from changing products or services. Lock-ins harm competition because consumers are locked in to a closed system and cannot migrate to new products from

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126 *Ibid* 3; see also Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Tex L Rev 1, 5 (explaining 'every successful competitive practice has victims. The more successful a new method of making and distributing a product, the more victims, the deeper the victims' injury').

127 Bork and Sidak, note 125 above, 3 (also noting that 'Google's competitors do the same thing, including offering specialized search').

128 *Ibid.*

129 FTC, 'Statement of Federal Trade Commission Concerning Google/DoubleClick' (FTC File No 071-0170), at 13, **www.ftc.gov/os/caselist/0710170/071220statement.pdf**, accessed 19 October 2012 ('Accounting for the *dynamic nature* of an industry *requires solid grounding in facts and the careful application of tested antitrust analysis*' (emphasis added)).

competitors, which prevents consumers from switching to substitute products in the primary market.[130]

Moreover, closed platforms can be used as choke points. If a company manufactures a platform it can exercise vertical leverage and control who can write for the platform, what tools writers can use, what applications are featured, what prices are charged, who receives the profits and who accesses information about customer behaviour. Those in control of the platform can potentially degrade the quality of competitors' products within the platform or block competitors' ability to use the platform. For example, an internet service provider could undermine the quality of competitors' video streams using its network to promote its own video streams.[131] This current net neutrality debate focuses on whether the companies who control telecommunications networks will block their customers from accessing competitors' products at full speed and ideal quality. Choke points, which consumers must use to access certain products, are often subject to antitrust scrutiny.[132] Facebook, as a market leader in social networking, is subject to significant observation regarding its alleged exclusionary conduct.

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130 David A J Goldfine and Kenneth M Vorrasi, 'The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts' (2004–2005) 72 Antitrust LJ 209, 209 ('A "lock-in"… is also known as "installed based opportunism" – the ability of primary market competitors to charge supra-competitive prices for their aftermarket parts or services'); also see *Eastman Kodak Co v Image Technical Services, Inc*, 504 US 451 (1992), at 476–477 (for the court's description of 'lock-in').

131 Mark Cooper, 'Testimony to the Subcommittee on Courts and Competition Policy, Committee on the Judiciary' (16 September 2010) (US House of Representatives), **http://judiciary.house.gov/hearings/pdf/Cooper100916.pdf**, accessed 18 October 2012.

132 See *Kinderstart.com LLC v Google, Inc*, not reported in F Supp 2d (2006) No C 06-2057 JF (RS); *Kinderstart.com LLC v Google, Inc*, not reported in F Supp 2d (2007) No C 06-2057 JF (RS). Kinderstart 2006, at para 9 (Kinderstart, the website operator of www.kinderstart.com, which is a directory and search engine for links to information and resources on subjects related to young children, claimed that Google engaged in 'pervasive monopolistic practices', which have led to the denial of free speech rights, prevention and destruction of competition and predatory pricing. Among Kinderstart's allegations was attempted monopolisation under Section 2 of the Sherman Act and that it and Google are competitors in the 'Search Engine Market' and the 'Search Ad Market', but that Google has a dominant position in a third market, the 'Website Ranking Market'. Kinderstart claimed that through its 'statements, behaviour, conduct, acts and omissions,… [Google] harbours and evinces specific intent to destroy competition in the Search Engine Market and the Search Ad Market', and to 'control prices in the Search Ad Market'. The court decided in favour of Google, thereby dismissing Kinderstart's allegations); see also *Google, Inc v MyTriggers.com, Inc*, 2011 WL 3850286 (2011) No 09CVH10-14836, 31 August 2011; *Melanie Tucker v Apple Computer, Inc*, United States District Court (ND Cal 2006) No C 06-04457 JW; *In Re Apple iPod iTunes* Antitrust Litigation, 796 F Supp 2d 1137 (ND Cal 2011).

Facebook

Some commentators have warned that Facebook's market position could indicate potentially illegal monopolistic behaviour by erecting barriers to entry into the social networking market and preventing the exportability of personal information.[133]

As Facebook gathers more data on user behaviour, there is a potential to develop their platform to take advantage of that knowledge and create barriers to potential competitors in the social networking market.[134] The barrier is not one of technological blocking, but rather information blocking.[135]

In June 2011, the public interest group Consumer Watchdog filed an antitrust complaint[136] with the FTC alleging that Facebook engaged in illegal monopolistic conduct. The complaint alleged that Facebook used its Facebook credit virtual currency scheme to prevent its users from using competitors' virtual goods in online games; it also alleged that Facebook prohibited game developers from charging lower prices for their games on competitors' social networks, thus dictating prices and undermining competition in the virtual goods in virtual games product market. Consumer Watchdog was concerned that Facebook credits would discriminate against smaller game developers attempting to compete within the Facebook platform because of the imposed service fees for developers to use the virtual currency. The terms effectively created a barrier to competition between social game developers and between Facebook and other social networks that operate a virtual game platform.

Internet-based businesses, such as Facebook, may be subject to more extensive exclusionary conduct investigations. The rapid innovation required in the internet sector challenges existing ideas regarding monopolistic conduct, and raises questions as to whether an internet business intentionally engages in exclusionary policies or whether the company is simply innovating to the exclusion of potential competitors.

Exclusive dealing arrangements

Competition authorities are also concerned with exclusive dealing arrangements in the internet context. In the US these types of agreement are subject to the 'rule of reason' analysis, which assesses: monopoly power in a

133 Butts, 289.
134 *Ibid* 290–291.
135 *Ibid.*
136 See 'Consumer Watchdog Complaint, Request for Investigation and Other Relief' of 28 June 2011, **www.consumerwatchdog.org/resources/cwd_ftc_facebook_credits_complaint-3.pdf**, for full complaint by the authority.

relevant market, substantial foreclosure of the market covered by the restraint, degree of foreclosure, nature of the restraint, duration of agreement, entry conditions on both ends and proof of anti-competitive effect.[137]

A monopolist can remove access to the market and extend its monopoly power by requiring a customer or supplier to deal only with its company and not with its competitors. Under the 'rule of reason' analysis, if the arrangement concerns less than 30–40 per cent of the suppliers or customers in a particular market, a court is unlikely to find the conduct illegal.[138]

The European Commission assesses the legality of exclusive agreements by looking at their effects. Exclusive dealing agreements only violate Article 102 of the TFEU if they have anti-competitive effects, which distort the particular market.[139]

In early 2010, European officials examined Apple's developer policies for exclusive dealing agreements. The European Commission investigation focused on the App Store and the iPhone, particularly how developers created new apps, as well as the ban on Flash and certain other software languages. In September 2010, however, the European Commission dropped its investigation after Apple revised its company policies and the Android phone entered the market with its own App Store.[140]

Tying

Product tying is another type of conduct that raises particular concerns in the internet context. Tying occurs when a customer, purchasing a monopolised product, is required to buy a secondary product or service.

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137 See *Omega v Gilbarco* (9th Cir 1997) for modern exclusive dealing analysis (Clayton Act 3 in play because goods involved but legal analysis analytically equivalent; Gilbarco sold dispensers through both end users and authorised distributors, ie two different channels of distribution).

138 Quoted: *United States v Microsoft Corp* (Microsoft III), No Civ A 98-1232, 1998 WL 614485, at *19 (DDC 14 September 1998) (response to motion for summary judgment) (describing 40 per cent threshold of illegality for exclusive dealing arrangements); *Gonzales v Insignares*, No C84-1261A, 1985 WL 2206, at *2 (ND Ga 27 June 1985) (granting summary judgment for defendant when only 40 per cent of consumers were affected by exclusive arrangement).

139 For more on the Commission's approach to anti-competitive behaviour under Art 102 TFEU (ex Art 82) see: **http://ec.europa.eu/competition/antitrust/art82/index.html**.

140 European Commission, 'Antitrust: Statement on Apple's iPhone policy changes' (25 September 2010) (Press Release. Reference IP/10/1175), **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1175**, accessed 18 October 2012.

In US

US courts have been fairly strict in their review of monopolists' tying arrangements. A tying claim must show four elements: (1) that there are two separate products; (2) that the purchase of the tying product is conditioned on the purchase of the tied product; (3) that the company has sufficient market power for the tying product; and (4) it affects interstate commerce. Tying may be judged under a per se rule, or under a rule of reason test, depending on the obviousness of the anti-competitive conduct.[141] Generally, if the company has sufficient economic power in the market for the tying products to restrain trade, the conduct is per se illegal.[142]

Over the past few decades, US agencies have focused on 'technological tying'. When monopolists integrate previously independent components into a single package, making competitors' components unnecessary, the company has engaged in 'tying'. Federal courts have been ambivalent about whether technological tying is illegal. With IBM, Kodak and other technology companies, the federal courts have rejected tying claims; with Microsoft, however, the court found Microsoft guilty of illegally tying its internet browser to its operating system, in order to exclude competition from rival browsers.

To determine the legality of a product combination, part of the issue is whether technologically interrelated components are part of a single distinct product, and thus permissible tying.[143] Courts have also considered customer

141 *Phonetele, Inc v Am Tel & Tel Co*, 664 F 2d 716, 738 (9th Cir 1981).

142 *Jefferson Parish Hospital Dist No 2 v Hyde*, 466 US 2, 9 (1984); cf *Henry v AB Dick Co*, 224 US 1 (1912) (overruled by *Motion Picture Patents Corp v Universal Film Mfg Corp*, 243 US 502, 517–18 (1917)); *United States v Winslow*, 227 US 202 (1913); *United Shoe Mach Corp v United States*, 258 US 451 (1922). See also *Fortner Enters v US Steel Corp*, 394 US 495, 502–06 (1969) (reversing grant of summary judgment in favour of steel company that allegedly tied availability of credit to purchase of prefabricated houses).

143 *Phonetele, Inc v Am Tel & Tel Co*, 664 F 2d 716, 738 (9th Cir 1981), at 155; *Innovation Data Processing, Inc v IBM Corp*, 585 F Supp 1470, 1476 (DNJ 1984) (quoting *International Mfg Co v Landon, Inc*, 336 F 2d 723, 730 (9th Cir 1964)) (discussing IBM's integration of 'dump/restore' utility into mainframe operating system); *Accord Foremost Pro Color, Inc v Eastman Kodak Co*, 703 F 2d 534, 543 (9th Cir 1983) (declining to find per se unlawful tying arrangement by virtue of Kodak's bundling of 'technologically interrelated' 110 Instamatic camera, film and developing process).

preferences; if customers would prefer the products to be sold individually, the products are not interrelated and tying could be illegal.[144]

The US has generally used a 'rule-of-reason' standard to determine whether tied software products were illegal. The courts will consider whether there were compelling efficiency explanations for the tying that might make it legitimate.[145] US agencies recognise that technological tying can produce procompetitive benefits and efficiencies and therefore may not pursue tying conduct that benefits the market and the customers.[146]

US courts and agencies also consider available alternatives when evaluating tying conduct – whether customers are provided with only one purchase option or whether alternatives exist that do not include the tied product.[147] It remains to be seen whether the courts will treat internet-based companies with the same 'rule of reason' standard applied to software platforms.

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144 *Ibid* 19; see also *Eastman Kodak Co v Image Technical Servs, Inc*, 504 US 451, 462 (1992) (stating that tying can exist if there is sufficient consumer demand for a firm to provide two products separately). In *Microsoft III*, the DOJ argued that Microsoft's operating system and internet browser should be deemed separate tied products because the products are available separately and separate market demand exists for each. See Memorandum of the United States in Support of Motion for Preliminary Injunction at *106–*123, *United States v Microsoft Corp (Microsoft III)*, 84 F Supp 2d 9 (DDC 1999) (findings of fact), 87 F Supp 2d 30 (DDC) (conclusions of law), 97 F Supp 2d 59 (DDC 2000) (final judgment), petition for cert filed, 69 USLW 3111 (US 26 July 2000) (No 00-139), available in 1998 Extra Lexis 92. 701 F 2d 1276 (9th Cir 1983). *Ibid* 1289; see also *Multistate Legal Studies, Inc v Harcourt Brace Jovanovich Publications*, 63 F 3d 1540, 1547–48 (10th Cir 1995) (observing that combination of full-service bar review course with supplemental workshop could be viewed as illegal tying of two products because defendants had 'marketed their full-service course and their supplemental workshop as separate products, for separate fees, for over a decade'); *Caldera, Inc v Microsoft Corp*, 72 F Supp 2d 1295, 1327 (D Utah 1999) (finding tying arrangement may exist between Microsoft's Windows and MS-DOS programs based, in part, on fact that 'but for the tying of Windows 95 a market would exist for other DOS products').

145 'A rule-of-reason analysis requires first checking whether the facts of a given case suggest that anti-competitive tying is a possibility and then weighing those anti-competitive effects with the benefits resulting from a tying policy.' See D S Evans, A J Padilla and M Polo, 'Tying in Platform Software: Reasons for a Rule-of-Reason Standard in European Competition Law' (2002) 25 *World Competition* 509, 514; see *United States v Microsoft Corp*, 253 F 3d 34, 93 (DC Cir 2001).

146 US Dep't of Justice & Fed Trade Comm'n, 'Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition' (April 2007), at 19, 37, 54, **www.justice.gov/atr/public/hearings/ip/222655.pdf**, accessed 18 October 2012; cf *ibid* 11, n 24 (quoting *Nat'l Collegiate Athletic Ass'n v Bd of Regents of the Univ of Okla*, 468 US 85, 104 n 26 (1984) ('[W]hile the Court has spoken of a "per se" rule against tying arrangements, it has also recognized that *tying may have procompetitive justifications* that make it inappropriate to condemn without considerable market analysis' (emphasis added)).

147 *Ibid* 19.

Apple has come under scrutiny for tying its iTunes Music Store and its FairPlay DRM software to its iPod devices. Apple's dominant market position in the online digital music market means that its proprietary network could be used to lock customers into their product and undermine competition.[148]

Several private plaintiffs brought legal action against Apple for tying the iPod hardware with the iTunes music store and the DRM technology. One complaint alleged that Apple's tying harmed purchasers of iPods by limiting use of purchased music on competing devices, locking consumers into iPod usage, and charging higher prices than competitors.[149] In 2009, the US District Court in the Northern District of California ruled that the illegal tying claim was not strong enough to sustain a 'per se' analysis, but it could potentially sustain a 'rule of reason' analysis.[150]

In the EU

The European Commission takes a relatively formalistic approach to tying.[151] For example, the European Commission investigated Microsoft's offline media player for its online effects based on concerns that Microsoft used the company's dominant market power in personal computers to influence competition among internet-based music players.

The European Commission looked at functionality and consumer demand to determine whether the Windows Media Player was a separate product tied into the Windows operating system, or was part of the same product. The European Commission held that the tying was illegal because the media player was effectively a separate product.[152]

Mergers and acquisitions

Mergers and acquisitions are a third category of conduct subject to antitrust scrutiny. If two or more companies merge together, and the resultant company would dominate a market to the extent that it would harm competition, competition law enforcement agencies could pre-emptively block the merger or seek a post-closing remedy. Several mergers of internet companies have been investigated for antitrust violations; although no

148 *Apple iPod iTunes Antitrust Litigation*, No 05-00037-JW, slip op (ND Cal 15 May 2009).

149 *Ibid.*

150 *Ibid.*

151 Christian Ahlborn and David S Evans, 'The Microsoft Judgment and its Implications for the Competition Policy Towards Dominant Firms in Europe' (2008–2009) 75 Antitrust L J 887, 929.

152 Case T-201/04 *Microsoft Corp v Comm'n*, at para 933; Commission Decision of 24 March 2004, Case COMP/C-3/37.792 at para 804-059.

internet company mergers have been blocked, future mergers may face increasing scrutiny for possible anti-competitive effects.

To exert control over mergers, the US employs a substantive test, based on whether the merger will substantially lessen competition. Under the old EU Merger Regulations of 1990 there were two alternative interpretations,[153] which prohibited mergers that 'create or strengthen a dominant position as a result of which effective competition would be significantly impeded'.[154] The first interpretation required a cumulative two-tier test, where dominant position is created or strengthened *and* the market structure amounts to a significant impediment of effective competition. The second interpretation only addressed the creation or strengthening of market dominance. The new Merger Regulation, adopted in 2004,[155] reformulates the substantive test as '[a] concentration which would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, in the common market or in a substantial part of it shall be declared incompatible with the common market'.[156] In practice, the standards of the US and the EU resemble each other.

US approach

Mergers are regulated by multiple provisions,[157] primarily section 7 of the Clayton Act, which prohibits mergers and acquisitions 'in any line of commerce or in any activity affecting commerce in any section of the country, [if] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'.[158] The 2010 Merger Guidelines,[159] set forth by the DOJ and FTC, define the framework for reviewing and challenging

153 Council Regulation 4064/89 of 21 December 1989, on the control of concentrations between undertakings, 1990 OJ L'257/13, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:395:0001:0012:EN:PDF** accessed 18 October 2012; with corrigendum 1998 OJ L'40/17, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:040:0017:0017:EN:PDF** accessed 18 October 2012.

154 EU Merger Regulation 1990, Article 2(3).

155 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 OJ L'24/1, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF**, accessed 18 October 2012.

156 EU Merger Regulation 2004, Article 2(3).

157 The relevant statutory provisions are section 7 of the Clayton Act, 15 USC§ 18, sections 1 and 2 of the Sherman Act, 15 USC § 1, 2, and potentially section 5 of the Federal Trade Commission Act, 15 USC § 45.

158 15 USC § 18.

159 US Department of Justice and the Federal Trade Commission, 2010 Horizontal Merger Guidelines (19 August 2010), **www.justice.gov/atr/public/guidelines/hmg-2010.html**, accessed 18 October 2012.

horizontal mergers, which are the primary focus (the guidelines lack any binding effect on the courts).

Horizontal mergers receive particular scrutiny because of the likelihood of anti-competitive effects. A proposed horizontal merger will be subject to a multi-step review, using a combination of methods that focus on the specific facts. The overarching principle is that the merger should not create, enhance or entrench market power or facilitate its exercise.[160] Enhanced market power may manifest in price increases, reduced output, diminished innovation, or other harm to customers. The primary focus of the analysis is the adverse effect of the merger on customers. If another competitor can enter the market within two years of the merger and could counteract the anti-competitive effects, then the guidelines suggest that the merger is not illegal.[161]

Vertical mergers, in which suppliers and distributors merge, are treated less stringently by the US authorities. These mergers are scrutinised for an anti-competitive effect based on whether the merger will foreclose competing sellers from outlets for their goods, or competing buyers from supplies. If the percentage of foreclosure is substantial, then the vertical merger will be reviewed for illegality.[162]

These antitrust parameters in merger cases increasingly necessitate a flexible approach to be undertaken given the fast-paced growth in the market structure, and the market players' significant powers in the respective market. On this note, and very recently, the investigations launched by enforcement agencies in the US (and the EU) over the merger activity of a prominent search engine, Google, merit close attention.

Google/DoubleClick Merger

The FTC investigated Google's acquisition of DoubleClick in 2007, and ultimately declined to block the merger.[163] The FTC found that the merger of Google and DoubleClick would not be anti-competitive.[164] The FTC

160 2010 Horizontal Merger Guidelines, § 1.

161 2010 Horizontal Merger Guidelines, § 3.2.

162 *Tampa Elec Co v Nashville Coal Co*, 365 US 320 (1961) (court focusing on the percentage of relevant business 'foreclosed', by indicating that if arrangement forecloses rivals from access to a substantial portion of the relevant market, if would be condemned).

163 FTC, 'Federal Trade Commission Closes Google/DoubleClick Investigation' (20 December 2007) (Press Release), **www.ftc.gov/opa/2007/12/googledc.shtm**, accessed 18 October 2012.

164 J Thomas Rosch, 'Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector' (18 November 2010) (Remarks at the ABA Antitrust Section Fall Forum, at 5) **www.ftc.gov/speeches/rosch/101118fallforum.pdf**, accessed 18 October 2012.

concluded that the merger would not eliminate direct competition between the companies, it would not eliminate competition from others in the ad serving space, and it would not allow Google to push AdSense to dominance over competing ad programs.

To evaluate the merger, the FTC considered whether the acquisition would eliminate direct and substantial competition between the two companies.[165] The investigation found that the companies were not direct competitors in any relevant product market. First, the FTC defined the relevant product market as segmented product markets – directly-sold advertising rather than intermediate-sold advertising, search-based advertising rather than content-based advertising, and tools (eg third party ad servers) that manage the process of selecting and displaying ads – rather than 'all online advertising'. DoubleClick was considered a third party ad serving market; Google's relevant markets, however, were search-based advertising and ad intermediation markets. Thus, they operated in separate markets and were not direct competitors.[166]

Secondly, the FTC also inquired whether the merger would eliminate potentially beneficial competition based on a 'prevention' (of potential future competition) theory of harm; the FTC assessed whether Google entered into the third party ad serving market and otherwise would have a procompetitive effect on the market.[167] The FTC found that the competition in the third party ad market was vigorous, and likely to increase, so Google's entry would not significantly harm competition.

Finally, based on any non-horizontal theory of harm, the FTC considered whether the merger would allow Google to exploit DoubleClick's position in the third party ad market and illegally benefit Google's ad intermediation product, AdSense. Because DoubleClick lacked substantial market power in the third party ad serving market, the FTC found it unlikely that Google could foreclose competition in the related market of ad intermediation after the merger.[168]

165 FTC, 'Statement of Federal Trade Commission Concerning Google/DoubleClick' (FTC File No 071-0170), at 7, **www.ftc.gov/os/caselist/0710170/071220statement.pdf**, accessed 19 October 2012.

166 FTC 2007, 6–7.

167 See note 165 above, at 8.

168 FTC, 'Federal Trade Commission Closes Google/DoubleClick Investigation' (20 December 2007) (Press Release), **www.ftc.gov/opa/2007/12/googledc.shtm**, accessed 18 October 2012.

Google/AdMob merger

The FTC also investigated and permitted Google's purchase of the mobile ad network AdMob.[169] Google and AdMob were two leading mobile advertising networks and the FTC was concerned that the merger would substantially decrease competition. The FTC closed its investigation when Apple indicated its intent to counteract potentially anti-competitive effects from the Google/AdMob merger.[170] Because Apple had recently acquired the third-largest mobile ad network, Quattro Wireless, begun to develop its own network (iAd), and could leverage its iPhone software development tools and licence agreements to determine the development of iPhone advertising the FTC believed that Apple could quickly become a strong competitor in the product market and thus the merger between Google and AdMob would not lead to monopoly.[171] Additionally, Android-based phones provide serious competition with iPhones in the mobile phone market and therefore Google would have the incentive to keep its applications reasonably priced and ensure the phone would still be competitive against Apple.[172]

Google/ITA merger

In mid-2010, the DOJ considered filing an antitrust suit against Google's acquisition of ITA Software Inc, a leading producer of airfare pricing and shopping systems in the United States.[173] ITA's fare comparison search software is incorporated into many travel agency, airline, and online travel services, including Microsoft's Bing Travel. Concerns arose that Google might try to cut ITA's ties to its competitor, Bing, and decrease competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for consumers.[174] Potential concerns were:

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169 FTC, 'Statement of the Commission Concerning Google/AdMob' (FTC File No 101-0031) (21 May 2010), **www.ftc.gov/os/closings/100521google-admobstmt.pdf**, accessed 8 July 2012; Brad Stone, 'US Approve Google Deal for AdMob', *New York Times* (21 May 2010), **www.nytimes.com/2010/05/22/technology/22admob.html**, accessed 18 October 2012.

170 J Thomas Rosch, 'Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector' (18 November 2010) (Remarks at the ABA Antitrust Section Fall Forum, at 5-6) **www.ftc.gov/speeches/rosch/101118fallforum.pdf**, accessed 18 October 2012.

171 FTC, 'Statement of the Commission Concerning Google/AdMob' (FTC File No 101-0031) (21 May 2010), at 1, **www.ftc.gov/os/closings/100521google-admobstmt.pdf**, accessed 18 October 2012.

172 *Ibid* 2.

173 DOJ Press Release, 'Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc' (8 April 2011), **www.justice.gov/opa/pr/2011/April/11-at-445.html**, accessed 19 October 2012.

174 *Ibid.*

(1) that Google would stop competitors from using ITA tools; and (2) that Google would continue to license out the technology but use it on Google searches to prioritise their own travel fare searches over those of competitors.

The DOJ required Google to develop and license travel software, establish internal firewall procedures and continue software research and development before it could proceed with ITA Software Inc's acquisition.[175] Mandatory arbitration under certain circumstances was also required. Under the proposed five-year settlement, Google was to be required to continue to license ITA's QPX software to airfare websites on commercially reasonable terms, while also continuing to fund research and development of that product at least at similar levels to what ITA invested in recent years. To prevent abuse of commercially sensitive information, Google was required to implement firewall restrictions within the company to prevent unauthorised use of competitively sensitive information and data gathered from ITA's customers.

EU approach to merger law

Similar to the US, provisions regulating mergers (in particular horizontal mergers) are manifold under the EU Merger Regulation.[176] Various factors will need to be taken into consideration when assessing the compatibility of a notified transaction with the common market and whether the respective transaction significantly impedes effective competition.[177]

As a pertinent case in the internet market, the European Commission also investigated Google's acquisition of DoubleClick, beginning in November 2007.[178] The European Commission found that the merger would not be likely to harm consumers either in the direct advertising market or the intermediated ad market. The investigation found that there were credible ad-serving alternatives to which publishers, advertisers, ad networks and other customers could switch, including vertical searches from Microsoft, Yahoo and AOL. Additionally, the merged company would not be likely to have an incentive to close off access for competitors in the market because it would probably not be profitable. Under the EU Merger Regulation,[179] the acquisition was legal and approved.[180]

175 *Ibid.*

176 Article 101 of the TFEU; Article 2 of the EU Merger Regulation; Horizontal Merger Guidelines, OJ 2004 C31/5: Vol II, App D.6.

177 Cf *Bellamy & Child*, §8.207 *et seq.*

178 Europa, Press Release, 'Mergers: Commission clears proposed acquisition of DoubleClick by Google' (11 March 2008), **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426**, accessed 18 October 2012.

179 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1–22.

180 EC, 'Mergers: Commission clears proposed acquisition of Double Click and Google' (11 March 2008) (Reference number IP/08/426), **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426&format=HTML&aged=0&language=EN&guiLanguage=en**, accessed 18 October 2012.

Conclusion

Applying traditional antitrust law to the 'new economy'[181] of internet-based businesses poses unique challenges for enforcement agencies and courts. While traditional industries are often characterised as demonstrating 'multi-plant and multi-firm production,… stable markets,… modest rates of innovation, and slow and infrequent entry and exit',[182] this characterisation is not applicable to internet-based businesses; enforcing competition requirements for internet-businesses requires a reassessment of antitrust tools and regulations in the US as well as in the EU.

There is a rise in investigations and legal actions against internet-based businesses for competition law violations. However, there is no clear indicator for how competition authorities and courts intend to apply antitrust jurisprudence to internet-based businesses. Enforcement agencies are challenged to identify market boundaries that define the relevant product and geographical markets. Courts are challenged to address the rapidly changing technology markets, which may complicate antitrust enforcement. Addressing these challenges may require a revolutionary[183] change in antitrust law.

Applying existing antitrust laws may not be a doctrinal problem,[184] but rather an enforcement issue. Enforcement agencies and courts need to use technical resources to tackle new challenges posed by internet-based businesses. The rapidly evolving internet sector, 'would particularly benefit from a quick resolution of the competition issues identified',[185] requiring courts to respond quickly and effectively to antitrust issues as they develop.

Consequently, the principle of 'maintaining effective competition', which is an essential legal provision,[186] should apply to both traditional markets and new markets that advance the interactions between consumers and businesses based on new technologies. At the brink of the 21st century,[187] the task of reinvigorating and reshaping antitrust policy to foster competition and

181 Richard A Posner, 'Antitrust in the New Economy' (2000–2001) 68 Antitrust LJ 925, 925.

182 *Ibid* 926.

183 Joaquín Almunia, 'Antitrust enforcement: Challenges old and new' (8 June 2012) (Speech/12/428), at 5, **http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428**, accessed 19 October 2012.

184 Posner, note 172 above, 925.

185 Joaquín Almunia, 'Statement of VP Almunia on the Google antitrust investigation' (21 May 2012) (Speech/12/372), at 2, **http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/372**, accessed 19 October 2012.

186 *Europemballage and Continental Can v Commission*, Case 6/72 [1973] ECR 215, [1973] CMLR 199, section 24.

187 DOJ Address by Anne K Bingman, 'Antitrust Enforcement, Some Initial Thoughts and Actions' (10 August 1993), at 9, **www.justice.gov/atr/public/speeches/0867.pdf**, accessed 19 October 2012.

innovation for internet-based businesses may require traditional enforcement agencies to adapt existing competition rules to a nascent industry, requiring the application of non-traditional methods, which would essentially generate a transitory semblance of a new era in antitrust.