Nicolas Charbit
Carolina S. Malhado
Ellie Yang
Editors

Douglas H. Ginsburg

An Antitrust Professor on the Bench

Liber Amicorum

Volume I

Alden F. Abbott, Margaret Artz, Anıl Acar, Gary Born, Michelle M. Burtis, John DeQ. Briggs, Terry Calvani, James Cooper, Daniel Crane, Susan Creighton, David S. Evans, Eric M. Fraser, Jamillia P. Ferris, Damien Geradin, Ilene Knable Gotts, Gönenç Gürkaynak, John Harkrider, Joshua Hazan, Thu Hoang, Keith N. Hylton, Jonathan M. Jacobson, Bruce H. Kobayashi, Gregor Langus, Marina Lao, Vilen Lipatov, Ryan S. Maddock, Danielle Morris, Damien Neven, Barak Orbach, James F. Rill, Katarzyna Sadrak, Jana I. Seidl, Hal S. Scott, D. Daniel Sokol, Jacques Steenbergen, Richard M. Steuer, Pablo Trevisán, Esra Uçtu, Nils Wahl, Joshua D. Wright

Concurrences
Antitrust Publications & Events

DOUGLAS H. GINSBURG

An Antitrust Professor on the Bench

Liber Amicorum - Volume I

Foreword by Joshua Wright

Editors

Nicolas Charbit

Carolina Malhado

Ellie Yang

GO TO TABLE OF CONTENTS

885 Avenue of the Americas, Suite 32G, NY 10001, USA
www.concurrences.com
book@concurrences.com

Printed in the United States
First Printing, February 2018
978-1-939007-62-9 (hardcover)
978-1-939007-63-6 (paperback)
978-1-939007-64-3 (e-book)

Cover and book design: Yves Buliard, www.yvesbuliard.fr
Layout implementation: Darlene Swanson, www.van-garde.com

▶ GO TO TABLE OF CONTENTS

Concurrences Books

Antitrust Liber Amicorum

Frédéric Jenny – Liber Amicorum (Vol. I-II)
Nicolas Charbit et al., 2018

Douglas H. Ginsburg – An Antitrust Professor on the Bench (Vol. I-II)
Nicolas Charbit et al., 2018

Wang Xiaoye, A Chinese Antitrust Tale
Nicolas Charbit et al., 2018

Ian S. Forrester, A Scott without Borders (Vol. I-II)
Sir. David Edward et al., 2015

William E. Kovacic: An Antitrust Tribute (Vol. I-II)
Nicolas Charbit et al. 2013-2014

Practical Law

Competition Digest – A Synthesis of EU and National Leading Cases, 3rd ed.
Frédéric Jenny, 2018

Choice - A New Standard for Competition Analysis?
Paul Nihoul et al., 2016

Grands arrêts du droit de la concurrence (Vol. I-II)
Laurence Idot, 2016

Les pratiques restrictives – L'application de l'article L. 442-6 C. com.
Erwann Kerguelen, 2015

A quoi sert la concurrence ?
Martine Behar-Touchais et al., 2014

Conference Proceedings

Antitrust in Emerging and Developing Countries – Vol II
Eleanor Fox, Harry First, 2016

Global Antitrust Law - Current Issues in Antitrust Law and Economics
Douglas Ginsburg, Joshua Wright, 2015

Antitrust in Emerging and Developing Countries – Vol. I
Eleanor Fox, Harry First, 2015

Competition Law on the Global Stage: David Gerber's Global Competition Law in Perspective
David Gerber, 2014

PhD Theses

Buyer Power in EU Competition Law
Ignacio Herrera Anchustegui, 2017

Google, la presse et les journalistes
Guillaume Sire, 2015

L'Union européenne et le droit international des subventions
Loïc Wagner, 2015

All books are published in print and electronic formats.

▶ GO TO TABLE OF CONTENTS

Foreword

Joshua Wright

It is our great honor and privilege to present this Liber Amicorum to Judge Douglas H. Ginsburg. I admit I also introduce this volume with some hesitation. For one usually introduces a volume such as this to mark the end of a distinguished career. And a distinguished career it has been. But as a significant beneficiary of Judge Ginsburg's scholarly endeavors at Scalia Law School, his guiding hand at the Global Antitrust Institute at George Mason University, and his friendship, I am particularly fond of the status quo.

Judge Ginsburg received a Bachelor of Science degree from Cornell University and his JD from the University of Chicago Law School. He then served as a clerk for Judge Carl McGowan on the D.C. Circuit and for Justice Thurgood Marshall on the Supreme Court. Following his clerkships, Judge Ginsburg began his career in academia at Harvard Law School in 1975.

Judge Ginsburg later became the Administrator of the Office of Information and Regulatory Affairs (OIRA) and then the Assistant Attorney General for the Antitrust Division of the Department of Justice. In 1987, he was nominated to the Supreme Court of the United States. Judge Ginsburg served on the D.C. Circuit Court of Appeals for more than 30 years, including as Chief Judge from 2001 to 2008. During this time, he also taught part-time at George Mason University School of Law. After taking senior status on the D.C. Circuit, Judge Ginsburg continued his career in academia teaching full time at NYU Law in 2012. He later returned to Scalia Law School at George Mason University, where he continues to serve as a

▶ GO TO TABLE OF CONTENTS

Professor of Law and as the Chairman of the International Advisory Board of the Global Antitrust Institute.

A robust and full Liber Amicorum could focus exclusively upon Judge Ginsburg's impactful role as a jurist, or his contributions as legal scholar, or his commitment to public service, or his mentorship as a teacher. This challenge in fully capturing Judge Ginsburg's contributions in such a volume is to explore these dimensions of achievement individually as well as to take this opportunity to reflect upon their interactions.

The essays in this Liber Amicorum take up this challenge admirably. Practitioners, economists, and legal scholars explore the multiple dimensions of the footprint Judge Ginsburg has left in antitrust's landscape. Some explore in depth the impact Judge Ginsburg's opinions and scholarship have had in specific areas of antitrust jurisprudence: horizontal restraints, the intersection of intellectual property rights and antitrust, and international antitrust. Others focus more broadly upon how we should think about Judge Ginsburg's intellectual legacy and public service. The Liber Amicorum ties together these multiple dimensions of production and service to recognize and appreciate the full fruits of Judge Ginsburg's labors in the domestic and global antitrust community.

Judge Ginsburg is remarkably generous with his time and his wisdom with colleagues, students, legal academics, clerks, and practitioners alike. He is a source of advice and counsel for those who need it, of substantive intellectual feedback for those who seek it, and of mentorship for those fortunate enough to cross his path. The beneficiaries of his generosity range from antitrust luminaries and agency leadership around the world to aspiring law students. I would be remiss if I did not acknowledge the tremendous intellectual and personal debt I owe Judge Ginsburg as a colleague, co-author, co-venturer, and friend. I intend to run that debt even deeper in the years to come as I further benefit from Judge Ginsburg's continued dedication and commitment to his work. And so I hope selfishly – but no doubt joined by the international antitrust community that benefits from Judge Ginsburg's insights and wisdom – this Liber Amicorum is necessarily incomplete and leaves room for contributions yet realized.

▶ GO TO TABLE OF CONTENTS

Contributors

Alden F. Abbott
The Heritage Foundation

Margaret Artz
WilmerHale

Anıl Acar
ELIG, Attorneys-at-Law

Gary Born
WhilmerHale

Michelle M. Burtis
CRA International

John DeQ. Briggs
Axinn

Terry Calvani
Freshfields Bruckhaus Deringer

James C. Cooper
George Mason University Antonin Scalia Law School

Daniel A. Crane
University of Michigan Law School

Susan A. Creighton
Wilson Sonsini Goodrich & Rosati

David S. Evans
Global Economics Group

Eric M. Fraser
Osborn Maledon

Jamillia P. Ferris
Wilson Sonsini Goodrich & Rosati

Damien Geradin
EUCLID Law

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz

Gönenç Gürkaynak
ELIG, Attorneys-at-Law

John D. Harkrider
Axinn

Joshua Hazan
Wachtell, Lipton, Rosen & Katz

Thu Hoang
Wilson Sonsini Goodrich & Rosati

Keith N. Hylton
Boston University School of Law

Jonathan M. Jacobson
Wilson Sonsini Goodrich & Rosati

Bruce H. Kobayashi
George Mason University Antonin Scalia Law School

Gregor Langus
European Commission

Marina Lao
Seton Hall University School of Law

Vilen Lipatov
Compass Lexecon

Ryan S. Maddock
Wilson Sonsini Goodrich & Rosati

Danielle Morris
WilmerHale

Damien Neven
Graduate Institute of International and Development Studies

Barak Orbach
University of Arizona James E. Rogers College of Law

James F. Rill
Baker Botts

Katarzyna Sadrak
EUCLID Law

Jana I. Seidl
Baker Botts

Hal S. Scott
Harvard Law School

D. Daniel Sokol
University of Florida Levin College of Law

Jacques Steenbergen
Belgian Competition Authority

Richard M. Steuer
Mayer Brown

Pablo Trevisán
Comisión Nacional de Defensa de la Competencia

Esra Uçtu
ELIG, Attorneys-at-Law

Nils Wahl
Court of Justice of the European Union

Joshua D. Wright
George Mason University Antonin Scalia Law School

▶ GO TO TABLE OF CONTENTS

Table of Contents

GO TO TABLE OF CONTENTS

Part II: New Frontiers of Antitrust

Part III: Complexities of Antitrust Rules Around the World

▶ GO TO TABLE OF CONTENTS

▶ GO TO TABLE OF CONTENTS

Judge Douglas H. Ginsburg Biography

Career

Senior Circuit Judge Douglas H. Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1986; he served as Chief Judge from 2001 to 2008. After receiving his B.S. from Cornell University in 1970, and his J.D. from the University of Chicago Law School in 1973, he clerked for Judge Carl McGowan on the D.C. Circuit and Justice Thurgood Marshall on the United States Supreme Court. Thereafter, Judge Ginsburg was a professor at the Harvard Law School, the Deputy Assistant and then Assistant Attorney General for the Antitrust Division of the Department of Justice, as well as the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. Concurrent with his service as a federal judge, Judge Ginsburg has taught at the University of Chicago Law School and the New York University School of Law. Judge Ginsburg is currently a Professor of Law at the Antonin Scalia Law School, George Mason University, and a visiting professor at University College London, Faculty of Laws.

Judge Ginsburg is the Chairman of the International Advisory Board of the Global Antitrust Institute at the Antonin Scalia Law School, George Mason University. He also serves on the Advisory Boards of: Competition Policy International; the Harvard Journal of Law and Public Policy; the Journal of Competition Law and Economics; the Journal of Law, Economics and Policy; the Supreme Court Economic Review; the University of Chicago Law Review; The New York

▶ GO TO TABLE OF CONTENTS

University Journal of Law and Liberty; and, at University College London, both the Center for Law, Economics and Society and the Jevons Institute for Competition Law and Economics.

Education

Judge Ginsburg obtained his B.S. degree from Cornell University in 1970 and his J.D. from the University of Chicago Law School in 1973.

Publications

Books and Monographs

GLOBAL ANTITRUST ECONOMICS - CURRENT ISSUES IN ANTITRUST AND LAW AND ECONOMICS (with Joshua D. Wright; Institute of Competition Law March 21, 2016)

REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES, SECOND EDITION (with M. Botein and M. Director; West, 1991)

1983 SUPPLEMENT TO REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS (with M. Director; West, 1983)

INTERSTATE BANKING, 9 HOFSTRA LAW REV. 1133-1371 (Special Issue 1981)

REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE (editor, with W. Abernathy; McGraw-Hill, 1980)

ANTITRUST, UNCERTAINTY, AND TECHNOLOGICAL INNOVATION (National Academy of Engineering/National Research Council, 1980), reprinted at 24 ANTITRUST BULL. 635 (1980)

CABLE COMMUNICATIONS (West, 1979)

▶ GO TO TABLE OF CONTENTS

Common Ownership (forthcoming 2018);

FRAND in India, *in* COMPLICATIONS AND QUANDARIES IN THE ICT SECTOR: STANDARD ESSENTIAL PATENTS AND COMPETITION ISSUES (Ashish Bharadwaj et al. eds., 2018) (with Joshua D. Wright, Bruce H. Kobayashi, and Koren W. Wong-Ervin) ;

The Department of Justice's Long-Awaited and Much Needed Course-Correction on FRAND-Assured Standard-Essential Patents, COMP. POL'Y INT'L N. AM. COLUMN, Nov. 2017 (with Koren W. Wong-Ervin);

The Economic Analysis of Antitrust Consents, *in* Tribute to Henry Manne, 2017 EUROPEAN JOURNAL OF LAW AND ECONOMICS (with Joshua Wright) (forthcoming);

Extraterritoriality and Intra-Territoriality in US Antitrust Law, 2017 COMP. POL'Y INT'L., Sept. 28., 2017 (with Josh Hazan);

A Comparative And Economic Analysis Of The U.S. FTC's Complaint And The Korea FTC's Decision Against Qualcomm, 1 ANTITRUST CHRONICLE, Spring 2017 (with Koren Wong-Ervin, Anne Layne-Farrar et al.);

Extra-Jurisdictional Remedies Involving Patent Licensing, 12 COMP. POL'Y INT'L., NO. 2, at 41 (2016) (with Joshua D. Wright, Bruce Kobayashi, and Koren W. Wong-Ervin);

Our Illiberal Administrative Law, 10 N.Y.U. J. OF L. & LIBERTY 475 (2016) (with Steven Menashi);

The FTC PAE Study: A Cautionary Tale About Making Unsupported Policy Recommendations, AM. BAR ASS'N SECTION OF ANTITRUST L. INTELL. PROPERTY COMM. NEWSL. (2016)(with Joshua D. Wright);

Monetary Penalties in China and Japan, AM. BAR ASS'N SECTION OF ANTITRUST L. CARTEL & CRIMINAL PRACTICE NEWSL. (2016)(with Joshua D. Wright, Bruce Kobayashi, Ariel Slonim, and Koren W. Wong-Ervin);

The Costs and Benefits of Antitrust Consents, OECD COMPETITION COMM. DAF/COMP/WD(2016)81 (2016) (with Joshua D. Wright), available at: https://one.oecd.org/document/DAF/COMP/WD(2016)81/en/pdf;

▶ GO TO TABLE OF CONTENTS

Goals of Antitrust: Welfare Trumps Choice, *reprinted in* CHOICE - A NEW STANDARD FOR COMPETITION LAW ANALYSIS? (P. Hihoul, N. Charbit, & E. Ramundo, eds., 2016);

In Memoriam: Justice Scalia's Antitrust Legacy, CONCURRENCES REVIEW, p.8 (2016);

'Excessive Royalty' Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate, CPI ANTITRUST CHRONICLE, Vol. 4, No. 3, (2016) (with Joshua D. Wright, Bruce Kobayashi, and Koren W. Wong-Ervin);

Reverse Settlements in the European Union and the United States, *in* COMPETITION AND PATENT LAW IN THE PHARMACEUTICAL SECTOR: AN INTERNATIONAL PERSPECTIVE 125 (Giovanni Pitruzzella & Gabriella Muscolo eds., 2016) (with Damien Geradin and Graham Safty);

Product Hopping and the Limits of Antitrust: The Danger of Micromanaging Innovation, Competition Policy International, ANTITRUST BULLETIN, DECEMBER (2015) (with Joshua D. Wright and Koren W. Wong-Ervin);

The Troubling Use of Antitrust to Regulate FRAND Licensing, CPI ANTITRUST CHRONICLE, VOL. 10, NO.1 PP.2-8, (2015) (with Joshua D. Wright and Koren W. Wong- Ervin);

DOJ Has the Power to Crush Price-Fixers: Column, USA TODAY WEEKEND, MAY 29-31, (2015) (with Albert Foer);

Actavis and Multiple ANDA Entrants: Beyond the Temporary Duopoly, 29, ANTITRUST 89 (2015), NO. 2, SPRING (2015) (with Bruce Kobayashi, Joshua D. Wright and Joanna Tsai);

Bork's "Legislative Intent" and the Courts, 79 ANTITRUST L. J. 3 (2015);

Rational Basis with Economic Bite, 8 N.Y.U. J. OF L. & LIBERTY 1055 (2014) (with Steven Menashi);

Since Bork, 10 J. L. ECON. & POL'Y 599 (2014) (with Taylor M. Owings);

Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions, ANTITRUST SOURCE, Oct. 2014, at 1 (with Taylor M. Owings and Joshua D. Wright);

▶ GO TO TABLE OF CONTENTS

Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease, 79 ANTITRUST L. J. 501 (2014) (with Joshua D. Wright);

Resolving Conflicts between Competition and Other Values: The Roles of Courts and Other Institutions in the U.S. and the E.U., *in* EUROPEAN COMPETITION LAW ANNUAL 2012: PUBLIC POLICIES, REGULATION AND ECONOMIC DISTRESS (Philip Lowe & Mel Marquis eds., 2014) (with Daniel E. Haar);

Bork's "Legislative Intent" and the Courts, 79 ANTITRUST L.J. 941 (2014);

Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ, 9 COMP. POL'Y INT'L., No. 2, at 41 (2013) (with Joshua D. Wright);

Antitrust Settlements: The Culture of Consent, CONCURRENCES, No. 2–2013, at 56 (with Joshua D. Wright);

Antitrust Courts: Specialists versus Generalists, 36 FORDHAM INT'L. L.J. 788 (2013) (with Joshua D. Wright);

Dynamic Economics in Antitrust Analysis, 78 ANTITRUST L.J. 1 (2012) (with Joshua D. Wright);

Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty, 106 NW. U. L. REV. 1033 (2012) (with Joshua D. Wright); *reprinted in* LAW AND ECONOMICS: PHILOSOPHICAL ISSUES AND FUNDAMENTAL QUESTIONS (Aristides N. Hatzis & Nicholas Mercuro eds., 2015);

The Role of Economic Analysis in Competition Law, *in* GETTING THE BALANCE RIGHT: INTELLECTUAL PROPERTY, COMPETITION LAW, AND ECONOMICS IN ASIA (Ian McEwin ed., 2011) (with Eric M. Fraser);

Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making, 33 HARV. J. OF L. & PUBLIC POL'Y 217 (2010);

Antitrust Sanctions, 6 COMP. POL'Y INT'L, No. 2, at 3 (2010) (with Joshua D. Wright);

The Future of Behavioral Economics in Antitrust Jurisprudence, 6 COMP. POL'Y INT'L No. 1, at 89 (2010) (with Derek W. Moore);

▶ GO TO TABLE OF CONTENTS

The Costs and Benefits of Private and Public Antitrust Enforcement: An American Perspective, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY AND ANTITRUST ENFORCEMENT (Abel M. Mateus & Teresa Moreira, eds., 2010);

Rethinking Cartel Sanctions, 6 COMP. POL'Y INT'L (2010) (with Joshua Wright);

The Role of Economic Analysis in Competition Law, *in* GETTING THE BALANCE RIGHT: INTELLECTUAL PROPERTY, COMPETITION LAW, AND ECONOMICS IN ASIA (Ian McWein ed., 2010) (with Eric M. Fraser);

Appellate Courts and Independent Experts, 60 CASE WESTERN L. REV. 303 (2010);

The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?, 7 OHIO STATE J. OF CRIM. L. 771 (2010) (with Hyland Hunt);

The Future of Behavioral Economics in Antitrust Jurisprudence, 6 COMP. POL'Y INT'L 89 (2010) (with Derek W. Moore);

Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making, 33 HARV. J. OF L. & PUB. POL'Y 217 (2010);

Nondelegation and the Unitary Executive, 12 U. PA. J. CONST. L. 251 (2010) (with Steven Menashi);

The Costs and Benefits of Private and Public Antitrust Enforcement - An American Perspective, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA (Abel M. Mateus & Teresa Moreira. eds., 2010);

Antitrust Decisions of the Supreme Court, 1967-2007, 3 COMP. POL'Y INT'L., No. 2, at 3 (2007) (with Leah Brannon);

Synthetic Competition, 16 MEDIA L. & POL'Y 1 (2006);

ARTICLE I, SECTION 1, LEGISLATIVE VESTING CLAUSE, in THE HERITAGE GUIDE TO THE CONSTITUTION (Edwin Meese, III ed.) (2005);

Comparing Antitrust Enforcement in the United States and Europe, 1 J. COMP. L. & ECON. 427 (2005);

▶ GO TO TABLE OF CONTENTS

Determinants of Private Antitrust Enforcement in the United States, Vol. 1, No. 2 COMP. POL. INT'L 29 (2005) (with L. Brannon);

On Constitutionalism, CATO SUPREME COURT REVIEW 7 (2003);

The Court En Banc: 1991-2002, 70 GEO. WASH. L. REV. 259 (2002) (with B. Boynton);

International Antitrust: 2000 and Beyond, 68 ANTITRUST L.J. 571 (2000);

Multinational Merger Review: Lessons From Our Federalism, 68 ANTITRUST L.J. 219 (2000) (with S. Angstreich);

Foreword: "An Open Letter to Vice President Gore," in ENVIRONMENTAL GORE (J.A. Baden ed., 1995) ;

Legal Responses to Bounded Rationality in German Administration: Comment, 150 J. OF INSTITUTIONAL & THEORETICAL ECON. 163 (1994);

Blackmail: An Economic Analysis of the Law, 141 U. PA. L. REV. 1849 (1993) (with P. Shechtman);

Nonprice Competition, 38 ANTITRUST BULL. 83 (1993);

A Property Rights Analysis of the Inefficiency of Investment Decisions by Labor-Managed Firms: Comment, 148 J. OF INSTITUTIONAL AND THEORETICAL ECON. 45 (1992);

Antitrust as Antimonopoly, REGULATION (Summer 1991);

Vertical Restraints: De Facto Legality Under the Rule of Reason, 60 ANTITRUST L.J. 67 (1991);

The Court En Banc: 1981-1990, 59 GEO. WASH. L. REV. 1008 (1991) (with D. Falk);

Rationalizing Antitrust: A Rejoinder to Professor Armentano 35 ANTITRUST BULL. (1990), *reprinted in* 2 THE ANTITRUST IMPULSE 933 (Theodore P. Kovaleff, ed., 1994);

The Appropriate Role of the Antitrust Enforcement Agencies, 9 CARDOZO L. REV. 1277 (1988);

▶ GO TO TABLE OF CONTENTS

White House Review of Agency Rulemaking, 99 HARV. L. REV. 1075 (1986) (with C. DeMuth);

The Case Against Federal Intervention in the Market for Corporate Control, 4 BROOKINGS REV. 15 (Winter/Spring 1986), *reprinted at* 32 U. OF CHICAGO L. SCHOOL RECORD 14 (1986) (with J. Robinson);

The Future of Interstate Banking, 9 J. CORP. L. 655 (1984), *reprinted at* 26 CORP. PRAC. COMMENTATOR 469 (1985);

Rights of Excess: Cable and the First Amendment, 6 COMMUNICATIONS AND THE LAW 71 (1984);

Regulating Television Violence, NAE workshop mimeo (1983);

Interstate Banking: A Preview of the Issues, ABA BANKING J. (1983);

The New Illinois Bank Holding Company Act, 99 BANK L. J. 598 (1982);

Making Automobile Regulation Work: Policy Options and a Proposal, *in* D. GINSBURG & W. ABERNATHY, *supra* Books, *reprinted in* 2 HARV. J. L. & PUB. POL'Y 73 (1979);

Ernst Freund and the First Amendment Tradition: Afterword, 40 U. CHICAGO L. REV. 235 (1973)

Book Reviews

The Behavior of Federal Judges: A view from the D.C. Circuit, review by Lee Epstein, William Landes & Richard Posner, The Behavioral of Federal Judges, 97 JUDICATURE (NO. 2, 2013);

Rationalism in Regulation, review of Richard Revesz & Michael Livermore, *Retaking Rationality: How Cost Benefit Analysis Can Better Protect the Environment and Our Health*, 110 MICH. L. REV. 877 (2010) (with Christopher C. DeMuth);

Competition Rules for the 21st Century: Principles from America's Experience, by Ky P. Ewing, 103 MICH. L. REV. (2004);

Money for Nothing: Politicians, Rent Extraction, and Political Extortion, by Fred S. McChesney, 97 MICH. L. REV. 6 (1999);

▶ GO TO TABLE OF CONTENTS

Power Without Responsibility: How Congress Abuses the People Through Delegation, by David Schoenbrod, Regulation Magazine No. 1 (1995);

Enterprise and American Law, by Herbert Hovenkamp, 75 Public Choice 396 (1993);

The Litigation Explosion, by Walter Olsen, 90 Mich. L. Rev. 1609 (1992);

Regulation and Its Reform, Stephen Breyer, 20 Harv. J. Legis. 647 (1983);

Reluctant Regulators: The FCC and the Broadcast Audience, by Barry Cole & Mal Oettinger, 30 Fed. Communications L. J. 173 (1978)

Occasional Papers

Comment on the Canadian Competition Bureau's White Paper, "Big Data and Innovation: Implications for Competition Policy in Canada" (The Global Antitrust Institute, Antonin Scalia Law School, George Mason University, November 29, 2017)

Comment on the Japan Patent Office's Tentative Guidelines on Licensing Negotiations Involving SEPs (The Global Antitrust Institute, Antonin Scalia Law School, George Mason University, November 10, 2017);

Comment on the Proposed Revisions to the People's Republic of China Anti-Unfair Competition Law (The Global Antitrust Institute, George Mason University School of Law. March 19, 2017);

Comment on the U.S. Antitrust Agencies' Proposed Update of the Antitrust Guidelines for the Licensing of Intellectual Property (The Global Antitrust Institute, George Mason University School of Law. September 20, 2016);

Comment on the Proposed Revisions to the Guidelines of the Anti-Monopoly Commission of the State Council on Determining the Illegal Gains Generated from Monopoly Conduct and on Setting Fines (The Global Antitrust Institute, George Mason University School of Law. July 9, 2016);

Comment on the Japan Fair Trade Commission's Consultation on the Administrative Surcharge System (The Global Antitrust Institute, George Mason University School of Law. August 6, 2016);

Comment on the India Department of Industrial Policy and Promotion's Discussion Paper on Standard Essential Patents (The Global Antitrust Institute, George Mason University School of Law. March 31, 2016);

Comment on the Proposed Revisions to the People's Republic of China Anti-Unfair Competition Law (The Global Antitrust Institute, George Mason University School of Law. March 24, 2016);

Comment on National Development and Reform Commission's Draft Anti-Monopoly Guideline on Intellectual Property Abuse (The Global Antitrust Institute George Mason University School of Law. January 13, 2016);

Comment on the State Administration for Industry and Commerce Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (The Global Antitrust Institute, George Mason University School of Law. January 11, 2016);

Comment on the Korea Fair Trade Commission's Amendment to its Review Guidelines on Unfair Exercise of Intellectual Property Rights (The Global Antitrust Institute, George Mason University School of Law. January 3, 2016);

Comment on the European Commission's Public Consultation on the Regulatory Environment for Platforms (The Global Antitrust Institute, George Mason School of Law. December 29, 2015);

Comment on the Questionnaire for the Revision of China's Anti-Monopoly Law, (The Global Antitrust Institute, George Mason University School of Law. December 10, 2015);

Comment to China's National Development and Reform Commission's (NDRC's) Anti- Monopoly Guide on Abuse Intellectual Property Rights, (The Global Antitrust Institute, George Mason University School of Law. November 12, 2015);

Comment on the Korea Fair Trade Commission's Revised Review Guidelines On Unfair Exercise of Intellectual Property Rights (The Global Antitrust Institute, George Mason University School of Law. October 5, 2015);

Comment on China's NDRC's Questionnaire on Intellectual Property Rights Misuse Antitrust Guidelines (The Global Antitrust Institute, George Mason University School of Law. September 30, 2015);

▶ GO TO TABLE OF CONTENTS

Comment on the Japan Fair Trade Commission's Draft Partial Amendment to the Guidelines for the Use of Intellectual Property Under the Antimonopoly Act (George Mason Legal Studies, Research Paper No. LS 15-13, 2015) (with Joshua D. Wright);

Comment on the Canadian Competition Bureau's Draft Updated Intellectual Property Enforcement Guidelines (George Mason Legal Studies, Research Paper No. LS 15-14, 2015) (with Joshua D. Wright);

Introduction to *R.H. Bork, Legislative Intent and the Policy of the Sherman Act*, 2 Comp. Pol'y Int'l 225 (2006); excerpted at *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 Harv. J. L. & Pub. Pol'Y 449 (2008);

Reflections of the Twenty-Fifth Anniversary of the Harvard Journal of Law & Public Policy, 25 Harv. J. L. & Pub. Pol'y 835 (2002);

Preface, First Amendment Law Handbook, 1997-98 Ed. (1997);

Introduction: Competitive Enterprise Institute, Antitrust Reader (1997);

The Goals of Antitrust Revisited: Comment, 147 J. Of Institutional & Theoretical Econ. 24 (1991);

Introduction, Federal Spending and the Deficit: Is a Constitutional Remedy Necessary? 11 Geo. Mason L. Rev. 115 (1989);

In Memoriam: Judge Carl McGowan, 56 Geo. Wash. L. Rev. (1988);

The Reagan Administration's Legislative Initiative in Antitrust, 31 Antitrust Bull. 851 (1986)

Selected Presentations

Judge Richard Posner on Antitrust Remedies (ABA Section of Antitrust Law. Washington, DC, April 12, 2018);

International Antitrust Policy in the Trump Administration (Heritage Foundation, Washington, DC, January 23, 2018);

Extraterritorial Reach of Remedies (OECD Competition Committee, Paris, France, December 5, 2017)

Antitrust and the Economics of Vertical Restraints (Ministry of Industry and Informational Technology, Beijing, China, November 29, 2017);

The Legacy of Goldfarb v. Virginia (ABA Section of Antitrust Law, Washington, DC, March 29, 2017);

Speaker, China Competition Policy Forum – Implementation of Competition Policy in Supply-side Structural Reform (Beijing, China - October 27-28, 2016);

Is territoriality still meaningful?, New Frontiers of Antitrust, Paris, 7th International Concurrences Review Conference (June 13, 2016) (with Joshua Hazan);

Antitrust Policy to Benefit Companies and Consumers Alike, Forum for EU-US Legal Economic Affairs (Brussels, Belgium - April 12, 2016);

Antitrust in High-Tech Markets, Second Advanced Conference on Contemporary Competition Law Issues (Istanbul, Turkey - March 11, 2016);

FTC v. NC Dental Board, Where Administrative Law Meets Antitrust, ABA Section of Administrative Law and Regulatory Practice, Administrative Law Conference (Washington, DC - October 29, 2015);

Non-practicing Entities, Patent Assertion Entities, and Antitrust, 2015 Innovation and Competition Forum at the University of International Business and Economics (Beijing, China - October 12, 2015);

Hot Topics in Antitrust Law Competition and Global Economy, University of Chicago Alumni Law Society (Chicago, IL - April 13, 2015);

Discovery and Creation in the Common Law, Mont Pelerin Society (Lima, Peru – March 24, 2015

Speaker, *The United States Department of Justice (DOJ), Obama Administration Antitrust Policies: A Report Card*, Heritage Foundation (Washington, DC - January 29, 2015);

Regulating Competition in High Tech Industries, Federalist Society, Silicon Valley Chapter (Silicon Valley, CA - November 8, 2014);

Judicial Ethics & Election Law in the United States, (Mexico City - August 26, 2014);

▶ GO TO TABLE OF CONTENTS

Competition and the Administrative State, Transatlantic Legal Forum, Annual Conference (Hamburg, Germany - June 10, 2014);

Un autre regard, Cour de Cassation, 130ème anniversaire du Conseil supérieur de la magistrature, « la contribution des Conseils de Justice à la séparation des pouvoirs » (Paris, France - October 25, 2013);

Problems of Adjudication in Competition Law Cases, International League of Competition Law, Oxford Congress (Oxford, England - September 22, 2011);

DNA & Post-Conviction Exonerations, Federalist Society, Florida International University Student Chapter (Miami, FL - April 19, 2011);

Speaker, Federal Antimonopoly Service of Russia, Competition Development in Russia (Moscow, Russia - July 8-9, 2010);

Speaker, Cartel Sanctions and the Balance of Optimal Enforcement, University College London, Jevons Institute Advanced Training for Judges in Competition Law and Economics, (February 2010);

Presentations on "Private Enforcement" and "Market Dominance"; panels on *Conwood v. U.S. Tobacco* and *3M v. LaPage's*, China Intellectual Property Training Centre, Private Enforcement of Antimonopoly Law in China and the US (Beijing, China - October 26-30, 2009).

▶ GO TO TABLE OF CONTENTS

Applying the Dynamic Competition Approach to Zero-Priced Markets

Gönenç Gürkaynak
Esra Uçtu
Anil Acar*
ELIG, Attorneys-at-Law

Abstract

This article examines competition law analysis on zero-priced markets within the scope of dynamic competition model. In this regard, following the proliferation of the Internet-based services, zero-priced markets have become an important part of our ecosystem. To that end, given that the current competition law tools and assessment methods depend heavily on the existence of positive prices in the relevant markets, zero-priced markets—as a fast-spreading concept—pose several complexities for competition law practitioners in particular in the fields of relevant product market definition and competitive assessment in such markets. In this regard, recent case law and scholarly analyses clearly indicate that there is a need for implementing a dynamic competition law model when dealing with zero-priced markets by taking their specific characteristics into consideration. In this article, we will discuss the effectiveness

* The authors of this article would like to express their gratitude to Hakan Demirkan, an associate at ELIG, Attorneys-at-Law, for his assistance in the research and writing process of this article.

▶ GO TO TABLE OF CONTENTS

of the traditional competition law tools and present alternative competition law approaches for evaluating zero-priced markets in a dynamic manner.

> *"Industrial economy was a Newtonian system checks and balances, in which disequilibria of demand and supply arose, only to be equilibrated by adjusting prices. While the right metaphors for the new economy are more Darwinian, with the fittest surviving, the winner frequently taking all, and, as modern Darwinians have come to understand, accidents of history casting long and consequential shadows."*[1]
>
> Lawrence Summers

This article aims to illuminate the approach toward zero-priced markets from the perspective of a dynamic competition law model, which has been increasingly discussed among scholars and practitioners from all around the globe. As a fast-spreading competition law concept with growing relevance to the field, zero-priced markets pose several challenges for competition law practitioners. We seek to navigate through these challenges, identify the key issues, and explore several sensible and practical solutions for adapting the dynamic competition model to these newly emerging markets.

Chapter I of this article provides general explanations on the dynamic competition model and zero-priced markets mainly on theoretical basis, by explaining the unique characteristics of zero-priced markets and the need for applying a dynamic model in the competition law assessment of these markets. Chapter II will summarize the doctrinal developments, as well as providing a practical illustration of the dynamic competition model being applied to mergers and acquisitions and antitrust cases. In this regard, this article will first focus on the inadequacy of the traditional competition law methods, and evaluate the alternative methods discussed in the competition law literature and recent case law of the competition authorities, namely for: (i) the relevant product market definition in M&A and antitrust cases, (ii) the evaluation of the market power of undertakings that operate in zero-priced markets, and (iii) the assessment of the competitive effects of transactions/activities

---

1 Lawrence H. Summers, The New Wealth of Nations, Remarks of the Treasury Secretary at the Hambrecht & Quist Technology Conference, San Francisco, California (May 10, 2000). This was quoted by Douglas H. Ginsburg during his speech at the *Second Advanced Conference on Contemporary Competition Law Issues*, organized by ELIG, Attorneys-at-Law (Istanbul, March 11, 2016).

▶ GO TO TABLE OF CONTENTS

in zero-priced markets that are considered to be challenging for enforcement authorities, in particular competition authorities, from a competition law perspective. The evolution of the approach toward zero-priced markets will also be considered and discussed in this section. Last but not least, Chapter III will examine and assess recent legislative studies regarding zero-priced markets that, in some way, apply the dynamic competition law model.

I. Introduction to the Main Concepts

1. Zero-Priced Markets

Unlike traditional markets, in the so-called "zero-priced markets," companies sell their goods or services at the price of "0," meaning they are offered for free. In particular, following the immense proliferation of Internet-based services in recent years, a growing number of goods and services are currently being provided free of charge in these markets. In this context, millions of Internet users are able to benefit from free online search engines, such as Google Search, Microsoft Bing, and Yandex; Online video/music streaming services offer Internet users an infinite supply of audiovisual content for free on various platforms such as YouTube and Spotify. Finally, people can share their ideas, photos, life memories and various kinds of personal content through different social networks, such as Twitter, Instagram, and Facebook, without paying any service fees whatsoever. These well-known and immensely popular services may be considered as the prime examples of zero-priced markets in the global modern economy. In the digital age that we are living through, zero-pricing strategy has thus become an increasingly important part of our commercial ecosystem (i.e., services offered for free, such as social networks, online search engines, hotel and flight booking, dating, shopping, meal ordering, instant messaging sites, etc.).

We observe that zero-priced markets may exist in various forms and embody diverse structures of market functioning. Indeed, the zero-priced strategy may comprise complementary products, a "freemium-premium" product strategy,[2] or

2 In the freemium-premium strategy, firms offer two versions of the same product or service, where the basic version of the relevant product/service is offered for free, while the upgraded version, which includes additional features, must be paid for (i.e., it is offered at a non-zero price).

▶ GO TO TABLE OF CONTENTS

multi-sided markets, among others. In this respect, Gal & Rubinfeld have emphasized that:

> Changes in the modes of production, distribution, and dissemination of information that have substantially reduced incremental costs have driven the provision of free goods. Such changes have encompassed not only commonly recognized methods such as the digital distribution and digital dissemination of information, but have also expanded through new technologies to include methods such as bio-printing and 3D printing.[3]

Companies choose to offer free goods and services for various economic reasons providing them significant commercial gains such as boosting the sales of their related products/services through several marketing tools such as bundling or tying strategies. Additionally, the economic compensation that the provider of a free product or service foregoes may be returned by generating other business profits or the accrual of other economic advantages to the service providers. These may include the collection of users' personal data for advertisement purposes, advertisements and marketing messages displayed on relevant free platforms for unrelated products, or the effects of the free product or service on increasing the popularity of interrelated products, among others. On this subject, Evans has noted that:

> [B]usinesses often offer a product for free because it increases the overall profits they can earn from selling the free product and a companion product to either the same customer or different customers. The companion product may be a complement, a premium version of the free product, or the product on the other side of a two-sided market . . . . A key point is that the existence of a free good signals that there is a companion good, that firms consider both products simultaneously in maximizing profit.[4]

Therefore, the common feature presented by zero-priced markets is that there is—almost always—an interrelated product or service that is offered in the market in exchange for a non-zero price (i.e., sold for a positive amount, like regular

---

3 Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 Antitrust L.J. 521, 522 (2016).

4 David S. Evans, *The Antitrust Economics of Free* (John M. Olin Program in Law and Economics Working Paper No. 555, 2011).

▶ GO TO TABLE OF CONTENTS

goods and services), and which benefits from the popularity of the relevant zero-priced market.

2. Dynamic Competition

The emergence of new products and business models in the modern world has given rise to the necessity of adopting a dynamic model to carry out effective competition law assessments. The *dynamic analysis* concept has been introduced to the competition law environment in at least two different ways. The first results from the emergence of new products and business models and their subsequent incorporation into the traditional methods used in competition law practice. The second refers more broadly to the relationship between present competitive activities and future market conditions.[5]

With respect to the basis of the dynamic competition concept, Schumpeter provides a solid intellectual foundation. In this regard, Schumpeter emphasized the importance of a dynamic point of view toward competitive assessments, and suggested that:

> [T]he kind of competition embedded in standard microeconomic analysis may not be the kind of competition that really matters if enhancing economic welfare is the goal of antitrust. Rather, it is dynamic competition propelled by the introduction of new products and new processes that really counts. If the antitrust laws were more concerned with promoting dynamic rather than static competition, which we believe they should, we expect that they would look somewhat different from the laws we have today.[6]

It has been acknowledged for decades that the static model of competition, which dominates modern antitrust analysis, has generally served antitrust law well, but that it also has some drawbacks familiar to practitioners in the competition law discipline; in particular, the tendency of the static model to ignore the impact that

---

5 Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions,* 78 Antitrust L.J. 1, 1 (2012).

6 J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law,* 5 J.C.L. & E. 4, 582 (2009).

▶ GO TO TABLE OF CONTENTS

competitive activities undertaken today will have upon future market conditions.[7] Indeed, the dynamic competition model entails the prediction of future competitive outcomes, including considerations of the effects of a conduct on entry, investment, innovation, price, output, and quality.[8]

As a result of the foregoing considerations, the dynamic competition model has become an internationally prominent analysis method promulgated through the competition law literature. In this regard, dynamic competition (also called "Schumpeterian competition") is defined as competition that is characterized by product and process innovation.[9] Dynamic competition is distinguished by its focus on the prediction of future competitive outcomes. Unlike the traditional (i.e., static) competition approach, dynamic competition does not necessitate price competition. Indeed, promoting dynamic competition may well reduce the effects of short-run price competition in the market.[10] All in all, the dynamic model considers not only the price competition in the market, but also non-price competitive outcomes that may show up in different forms, such as increased investment, innovation, and quality, among others.

3. The Context that Brings Zero-Priced Markets and Dynamic Competition Together

The unique characteristics of zero-priced markets have led to cutting-edge discussions in relation to several aspects of the traditional competition law rules. In this scope, the primary question which would come to mind is whether the fact that companies offer their products free of charge would logically imply that competition law rules should not apply to these zero-priced products.

In this context, Gal & Rubinfeld have underlined the atypical structure of zero-priced markets and the unique challenges of competition law related assessments in these markets as follows:

> Free goods pose a special challenge. While free goods create obvious benefits to consumers, they have the potential to create negative effects

7 Ginsburg & Wright, *supra* note 5, at 1.

8 *Id.* at 3.

9 Sidak & Teece, *supra* note 6, at 581.

10 *Id*. at 600.

▶ GO TO TABLE OF CONTENTS

> on both competition and welfare. . . . As a starting point, it is helpful to recognize that some of the most basic market-related assumptions made in economic models do not hold when a free good is provided. One such assumption is that the price of a good covers (or more than covers) its costs of production, at least in the long-run.[11]

Accordingly, the question of whether free products should be excluded from the scope of competition law has spread throughout the competition law world in recent years. In this regard, it has been argued in several cases in different jurisdictions[12] that zero-priced markets should not be regulated under the rules of competition law, as these markets do not actually constitute a "*market*" within the meaning of competition law. However, as also elaborated in detail in the sections below, the assessment regarding the market definition of zero-priced markets has been continuously evolving, and, in recent times, free products have been evaluated within the scope of competition law by numerous scholars in their academic writings, as well as by various practitioners in several cases.[13]

Given that conventional/static competition law tools and assessment methods depend heavily on the existence of "non-zero prices" (i.e. positive prices) in the relevant market, which zero-priced markets naturally lack; these complex characteristics and the multifaceted dynamics of zero-priced markets would give rise to thorny and controversial issues in terms of the application of core competition law concepts and to the necessity of taking into consideration interrelated non-zero priced markets. Regarding this point, Evans has noted that:

---

11 Gal & Rubinfeld, *supra* note 3, at 531.

12 For instance, in *Kinderstart.com LLC v. Google Inc.* (N.D. Cal. 2007) where Kinderstart, a website providing content for young children, alleged that Google had abused its dominant position by artificially lowering Kinderstart's "Page Rank" in its Internet search results, The District Court concluded that the plaintiff had failed to establish that search engine was a relevant product market in terms of competition law, by stating that, "KinderStart has failed to allege that the Search Market is a "grouping of sales." It does not claim that Google sells its search services, or that any other search provider does so." However, in 2009, a Chinese court rejected the same conclusion in Baidu/Renren and concluded that whether or not a service is free was irrelevant to its assessment regarding the relevant product market.

13 *See, e.g.,* Miguel S. Ferro, *"Ceci n'est pas un marche": Gratuity and Competition Law*, Concurrences N° 1, 6-13 (2015); Gal & Rubinfeld, *supra* note 3, at 552-556; Evans, *supra* note 4, at 18-23; Sidak & Teece, *supra* note 6, at 628-629.

▶ GO TO TABLE OF CONTENTS

> The fact that a product is free is not, however, completely irrelevant to the practice of antitrust. A price of zero provides a red flag that the textbook model of competition and standard antitrust analysis do not apply to the product in question. Almost certainly the proper antitrust analysis will need to consider the free product together with its companion moneymaking product.[14]

Accordingly, it is clear that the evaluation of zero-priced markets from a competition law perspective should consider not just the free products, but also any interrelated products from which firms may gain a profit, in order to effectively assess the competitive effects of a business deal or an M&A transaction. Therefore, a more dynamic approach that considers and deals with the peculiar characteristics of zero-priced markets would be more appropriate for dealing with these markets within the context of competition law.[15] To that end, competition authorities should embrace the progressive view that has emerged in the academic world, and adapt the main tools used for assessing the traditional markets and harmonize them with a new dynamic approach for evaluating the competitive effects of transactions in zero-priced markets.

II. Dynamic Competition Model Applied to Merger and Acquisition Transactions and Antitrust Cases in Zero-Priced Markets

The importance and suitability of the dynamic competition law approach in cases involving zero-priced markets is not only evident, but also inevitable, in the competition authorities' examination of (i) the relevant product market definition, and (ii) the effects of the free products/services on competition, consumer welfare

---

14 Evans, *supra* note 4, at 17.

15 As Ginsburg and Wright noted, in support of a shift toward a dynamic competition law analysis, "The debate over dynamic analysis appears to be moving beyond the question whether it should be used in antitrust law and toward identifying the appropriate ways and circumstances in which to do so. An increased focus upon dynamic competition has the potential to improve antitrust analysis and, thus, to benefit consumers." Ginsburg & Wright *supra* note 5, at 2. Furthermore, Sidak and Teece favored a dynamic competition law approach, by noting that, "[A]ntitrust analysis must recognize that advancing dynamic competition will benefit consumers most, certainly in the long run if not also in the short run." Sidak & Teece, *supra* note 6, at 631. *See also* John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 Wash. U. L. Rev. 49, 60-71 (2016), Gal & Rubinfeld, *supra* note 3, at 550-551; Evans, *supra* note 4, 22-23.

▶ GO TO TABLE OF CONTENTS

and innovation in the relevant markets. These issues will be further discussed and elaborated on below.

1. Market Definition in Zero-priced Markets: The Need for a Modernization of Traditional Competition Law Tools

A. *Inadequacy of the Traditional Competition Law Methods used in Market Definition*

Market definition is a tool for identifying and defining the boundaries of competition between various undertakings. To that end, the main goal of establishing the relevant market definition is to determine the competitive conditions that the undertakings under scrutiny in an antitrust or M&A case are faced with.[16]

Under the E.U. competition law regime, the European Commission's Notice on the Definition of the Relevant Market (the Notice)[17] is of particular importance, because it adopts the "hypothetical monopolist" test—also known as the SSNIP test[18]—in defining the relevant product markets in antitrust or M&A cases. It should be noted that the Notice adopts the same hypothetical monopolist test that has also been implemented by antitrust authorities in the United States and by other competition authorities throughout the world.[19] Paragraph 17 of the European Commission's Notice explains the hypothetical monopolist test in the following manner:

---

16 *See* European Commission's Notice on the Definition of the Relevant Market for the Purposes of [EU] Competition Law, OJ 97/C 372/03, ¶1 [hereinafter Definition of Relevant Market]. *See also* Turkish Competition Board, Guidelines on the Definition of Relevant Market ¶1.

17 The European Commission's Notice on the Definition of Relevant Market, *id*.

18 *See* Øystein Daljord, Lars Sørgard & Øyvind Thomassen, *The SSNIP test and market definition with the aggregate diversion ratio: A reply to Katz and Shapiro*, 4 J. C. L. & E. 2 (2008), where the authors state that the Hypothetical Monopolist or Small but Significant Non-transitory Increase in Prices (SSNIP) test defines the relevant market by determining whether a given increase in product prices would be profitable for a monopolist in the candidate market. The U.S. Merger Guidelines do not specify whether the SSNIP test should be performed with an increase in one price, some prices, or all prices in the candidate market. We argue that this should depend on characteristics of the market: if there are asymmetries between products, increasing only one price might be the best way to identify competitive constraints.

19 Richard Whish & David Bailey, Competition Law 27 (7th ed. 2012).

▶ GO TO TABLE OF CONTENTS

> The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.[20]

Naturally, this price-based hypothetical monopolist test loses its rational basis and coherence, and thus becomes inoperable in zero-priced markets. Logically, a "small but significant" increase in the products' price (i.e., in the range of five to ten percent) would cause the prices to still remain at zero. Therefore, the need for competition law authorities to adopt a dynamic approach in defining the relevant product market in cases involving zero-priced markets becomes even more vital and urgent in order to accurately determining the competitive conditions that may occur within the market, together with the competitive conditions faced by the undertakings. Indeed, as Gal and Rubinfeld have noted in their discussion of traditional competition law tools, "[T]his price-based approach to market definition disregards other ways of exercising market power, such as reduced quality, variety or service or diminished innovation, which are often more typical of markets involving free goods."[21]

The difficulties faced by competition authorities in implementing the traditional competition law tools in defining the relevant product/service markets for free products have led to some leading conclusions and notorious assessments in competition law literature, as well as in the decisional practice.[22] In this regard, as explained above, there are only a small number of isolated cases related to zero-priced markets that touch on the issue of relevant market definition and that conclude that there should be no relevant product market definition for

---

20 Definition of Relevant Market, *supra* note 16, ¶ 17. *See also* Turkish Competition Board, *supra* note 16, ¶ 10.

21 Gal & Rubinfeld, *supra* note 3, at 549.

22 *See, e.g.,* Microsoft/Yahoo! Search Business, Case No COMP/M.5727 (EC, February 18, 2010), Google/DoubleClick; Case No COMP/M. 4731 (EC, March 11, 2008), Microsoft/Skype, Case No COMP/M. 6281 (EC October 7, 2011). Please also see *infra* for further examinations on the cases.

▶ GO TO TABLE OF CONTENTS

products and services that are given away for free[23]. As zero-priced markets continue to proliferate in our commercial ecosystem (and particularly in the digital realm), it would not be too bold to say that the approach adopted in these limited number of cases reflects a rather isolated and obsolete attitude toward this crucial issue. This is particularly the case in light of the fact that competition authorities have proven their ability to adapt their assessment tools and practices to the realities of the markets that they deal with, and that they generally tend to take zero-priced markets into consideration as well when defining the relevant product/service market at stake.

B. *Dynamic Competition Law Model Applied to the Definition of the Relevant Product Market*

In order to prevent errors and lapses which may stem from the implementation of the traditional competition law tools in cases involving zero-priced markets, competition law authorities would need to make a more thorough and vigorous assessment of the products/services that are interrelated to the zero-priced markets by adopting a more dynamic approach.[24] To that end, we find it encouraging that the case law on zero-priced markets has been evolving in recent years and that the importance of the relationship between free products and their interrelated products in zero-priced markets has been progressively recognized and increasingly given its due significance by competition authorities. Such an approach has been widely adopted in what are known as "two-sided markets," where two or more distinct sets of users interact with each other on a platform and provide each other with network benefits, which creates additional value for them.

Indeed, the European Commission's decisional practice as applied to two-sided markets in which zero-priced markets were involved offers a valuable example of the dynamic approach in action. In these cases, the European Commission's approach in its assessment of the market definition has been to focus on the markets where a profit-making relationship exists. For instance, in both *Microsoft/Yahoo!*[25]

---

23 S*ee, e.g.*, *Kinderstart LLC vs. Google Inc.*, *supra* note 12.

24 Gal & Rubinfeld, *supra* note 3, at 553-54.

25 *Microsoft/Yahoo! Search Business*, *supra* note 22.

▶ GO TO TABLE OF CONTENTS

and *Google/Doubleclick*,[26] although the European Commission defined the relevant product market as the advertising services offered by the relevant undertakings (which is where they gained their profits), the Commission ultimately left open (in both decisions) the question of whether the search engine market—where the online search services are offered to users for free—constituted a separate relevant product market. On the other hand, recent case law indicates that the European Commission has started to change its attitude toward the definition of the relevant product market in zero-priced markets, and has recently tended to define the relevant product market based not just on profit-making activities, but on the free goods/services at stake as well. For instance, in *Microsoft/Skype*,[27] the European Commission considered the market for Internet-based consumer communications services where the related services were provided for free for its assessment of the definition of the relevant product market, but ultimately left open the exact definition of this market.

Similarly, in *MasterCard,*[28] when analyzing the relevant product market definition, the European Commission considered the two-sided nature of the payment cards industry, and, consequently, recognized that demand from both consumers and retailers must be taken into account in establishing the relevant product market, given that the choice of payment method is determined jointly by both parties to the transaction.

As for the Turkish competition law practice, the investigation of *Yemek Sepeti*[29] provides an illuminating case study of the evolving approach to relevant product market definitions. Yemek Sepeti is by far the most widely used online meal-ordering platform in Turkey. In its investigation of the company, the Turkish Competition Board evaluated whether the "most favored customer" (also called "most favored nation" or MFN) clauses contained in Yemek Sepeti's agreements with participating restaurants constituted a violation of Turkish competition law. In its decision, the Board adopted the same attitude toward the relevant product market definition as the European Commission did in its decisional practice, and

---

26 *Google/DoubleClick*, *supra* note 22.

27 *Microsoft/Skype*, *supra* note 22.

28 European Comm'n Decision of December 19, 2007, Case No COMP/34.579 – MasterCard.

29 Turkish Competition Bd. Decision of June 9, 2016, Case 16-20/347-156 – Yemek Sepeti.

▶ GO TO TABLE OF CONTENTS

determined that there are two different groups of customers on platforms such as Yemek Sepeti. In this regard, the Board stated that:

> Online food delivery/services platforms have the nature of intermediary services, which mainly enable the interaction between users/customers who wish to order food and restaurants that provide take-away food services; in other words these platforms enable users to order food on the Internet and enable restaurants to receive food orders on the Internet, but do not include direct/physical take-away food services. Although this service is offered to both users and restaurants, the party paying in return for the service is the restaurants.[30]

Similarly, in a very recent case[31] against Booking.com—which is a travel fare aggregator and travel search engine for lodging reservations, such as hotels, motels, guest houses, etc.—the Turkish Competition Board evaluated whether MFN clauses placed on the contractual agreements between Booking.com and hotels violated competition law rules. In its decision, the Board recognized that, in the market for online booking services such as Booking.com, the relevant services are offered simultaneously to two different customer groups, namely (i) consumers, and (ii) hotels. To that end, the Board concluded that, in defining the relevant product market, both sides of this market should be taken into consideration.

Apart from recognizing (and clarifying) the relationship between free products and their interrelated companion products when defining the relevant product market in zero-priced markets, competition law scholars also endeavor to revise and modernize the traditional competition law standards, so that they can be used to effectively evaluate zero-priced markets within the scope of competition law. In this regard, it has been argued[32] that the traditional (i.e., priced-based) competition law tools are not entirely inoperable in zero-priced markets and that, accordingly, they can be used in zero-priced markets subject to some adjustments and variations. Certain alternative methods to the SSNIP test (which, as explained earlier, is not adequate to the task of relevant product market definition in zero-priced markets) have been proposed in the competition law literature. One of these alternative

---

30 *Id.* ¶ 81.

31 Turkish Competition Bd. Decision of January 5, 2017, Case 17-01/12-4 - Booking.com.

32 Newman, *supra* note 15, at 66.

▶ GO TO TABLE OF CONTENTS

methods is the "SSNIC" test—a small but significant and non-transitory increase in (exchanged) costs—on customers. In this regard, Newman has explained that:

> By substituting the relevant exchanged cost(s)—i.e., information and/or attention—for prices, enforcers may gain insight as to how closely products compete. The question becomes whether a hypothetical monopolist would likely impose an "SSNIC"—a small but significant and non-transitory increase in (exchanged) *costs*—on customers. For example, investigators analyzing a merger between two search providers might ask whether a market-wide five per cent increase in the amount (or length, duration, etc.) of advertisements would cause search customers to substitute away to a different product.[33]

However, the implementation of this alternative SSNIC test may involve certain complications in practice, as it has been argued that there would be significant difficulties in determining the relevant costs. For example, although the relevant costs may be apparent or easy to discern in some clear-cut cases (e.g., in the television broadcasting market, where the consumers incur the attention costs), in more sophisticated or complex cases, it would be more challenging to determine the relevant costs. Therefore, commentators have argued that the SSNIC test would not be completely sufficient for defining the relevant product market in every case involving a zero-priced market.[34] In other words, the adequacy of the SSNIC test for zero-priced markets is not absolute.

However, the SSNIC test is not the only alternative method that has been proposed for replacing the traditional SSNIP test in the assessment of the relevant product market in zero-priced markets. Indeed, in *Qihoo 360 v. Tencent*[35], the Chinese Supreme People's Court presented a different approach for the assessment of the relevant product market. To that end, the Chinese court first noted that the application of the SSNIP test would be impractical in the present case, as Tencent's relevant online instant messaging services were offered for free in the market through the "QQ" app, which is the most commonly used online messaging service

33 *Id.*

34 *Id.* at 67.

35 Beijing Qihoo 360 Technology Co. v. Tencent Technology (Shenzhen) Co., (Sup. People's Ct. 2013) (China), *translated in* https://www.competitionpolicyinternational.com/assets/Decision-Translation.pdf.

▶ GO TO TABLE OF CONTENTS

in China. Then, in terms of its assessment, the Chinese court implemented a so-called "SSNDQ" test, which determines the limits of the relevant product market by focusing on the effects of a hypothetical "small but significant and non-transitory decline of quality." In a SSNDQ test, which is also proposed by Gal & Rubinfeld, the main factor that would be taken into consideration in the assessment of the relevant product market would be the quality of the relevant products/services (as opposed to the price or the costs). As for the implementation of this test, it is argued that although differences in quality of the goods/services are more difficult to measure compared to the differences in price, consumer behavior may provide valuable inputs about consumer preferences in case of a change in the quality.[36]

However, similar to the SSNIC test, scholars[37] have argued that the SSNDQ method may not be appropriate for the definition of the relevant product market in certain cases. For example, the SSNDQ test may not be suitable in markets where practical problems arising from the application of this test may occur, given that, in certain circumstances, it would be economically irrational for a dominant undertaking to exercise its market power by decreasing the quality of its products /services. In those circumstances, adopting and implementing the criterion of "decline of quality" would be insufficient in the assessment of the relevant product market definition.[38]

In conclusion, the definition of the relevant product market, which is one of the core concepts and fundamental concerns of competition law in terms of its significance in evaluating the competitive framework of a given market, may be a challenging task in zero-priced markets, due to the unique characteristics of such markets. In this regard, we observe that there is an emerging consensus in both the literature and the decisional practice of competition law authorities on the necessity of considering the relationship between free products and interrelated products in the assessment of the relevant product market for free products. Moreover, we consider it to be an encouraging development that this necessity

---

36 Gal & Rubinfeld, *supra* note 3, at 551.

37 In this regard Newman noted that "it is unlikely that firms enjoying market power in at least some zero-price markets would choose to exercise that power by lowering quality. Where doing so would result in negligible cost reduction, the attendant loss of customers would likely make an SSNDQ irrational—yet a relevant antitrust market may still be present. Consequently, SSNDQ tests are more appropriate where marginal costs vary substantially in tandem with quality levels, and less appropriate where that is not the case." Newman, *supra* note 15, at 71.

38 *Id.* at 71.

▶ GO TO TABLE OF CONTENTS

has been increasingly observed, acknowledged, and taken into consideration by competition authorities all around the world.

2. Competitive Assessment in Zero-Priced Markets in Light of the Dynamic Competition Law Model

Although one may logically argue that zero-priced markets are always pro-competitive, as their products are offered to the customers for free, it should be noted that zero-priced goods/services do not necessarily tend to yield massive (or, in fact, any) consumer welfare surplus. In this regard, although consumers do not pay a direct price for free goods/services, the change in the pricing strategy may affect other dimensions of competition in a way that can harm social welfare in certain circumstances.[39]

Therefore, it is commonly argued that zero-priced markets should not be exempted from competition law scrutiny. However, as we have tried to illustrate in the foregoing discussion, competition law analyses in zero-priced markets are never simple or straightforward, and in order to be effective, such analyses must pay the unique characteristics of zero-priced markets a great attention.

A. *Inadequacy of Traditional Methods for Conducting a Competitive Assessment in Zero-Priced Markets*

Similar to the issues revolving around the difficulty of "market definition" in zero-priced markets above, the traditional competition law methods lack the necessary tools for conducting a competitive assessment which is adequate to zero-priced products/services, through analyzing factors such as market power, competitors' position, buyer power, barriers to entry and expansion in the market, etc.

Indeed, the existing tools are rather equipped to apply to non-zero priced markets and even the definitions of the core competition concepts contain the "price" factor. For instance, the "market power" of the undertakings under scrutiny, which is one of the most important factors in determining and delineating the competitive

39 Gal & Rubinfeld, *supra* note 3, at 523.

▶ GO TO TABLE OF CONTENTS

landscape of a given market, is generally perceived and defined as the undertakings' ability to increase their prices above the competitive level.[40]

This inadequacy of the traditional tools for zero-priced markets arises from the fact that in such markets, the incentives and inclinations of a dominant undertaking would naturally lean toward not increasing the price of its products/services. Similarly, a dominant undertaking will not necessarily impose a non-zero price for its products/services, which were previously offered to consumers for free, after gaining market power in these products/services. This is because market power in zero-priced markets could be exercised through different means, such as increasing information or attention costs, or both.[41] Therefore, the evaluation of the market power of undertakings operating in zero-priced markets is generally more complex and challenging compared to similar evaluations in markets where goods/services are offered at non-zero prices.

This point has also been emphasized in various judicial cases, where the argument has been made that traditional competition law methods would not be sufficient in dealing with the challenges of the competitive analysis pertaining to zero-priced markets. In this regard, the U.S. Department of Justice concluded, in *LiveUniverse, Inc.*,[42] that the appropriate measure for calculating an undertaking's market share is not always the quantity of goods or services sold to customers, but instead the number of users of the undertaking's products/services.

In other cases, the competition authorities tend to fill the gaps of the existing competition law tools and take the specific features of the zero-priced products/services into consideration. They do this mainly for conducting their competitive assessment by considering the interrelated products/services as well; and for evaluating the role of innovation in these fast-growing and innovation-sensitive markets.

---

40 EC Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, ¶ 11. *See also* Guidelines on Horizontal Cooperation Agreements, ¶ 25.

41 Newman, *supra* note 15, at 72.

42 LiveUniverse, Inc. v. Myspace, Inc., CV 06-6994 AHM (C.D. Cal, 2007).

▶ GO TO TABLE OF CONTENTS

B. *Main Feature of the Competitive Assessment in Cases Involving Zero-Priced Markets: The Need to Consider the "Interrelated Products/Services"*

It is commonly argued that when conducting their analyses on the effects of free products on the competition in the relevant market, competition law authorities should not focus solely on the free products themselves, but also consider the overall conditions in the related market(s). This is because, as explained throughout this article, zero-pricing strategy implies that there should be products/services interrelated to free products/services in these markets. Therefore, a competition law analysis on zero-priced markets should also take demand and supply structure of the other product into account given that any factor that affects the demand and supply of one of these products is likely to affect the other product as well[43]. Otherwise, any competition law assessment would likely to reach an erroneous conclusion that zero-priced markets are always pro-competitive without assessing mid-term and long-term effects of these markets. However, an ideal competition law assessment should also consider long-term effects of zero-priced markets by encompassing and incorporating the analysis of the relationship between the free good/service in question and interrelated goods/services.

Through examination of the recent case law involving zero-priced products which are sometimes also two-sided products, one can observe that enforcement authorities have begun to evaluate the relationship between free and interrelated products in detail. These precedents indicate that, although zero-priced products/services are offered for free in one market, there may still be anti-competitive exclusionary effects in an interrelated market (i.e., the other side of the coin), where products or services are offered for non-zero prices.

For instance, in its recent *Google Shopping* decision, the European Commission considered the pro- and anti-competitive effects of Google's conduct in the online search market, and concluded that Google had abused its dominant position in the search engine market by giving an unjust advantage to its own comparison shopping

43 *See also Evans, supra* note 4, at 21-23.

▶ GO TO TABLE OF CONTENTS

service[44] (initially called "Froogle," re-named "Google Product Search" in 2008, and finally "Google Shopping" in 2013) to the detriment of rival comparison shopping services.[45] To that end, it is stated in the fact sheet published on the European Commission's website that:

> The Commission Decision does not object to the design of Google's generic search algorithms or to demotions as such, nor to the way that Google displays or organi[z]es its search results pages (e.g., the display of a box with comparison shopping results displayed prominently in a rich, attractive format). It objects to the fact that Google has leveraged its market dominance in general internet search into a separate market, comparison shopping. Google abused its market dominance as a search engine to promote its own comparison shopping service in search results, whilst demoting those of rivals. This is not competition on the merits and is illegal under E.U. antitrust rules.[46]

In *Yemek Sepeti*, the Turkish Competition Board adopted a dynamic approach and examined whether the MFN clauses incorporated into Yemek Sepeti's agreements with restaurants led to any exclusionary effects in the relevant markets by taking into account the two-sided nature of the markets in question; namely the free services offered to users on the one hand and the services offered to restaurants in return of a fee on the other. To that end, the Board concluded that Yemek Sepeti's MFN clauses would have the effect of excluding the actual and potential competing platforms from the market for online food delivery services due to Yemek Sepeti's dominant position in that market.[47]

The assessment of the interrelated markets gains importance, in particular, when a free product is bundled with its interrelated product (i.e., customers would need to buy the interrelated product for a non-zero price in order to gain access to the

---

44 The European Commission's fact sheet defines the comparison shopping services as: "Comparison shopping services offer a tool for consumers to compare products and prices online and find deals from online retailers of all types. By contrast, they do not offer the possibility for products to be bought on their site, which is precisely the aim of merchant platforms." European Commission's fact sheet, MEMO/17/1785 (published June 27, 2017).

45 *Id.*

46 *Id.*

47 *Yemek Sepeti*, *supra* note 29.

▶ GO TO TABLE OF CONTENTS

free product). In such a case, an analysis regarding the market power of the undertakings should also encompass and evaluate the complementary goods that have positive prices, given that offering a free product in a market enables the seller to: (i) increase costs, (ii) create barriers to entry in a related market, and (iii) to cover the costs involved in producing and supplying both products. Therefore, competitive restrictions derived from providing free products over paid ones should be taken into consideration in the competitive assessment and in particular the evaluation of market power, even if such undertakings are not considered to have activities in the same product market from a competition law perspective.[48] For instance, in *Microsoft,*[49] the U.S. Department of Justice claimed that offering the Internet Explorer browser for free was aimed at maintaining Microsoft's monopoly in the PC-based desktop operating system market by stating that, "Microsoft's conduct with respect to browsers is a prominent and immediate example of the pattern of anticompetitive practices undertaken by Microsoft with the purpose and effect of maintaining its PC operating system monopoly and extending that monopoly to other related markets."

With regards to the evaluation of welfare effects in zero-priced markets, Gal and Rubinfeld have correctly observed that: "the analysis should place less emphasis on price as indicator of welfare, and more emphasis of quality. To give an example, it might be the case that an exclusionary bundling would have no substantial effect on the price of the paid product, yet still reduce the overall quality of the products."[50]

As it follows from the case law cited above, it is quite encouraging to observe that the competition authorities generally take into consideration the specific features of the zero-priced products/services in their competitive assessment even though the existing competition law framework does not contain the necessary tools that would apply to zero-priced products/services.

---

48 Gal & Rubinfeld, *supra* note 3, at 552.

49 United States v. Microsoft, 253 F. 3d 34 (D.C. Cir. 2001).

50 Gal & Rubinfeld, *supra* note 3, at 555.

▶ GO TO TABLE OF CONTENTS

C. *Role of Innovation in the Competitive Assessment: A New Dimension of Competition*

The competitive assessment in zero-priced markets should also take into consideration certain non-price criteria, such as quality and consumer choice, among others.[51] In this context, the tangled relationship between innovation and competition has become an important competition law parameter, particularly in competition law assessments involving digital markets. In this regard, it is not surprising that competition law authorities frequently refer to the role of innovation in competition when conducting their analyses of market power. Furthermore, the European Commission has also pointed out the crucial role/impact of innovation in the market, which may be considered as an important criterion in the assessment of market power, and has drawn attention to the fact that digital markets are characterized by rapid innovation and the availability of free goods.[52] In this regard, traditional competition law parameters (such as market share) may not be practical or effective in evaluating the market power of undertakings in zero-priced markets. In *Microsoft/Skype*,[53] the European Commission found that, in light of the fast-growing nature of zero-priced markets, large market shares may not necessarily be an indicator of significant market power, and emphasized this point by stating that, "market shares are not the best proxy to evaluate the market power of providers of consumer communications services and they only give a preliminary indication of the competitive situation in these dynamic markets." Similarly, the European General Court concluded in *Cisco Systems Inc./Messagenet SpA v. European Commission* that, "the consumer communications sector is a recent and fast-growing sector which is characterized by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power."[54]

More specifically, in several recent M&A cases, competition authorities have applied the so-called "innovation market analysis" in order to assess whether a merger or acquisition transaction had the potential to reduce the incentive to be

---

51 *Id.* at 553.

52 *See, e.g.,* Cisco Systems Inc./Messagenet SpA v. EC, Case T-79/12 (4th Chamber of the General Court, December 11, 2013).

53 *Microsoft/Skype*, *supra* note 22.

54 *Cisco Systems Inc./Messagenet SpA*, *supra* note 52.

▶ GO TO TABLE OF CONTENTS

innovative in the relevant market. For instance, in *Microsoft/Yahoo*, the European Commission stated that innovation is an important dimension of competition for the undertakings especially operating in digital markets. In this regard, the European Commission held that undertakings operating in the search-engine market not only endeavor to create new services but also try to bring innovation in order to increase the quality of their services and provide better services to consumers.[55] After then, the European Commission evaluated the impact of the relevant transaction on the parties' ability to innovate with regard to their existing services in the relevant market (i.e., online search engines) and concluded that the relevant transaction does not negatively affect the parties' incentives to innovate post-transaction due to the low combined market share of the parties and the importance of the innovation on the competition in the relevant market.

The European Commission adopted the same approach in *Microsoft/LinkedIn*,[56] which concerned the examination of the transaction by which Microsoft acquired sole control of LinkedIn, a business- and employment-oriented social networking service. In this case, the European Commission also evaluated whether there would be any effect on innovation in the relevant market as a result of the transaction in question. In this regard, the European Commission concluded that:

> [I]t is unlikely that if LinkedIn full data, of a subset thereof, were to be used for ML[57] only in Microsoft's CRM[58] software solution, this would affect a sufficiently important proportion of Microsoft's competitors to result in a significant price increase or reduction of market incentives to innovate.[59]

Similarly, in its evaluations, the Turkish competition Board also considers the relationship between innovation and competition and investigates whether the conduct in question is likely to hinder innovation in the relevant market. For instance, in the aforementioned *Yemek Sepeti*[60] case, when evaluating the possible

---

55 *Microsoft/Yahoo! Search Business*, *supra* note 22, ¶¶ 109-110

56 Microsoft/LinkedIn, Case M.8124 (EC, December 6, 2016).

57 ML stands for "Machine Learning."

58 CRM stands for "Customer Relationship Management."

59 *Microsoft/LinkedIn*, *supra* note 56, ¶ 275.

60 *Yemek Sepeti*, *supra* note 29, ¶ 139.

▶ GO TO TABLE OF CONTENTS

effects of MFN clauses on the online food-delivery market, the Board ultimately concluded that such clauses may hinder the offering of innovative products and business models in the relevant market. In this regard, the Board held that, in case a considerable amount of a supplier's sales is subjected to MFN clauses, this may lead to a decrease in the supplier's incentive to lower its prices for other competitor platforms. Consequently, such clauses may lead to increase in prices for competitor platforms, prevent new entries into the market and hinder innovative products or business models as well.

III. Recent Regulatory Studies regarding Zero-Priced Markets

Following the meteoric growth of digital markets in recent years, and the ensuing increase in the number of products/services offered for free, the need for a modernization of the traditional competition law tools has become urgent and inescapable.[61]

As the dynamic competition law model has spread throughout the competition law community and gained increasing (if not yet widespread) acceptance in the competition law literature, competition law authorities have started to consider amending the existing regulations in order to better evaluate antitrust and M&A cases in these fast-growing markets, such as the zero-priced markets discussed here. In fact, it can be argued that, by explicitly referring to the specific characteristics of the zero-priced markets in their decisions, some competition authorities have already started to build a framework for using more dynamic assessment models, in order to meet the unique challenges posed by the innovative developments that are occurring more and more in the relevant markets.

---

61 John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. Pa. L. Rev. 149, 196-197 (2015).

> One particularly striking—and under-researched—consequence of the digital revolution is the rise to prominence of firms offering goods and services at zero prices. While zero-price products have existed for many decades, even centuries, such offerings have increased exponentially and now feature conspicuously across modern markets. . . . Antitrust law, however, has failed to evolve to account for the disappearance of prices. The antitrust enterprise remains firmly grounded in price theory, yet this dependence has inevitably led to an exclusive focus on price competition that is often inappropriate in the face of zero price.

▶ GO TO TABLE OF CONTENTS

Within the scope of the foregoing discussion, the European Commission's Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of E.U. Merger Control (EC Public Consultation), which was launched on October 7, 2016 (and due on January 13, 2017), may be considered as the most recent and concrete example of these regulatory studies.

The EC Public Consultation's primary topic of discussion is the effectiveness of turnover-based jurisdictional thresholds. More specifically, the chief purpose of the EC Public Consultation is to examine and discuss whether the current merger control system captures all transactions that may have an impact on the relevant markets. To that end, the EC Public Consultation also makes reference to the general characteristics of the digital markets in which services are regularly offered for free in order to first establish a customer base, so that the company can then adopt and implement a business model which may generate significant revenues later on. In such business models, although firms may not generate considerable turnovers at the beginning, they may nevertheless have a significant impact on the relevant market. In this scope, it has been argued that the current turnover-based system may not adequately capture transactions that such market players are engaged in. Consequently, the European Commission seeks to find complementary criteria that it can use in order to evaluate such merger cases more effectively.

The Organization for Economic Cooperation and Development (OECD) is an international organization which, through the studies and reports of its Competition Committee, contributes to the proliferation of competition law legislation and policy. In its working paper titled, "Big Data: Bringing Competition Policy to the Digital Era,"[62] the effects of providing goods/services for free within the context of Big Data was studied and discussed, and it was suggested by the authors that a new understanding and approach to dealing with zero-priced markets is required. To that end, this important document refers to the concept of *transaction cost economics* (TCE), proposed by Chris Jay Hoofnagle and Jan Whittington, which aims at gaining a better understanding of the costs of transactions in online products,

62 OECD, *Big Data: Bringing Competition Policy to the Digital Era,* Directorate for Financial and Enterprise Affairs Competition Committee DAF/COMP(2016) 14 (October 27, 2016) [hereinafter Big Data].

▶ GO TO TABLE OF CONTENTS

including zero-priced markets.[63] As for the need for a new approach to zero-priced markets, the OECD's working paper states that:

> One of the sources of information asymmetry between users and service providers is the fact that online companies often propose their products for 'free', when in fact these involve multiple non-pecuniary costs in the form of providing personal data, paying attention to ads, or the opportunity costs of reading privacy policies.[64]

To that end, although the OECD's working paper is not directly related to the evaluation and examination of zero-priced markets within the framework of competition law, it is worth highlighting as a significant contribution to the evolving literature, as it identifies and lays out the need for a new model in evaluating the effects of providing free products in a given market.

IV. Conclusion

The zero-pricing strategy (i.e., providing free products to customers) has become a common and increasingly widespread business strategy, particularly following the proliferation of Internet-based services in the 21st century.

The evaluation of zero-priced markets under competition law rules is necessarily more complex and difficult compared to the competition law analysis conducted in traditional markets with non-zero prices. In this regard, the changes introduced by zero-priced markets to the supply of goods and services, and to the existing business models, require competition law analyses in such markets to be more flexible and dynamic.

Due to the fact that current competition law tools and methods depend heavily on the "price" factor, they are not fully adequate to be dealing with zero-priced products/services, and thus cannot be used effectively in such markets in their conventional forms. In this regard, recent case law and scholarly analyses clearly indicate that there is a need for implementing a dynamic competition law model

---

63 Jan Whittington & Chris Jay Hoofnagle, *Unpacking Privacy's Price*, 90 N.C. L. Rev. 1327 (2011).

64 Big Data, *supra* note 62, at 25.

▶ GO TO TABLE OF CONTENTS

when dealing with zero-priced markets by taking their specific characteristics into consideration along with non-price criteria (e.g., innovation, investment, consumer welfare). The application of a dynamic competition approach by competition authorities in several jurisdictions and recent regulatory studies are encouraging developments in competition law practice, given that a reformist approach is necessary for an effective modernization of competition law rules, especially in view of the constantly changing nature of technological and digital markets in our time.

To that end, the existing regulatory framework could be further revised for instance by introducing alternative methods for defining the relevant product markets (alternative to the SSNIP test), new methods for calculating the undertakings' turnover in zero-priced markets, guidance for assessing the market power in such markets in view of the fast-growing/changing nature of these markets and the role of innovation. Although such adjustments appear to be more than necessary to adapt the current regulatory framework to the reality of zero-priced markets, it is important not to hinder the margin of maneuver of the competition enforcement bodies through rigid written criteria so that their assessment may be conducted in a dynamic way, on a case-by-case basis, by considering all the economic context of a given case. Given that interventionist policies may stifle innovation and competition in zero-priced markets, the competition authorities should keep the right balance between the need for a modernization of the existing regulatory framework and the fast-changing and dynamic nature of these markets.

▶ GO TO TABLE OF CONTENTS

Concurrences
Competition Laws Review

Concurrences Review

Concurrences is a print and online quarterly peer reviewed journal dedicated to EU and national competitions laws. It has been launched in 2004 as the flagship of the Institute of Competition Law in order to provide a forum for academics, practitioners and enforcers. The Institute's influence and expertise has garnered interviews with such figures as Christine Lagarde, Emmanuel Macron, Mario Monti and Margarethe Vestager.

CONTENTS

More than 15,000 articles, print and/or online. Quarterly issues provide current coverage with contributions from the EU or national or foreign countries thanks to more than 1,200 authors in Europe and abroad. Approximately 35 % of the contributions are published in English, 65 % in French, as the official language of the General Court of justice of the EU; all contributions have English abstracts.

FORMAT

In order to balance academic contributions with opinions or legal practice notes, Concurrences provides its insight and analysis in a number of formats:

- Forewords: Opinions by leading academics or enforcers
- Interviews: Interviews of antitrust experts
- On-Topics: 4 to 6 short papers on hot issues
- Law & Economics: Short papers written by economists for a legal audience
- Articles: Long academic papers
- Case Summaries: Case commentary on EU and French case law
- Legal Practice: Short papers for in-house counsels
- International: Medium size papers on international policies
- Books Review: Summaries of recent antitrust books
- Articles Review: Summaries of leading articles published in 45 antitrust journals

BOARDS

The Scientific Committee is headed by Laurence Idot, Professor at Panthéon Assas University. The International Committee is headed by Frederic Jenny, OECD Competition Comitteee Chairman. Boards members include Bill Kovacic, Bruno Lasserre, Howard Shelanski, Isabelle de Silva, Richard Whish, Wouter Wils, etc.

ONLINE VERSION

Concurrences website provides all articles published since its inception, in addition to selected articles published online only in the electronic supplement (around 40%).

WRITE FOR CONCURRENCES

Concurrences welcome spontaneous contributions. Except in rare circumstances, the journal accepts only unpublished articles, whatever the form and nature of the contribution. The Editorial Board checks the form of the proposals, and then submits these to the Scientific Committee. Selection of the papers is conditional to a peer review by at least two members of the Committee. Within a month, the Committee assesses whether the draft article can be published and notifies the author.

e-Competitions Bulletin

CASE LAW DATABASE

e-Competitions is the only online resource that provides consistent coverage of antitrust cases from 55 jurisdictions, organized into a searchable database structure. e-Competitions concentrates on cases summaries taking into account that in the context of a continuing growing number of sources there is a need for factual information, i.e., case law.

- 12,000 case summaries
- 2,600 authors
- 55 countries covered
- 24,000 subscribers

SOPHISTICATED EDITORIAL AND IT ENRICHMENT

e-Competitions is structured as a database. The editors make a sophisticated technical and legal work on all articles by tagging these with key words, drafting abstracts and writing html code to increase Google ranking. There is a team of antitrust lawyers – PhD and judges clerks - and a team of IT experts. e-Competitions makes comparative law possible. Thanks to this expert editorial work, it is possible to search and compare cases.

PRESTIGIOUS BOARDS

e-Competitions draws upon highly distinguished editors, all leading experts in national or international antitrust. Advisory Board Members include: Sir Christopher Bellamy, Ioanis Lianos (UCL), Eleanor Fox (NYU), Damien Géradin (Tilburg University), Frédéric Jenny (OECD), Jacqueline Riffault-Silk (Cour de cassation), Wouter Wils (DG COMP), etc.

LEADING PARTNERS

- Association of European Competition Law Judges: The AECLJ is a forum for judges of national Courts specializing in antitrust case law. Members timely feed e-Competitions with just released cases.
- Academics partners: Antitrust research centres from leading universities write regularly in e-Competitions: University College London, King's College London, Queen Mary University, etc.
- Law firms: Global law firms and antitrust niche firms write detailed cases summaries specifically for e-Competitions: Allen & Overy, Cleary Gottlieb, Jones Day, Norton Rose Fulbright, Skadden Arps, White & Case, etc.

INSTITUTE of Competition Law
Antitrust databases and resources

The Institute of Competition Law

The Institute of Competition Law is a publishing company, founded in 2004 by Dr. Nicolas Charbit, based in Paris and New-York. The Institute cultivates scholarship and discussion about antitrust issues though publications and conferences. Each publication and event is supervised by editorial boards and scientific or steering committees to ensure independence, objectivity, and academic rigor. Thanks to this management, the Institute has become one of the few think tanks in Europe to have significant influence on antitrust policies.

AIM

The Institute focuses government, business and academic attention on a broad range of subjects which concern competition laws, regulations and related economics.

BOARDS

To maintain its unique focus, the Institute relies upon highly distinguished editors, all leading experts in national or international antitrust: Bill Kovacic, Mario Monti, Eleanor Fox, Barry Hawk, Laurence Idot, Frédéric Jenny, etc.

AUTHORS

3,800 authors, from 55 jurisdictions.

PARTNERS

- Universities: University College London, King's College London, Queen Mary University, Paris Sorbonne Panthéon-Assas, etc.
- Law firms: Allen & Overy, Cleary Gottlieb Steen & Hamilton, DLA Piper, Hogan Lovells, Jones Day, Norton Rose Fulbright, Skadden Arps, White & Case, etc.

EVENTS

More than 250 events since 2004 in Brussels, London, New York, Paris, Singapore, Hong Kong, Milan, Moscow and Washington, DC.

ONLINE VERSION

Concurrences website provides all articles published since its inception.

PUBLICATIONS

The Institute publishes Concurrences Review, a print and online quarterly peer-reviewed journal dedicated to EU and national competitions laws. e-Competitions is a bi-monthly antitrust news bulletin covering 55 countries. The e-Competitions database contains over 12,000 case summaries from 2,600 authors.