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OBSERVATIONS ON THE EUROPEAN COMMISSION'S APPROACH TO MARKET DEFINITION IN THE DIGITAL ERA

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INTRODUCTION – THE COMMISSION’S EVOLVING APPROACH TO SUBSTITUTABILITY



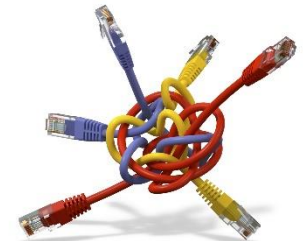
SSNIP



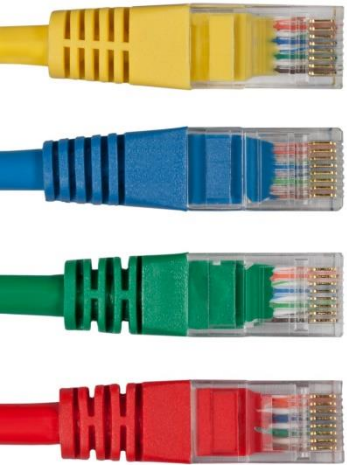
SSNDQ?

“only a banana ... tastes like a banana!”

United Brands v. Commission



AGENDA

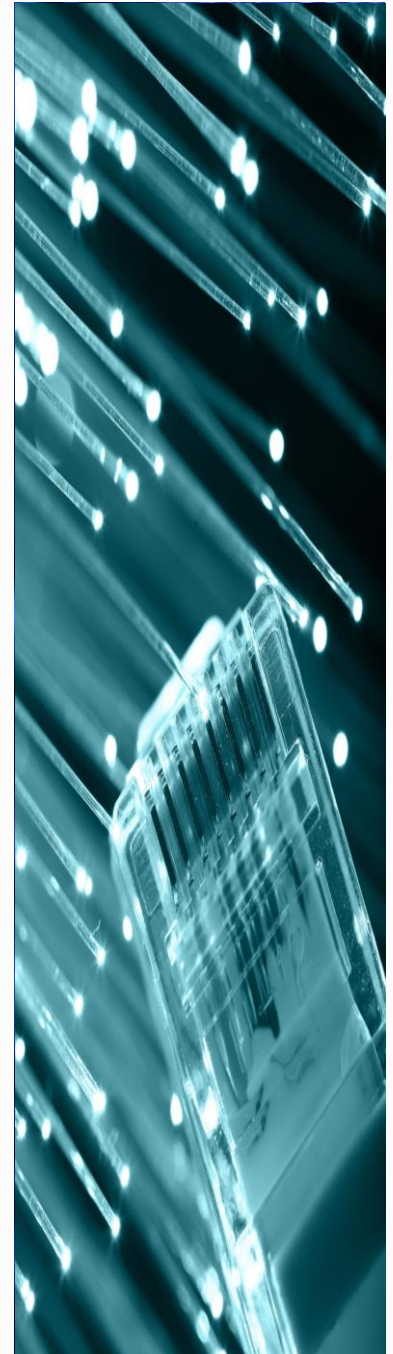


- Observations on the Commission's approach to market definition in the 'digital era':
 - The pros and cons of adopting an approach that is based on qualitative considerations (eg SSNDQ)
 - Case examples:
 - Assessing market definition in overlapping, fast moving and dynamic markets;
 - Defining markets involving multi-sided platforms; and
 - Accumulation of data as a further consideration

THE PROS AND CONS OF A MORE QUALITATIVE APPROACH

Pros

- Quality considerations can be used to assess markets involving multi-sided platforms with free-for use services where the applicability of the SSNIP test may be less obvious
- Quality considerations can capture dynamic effects that pricing parameters do not (whether positive, for example promoting innovation, or negative, for example privacy reduction)
- Quality considerations can be particularly useful where well accepted quantitative measures of quality exist (e.g. in the healthcare industry)



THE PROS AND CONS OF A MORE QUALITATIVE APPROACH

Cons (1)

- Complexity: quality considerations require an assessment of the importance of a multitude of quality variables, which can be less well-defined and may even compete with each other
- Quality considerations can be highly subjective and consumers, or competition authorities, may place significantly different levels of value on various qualitative factors (eg privacy: are regulators correct in assessing the extent to which privacy matters to consumers as a competitive parameter?)



THE PROS AND CONS OF A MORE QUALITATIVE APPROACH



Cons (2)

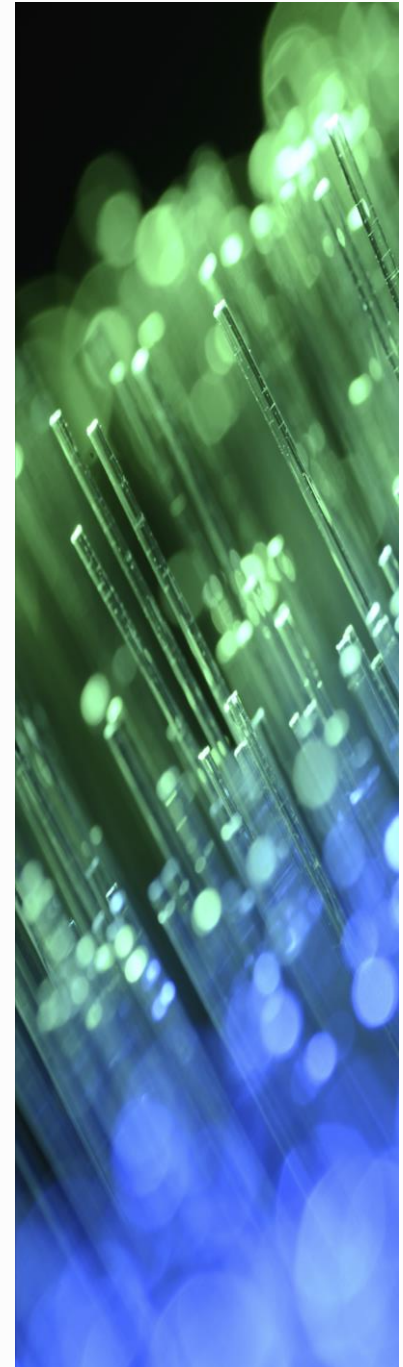
“Making a precise definition of quality for a given product is a complex task in competition investigations given the many subjective features that may contribute to a perception of quality by customers, the multi-dimensional nature of quality, and the absence of measurable variables”

OECD Policy Roundtables: The Role and Measurement of Quality in Competition Analysis (European Union submission)

ASSESSING MARKET DEFINITION IN OVERLAPPING, FAST MOVING AND DYNAMIC MARKETS

Are online markets more difficult to define than traditional markets?

- Consumers shift their attention fluidly amongst platforms
- Services overlap in functionality
 - Example: Facebook focuses on social connections, but many other services also incorporate a community aspect, such as photo sharing sites
- But why would this prevent authorities from adopting a traditional analysis based on substitutability considerations?
- There is no reason why the underlying principles should no longer be applicable (even if the analysis is more complex)

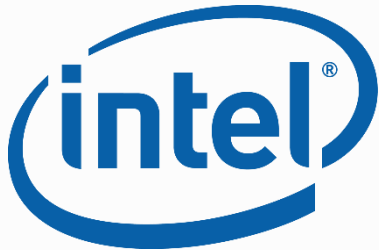


ASSESSING MARKET DEFINITION IN OVERLAPPING, FAST MOVING AND DYNAMIC MARKETS



Intel Decision (2009) (Comp/37.990)

- The Commission noted the challenge involved in assessing the quality-adjusted price of high-tech products
- In assessing market definition it looked at a combination of price and quality substitutability parameters
- The case demonstrated one of the key difficulties in measuring cross-elasticity based on quality parameters – lack of consumer knowledge and difficulties in determining consumer preferences



ASSESSING MARKET DEFINITION IN OVERLAPPING, FAST MOVING AND DYNAMIC MARKETS



Microsoft/Skype (2011) (M.6281)

- The Commission considered pricing parameters (alongside quality parameters) to assess whether customers would switch to another service if Skype began to charge for its free services
- The case arguably demonstrated the limits of price-based substitutability:
 - the fact that services are free does not necessarily mean that the market is competitive
 - consumers' sensitivity to price does not take into account other non-price effects which can co-exist



ASSESSING MARKET DEFINITION IN OVERLAPPING, FAST MOVING AND DYNAMIC MARKETS



Facebook/Whatsapp (2014) (M.7217)

- The Commission noted that "the consumer communications apps market is fast and growing and characterised by short innovation cycles"
- In assessing market definition, it examined the interaction between traditional electronic communications (e.g. SMS, telephone calls) and consumer communications apps
- It also considered the value added by unique product features that were part of the communication apps and found that there was only one way substitutability – i.e. apps being substitutes to telecoms services but not vice versa

facebook



ASSESSING MARKET DEFINITION IN OVERLAPPING, FAST MOVING AND DYNAMIC MARKETS



Microsoft/LinkedIn (2016) (M.8124)

- The Commission looked at the intended use of a social network as a quality factor (i.e. private vs. professional use)
- It considered substitutability between professional social networks and personal social networks, and found a distinct product market for Professional Social Networks ('PSNs')



Microsoft



ASSESSING MARKET DEFINITION IN MARKETS INVOLVING MULTI-SIDED PLATFORMS

In the 'digital era', the multi-sided nature of platforms also poses challenges – but is this new?

- Platforms that have multiple user groups such as search engines or booking websites
- Often one, or multiple, 'sides' of the platform are provided free of charge
- However, the issues posed are not necessarily different from those raised in offline multi-sided markets – “network effects” are not confined to the online space
- Does market definition really matter that much?
 - Differences between merger control and anti-competitive conduct (two-sided nature of market not necessarily aggravating factor in merger cases – eg newspaper mergers)



ASSESSING MARKET DEFINITION IN MARKETS INVOLVING MULTI-SIDED PLATFORMS



HRS – Hotel Reservation Service case (2013)

- The Bundeskartellamt defined the market almost entirely taking account of only one side of the platform
- The result was that a narrow market definition of “the sale of hotel rooms via online hotel portals” was adopted, despite there being a wide range of potentially substitutable options for consumers and hotels
- Would SSNIP for consumers have revealed that the direct sales channel forms part of the same market? If so, the relevant clauses may have benefited from the Vertical Block Exemption Regulation...



ASSESSING MARKET DEFINITION IN MARKETS INVOLVING MULTI-SIDED PLATFORMS



New German merger control thresholds (2017)

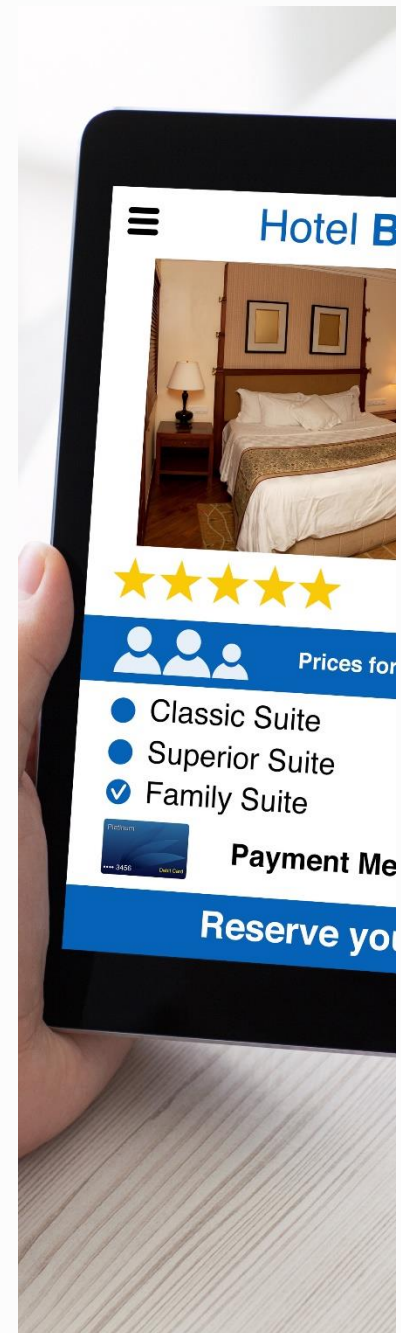
- The new German merger control thresholds recognise that the finding of a “market” does not depend on the exchange of pecuniary consideration (S.18(2a) ARC)
- The aim of this amendment is to capture multi-sided markets involving technology companies, where users receive services for free



ASSESSING MARKET DEFINITION IN MARKETS INVOLVING MULTI-SIDED PLATFORMS

Some additional observations

- For multi-sided **transactional** platforms (e.g. hotel booking platforms, or Airbnb), an alternative approach may be to look at the profitability of an increase in the total price level, in other words, the sum of the prices paid by the transactions of the two parties
- For multi-sided **non-transactional** platforms, one possible approach may be to examine the profitability of a price increase on each side of the platform



ACCUMULATION OF DATA AS AN ADDITIONAL QUALITATIVE CONSIDERATION

Case (6)



Bazaarvoice/PowerReviews – example of intervention in the US

- DOJ found network effects in data-driven market to confer ‘significant and durable advantage for Bazaarvoice’
- The DOJ considered qualitative factors such as feature-driven competition, innovation and product variety.
- Demonstrated that the agencies do take action where the accumulation of data arising from mergers could foreclose rivals.



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