ANTITRUST IN THE EU DIGITAL MARKETS: A CASE STUDY

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I. INTRODUCTION

The growth of large online platforms around the world has led to increased attention toward innovation policy. Dominant platforms such as search engines and social media have led many to question whether innovation is being stifled and whether economic growth, particularly when driven by smaller companies, is being held back. Low economic growth is the issue facing many parts of the world and one question posed by this article is whether we can afford to take the risk that monopolization provides huge gains for a few while depriving many of opportunity.

This article will place EU competition law policy in comparative perspective, drawing comparisons with U.S. federal antitrust law, which differs on a number of key points relating to innovation. As a starting point, both EU and U.S. policy and law both seek to foster innovation. However, they can be argued to do this in slightly different ways. For example, important EU precedents, such as the *Microsoft* decision, indicate that EU law displays a strong preference for fostering competition among small and medium enterprises ("SMEs") that compete to meet customers' needs in many varied and dynamic ways.[2] On this view, a large platform is regulated

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[2] Case T-201/04 *Microsoft*.

to preserve a single market in which new product innovation at a "small feasible component level" is promoted and organizations providing such products can grow, leading to desirable goals such as new products, market integration and employment growth. Aside from the position taken in the law, the Commission's appetite for competition law intervention is also now clearly a part of an overall Digital Single Market strategy.[3]

By contrast, U.S. federal antitrust law has taken a subtly but significantly different approach. Increased sensitivity to critics of earlier antitrust policy led to an antitrust "revolution" in the course of the 1970s and 1980s, chiefly at the hands of the federal judiciary. Important controls over business practices such as vertical restraints, or vertical integration between different players in a supply chain came to be regulated far less strictly, if at all,[4] and duties to deal with rivals were radically curtailed.[5] Evidence and pleading requirements were heightened for those alleging anti-competitive conduct.[6] Overall, great faith was placed in the belief in certain economic arguments that markets would be self-healing and that anti-competitive conduct would be disciplined by larger stronger more vertically integrated players, rather than the law.[7] These changes were an important factor in U.S. competition and technology policy that has created a small number of larger, often vertically integrated, players that run the major technology platforms and provide their own services over those platforms.

Recent cases at the intersection of competition law and technology policy have drawn out important differences between the EU and U.S. In the EU, competition law and technology policy is not likely to be well served if it were simply to copy U.S. policy; no one in the EU is going to create another Google, Amazon, IBM, or Facebook platform, given the challenge of scaling the enormous heights of the barriers to entry that a new entrant would now face. However, fostering innovation and encouraging competition among SMEs can and should mean allowing markets to be served by both the major technology platforms and products from SMEs that can be supplied over such platforms. Preventing abuse by dominant vertically integrated platforms then becomes critical to enable innovation at the level of smaller product markets such as those met by applications and technology services.

This article highlights a number of important precedents to show how EU competition policy fosters a competitive marketplace, before applying these points to the ongoing investigation into Google, whose resolution may yet prove to be the most important restatement of EU competition policy on digital markets.

II. COMPETITION POLICY DEBATES OVER ONLINE BUSINESS PRACTICES

[3]See also statements by the newly appointed Director General for Competition (Laitenberger) September 2015. For more details on the EU's Digital Single Market policies, see http://ec.europa.eu/priorities/digital-single-market/.
[4] For many years now, the U.S. agencies have published only *Horizontal Merger Guidelines* (most recently in 2010) and have not updated much earlier vertical guidelines, signaling that vertical merger challenges will be pursued comparatively rarely.
[5] See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (strengthening the test for a plausible case to avoid summary dismissal).
[6] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[7] J. Schumpeter, *Capitalism, Socialism and Democracy* (1942; reprinted 1994 London: Routledge).

Much of the difference between EU and U.S. competition policy towards online platforms reflects different positions in competition policy debates on the likelihood of competitive harm. In turn, the policy position applied can have a profound effect on a third party developer or entrant seeking access to market. The debate is especially clear in relation to the law on foreclosure and tying, which governs the combination of separate products by dominant companies, such as formerly separate online services.

Although the law on tying shares similar basic features across many jurisdictions,[8] important interpretive differences give rise to stricter regulation of tying of online services in the European Union than in the United Stated. This is especially clear with regard to the separate products requirement in tying law.

A. Separate Products Requirement

Both EU and U.S. competition law analyze whether it is truly the case that an alleged tying practice combines separate products; in both cases, showing that the affected products are not truly separate will defeat the claim.[9] However, a different standard is applied by each system. In the United States, the leading precedent on technological tying, *U.S. v. Microsoft Corp ("Microsoft II")*, altered an otherwise somewhat stricter rule to provide significant deference towards technological tying.[10] In this approach, separate products will only be found where there is no "plausible" case that combining the products leads to innovative benefits: "the question is not whether the integration is a net plus, but merely whether there is a plausible claim that it brings some advantage."[11]

Thus, the D.C. Circuit adopted a rule by which cases, in which the separate products requirement is even somewhat debatable, fall to be regulated chiefly by market forces. In the event that the market does not discipline the tying practice, it is entirely possible for it to remain entrenched for a significant period of time, since it will almost always be possible to arrive at some "plausible" case that even heavily distortive tying practices might carry some benefit.

By contrast, EU competition law has left more discretion to competition authorities in assessing the separate products element of the law. In the EU's *Microsoft* tying case, involving the tying of windows operating system with Microsoft's Media Player, several factors suggesting that there might be a separate product market received significant weight, including:

- "The factual and technical situation that existed at the time when…the impugned conduct became harmful," that is, the point at which the decision to combine the product is made.[12]

[8] International Competition Network, *Report on Tying and Bundled Discounting*, June 2009 (available at http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf)
[9] For the U.S. position, see *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); in the EU, see Case T-83/91*Tetra Pak v. Commission* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak v. Commission* [1996] ECR I-5951 ('*Tetra Pak II*') (tying cartons and carton machinery).
[10] *United States v. Microsoft Corp*, 147 F3d 935 (DC Cir. 1998).
[11] Id. at 948.
[12] *Microsoft* at para 914. The point was repeated in the context of remedies at para 942.

- The existence of a relatively small group of consumers seeking copies of Windows without Media Player for the workplace.
- Indirect evidence included aspects of the nature and features of the software, their historical development, the state of the market and commercial practice, such as the existence of independent suppliers and alternative sources of downloads.[13]
- Suspicions relating to findings of "commercial usage" in a market that might already be distorted by a large market share.[14]

The Court also stated that a number of factors that dominant companies would be likely to argue would not be given significant weight. Even where a "natural link" exists between products, or where combining them is consistent with commercial usage, the Court stated that combining products can still be found abusive unless the combination is objectively justified.[15] It also expressly rejected the argument that technical integration formed part of the "normal and necessary," "constant improvement" of products, instead looking to the purpose and technical constraints in the market which suggested that two separate products had been combined.[16]

In summary, whereas the Court of Appeals for the D.C. Circuit had adopted a standard by which a plausible case of efficiencies would result in a finding of a single, new product, and thus no tying, the EU position differs by requiring the dominant company to objectively justify its position that integration should take place in circumstances where there were separate products in existence. The bias toward vertical integration in the U.S. system means that innovation at the level of smaller markets will more easily be foreclosed and restricted. The EU courts are, in effect, adopting a position more likely to foster innovation and growth at the level of smaller markets where smaller and more agile companies can provide their services. This is consistent with EU technology policy from the Lisbon Agenda through to the i2010 and Digital Single Market Strategy. It also supports and fosters SMEs to deliver economic growth in the European Union where such companies are the motor for innovation and employment.

B. The Long Shadow of the One-Monopoly-Profits Theory

One important theoretical factor explaining some of the difference in approach seen between the two systems is the strong influence of the so-called "one monopoly profits" or "one monopoly rents" theory on U.S. antitrust law.[17] The theory, which is closely associated with Chicago school thinkers such as Judge Robert Bork, argues that under certain conditions it would not be necessary to tie two products in order to gain monopoly profits. Instead, the firm can simply increase the price of the product for which it has market power, and make its profit there.

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[13] *Microsoft* at paras 926 to 935.
[14] Id. at para 940.
[15] Id. at para 942. See Case C-333/94 P *Tetra Pak II*, para. 293 above, para. 37. "[E]ven when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article 82 EC, unless it is objectively justified." (
[16] Id. at paras 935 to 937.
[17] See e.g. Blair and Kaserman, *Antitrust Economics* (OUP, 2009) Ch. 18 (discussing economic approaches to analysis of tying arrangements).

The claim is that monopoly rents can only be had once ("one monopoly profits"), and that this can be done best by anticompetitive conduct in the market where there is market power rather than in another one. For instance, a photocopier manufacturer might increase the price of copiers, rather than increase the price of tied products such as service. On the one-rents view, an increase in service price will simply depress the sale price of the copier, resulting in no additional profits.

On this view, tying the products could possibly even decrease monopoly profits were the practice to lower overall demand for the product – in turn suggesting that the tying practice is pro-competitive since the monopoly profits could simply be extracted from increasing the price of the product in which there is market power.

The argument that monopoly profits exist only in a particular market casts doubt upon the "leverage" theory of tying, which argues that firms could use market power in one market to gain market power in another. For instance, the copier manufacturer might seek a monopoly on a separate but related service market.

For a number of simple markets, the one-rents theory is not wholly unreasonable. However, the theory depends on a number of assumptions that are unlikely to hold in many markets, and are especially unlikely to hold in technology markets. Perhaps the most notable of these is that consumers have similar demand profiles. In the copier example above, the copier manufacturer might find tying service or consumables an effective way to identify high-use users who value the copier more. Tying copiers and service or consumables would be a way to segment the market between high and low-use users, effectively charging a different total price to each. In this way, monopoly profits can be extracted from the high-use users without experiencing the loss of low-use consumers that would follow from simply increasing the price of the copier. Tying can thus be an effective way to extract increased rents from consumers, and for this reason has been repeatedly pursued by businesses over many decades.[18]

In technology markets, the constant dynamic of new innovation creating different solutions to pre-existing needs means that once a position of market power is attained, the holder can adopt a practice of foreclosing entry that is likely to deprive it of that power. This is not always the case since dominant companies can adopt the opposite strategy, one of constant innovation in order to meet consumer needs, while at the same time ensuring that their approach to the market complies with the duty to compete on the merits with the products and services of other players.

C. The Limited Relevance of the One-Rents Theory in the Online Marketplace

The one monopoly rents theory led to Judge Bork famously arguing that "analysis shows that every vertical restraint should be completely lawful."[19] However, there would be great danger in carrying over that thought into the current century from the simple markets and different time where it belongs. In technology markets in particular, technological tying can be a potent

[18] See e.g. *International Salt Co. v. United States* 332 U.S. 392 (1947); *Tetra Pak*, cited above.
[19] Robert H. Bork, *The Antitrust Paradox* (Free Press, 1978), 288.

means to create barriers to entry that foreclose rivals. For example, a dominant firm may have obtained market power in circumstances where there is a network externality at work; including circumstances where each individual additional user obtains a benefit from being a member of a network in which communicating with other users is valuable. Telecommunication and communications networks of all types often exhibit such characteristics and, where abuse of dominance leads to market foreclosure, competition law requires access or interoperability with essential inputs so that all can compete on the merits of their individual products.

Platforms are also often operating in two-sided markets. A theory such as the one-rents theory relies on competition in the target market; competition is assumed to discipline "leveraging". However, where entry into the target market depends on inputs from the dominant company, there is substantial scope for the dominant company to achieve "leverage" from one market to another. If online service providers rely on traffic from users of a dominant search engine, the decision of the dominant search engine to hinder or block traffic to them will deny them access to those users and access to the market. Moreover, it is likely to be profitable for a dominant platform to foreclose rivals in downstream product markets. Even if a strategy of foreclosure led to a small amount of the search engine's advertising revenue to be reduced in the short term, it is likely that the effect of traffic diversion into the search engines' own downstream products with different revenue and profit profiles can lead to higher profits for the firm overall. Put another way, if it pays to abuse a dominant position then abuse will occur and that is why we have laws against it.

In more complicated markets, it seems that the one-rents theory has little to offer the analysis, in turn suggesting that precedents motivated by it are of limited relevance in the case of dominant online platforms. It is perhaps for this reason that even Judge Bork, who had so loudly beat the drum for the one-rents theory, argued for competition law regulation in the case of dominant technology platforms.[20]

D. Attention to Separate Product Requirements Masks Factors in Online Markets

The caution of the decision of the D.C. Circuit in *Microsoft* is understandable to the extent that courts would reasonably wish to avoid getting into the position of regulating product design decisions.[21] However, such an approach may understate important dynamics in two-sided technology markets.

A two-sided market exists where demand in one market depends on demand in another. For instance, the demand for newspapers is an important factor driving the demand for advertisements in newspapers.[22] Markets affected by two-sided dynamics are not new. With the growth in advertising funded models in internet businesses they have become prevalent in certain parts of the technology ecosystem, particularly in recent years. Importantly, they defy the market-disciplining ethos implied by analysis such as the D.C. Circuit's "plausible efficiency"

[20] Harry First, "Bork and Microsoft: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior," paper presented at Yale Law School, September 27, 2013.
[21] *Microsoft*, above n. 10.
[22] See e.g. Rochet and Tirole, "Two-sided markets: An overview," discussion paper available at http://web.mit.edu/14.271/www/rochet_tirole.pdf.

standard, which is unlikely to apply satisfactorily to the more complicated dynamics of two-sided markets.

The nub of two-sided market analysis is the importance of considering both relevant markets. If competition exists across two markets, market power is likely to be a factor of the overall position across both. Simple examples of innovative products in simpler markets, such as the decision to integrate car radios and cars, are misleading in the case of a complicated two-sided market as they understate this dynamic.

In the case of an online platform, the decision of the dominant operator of one side of the market is likely to have significant effects on market power across the combined market. In some two-sided markets, platform providers may have a strong incentive to attract platform users. A dominant payment network might, for instance, have incentives to attract card issuers and acquirers (although whether the incentives are optimal is of course an additional question). In other markets, strong incentives might exist to exclude certain platform users in favor of an integrated product. In the process, an important competitive fringe, composed of a range of companies, who are often smaller, more agile and well placed to respond to user demand, might be excluded. As a result, the platform provider can put monopoly provision of the combined services in place, at the expense of innovation and choice for consumers.

Even if there is a case that a degree of integration of products is desirable as a matter of short term efficiency, it is unclear why as a matter of policy it needs to come at the expense of a thriving range of competitive providers of services which guarantees that consumers can choose between innovative service providers. The ability of smaller companies to access the wider market using the platform in turn allows them to reach consumers and grow, preventing the existence of a dominant platform from standing in the way of innovation and growth.

III. EU COMPETITION LAW AND THE DIGITAL SINGLE MARKET

The above discussion suggests that the more important question in a multi-sided market is the overall level of competition and the incentives faced by parties such as payment networks or search providers and platforms, as well as the competition that exists at the level of products services or components rather than doctrinal questions such as the line between separate and new products. Seen in this way, EU competition policy is to be commended in its ability to consider the competitive dynamics of emerging technologies in a context-sensitive way, and to intervene quickly to assure competition in digital marketplaces.

The EU Commission's enforcement record is good in this regard since it has intervened in a series of decisions such as the *Microsoft* case, the *Apple Developer Guidelines* case and the review of *IBM's* bundling of maintenance and mainframes. Its intervention was swifter in some cases and not others, which creates serious issues for confidence and investment and knock on effects on whether companies will be tempted to enter and grow. The Commission's ongoing investigation into Google's abuse of dominance in online searches can safely be said to have gone on for far too long.

A. Microsoft

The approach of EU competition law to platform markets can be seen particularly clearly in the *Microsoft* case.[23] In the course of the 1990s and 2000s, Microsoft drew antitrust scrutiny around the world for its software design practices, which were thought potentially to distort competition in certain software markets. Microsoft's decision to combine Microsoft Windows and Windows Media Player into a combined package was challenged as unlawful tying of the two products.[24] Microsoft also faced additional challenges in relation to browser choice, network interoperability and developer access to toolkits known as APIs.[25]

The *Media Player* case shows that reasonably prompt competition law enforcement will preserve a competitive marketplace. In the late 1990s, Microsoft Windows enjoyed a market share over 90%, making it an indispensable platform for software developers looking to access the software market for personal computers. Even if Microsoft's player was arguably not as advanced as those developed by others, it could be assured a certain market share by virtue of its visibility on every PC with Microsoft's Windows software. The reason for intervention was that a company in Microsoft's position could undermine a competitive market in media players, to the detriment of different media players and ultimately to the detriment of competition for media players in fulfilling the choices of consumers.

Faced with such a clear potential for competitive harm, the EU courts are to be commended for taking a sensible and appropriate approach. The courts took a firm position in favor of preserving a competitive marketplace since there was sufficient evidence that a separate product market had existed before the integration occurred. Indeed, the decision enables dominant companies to comply with their duties more easily by building a process to examine their actions for the effects they may have on others before taking action. This is a limited imposition given what is at stake. Also, since the law requires that a dominant company has to prove an objective justification before vertical integration takes place and that any justification for integration is necessary and proportionate.

Frequently, this requires dominant companies to heed their market position where small steps are available that significantly decrease the scope for competitive harm, such as labeling their own offerings or providing competitors with platform access on reasonable terms. The decision is clear in its preference for a competitive marketplace as the main driver of innovation, rather than allowing rewards from the accretion of market power or potential efficiency derived from vertical integration to be owned by yesterdays' innovators. In essence the decision is a victory for continuing diversity and plurality over short term claims by firms with market power for doubtful efficiency gains.

B. Apple Developer Guidelines: "There's an App for that", Thanks to the EU Commission.

A similar pattern of favoring a competitive and diverse developer marketplace in the context of a multi-sided technology market can be seen in the European Commission's investigation into

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[23] *Microsoft* n. 2 above.
[24] *Microsoft* n. 2 above.
[25] For an extensive analysis of the U.S. and EU cases, see Gavil and First, *The Microsoft Antitrust Cases* (MIT press, 2014).

the Apple Developer Guidelines.[26] In April 2010, Apple decided to restrict the terms and conditions of its license agreement with independent developers of mobile applications running on the iPhone operating system. This would have restricted the use of third party players which had allowed developers to use competing programming tools and languages when developing iPhone apps.[27]

The case provides another example of a dominant platform provider attempting to leverage market power into related markets. At the time of the case, the iPhone was the predominant smartphone, and the apps market was in its infancy. A restriction such as Apple's could easily have altered developers' use of third party tools, as they would not have been able to license such applications for the iPhone. Since the iPhone became the largest market for many app developers, there was little scope for competitive switching to discipline the market. The conditions were ripe for leveraging market power in handsets and operating systems into related applications markets.

The Commission's decision to launch a prompt investigation and precipitate a rapid change in Apple's terms and conditions is to be applauded. The case was resolved less than six months after the change, before lasting damage to the marketplace had occurred. Apple dropped the change to its terms and conditions, paving the way for the competitive app marketplace seen today. It could be said that the wide range and peculiar diversity of apps for myriads of user needs is a direct result of the Commission's swift action.[28] The success of this lesser-noted case might serve as a lesson for future investigations about the importance of promptly resolving competitive harm before it becomes entrenched.

C. IBM

In the same year as the *Apple* investigation, the Commission instigated an investigation into IBM concerning its alleged abuse of dominance in the mainframe maintenance market. The allegation was that IBM held a dominant position in legacy mainframe computers, bundled its mainframes with its own maintenance and hindered access to critical spare parts, potentially distorting competition in the market for independent players. Although the case took somewhat longer, being resolved only by December 2011, the Commission achieved a significant victory in preventing the leverage of market power from one market to another, related market, in a reasonable time frame.

The economic importance of the case is often overlooked. Mainframe computers perform mission-critical business processes, which demand a very high level of reliability. They are used by major companies and governments for computing that needs to be highly dependable such as billing, benefits systems and tax collection. Maintenance can be performed by smaller players. A healthy market for third party maintenance providers ("TPMs") can exist, limiting market power that might otherwise arise, and if it did would be likely to allow

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[26] European Commission, Antitrust: Statement on Apple's iPhone policy changes, Press release of September 25, 2010.

[27] The case also concerned restrictions to warranty policies, which Apple also agreed to alter. See European Commission Press Release, n. 26 above.

[28] See European Commission Press Release, n. 26 above.

significant extraction of consumer surplus by segmenting different groups with different demand profiles. IBM had adopted a number of business practices which struck at the heart of these independent service organizations.

First, IBM began to restrict TPM access to IBM spare parts while continuing to provide its own repairers with access. Until November 2002, TPMs enjoyed the same 24/7 access to spare parts as IBM engineers. From November 2002, however, TPM spare part access was restricted to normal business hours.

Secondly, certain crucial spare parts (stand-alone processor books) could only be bought from IBM and were subject to an exchange-only policy. The exchange-only policy required that the defective spare part be returned to IBM within 48 hours of delivery. Before October 2009, if TPMs failed to meet the deadline or failed to return the part altogether – referred to as a non-return – a much higher non-exchange price was applied to the part. From October 2009, a non-exchange price was charged for non-returns and a 3 percent daily fee applied for late returns. Depending on the series, model and configuration of the Mainframe, the non-exchange price could be up to 4139 percent higher than the exchange price.

Thirdly, IBM appeared to have unreasonably delayed access and withheld information on the existence of Machine Code Updates. This threatened TPMs' ability to provide their customers with adequate answers to technical issues.

The three restrictions constituted a direct threat to the existence of an independent market for mainframe maintenance. Applying a similar concern to preserve competition in related markets, and to prevent leverage of market power, the Commission resolved the case in December 2011 through a set of commitments accepted under Article 9 of Regulation 1/2003. The commitments require IBM to make spare parts and technical information swiftly available, under commercially reasonable and non-discriminatory terms, to independent mainframe maintainers. The commitments acted swiftly to allow smaller players to operate and to preserve competition that might otherwise have been eliminated by market power in a related market.

D. Reuters Instrument Codes

The same enforcement pattern can be seen in the Commission's investigation into restrictions relating to Thomson Reuters Instrument codes ("RICs") used to run financial software.[29] RICs identify a particular security and are embedded into financial software. As a result, there is the opportunity to undermine the scope to switch away from RICs to competing providers of real-time data, as expensive and sensitive trading systems would require an extensive redesign. The Commission's decision was to allow third party developers to handle RICs. This is to be welcomed to the extent that it will allow market power from RICs' embedded status in a variety of software to be addressed in much the same way as third party access to parts was critical in the case of IBM mainframes. Unlike the *IBM* case, the commitments stop short of allowing

[29] Case AT.29654 – *Reuters Instrument Codes*.

direct third party handling of RICs, a point which has been much debated and is currently being litigated.[30]

E. Google

The same issues arise with the Commission's longstanding, high-profile investigations into the search giant Google. Google provides search and a number of related services, with a European market share that has persisted over many years at over 90 percent. It also supplies the mobile operating system Android, which currently has an estimated 68 percent market share in Europe.[31]

Just as third party access to spare parts proved critical in the *IBM* case, a range of innovative online service providers depend on search traffic from Google. Some have joked that "the best place to hide a dead body is page two of the Google search results," a slightly glib expression of the seismic impact Google's search engine rankings have on the success, or failure of online businesses.[32] It is not just online service providers that are affected by Google's dominance in online searches. The vast and growing "search engine optimization" industry bears witness to the importance of the rankings for many ordinary brick and mortar businesses. In a world where most internet users rely on Google to point them to online resources, it is critical to be on the first page of search results. Google has, in effect, amassed substantial power over what users may see online and controls access to many businesses.

Such power is not, in itself, illegal under EU competition law, which distinguishes amassing market power from its abuse.[33] This is in line with the theory that success in business should not be penalized and indeed that innovation should receive reward. However, special duties arise in the case of the successful business that has become dominant since that position may then stifle innovation. The law seeks to ensure that further entry is not foreclosed, so that the crown for success in the competitive race can be passed from one successful firm to another, preventing firms from winning by killing off the competition. Dominant companies must have due regard to their impact on the competitive market structure. An analogy can be drawn between this duty and duties of care in tort law, which seek to promote risk-bearers to take cost-effective steps to minimize the social cost of their risky activities.[34] Companies such as Google are required under EU law to objectively justify their positions taking actions that adversely impact on others' and take a proportionate approach to potential market distortions arising from the way that they run their businesses.

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[30] Case Case T-76/14 *Morningstar*.

[31] Android Switchers Drive iOS Growth in Europe's Big Five, Kantar World Panel, May 6, 2015 (available at http://www.kantarworldpanel.com/global/News/Android-Switchers-Drive-iOS-Growth-in-Europes-Big-Five-Countries).

[32] Chad Pollitt, "The Best Place to Hide a Dead Body is Page Two of Google," *Huffington Post*, April 18, 2014 (available at http://www.huffingtonpost.com/chad-pollitt/the-best-place-to-hide-a-_b_5168714.html).

[33] Article 102 TFEU refers to "abuse of a dominant position," not its creation, unlike Section 2 of the U.S. Sherman Antitrust Act of 1890, which forbids "monopolization" but not necessarily the exploitation of market power already accrued.

[34] See e.g. Cooter and Ulen, *Law and Economics* (Pearson, 2011), ch. 6.

The ongoing EU Commission investigation now approaching its fifth anniversary concerns allegations that Google has failed to fulfil this duty. The main allegations concern Google's alleged self-promotion of search results, favoring its own specialized ("vertical") search services, and the misappropriation of third party content, such as reviews.[35] These practices undermine competition in related markets where Google is present, such as online shopping, news, images, weather, videos and maps. They undermine investment in third party products, which a third party provider knows is likely to be undermined if it falls foul of search result manipulation or content misappropriation. Google has taken steps to integrate formerly disparate products in much the same manner as was condemned by the European Commission and the Court in the *Microsoft/Windows Media Player* case. The investigation could well conclude that Google did not heed the important duties placed on dominant companies by EU law to consider, and to carefully review its actions on an objective and evidenced basis before adopting any form of integration and proportionately ensuring that it avoided competitive harm from integrating separate products into its dominant platform.

Alongside the search investigation, an additional investigation into Google's Android operating system was opened in April 2015. The investigation will assess whether Google has adopted similar practices in relation to its Android operating system to hinder development and market access for rival operating systems, communications applications and mobile services. The main allegations turn on alleged exclusive pre-installation, software modification and tying practices aimed at distorting competition, by leveraging power in the operating system into other, related markets. It would also be open to the Commission for it to consider that the embedding of Google's dominant search engine in Android and provision of both search and operating system software free of charge was designed to extend Google's dominance originally established in the search engine used in PC's to other more portable computer devices, reserving to itself a series of separate but related markets in the process.

Both investigations are ongoing, and it remains to be seen how they will be resolved. At the time of writing, the Android investigation was at a relatively early stage, whereas the search investigation appeared to be moving towards a prohibition decision, and a likely fine.

Remedies are a particular issue in technology markets and addressed fully in a seminal article by the small group of EU officials at the center of enforcement in many of these cases. In an influential article on remedies following the *Microsoft* cases, these officials stated:

> In its 2004 decision, the Commission found that Microsoft had abused its dominant position in PC operating systems by (1) refusing to supply interoperability information necessary for competitors to be able to effectively compete in the workgroup server operating system market; and (2) tying its Windows
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> Media Player with Windows. The decision ordered Microsoft to disclose the information that it had refused to supply and to allow its use for the development

[35] The investigation also considers restrictions on switching in advertising markets. See e.g. Press Release "Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns", April 25, 2013 (describing the case in the context of commitments proposals, which were rejected).

> of compatible products. The disclosure order was limited to interface specifications (not source code) and to ensuring interoperability with the essential features that define a typical workgroup network. It applied not only to the complainant Sun, but to any undertaking that had an interest in developing workgroup server operating systems.
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> The conditions under which Microsoft makes these disclosures have to be reasonable and non-discriminatory. Microsoft may require a reasonable and non-discriminatory remuneration for the production of the documentation, as well as for specific intellectual property rights that the Commission's decision might prevent it from fully enforcing against beneficiaries of the order to supply (provided that Microsoft could establish that these specific intellectual property rights are valid in the EEA). With respect to tying, the decision ordered Microsoft to provide a version of Windows that did not include Windows Media Player.[36]

Although it is still developing, the Android case might follow a similar remedial approach. There will no doubt be difficulties in defining the scope of the decision and with the ability to ensure that it cannot be bypassed by technological means. It is to be hoped that the lessons learned from *Microsoft* and other cases are borne in mind in the current case. It is refreshing to know that the current EU Commissioner for Competition has made clear her concern about the effects of Google's actions and appetite for an increase in enforcement efforts by sending Google a statement of objections in April 2015.[37]

It is very much hoped that the EU Commission will follow the pattern of its earlier practice and send a clear signal to dominant companies that they cannot simply promote and display their own products at the expense of competition. Taking an effective decision would help to promote a competitive online marketplace, and the Commission would be enforcing the rules for all on an equal basis.

IV. CONCLUSION

This article has surveyed recent cases concerning EU competition law enforcement efforts in technology markets, with reference to a few cases and policy initiatives. The record shows that the European Union has developed a consistent and principled approach to enforcement that should promote innovation. It will affect all businesses that use technology and promises to ensure that agile and innovative smaller and medium sized technology enterprises will prosper.

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[36] See for more detail on remedies Per Hellstrom and others, "Remedies in European Antitrust Law" 76 Antitrust Law Journal No 1 2009. Per Hellstrom is Head of Unit for Antitrust: IT, Internet and Consumer Electronics for the European Commission's Directorate General Competition. Frank Maier-Rigaud is a Senior Economist for the Energy and Environment Directorate for the European Commission's Directorate General Competition and is affiliated with both the Department of Economics, University of Bonn (Germany) and the Max Planck Institute for Research on Collective Goods (Bonn, Germany). Friedrich Wenzel Bulst is an Attorney in the IT, Internet and Consumer Electronics Unit for the European Commission's Directorate General Competition.

[37] Margrethe Vestager, "Competition policy in the EU: Outlook and recent developments in antitrust," speech delivered at the Peterson Institute for International Economics, April 16, 2015.

In this, EU policy differs from U.S. policy, resulting in the emergence of a small number of very large vertically integrated platforms in the United States.

Despite the differences considered above in the law and policy objectives applied by the two jurisdictions, it should be recalled that prosecutorial discretion would enable a more consistent approach to be achieved, given sufficient political will. There appears to have been a strongly arguable case against Google's search bias even under U.S. law. In March 2015, one of several FTC staff reports into Google's alleged search practices was leaked, and appears to have found serious concerns about search manipulation.[38] Although the politically appointed Commissioners acting at the FTC ultimately decided not to pursue a case, too much can be made of these differences in legal points since they would be much less important if prosecutorial discretion were to change. That is something that may change with the prevailing political wind.

As the final stages of the long-standing EU investigation into Google approach, an opportunity arises for the European Union to apply the same principled position in favor of innovation as seen in previous cases and to ensure that the playing field is level for all. It is only by such enforcement that dominant platforms can be prevented from substantially distorting competition in related markets, ensuring access for innovative players with much to offer a world needing their products and services and an economy in need of increased economic growth.

[38] B. Mullins, R. Winkler and B. Kendall, "Inside the U.S. Antitrust Probe of Google," *Wall Street Journal*, March 19, 2015. Curiously, only alternate pages of the report were leaked.