



Are we there yet?

Lessons Learned from the Facebook/Whatsapp
& Microsoft/Skype Decisions

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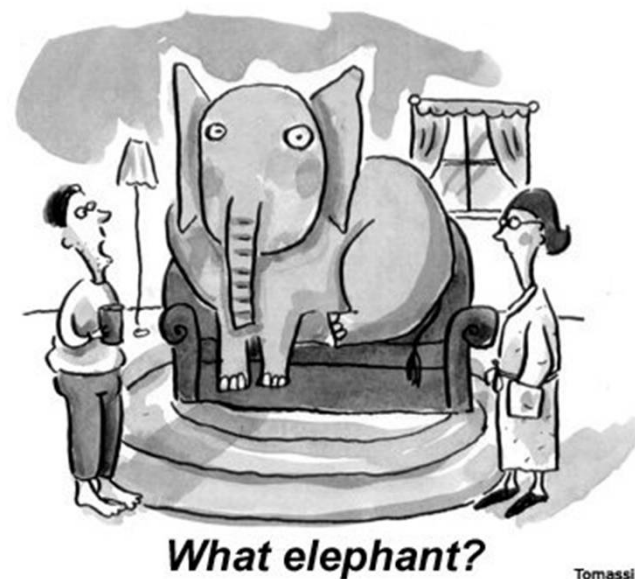
Before we get started

... let's address the elephant in the room:

→ EC Search Investigation

- ◆ Commissioner Vestager's statement: SO addresses Google Shopping
- ◆ The investigation has been open for five years, this is Google's chance to make its case
- ◆ <http://googleblog.blogspot.co.uk/2015/04/the-search-for-harm.html>

→ EC Android Investigation



Facebook/Whatsapp is the latest Commission Decision in online and (personal) communications markets

→ It touches upon a number of issues:

- ◆ Jurisdictional aspects
Are turnover thresholds well suited to determine notification of deals in all cases?
- ◆ Market definition
Drawing the line in innovative, new markets is often complicated
- ◆ Market shares
What is the best way to measure market power in two-sided markets?
- ◆ Network effects
Does it have an appreciable effect? Do they actually give a competitive advantage?
- ◆ Big data
What role does it play in appraising concentrations, and in antitrust generally?

(Big) Data

→ What is Big Data?

- ◆ What distinguishes data from Big Data?
- ◆ Has data (quantity, quality) evolved through the years?
- ◆ How much data do we need before we can speak of Big Data?
- ◆ What kind of data is Big Data?

→ An inconvenient truth about (Big) Data

- ◆ Data is not a finite resource
- ◆ It is not an input any one company can constrain access to

→ What is the issue from an antitrust perspective?

(Big) Data: Everyone...? Nobody!



Dan Ariely ✓

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Big data is like teenage sex: everyone talks about it, nobody really knows how to do it, everyone thinks everyone else is doing it, so everyone claims they are doing it...

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- Ultimately, is this a topic for antitrust enforcers to engage in?
 - ◆ No potential theory of harm leads to foreclosure or to SIEC of any kind
- Privacy and Data Protection regulation: is it enough?

“Market” Shares

- Online businesses
 - ◆ Characterised by innovation and growth
 - ◆ More often than not, two-sided and freemium business models

- So how can we define “market” shares for “free” online products?
 - ◆ The very notion of a market relies on the existence of a price
 - *Substitutability (aka SSNIP test)*
 - *Switching costs*
 - *Barriers to entry*
 - *Access to the inputs & to the marketplace*
 - *Capacity constraints*
 - ◆ What do usage shares show?

“Market” Shares: What’s the point?

Antitrust and IP in the Digital Age: Fall 1996

The Future of Information: Can Any “Search Engine” Ever Compete with AltaVista?*



Antitrust and IP on The Internet : Winter 1998

*The King is Dead. Long Live the King. Will Yahoo! Ever Be Dethroned from its Leadership in Search?**



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ABA Section of Antitrust Law, and ABA Section of Intellectual Property Law

*See Randall Stross, How Yahoo! Won the Search Wars, Fortune Magazine, March 2, 1998, available at http://money.cnn.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm (“This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.”).

- Usage shares of free online products aren’t a good proxy of market power
- ◆ Users face no switching costs of any kind
 - ◆ Adoption rates are heavily dependent on usefulness, and trend
 - ◆ High likelihood of disruptive entry

Usage Shares: What do they prove?

- Accumulation of users is no guarantee of (sustained) success
 - ◆ In merger control, it does not lead to SIEC or foreclosure of any kind
 - ◆ Consequently, it cannot be a good measure of market power for any other purposes of competition law

Antitrust and IP in the New Millennium: Summer 2006

*MySpace: THE Social Network?**



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*See Pete Cashmore, *Feeding the MySpace Beast*, <http://mashable.com/2006/04/19/feeding-the-myspace-beast/>, April 19, 2006 ("Believe me: you can't build the next MySpace. You may think you can, but you can't. And don't go thinking you can win by having more features: social software doesn't work like that.")