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ANDREJ FATUR

EU COMPETITION LAW
AND THE INFORMATION
AND COMMUNICATION
TECHNOLOGY NETWORK
INDUSTRIES

*Economic versus Legal Concepts in
Pursuit of (Consumer) Welfare*

EU Competition Law and the Information and Communication Technology Network Industries

Economic versus Legal Concepts
in Pursuit of (Consumer) Welfare

Andrej Fatur



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EU COMPETITION LAW AND THE INFORMATION AND COMMUNICATION TECHNOLOGY NETWORK INDUSTRIES

Competition policies have long been based on a scholarly tradition focused on static models and static analysis of industrial organisation. However, recent developments in industrial organisation literature have led to significant advances, moving beyond traditional static models and a preoccupation with price competition, to consider the organisation of industries in a dynamic context. This is especially important in the field of information and communication technology (ICT) network industries where competition centres on network effects, innovation and intellectual property rights, and where the key driver of consumer benefit is technological progress. Consequently, when an antitrust intervention is contemplated, a number of considerations that arise out of the specific nature of the ICT sector have to be taken into account to ensure improved consumer welfare. This book considers the adequacy of existing EU competition policy in the area of the ICT industries in the light of the findings of modern economic theory. Particular attention is given to the implications of these dynamic markets for the competitive assessment and treatment of the most common competitive harms in this area, such as non-price predatory practices, tying and bundling, co-operative standard setting, platform joint ventures and co-operative R&D.

Foreword

I was delighted to be asked to provide a Foreword for this important new book on the application of EU Competition Law to the information and communication technology network industries. The book has evolved from Andrej Fatur's PhD, which I supervised and which he completed in 2010. The book could hardly appear at a better time. The European Commission's investigation of two alleged abuses of its dominant position by Microsoft led to the imposition in 2004 of fines of €497 million (and further fines for Microsoft's subsequent failure to provide necessary interoperability information to other market participants). That decision of the Commission was upheld in 2007 by the General Court in Luxembourg. *Microsoft* was certainly one of the most controversial decisions ever to have been taken by a competition authority anywhere in the world, and it led to many heated disagreements: one of the mantras that was repeatedly heard was that this case showed that the institutions in Europe protect competitors rather than the process of competition, and that interventions of this kind would lead to a chilling effect on competition and a reduction in investment and innovation.

If we then fast-forward from the *Microsoft* case to the current day, we find that many competition authorities around the world, including the European Commission, are now investigating Google for possible abuses of dominance (and that, among the complainants, is none other than Microsoft). Many other firms in the ICT sector—for example Intel, Samsung, Rambus and Qualcomm—have come under antitrust scrutiny in recent years, and mergers such as *Intel/McAfee* and *Microsoft/Skype* were carefully reviewed for possible anti-competitive effects.

Competition authorities asked to deal with complaints about abusive behaviour, or to review mergers and agreements, in the ICT sector face formidable problems. Quite apart from the sector's intrinsic technological complexity and the speed of change within it, a major question is whether the conventional tools of competition law and economics—predominantly developed within the context of a static view of markets and, in particular, the 'structure-conduct-performance' paradigm—are suitable when dealing with cases involving ICT. For example, even if we decide that a consumer welfare standard is just as suitable for the ICT sector as it is for fizzy drinks or basic chemicals, how should one factor into the analysis of any particular case the need to recognise the dynamism that characterises information technology markets and to avoid decisions that might disincentivise firms from investing and innovating? Where firms are competing *for* the market rather than *in* the market, should we be concerned about a firm that has very high market shares—or even a monopoly—at all? Can we derive anything from 'post-Chicago' economics that suggests that we should resist that part of Chicago thinking that proposes a predominantly 'hands-off' approach to accusations of monopolisation and abuse in favour of the idea that, given time, markets themselves will ensure competitive outcomes favourable to consumers?

This book deals with these, and a range of associated, issues. Mr Fatur presents the relevant literature in the field, including an account of post-Chicago thinking. He stresses the importance of recognising the dynamism of ICT markets, and accommodating this

within competition authorities' analysis. He welcomes the move within the European Union towards a more 'effects-based' approach to competition analysis and away from the much-criticised 'form-based' approach of the past. It would be reasonable to sum up his position as being that the European Commission has moved quite a long way from the formalism of the past, but that the move towards an effects-based system remains work in progress; he also considers that the Courts of the European Union have important contributions to make towards this project. A specific suggestion of the author is that the Commission would be well-advised to utilise its own economists more when assessing complaints from third parties of anti-competitive behaviour by firms in the ICT sector, or to use external experts, rather than relying on representations made by economists instructed by the complainants themselves.

I feel confident that anyone interested in these intriguing and complicated issues will find much of value in this book, and I am delighted to see the fruits of so much research—and of many years as a PhD student—contained within it and available now to a much wider audience.

Richard Whish
King's College London

February 2012

Acknowledgements

This book is based on my doctoral thesis, which was defended in July 2009. While I have revised and added certain sections, this does not constitute a complete update. While writing a book is a solitary pursuit, I have come across precious few books that do not first introduce to readers a host of persons that have been of invaluable support in completing the task at hand. There are several people and institutions to whom I would like to express my gratitude for their support in the process of writing this book.

My supervisor, Professor Richard Whish, for giving me space to discover and develop my academic abilities. You have provided me with an intellectually challenging environment—and your high standards have been a constant source of motivation. Your guidance will always be as valuable to me as your verdict. Our continued cooperation has been of disparate nature and of great value both professionally and privately.

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Abbreviations

AAC	average avoidable cost
ATC	average total cost
ATM	automatic teller machine
AVC	average variable cost
BEREC	Body of European Regulators for Electronic Communications
CCP	central counter-party
CPU	central processing unit
CSD	central securities depositary
DOJ	US Department of Justice
ECJ	European Court of Justice
ECN	electronic communication network
ERG	European Regulators Group
FRAND	fair, reasonable and non-discriminatory
GDS	global distribution system
ICT	information and communication technology
IP	intellectual property
IPR	intellectual property right
ISP	Internet service provider
LRAIC	long-run average incremental cost
MIF	multilateral interchange fee
MNO	mobile network operator
MSC	merchant service charge
MVNO	mobile virtual network operator
NCA	national competition authority
NRA	national regulatory authority
OEM	original equipment manufacturer
ONP	open network provision
PDA	personal digital assistant
PND	portable network device
R&D	research and development
RRC	raising rivals' costs
SCP	structure, conduct, paradigm
SIEC	significantly impedes effective competition
SIG	special interest group
SMP	significant market power
SSNIP	small, significant non-transitory increase in price
TFEU	Treaty on the Functioning of the European Union

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