Streetmap gets lost in Google abuse of dominance claim

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Competition analysis: Tech giant Google, operator of the world's largest search engine, has successfully defended accusations of anti-competitive business practices by Streetmap, a provider of internet maps. Michael Armitage, a barrister at Monckton Chambers who specialises in EU and UK competition law, examines the case in more detail and assesses the impact of Roth J's judgment.

Original news

Streetmap.EU Ltd v Google Inc and other companies {2016] EWHC 253 (Ch), [2016] All ER (D) 129 (Feb)

The Chancery Division made preliminary rulings in a case brought by Streetmap.EU Ltd against Google Inc, alleging that Google had abused a dominant position in its provision of the Google Maps service. The court held that, among other things, if Google had held a dominant position, it had not committed an abuse.

What was the court asked to decide?

The judgment concerns the preliminary issue of whether, in its treatment of its 'Google Maps' product, Google had abused a dominant position as a matter of EU/UK competition law. Roth J held that it had not. In keeping with the case management approach that has been adopted in other recent High Court abuse of dominance claims (see eg *Arriva the Shires Ltd v London Luton Airport Operations Limited* [2014] EWHC 64 (Ch), [2014] All ER (D) 208 (Jan)), the logically prior question of whether Google in fact occupied a dominant position was simply assumed for the purposes of the 'first-stage' trial on the issue of abuse.

What was Streetmap's complaint?

Until its liquidation in 2009, Streetmap provided online maps which were in direct competition with Google Maps. Its complaint concerned the way in which Google displays the results of online searches for addresses or geographical locations (eg '10 Downing Street') made via the Google search engine. Since 2007, Google has been presenting such results by displaying, in a prominent position towards the top of its 'search engine results page' (SERP), a clickable thumbnail extract from Google Maps. If clicked, the thumbnail image—known as the 'Maps OneBox'—takes the user to the Google Maps page corresponding to the location which has been 'Googled'. As well as the Maps OneBox, the SERP also displays less prominent hyperlinks—in blue text—leading to other online maps provided by third parties. Streetmap alleged that it had been driven out of business by the prominence and preferential display Google had been giving to its own online maps product.

What was the legal basis of Streetmap's claim?

Streetmap's legal case was that, by displaying an image from Google Maps at the top of its SERP, and simultaneously relegating the link to Streetmap's rival product to a less prominent position on the page, Google had abused a dominant position contrary to section 18 of the Competition Act 1998 (known as the 'Chapter II prohibition'), as well as its EU law equivalent, Article 102 TFEU. It was common ground that there was no need to distinguish between the UK and EU provisions for the purposes of the case (judgment, paras 37–39).

Although Streetmap advanced its plea of abuse of dominance in several alternative ways, Roth J considered that—on a proper analysis—Streetmap was really advancing what amounted to a claim of discrimination, by alleging that Google's conduct had placed competing online maps such as Streetmap's product at an competitive disadvantage. Notably, Roth J was unimpressed by Streetmap's suggestion that Google's conduct involved 'bundling' or 'tying', including in the sense considered by what is now the General Court in Case T-201/04 *Microsoft v Commission* [2007] All ER (D) 98 (Sep), concerning Microsoft's practice of pre-installing Windows Media Player on its Windows operating system. This is because Google users remained free to click on the links to third party providers' online maps without charge or any other particular burden, even though it was only Google Maps that benefited from having a clickable thumbnail.

Under what circumstances can discrimination constitute an abuse under the Chapter II prohibition/Article 102 TFEU?

Discrimination—in the sense of 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'—is specifically prohibited by section 18(2)(c) of the Competition Act 1998 (and its EU equivalent).

In its orthodox form, discriminatory abuse involves charging different prices to, or imposing different non-price conditions of supply on, different customers in respect of an equivalent supply of products or services, without any objective justification. Discrimination is not, however, limited to this kind of conduct. As Roth J noted, the 'essence' of discrimination is treating like-products (or customers) in an unlike way (judgment, para 54). Moreover, it is well-established that an undertaking that is dominant on one market can commit an abuse even where the anti-competitive conduct in question takes effect on a different market, in which the undertaking is not dominant.

Drawing these threads together, Roth J held that, 'as a matter of principle', it may be abusive for a dominant company to leverage its power on a market in which it is dominant in order to promote its products on another market in which it is not dominant, thereby strengthening its position on that latter market (judgment, para [60]).

Such conduct will, however, only constitute an abuse where the dominant undertaking's conduct has a 'foreclosing' effect on its competitors. Determining whether this is the case requires 'careful consideration of the evidence, in its context' (judgment, para 61). Importantly, where foreclosure results from legitimate 'competition on the merits', there will be no abuse—what is required is 'anti-competitive foreclosure', whereby the dominant undertaking limits its competitors' ability to compete by depriving or hindering their access to essential inputs or customers (judgment, para 63).

What supporting evidence/data did Roth J consider?

In deciding whether Google's conduct had the foreclosing effect referred to above, Roth J considered a range of documentary and witness evidence. Given the nature of the issues in the case, a number of expert witnesses were called, including economists, computer scientists and an expert in the specific field of digital maps. Notably, the case appears to be the first example (at least in this jurisdiction) of the use of 'hot-tubbing' for expert economic evidence, a process where the parties' respective economists take the stand simultaneously for a process of 'judge-led' questioning. Roth J was largely complimentary about the procedure (judgment, para 47), and it may well be utilised in future cases.

Did Google intentionally pursue an anti-competitive strategy?

Roth J began by considering Streetmap's allegation that Google had intentionally pursued an anti-competitive strategy. Although such intention is not necessary to a finding of abuse, it well be a highly relevant consideration (judgment, para 66). However, having considered a range of contemporaneous evidence, the court concluded that while Google had expressly recognised that the introduction of the new Maps OneBox would drive more traffic to Google Maps, this was an expected consequence rather than a goal of the project—Google's central motivation was to improve its general search engine, by increasing user convenience and providing users with an instantly understandable result (judgment, paras 66–83).

Did Google's conduct have an anti-competitive effect?

Roth J remarked that it was 'indisputable' that the display of the thumbnail extract from Google Maps in response to geographical searches had improved the quality of Google's SERP. Unusually, therefore, the court was being invited to hold that conduct which was pro-competitive in the search engine market on which Google was assumed to be dominant was nonetheless abusive in consequence of its anti-competitive effect on the separate market for online maps (judgment, para 84).

In considering whether (irrespective of any question of subjective intention) Google's conduct had the requisite anti-competitive effect, Roth J began by considering the nature and degree of effect that the law requires in order to ground a finding of abuse. This had two aspects:

First, the judge reiterated the well-established proposition that evidence of an actual effect on competition is not required before the court will make a finding of abuse. While the 'mere possibility' of anti-competitive foreclosure is not enough, it is sufficient if the claimant can show that the impugned conduct was 'reasonably likely to harm the competitive structure of the market' (judgment, para 88). Importantly, however, Roth J noted that in determining that question, 'the court will take into account, as a very relevant consideration, evidence as to what the actual effect of the conduct has been'.

Second, Roth J held that in the circumstances of this case, it was necessary to show that the effect in question is 'serious or appreciable' (judgment, para 98). This is a potentially controversial aspect of Roth J's decision, in light of a number of Court of Justice authorities (referred to at paras 93–95 of the judgment) which suggest that no de minimis threshold applies in abuse of dominance cases. However, the authorities in question all concerned 'one market' cases in which the relevant effect on competition was alleged to have occurred on the same market in which a dominant position was held. In the present case, in contrast, the alleged anti-competitive effect of Google's conduct was said to have occurred on a 'non-dominated' market. Roth J held that it would be especially 'perverse' to find that conduct which was clearly pro-competitive on the market in which the defendant holds a dominant position nonetheless contravened competition law because it had a non-appreciable effect on competition on a separate market.

Accordingly, the question which the court had to decide was whether Google's conduct was reasonably likely to have a serious or appreciable effect on the market for online maps. Roth J noted that he regarded this question as 'the most difficult part of the case' (judgment, para 99).

The judge began by rejecting Google's contention that its conduct had no effect on competition. In so concluding, Roth J found it 'very relevant' that Google had itself expressed the view (in contemporaneous documents) that the new Maps OneBox would drive more 'traffic' to Google Maps (judgment, para 104).

The more difficult question was whether the effect in question was likely to be appreciable. This required a close analysis of a 'variety of data and metrics' which had been addressed, in particular, in the parties' economic evidence. Roth J ultimately concluded that the introduction of the new Maps OneBox in 2007 was not reasonably likely to give rise to an appreciable anti-competitive foreclosure effect.

Roth J's reasoning on the issue of effect on competition is extremely detailed, and this article does no more than summarise some of the key themes in the analysis:

First, in analysing the evidence, Roth J is careful to distinguish between correlation and causation. While Google had clearly increased its UK market share relative to Streetmap and other third party providers of online maps, it did not follow that this was the result of the introduction of the Maps OneBox. On the contrary, there was ample evidence that Google Maps' increasing market share was the result of specific features of the Google Maps product itself that were attractive to consumers, in respect of which Streetmap was lagging behind. These included Google's introduction of 'natural language' searching, allowing users simply to type a request (eg 'where is the British Museum') without entering a street name or postcode. Accordingly, the relative success of Google Maps vis-à-vis Streetmap was readily explicable by a range of factors amounting to perfectly legitimate 'competition on the merits', and was 'wholly unrelated' to the introduction of the new Maps OneBox on Google's SERP from 2007 (judgment, para 119).

Second, Roth J paid close regard to contemporaneous evidence of the parties' own views as to the explanation for their respective successes and failures. On Google's side, there were internal emails which discussed the various factors which contributed to the advance of Google Maps between 2007 and 2009 (in the context of Google's slow progress in overtaking the major competitor to Google Maps in the US, MapQuest), but which made no mention of the introduction of Maps OneBox. In addition, Roth J observed that Streetmap itself had not, at the time, identified the introduction of the new Maps OneBox in 2007 as the reason for the decline in its business.

The fact that Google's conduct was not reasonably likely to have an appreciable effect on competition was enough to dispose of the preliminary issue of abuse (judgment, para 141). Notably, however, Roth J also gave detailed consideration to the question of objective justification, which had been heavily contested at the hearing. The key question in this regard was whether there existed more proportionate alternatives by which Google could have achieved the undoubted improvements to its search engine which were attained by the display of a thumbnail map, but without placing Streetmap at such a competitive disadvantage. Roth J ultimately rejected a number of alternatives advanced by Streetmap, including on the grounds that they would impose a disproportionate additional burden and cost on Google (including that associated with having to introduce equivalent alternatives in any other EU markets in which Google holds a dominant position).

What is the basis of the European Commission's online search investigation alleging abuse of dominance by Google—and will Roth J's decision have any impact on it?

The Commission is currently conducting a wide-ranging investigation into whether various aspects of Google's conduct involve the abuse of a dominant position contrary to Article 102 TFEU in relation to online search (see further, Google (online search) (COMP/39.740, COMP/39.775 and COMP/39.768)). As part of that investigation, on 15 April 2015 the Commission issued a Statement of Objections, setting out its provisional view that Google has, since 2008, abused a dominant position by systematically favouring, in its SERPs, its own comparison shopping product (Google Shopping) over competing products offered by alternative providers. The Commission's allegations therefore closely resemble those made by Streetmap before the English courts, albeit in a slightly different factual context.

It is difficult to second-guess the extent to which the Commission's final decision will be impacted by Roth J's decision, particularly since the text of the Statement of Objections—setting out the Commission's provisional 'theory of harm'—is not publicly available. Article 16(1) of Regulation (EC) 1/2003 prohibits the courts of EU Member States from taking decisions which run counter to decisions of the Commission. However, the EU law principle of sincere cooperation, from which this rule is derived, is not typically understood as a 'two-way street' which also requires the Commission to avoid conflicts with judgments which emanate from the EU Member States. In any case, the cases concern different products and, as is apparent from a published memo which summarises the Statement of Objections, the Commission has taken the preliminary view that Google's conduct in the sphere of comparison shopping products has had a negative effect on consumers/innovation. This contrasts with Roth J's very clear view (which was not itself contested by Streetmap) that the introduction of the Maps OneBox was a pro-competitive measure, at least in the online search market on which Google was assumed to be dominant.

All that said, Roth J's judgment is a model of analytical clarity, containing detailed (and, particularly in relation to the requirement for an appreciable effect on competition, novel) reasoning on precisely the sorts of legal issue with which the Commission will be required to deal. It seems inconceivable that the officials responsible for writing the Commission's final decision in the Google investigation would not pay close attention to the approach taken by one of the UK's leading competition law judges. It is important to note, however, that the possibility of an appeal against Roth J's judgment cannot be excluded. This may not be the final word of the English courts on the Streetmap case.

Interviewed by Susan Ghaiwal.

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