HUNTING THE WILD GEESE: COMPETITION ANALYSIS IN A WORLD OF "FREE"

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Abstract

Not far from DG Competition, in Brussels, there is the "Wild Geese", a pub where football games (generally broadcast on pay TV) may be watched for free while sipping a beer or eating a sandwich (which, of course, are not free). In a more metaphoric sense, a business based on "free" products or services is a "wild" animal which has a disruptive effect on markets and business traditionally based on (and used to) fees and subscriptions. This article observes from a competition law perspective the case of a number of "wild geese" active in today's economy. The article consists of two parts: the first one focuses on market identification and definition, in cases where "free" is involved. In doing so, the article considers the Commission's previous case practice and, in addition, takes into consideration elements which might be relevant to market definition (*i.e.* reverse cellophane fallacy, the demand-enhancing effect of "free" and the role of technology). The second part focuses on the possible conflict between businesses based on "free" and traditional "fee-based" businesses. In particular, it explores available theories of harm which could be raised in relation to "free" businesses. In doing so, the article reviews case decisions based on theories and disciplines which might provide the reader with new tools in the competition analysis of "free" (in particular, game theory and pre-emption in *Alcoa*, bundled rebates and tying in *3M/LePage* and tying in *Microsoft*). The article concludes with the recently published

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Microsoft/Skype merger decision which appears to set a new trend for the analysis of "free".

Keywords:

Competition, Antitrust, Merger, European Commission.

JEL Classification:

K21 — Antitrust Law

1. Introduction.

Not far from DG Competition, in Brussels, there is the "Wild Geese", a pub where football games (generally broadcast on pay TV) may be watched for free while sipping a beer or eating a sandwich (which, of course, are not free). This is only one example of various business models which rely on the power of "free". By way of approximation, we can think of at least four such models: (i) *direct cross-subsidies* (the producer offers two products, one which is free, the other which is paid. The consumer can get the free product but is tempted to buy the paid product. *E.g.*, buy one get one free offers); (ii) *the three-party, two-sided market* (the producer offers its products to the consumer for free, the advertiser pays the producer for advertising space, some consumers pay the advertiser for the paid products they have advertised, *e.g.* Google); (iii) *freemium* (many consumers can get the basic product of the producer for free while some consumers pay for the premium product of the producer, *e.g.*, free e-mail but consumers have to pay for spam filters, more space, etc); and (iv) *non-monetary markets*