ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 12 Issue 2 pp 119-130 **July 2017**

Editorial: Competition and Regulatory Trends in Digital Markets

*Anca D Chirita**

I. INTRODUCTION

The contributions submitted to the present issue of the *Competition Law Review* were presented at the 26th Workshop on 'Competition and Regulatory Trends in Digital Markets' on the 14th of April 2016. The workshop, which was held at the Lisbon Law School in conjunction with its Jean Monnet Chair in Economic Regulation in the European Union,[1] continues a tradition that has been established and nurtured by the Competition Law Scholars Forum.

In recent years, the debate over anti-trust intervention in digital markets has generated many controversies, and ultimately tensions, among competition academics and practitioners. Most commentators have been divided on the substance – some with compelling reasons, others with rather personal ones[2] - as well as on the shifting of direction by the European Commission from its previously proposed commitments to its recent record breaking €2.42 billion[3] antitrust fine imposed on Google. The first two articles contribute to this debate, first, regarding the challenges raised by finding the proper definition of digital markets, and second, regarding the potential to identify a relevant market for services that are provided free of charge. Moving on from the discussion of *ex post* competition intervention, the third article focuses on the *ex-ante* regulatory framework in electronic communications.

The first article, 'Delineating Digital Markets under EU Competition Law: Challenging or Futile?' by Viktoria Robertson, Assistant Professor at the University of Graz in Austria, explores the challenges posed by the need to define digital markets whilst examining multi-sided online platforms. The second article, '*De Gratis Non Curat Lex*: Abuse of Dominance in Online Free Services' by Miguel Sousa Ferro, Professor at the

* Dr. iur., Assistant Professor of Competition Law, Durham University, UK.

1 The workshop programme is available at http://clasf.org/event/workshop-competition-and-regulatory-trends-in-digital-markets/, last accessed August 2017.

2 For an attempted collection of academic articles funded by Google, see Google Transparency Project's table at http://django.googletransparencyproject.org/table/, cited more recently by Wouter Wils, 'Competition authorities: Towards more independence and prioritisation', 2017 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000260. The Project's work-in-progress list is by no means exhaustive.

3 See European Commission, press release IP/17/1784, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', Brussels, 27 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

University of Lisbon Law School, challenges the existence of a market for digital services provided free of charge. The third article, 'A Future for ex ante electronic communications regulation?' by João Confraria, Assistant Professor at the Catholic University of Portugal, Member of the Board of Electronic Communications Regulatory Authority, explores electronic communications regulations, including more recent concepts, such as universal service, net neutrality, and the control of market power and security.

II. WHY SHOULD WE TREAT DIGITAL MONOPOLISTS WITH KID GLOVES?

The over-arching theme stemming from the first two contributions to the present issue could be best revealed by seeking an answer to the above question. While the first article advises how best to avoid the pitfalls of 'too narrow' or 'artificially defined' digital markets, the second article advises that there is 'no relevant market' if the product or service is offered free of charge.

The quest for the proper definition of the relevant market has traditionally become so well embedded in antitrust analysis that few imaginative scholars could think of a competition authority that could proceed to the next level without first defining a relevant product or service market.

The trouble with any digital presence is often that there could be an array of such products or services being offered through the medium of an online platform. For obvious reasons, Google and Amazon are both contrasting textbook examples. Final consumers identify Google with a variety of its own, or owned products from YouTube videos, e-mail, maps, and shopping to its search-engine, and identify Amazon with its famous marketplace. At the same time, intermediate consumers identify Google with an advertising business for placing ads and Amazon with a marketplace for selling. It would be wrong to consider that these markets are interchangeable from the perspective of final consumers. The latter prefer Google when undertaking general searches and Amazon when making online purchases. It is perfectly true that a Google search can easily end up with an actual purchase; similarly, a prospective buyer from Amazon might end up merely searching for, but never actually purchasing any product. Even from the perspective of intermediate consumers, there are two sides to each online platform: pre-sale marketing or advertising by Google and actual sales by Amazon. Indeed, both platforms offer a search engine, the difference being that Google's is universal whereas Amazon's is limited to its own selling pursuits.

Robertson mentions some critical scholarship that has already raised doubts over the usefulness of defining a relevant market[4] in general. She is, however, supportive of an analysis of the relevant digital market regarding the extent to which such an analysis is

[4] See most notably the works of Louis Kaplow, 'Why (Ever) Define Markets?' (2010) 124 Harvard L Rev 438, and 'Market Definition: Impossible and Counterproductive' (2013) 79 Antitrust LJ 361, and a critique of him by Richard S Markovits, 'Why One Should Never Define Markets or Use Market-Oriented Approaches to Analyze the Legality of Business Conduct under U.S. Antitrust Law: My Arguments and a Critique of Professor Kaplow's' (2012) 57 Antitrust Bulletin 747.

necessary for finding market power.[5] Robertson starts from the premise that defining digital markets is a difficult task due to the fast pace of innovation cycles present in these markets.[6] While drawing on examples of digital platforms for trading, gaming, or travel, she suggests that it would be erroneous to define 'several isolated product markets'.[7] Direct network effects, however, are generated by such online platforms.[8]

As many digital industries are driven by innovation, Robertson assimilates them into 'Schumpeterian markets' where market shares could often turn out to be 'volatile'.[9] However, while this may, indeed, be true for some platforms, one should exercise extreme caution when making a generalisation from this tentative assimilation. As examined elsewhere, competition on the basis of innovation remains the 'prime competitive weapon' in many oligopolistic high-technology markets.[10] However, as I have argued elsewhere,[11] with reference to Google's example of dominance over digital search-engines, its duration now spans nearly two decades.

Inevitably, laws regarding intellectual property, not competition, could offer protection for innovation through patents, trade-marks, and industrial property rights. The mission of competition law is not one that safeguards IP laws, so when enforcing the prohibition of abuse of a dominant position under Article 102 TFEU, there is no objectively justified defence on the basis of pure innovation, including any failed attempts to innovate. On the contrary, Article 102(b) hints at potential competition intervention against 'limiting technical development to the prejudice of consumers'. Reading this provision in the wider context of innovation, one could imagine Schumpeter's 'creative destruction' in action where imitators have to be given the same right to market access that pioneers of novel inventions already enjoy. Otherwise, intermediate or final consumers could never see any benefits from price competition; instead, consumers would be confronted with limitations due to the available monopolistic technologies.

Robertson relies on the German Monopolies Commission's recommendation[12] when suggesting that it might not be a good idea to consider each side of an online platform as a separate market.[13] However, a reading of the original text reveals the opposite. For example, at paragraph 19, the Monopolies Commission explains that identifying two separate advertising markets, namely, one for 'display' and another for 'targeted'

5 Viktoria HSE Robertson, 'Delineating Digital Markets under EU Competition Law: Challenging or Futile?' (2017) 12(2) Comp L Rev x.

6 Ibid, p x3.

7 Ibid, p x4.

8 Ibid, p x5.

9 Ibid, p x5 or 'short-lived', p x18.

10 See William J Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (Princeton University Press, 2004), p 4.

11 For an earlier emphasis on this point, see e.g., AD Chirita, 'Google's Anti-Competitive and Unfair Practices in Digital Leisure Markets' (2015) 11 Comp L Rev, p 118.

12 See Monopolkommission, 'Wettbewerbspolitik: Herausforderung digitale Märkte', Sondergutachten 68 (2015), paras 19 and 58, available at http://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf.

13 Robertson, n 5, p x7.

advertising, could be judged only on the basis of the facts of a given case. The same Commission acknowledges the growing importance of data and the need to further establish whether online and offline markets could be seen as interchangeable. Furthermore, at paragraph 58, the Commission explores the avenues available for proving an abusive exploitation of data vis-à-vis competitors, including through restrictions on data portability. For non-German readers, there is a helpful English summary available, too.[14]

Moving on from this point, Robertson examines several merger decisions[15] where the Commission had already acknowledged the existence of network effects and distinguished between 'on'- and 'off'-line competition.[16] However, in *Facebook/WhatsApp*, the Commission did not establish a social networking market for online advertising. In contrast, the Higher Regional Court of Düsseldorf identified an online 'free-of-charge' service market for online hotel booking intermediaries.[17] In arriving at its conclusion, the Court noted at paragraph 42 that there is no other 'search' or 'comparable' market; similarly, at paragraph 57, it disregarded an offline market for online bookings via phone calls, e-mails, and booking forms.

In any given case, a too wide or a too narrow definition will never be well received by the theorists of 'two-sided markets' or by academics respectively. The proponents of the 'two-sided markets' theory seek to convince us of it being able to justify the costs of running an online platform that results in benefits to its end-users. The mainstream complaint by theorists is that competition authorities fail to accept network effects as an efficiency defence. As Robertson, too, notes,[18] there is a trend not to pursue a 'precise' market definition. Ultimately, she questions whether an online sale platform, such as eBay or Amazon, could really constitute the relevant product market, and not the products on offer for sale.[19] In the end, Robertson suggests that the analysis of online and offline markets needs to be more detailed; otherwise, one could extract an inaccurate picture of market power.[20] This would, in my view, involve asking competition authorities to engage in an extensive exercise, which could eventually alleviate some critics' concerns about the market power of online compared to brick-and-mortar businesses, but could inevitably become a waste of time. For example, advertising could be divided into endless categories: ranging from door-to-door; e-mail, including spam; newspapers, both online or in print; and, so on. It demands that competition authorities invest their limited human

14 See Monopolkommission, 'Competition Policy: The Challenge of Digital Markets', Summary available at http://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf.

15 Robertson, n 5, p x8.

16 See, e.g., European Commission, Case COMP/M.4731, *Google/Double Click*, para 290; Case COMP/M.7217, *Facebook/WhatsApp*, para 79.

17 See the Higher Regional Court (Oberlandesgericht) of Düsseldorf's ruling in Case Kart 1/14 (V), *HRS*, 2015, paras 42, 43 and 44, online available at https://openjur.de/u/759111.html.

18 Robertson, n 5, p x10 and x14.

19 Ibid, p x12.

20 Ibid, p x17.

resources to justify a particular relevant market by engaging in an extensive 'dissertation' exercise focused on one very narrow issue of the overall analysis.

Robertson also warns against very narrow market definitions, arguing that 'high innovation' could be used to identify broader markets, which could also avoid the risk of over-enforcement.[21] Furthermore, she demands that innovation be recognised as 'a force eradicating the market power that might stem from differentiation'.[22] Indeed, it is true that an antitrust intervention could lead to unintended market disruptions, for example, if a large corporate fine translates into immediate job losses to recover lost profits. However, the above *laissez-faire* approach based on innovation as an efficiency defence is, at best, a fallacy. It is the task of another branch of law, namely, intellectual property, to measure and adequately reward innovation.

The second article, by Sousa Ferro, starts with a rather bold argument, specifically, that 'there is no such thing as a market for a product supplied free of charge'[23] or that 'there is no sense to talk about a market if there is no 'price".[24] Sousa Ferro argues that competition authorities misinterpret the law 'in order to arrive at their intended result'.[25] Thus, he acknowledges that cross-subsidisation had made it possible to define free markets in these previous cases.[26]

Unimpressed by big data, Sousa Ferro recommends big data be addressed by data protection law,[27] as 'it is impossible to measure degrees of privacy'.[28] It is right to say that users of online platforms might never know how much their personal data is worth. However, one could argue that competition authorities could still come across any revenues extracted from the sharing of such data. In other words, even if the price for data is hidden from individual platform users, competition authorities, before arriving at a conclusion, could still work out that there is, indeed, a price to be paid.

In order to support his claims, Sousa Ferro relies on what he calls 'omnipresent, but often silenced general principle of competition law', namely, '*de gratis non curat lex*'.[29] Continental lawyers, however, are more familiar with '*de minimis non curat lex'.* Accordingly, one would not expect competition authorities to handle trivial matters. Ferro Sousa then divides cases of gratuity based on 'close', 'remote' and 'non-commercial' subsidisation.[30]

In essence, Sousa Ferro claims that defining digital markets that are being offered free-of-charge is not a novel issue, so he briefly reviews the case law. The latter cases highlight

---

21 Ibid, p x15.

22 Ibid, p x20.

23 See Miguel Sousa Ferro, 'De Gratis Non Curat Lex: Abuse of Dominance in Online Free Services' (2017) 11(2) Comp L Rev 153, p x2.

24 Ibid, p x4.

25 Ibid, p x2.

26 Ibid, p x3.

27 Ibid, p x2 and x12.

28 Ibid, p x5.

29 Ibid, p x7.

30 Ibid, p x7.

a bundle of products, of which one is for free and another is paid for. Throughout his article, Sousa Ferro often refers to 'many precedents'[31] albeit without identifying the cases in question. While it is technically possible that the EU Courts refer back to previously held positions, there is no recognised doctrine of precedent under EU law. With the UK's imminent departure, the chances that there would ever be a formal recognition of judicial precedents are even slimmer than before.

Following a review of the *Microsoft* rulings and of the *Google* case, Sousa Ferro arrives at the conclusion that should the Commission define a relevant market for 'the (free) supply of general online search services' without including advertising as part of a multilateral platform, then the Commission would 'simply' be 'inventing a market for free online search services'.[32] The decision on the *Google* case (I) is not yet available. The press release[33] goes, nonetheless, in the opposite direction to Sousa Ferro's suggestion. The Commission did not mention that there is a 'free' service; it acknowledged that consumers pay for search results with their data and that Google's revenues stem from advertising. This is, in my view, a welcome recognition of recent scholarship,[34] which has shown that data is the price to pay for online searches. There is no need to mention here that many competition scholars[35] are not going to be delighted about this.

A final remark goes to the ongoing investigation of Facebook by the Bundeskartellamt, which Sousa Ferro considers to be problematic, as data protection is covered by another area of law.[36] I fully agree with his argument that enforcing privacy or data protection is the subject of another area of law. Yet, when the European Data Protection Supervisor itself recommends coordinated action and sees digital monopolies in the hands of competition law, it would look rather awkward, in my view, to pass on the case and miss an excellent opportunity for clearing the air. For digital monopolies, this leaning on data protection laws would result in an enforcement gap. Also, the prohibition of abuse of dominance under Article 102(a) TFEU refers to 'unfair pricing or other trading conditions'. The use of the disjunction makes it possible to investigate online terms and conditions which do not necessarily include the main price but are connected to it.

In contrast to the first two articles, the final contribution to this issue by Confraria explores previous *ex ante* electronic communications regulations, including a recent

31 Ibid, p x11 and x17.

32 Ibid, p x14.

33 Press Release, n 3.

34 See, e.g., Maurice E Stucke and Allen P Grunes, *Big Data and Competition Policy* (Oxford University Press, Oxford, 2016); Anca D Chirita, 'The Rise of Big Data and the Loss of Privacy' in *Personal Data in Competition, Consumer Protection and IP Law – Towards a Holistic Approach?* (eds) M Bakhoum, B Conde Gallego, MO Mackenordt and G Surblyte (Springer, Berlin, Heidelberg, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795992; Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, Cambridge MA, 2016).

35 See, for example, the works cited, n 2.

36 See Sousa Ferro, p x17.

regulatory framework proposed by the EU Commission.[37] A vast array of regulatory interventions including the 2010 Regulation on unbundling the local loop, Regulation 2015/2120 on net neutrality, and the 2016 Proposal for a new electronic communications code,[38] to name but a few, are being examined from the perspective of service availability and affordability.[39] There is an interesting mention of network externalities that bring about welfare benefits once a network has attracted more subscribers,[40] but also recognition that there is still a debate to be had on the empirical relevance of network externalities. Confraria argues that uniform pricing is a source of economic efficiency due to cross-subsidisation among high and low cost areas and between high and low income consumers.[41] With regard to broadband universal services, Confraria highlights 'the ambitious targets for internet access at increasingly high speeds,'[42] as set out by the Commission's Digital Agenda. These are all very welcome developments. One could add the positive developments with regard to roaming charges where local mobile calls and SMS texts can now be used abroad in another EU member state.

As Confraria explains, one of the Commission's objectives is to reduce the direct burden of a universal service imposed on electronic communications operators; thus, the taxpayer will have to finance it. In this respect, Confraria argues that, contrary to the Commission's objective, any additional taxes imposed on labour or on capital income so as to achieve this objective could turn into 'significant deadweight losses'.[43] It remains to be seen how this ambition could be achieved in practice. When discussing net neutrality, Confraria refers to Regulation 2015/2120, which details measures concerning open internet access, but which does not include any 'explicit reference' to the concept of net neutrality.[44] Moving on, Confraria explores high mobile termination rates, which are another source of distortions of competition law.[45]

Last but not least, Confraria spells out the new security regulation that could sort out market failures.[46] He concludes that, despite the benefit of having an *ex ante* regulatory intervention, the fast pace of technological change in electronic communications makes these interventions rather ineffective.[47] This conclusion blends in well with the Commission's attempt to regulate online platforms following its *MasterCard* case. Furthermore, despite many existing controversies over the lack of internet regulation that could see as justified an intervention in high-technology markets, this conclusion shows

37 See João Confraria, 'A future for ex ante electronic communications regulation?' (2017) 11(2) Comp L Rev 171, p x2.

38 Ibid, p x3.

39 Ibid, p x5.

40 Ibid.

41 Ibid, p x6.

42 Ibid, p x8.

43 Ibid, p x9.

44 Ibid, p x12.

45 Ibid, p x14.

46 Ibid, p x20.

47 Ibid, p x22.

how fraught with difficulty are both the *ex ante* and the *ex post* approaches. Ultimately, there is no perfect approach to intervention that could alleviate any market imperfection. Given the absence of an *ex ante* internet regulation, the Commission holds democratic legitimacy to correct market distortions of competition solely *ex post*. This leads us to ask ourselves what is the belief that dominates our minds when we recommend that competition authorities do not intervene in high-technology markets and who informs it?

III. IN SCHUMPETER WE TRUST, WITH SCHUMPETER WE FALL

One of the most commonly held pieces of general wisdom used to advise competition authorities that they treat digital monopolists with kid gloves has been that first, high-technology market shares are volatile; second, monopolists are good because of investments in innovation; and third, as you probably guessed, it is better to refrain from competition intervention. Most scholars rely on Schumpeter's seminal work, 'Capitalism, Socialism, and Democracy', where he famously coined the concept of 'creative destruction', dismissed the theory of perfect competition, and attempted to shift the focus from static to dynamic competition based on innovation. Once upon a time, there was only price competition, but with Schumpeter, innovation becomes the driver. Had an accidental intervention killed the driver, we might have rescued the price (were one is out there, as most of us are short-sighted and cannot see those hidden). However, if we rescue the driver, we cannot fix the price. In my view, Schumpeter played devil's advocate: shooting neo-classical economics, sympathising with monopolists and, in the end, dismissing capitalism. Many scholars have placed enormous trust in his pervasive discourse. But was Schumpeter right, after all, to challenge the view that one should not ban such monopolies? At least we now know that capitalism has survived. Would competition authorities continue to be publicly funded if these enforcers were to abandon their chasing of monopolistic practices simply because 'good' monopolists innovate? Furthermore, if all firms started to make up defences based on innovation alone, would taxpayers still fund a competition regime that treats digital monopolists with kid gloves? I fear the answer is in the negative.

In 1942, so the story goes, Schumpeter included a chapter on 'monopolistic practices', criticising established economists for having used 'formalistic' concepts, such as perfect competition, which Schumpeter argued that it was the product of, 'an entirely imaginary golden age' that, 'at some time somehow metamorphosed itself into the monopolistic age, whereas it is quite clear that perfect competition has at no time been more of a reality than it is at present'. [48]

Schumpeter criticised economists for looking after the behaviour of an oligopolistic industry, that is, 'an industry which consists of a few big firms', whilst observing well-known moves that 'seemed to aim at nothing but high prices and restrictions of output'.[49]

[48] See Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1st ed 1942, Routledge, London and New York, 2003), p 81.

[49] Ibid, p 84.

He trivialised 'price competition' as it ignored 'quality competition and sales effort'.[50] Instead, in his Chapter VII on the 'Process of Creative Destruction', Schumpeter recognised 'competition from the new commodity, the new technology, the new source of supply, the new type of organization' as being more effective because this kind of competition 'commands a decisive cost or qualitative advantage' and does not 'strike at the margins of the profits and the outputs of an existing firm but at their foundations and their very lives'.[51]

There is, however, not a single mention of innovation in the context of 'creative destruction'. Throughout his book, Schumpeter refers to innovation twice: first, in Chapter XII, 'Crumbling Walls', when he mentions entrepreneurship as 'the prime mover' and states that 'innovation itself is being reduced to routine' whilst technological progress becomes the business of 'teams of trained specialists'[52] and, second, when he refers to 'innovation in the productive process'.[53] However, he sees capitalism as a 'great obstacle' to achieving such an end, offering as an example the potential to achieve mass production of cheap housing through 'radical mechanization' and 'elimination of inefficient methods of work'.[54] It appears clear to anyone that Schumpeter's concept moves away, albeit only slightly, from static forms of competition to include quality beyond price competition. Thus, it does not move way beyond towards dynamic competition, as we now call it.

How it is possible to rely on something that sounds too implausible to be true? Capitalism, for example: how has it survived? This is in spite of the fact that parts of his seminal book had already been written long before, during 1935-38 and so before the digital revolution. I would interpret his concept of 'creative destruction' as signalling that competition based on innovation is even more self-destructive for businesses than well-known forms of aggressive price competition. Innovation itself is not even the central theme of Schumpeter's book. One could recall here that the first patents were recorded in Venice around 1474. However, Schumpeter is rather dismissive of patents; he candidly questions sources of 'social waste', including the 'buying up of patents in order not to use them' or the costs of advertising campaigns.[55] His vision on patents was that any 'new' methods of production or new commodities do not confer a monopoly *per se,* as these have to compete against older products or wait for new ones to be introduced.[56] Thus, Schumpeter acknowledged cases of the 'spectacular superiority' of a new device that could be leased and offers the example of shoe machinery, from which it is clear how primitive his projections of technological advance were. From this example, I could not see any seeds of dynamic efficiency, as his reference points towards productive efficiency, i.e., even more shoes as a result of better technology. What could, indeed, be

50 Ibid, p 84.

51 Ibid.

52 Ibid, p 132.

53 Ibid, p 133.

54 Ibid.

55 Ibid, 80.

56 Ibid, p 102.

interpreted in his own favour is Schumpeter's recognition of 'an element of genuine monopoly gain in those entrepreneurial profits which are the prizes offered by capitalist society to the successful innovator'.[57] This recognition, however, is of a 'volatile nature', as Schumpeter admits. Later, he adds that:

> 'The main value to a concern of a single seller position that is secured by patent or monopolistic strategy does not consist so much in the opportunity to behave temporarily according to the monopolist schema, as in the protection it affords against temporary disorganization of the market and the space it secures for long-range planning'.[58]

In the above reference to a 'temporary' monopoly, there is, in my view, nothing to suggest volatile predictions for dynamic, i.e., digital markets. Instead, there is Schumpeterian recognition that a patent will one day expire and his remaining hope that a new innovator could soon challenge the existing monopoly.

Chapter VIII, 'Monopolistic Practices', remains rather dubious, in particular regarding Schumpeter's encouragement of 'restraints of trade of the cartel type as well as those which merely consist in tacit understandings about price competition' as an effective remedy during times of economic depression, as opposed to 'vindictive regulation by public authority'.[59]

Many passages of this chapter remain deeply troubling. And many of his predictions have proved to be hopelessly wide of the mark. Due to space constraints, it is not possible to mention more than a selection of the elements most relevant to our wider debate, namely, his suggestion that 'if a patent cannot be secured or would not, if secured, effectively protect, other means may have to be used in order to justify the investment.'[60] Schumpeter goes on to suggest 'a pricing policy that will make it possible to write off more quickly than would otherwise be rational, or additional investment in order to provide excess capacity to be used only for aggression or defense'. All of the above indicate Schumpeter's ever growing sympathy towards monopolists, for whom he sees abnormal pricing practices as justified in the name of securing investments. The same goes for the practice of contractual tying by monopolists: 'if long-period contracts cannot be entered into in advance, other means may have to be devised in order to tie prospective customers to the investing firm.'[61] In other words, Schumpeter was more concerned about how best a monopolist, in particular an innovator, might be able to maximise its own profits, rather than about the other side of the market, i.e., consumers.

The funny side of Schumpeter's parlance is where he defines a monopolist as a 'Single Seller,'[62] from which he extracts the logical sequence that we could all be monopolists:

---

57 Ibid, p 102.

58 Ibid, p 103.

59 Ibid, p 91.

60 Ibid, p 88.

61 Ibid.

62 Ibid, p 89.

> 'Literally therefore anyone is a monopolist who sells anything that is not in every respect, wrapping and location and service included, exactly like what other people sell: every grocer (…) or every seller of 'Good Humours' on a road that is not simply lined with sellers of the same brand of ice cream.'[63]

After reading this paragraph, I had almost come to see myself, in my editorial role, as a monopolist. That we are, nonetheless, not real monopolists, we find out later when Schumpeter recognises that:

> 'This however is not what we mean when talking about monopolists. We mean only those single sellers whose markets are not open to the intrusion of would-be producers of the same commodity and of factual producers of similar ones (…)'.[64]

Schumpeter, then, blames it on sixteenth and seventeenth century England's public hostility towards monopolies, which had made it possible that the 'world monopoly has been cursed and associated with functionless exploitation'[65] since it was:

> 'English administrative practice to create monopoly positions in large numbers which, on the one hand, answered fairly well to the theoretical pattern of monopolist behaviour and, on the other hand, fully justified the wave of indignation that impressed even the great Elizabeth'.[66]

However, Schumpeter does not stop here, but goes on to trivialise monopolies as a practice that 'made the English-speaking public so monopoly-conscious that it acquired a habit of attributing to that sinister power practically everything it disliked about business'.[67] These last shocking remarks are Schumpeter's reproaches to both Adam Smith, who, 'thinking primarily of monopolies of the Tudor and Stuart type, frowned on them in awful dignity', and to Sir Robert Peel, 'who knew how to borrow from the arsenal of the demagogue' when speaking of 'a monopoly of bread and wheat, though English grain production was of course perfectly competitive in spite of protection'.[68]

IV. CONCLUSIONS

A wider reading of Schumpeter's seminal book raises serious doubts about his attempts to defend and justify monopolistic practices under dynamic market conditions driven by investments in technological innovation. In contrast, Arrow argues that 'the incentive to invest is less under monopolistic than under competitive conditions'.[69] This is because a

63 Ibid, p 90.

64 Ibid.

65 Ibid, p 100.

66 Ibid.

67 Ibid.

68 Ibid, p 100.

69 See e.g., Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Innovation', in *The Rate and Direction of Inventive Activity*: *Economic and Social Factors* National Bureau of Economic Research (eds) (Princeton University Press, 1962) 619; online available at http://www.nber.org/chapters/c2144.pdf

monopolist 'already has most of the business there is to get'.[70] To illustrate the truthfulness of the latter proposition, readers are invited to check the impressive list of Google's mergers and acquisitions.[71] The list challenges the widespread perception that a monopolist has a higher incentive to innovate than have smaller firms. Why could Google be bothered to buy smaller firms, if these were not innovative in the first place? The list of subsidiaries shows that the monopolist has obvious incentives and sufficient available finance to acquire anything that innovates or holds any intellectual or industrial property value. Nonetheless, 'Google has come up with many innovative products and services that have made a difference to our lives' and 'That's a good thing',[72] as EU Commission Vestager has recently recognised. Innovation is not the culprit of the proceedings; thus, it cannot serve as an effective justification for anti-competitive conduct. As a multi-national corporation, Google is a real textbook example of a monopolistic conglomerate.[73] For any readers now sympathising with Google – the good monopolist of our digital times, i.e., successful innovator, and owner of many other lesser known successful innovators and entrepreneurs - I may be excused by the fact that even Google itself has recognised its various vested interests as an 'Alphabet Inc.' conglomerate, having Google as its leading subsidiary. As Descartes once mentioned in his 'Principles of Philosophy', *Cogito ergo sum*, i.e., I think, therefore I am not Schumpeterian when it comes to trusting 'good' monopolists.

[70] For an excellent chapter on 'Innovation, Intellectual Property and the 'New Economy', see e.g. Andrew I Gavil, William E Kovacic, Jonathan B Baker & Joshua D Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (West Academic Publishing, 3rd ed, 2017) 1102.

[71] See CB Insights, 'The Google Acquisition Tracker', available at https://www.cbinsights.com/research-google-acquisitions.

[72] Press Release, n 3.

[73] For Google's acquisitions world in a picture see https://www.ovrdrv.com/wp-content/uploads/2015/02/vxcnj606.png.