

Designing Antitrust for the Digital Era

Evidence of exclusion and damages in digital markets

July 2019

INNOVATION IS OFTEN THE MAIN COMPETITIVE DRIVER IN DIGITAL MARKETS



- ▶ Low marginal costs to products and services allow firms to reach large amounts of consumers, as well as enjoy economies of scale and scope
- ▶ Platform markets: providing a similar product or service to an incumbent is unlikely to earn consumers because of network effects (direct and indirect)

- ▶ Offering new solution to consumers (**Innovation, differentiation and quality**) becomes the main driver behind competition → **Price competition plays a different role**
 - In the case of platform markets: the price strategy for one or more side of the market may be to provide service for no monetary cost (zero price)
 - “Non monetary prices” may be part of the equation (E.g. Barter between users and platforms: users provide data, platforms provide a service at no monetary price)

Impacts on consumer behavior and competition policy

HIGH INNOVATION RATE DEMANDS CAREFUL ANALYSIS

- ▶ Antitrust enforcement needs to adapt its analysis to digital markets, which are both innovation heavy and don't have price as an objective quantitative anchor for effects.
- ▶ Innovation can be disruptive or incremental – it is all about **generating value**
 - New products or business models
 - Improvements to existing products often shift the way consumers interact with the different alternatives in the market
- ▶ Deciding whether an innovation is anticompetitive is one of the main antitrust challenges of the Digital Age



“Antitrust authorities need to exercise special care in making enforcement decisions with respect to high-technology industries, starting with appreciation of the potential pitfalls of all regulatory schemes, including antitrust.”

Cass (2013)

Rule of Reason



Are there positive effects?



Is competition damaged?

“No Economic Sense”

Test: a conduct should be considered anticompetitive when it only makes economic sense if it restricts competition (WERDEN, 2005)

- Additionally, the conduct must have the potential effect of restricting competition



When dealing with predatory innovation, the “No Economic Sense” Test is the best alternative. For that reason, Herbert Hovenkamp proposes applying it to all cases of this kind.

(Schrepel,2018)

ASSESSING HARM

▶ **Competition in digital markets is driven by how users of different sides of the platform interact with the service**

- Differentiation as the main strategy to challenge incumbents
 - Perfect substitutability is unusual
 - Eyeballs: platforms often compete for the time of the user, even if they provide different services and functionalities (e.g. Youtube and Facebook)

▶ **Challenges to evaluate market power**

- Are competition boundaries horizontal, vertical or broader ecosystems?
- Dominant position may be transitory

▶ **Entry barriers**

- Network effects, scale and scope are entry barriers
 - Low switching costs and multi-homing may reduce these barriers

▶ **How to measure quality?**

- Consumer surplus: different dimensions

▶ **“Non-monetary price”**

- Subjective variable: more difficult to consumers to react in face of changes in relative “prices”

▶ **Can consumer be systematically misled?**

- Behavioral economics brings some highlights
 - Status quo, salience effects, impatience
- How bounded is rationality?

HOW TO EVALUATE DAMAGES?

- ▶ Without monetary price as the main variable for analysis and broadly defined relevant markets, quantitative methodologies become a challenge
 - Endogeneity
 - Omitted variable bias
 - What variables can/should be used?
- ▶ What should data show us to indicate harm to competition?
 - Incumbents losing “share” at the same time that the “dominant” firm is succeeding?
- ▶ New products and business models may cannibalize existing markets
 - Should antitrust law protect competitors? Should antitrust policy try to preserve market structure and the numbers of competitors as a proxy for competition?
 - Is market structure a barrier itself? Is a dominant position, by itself, evidence of damage? Does winner always take (or almost) all?
 - Should organic growth be understood as a form of creating artificial barriers to entry?



Potential Effects

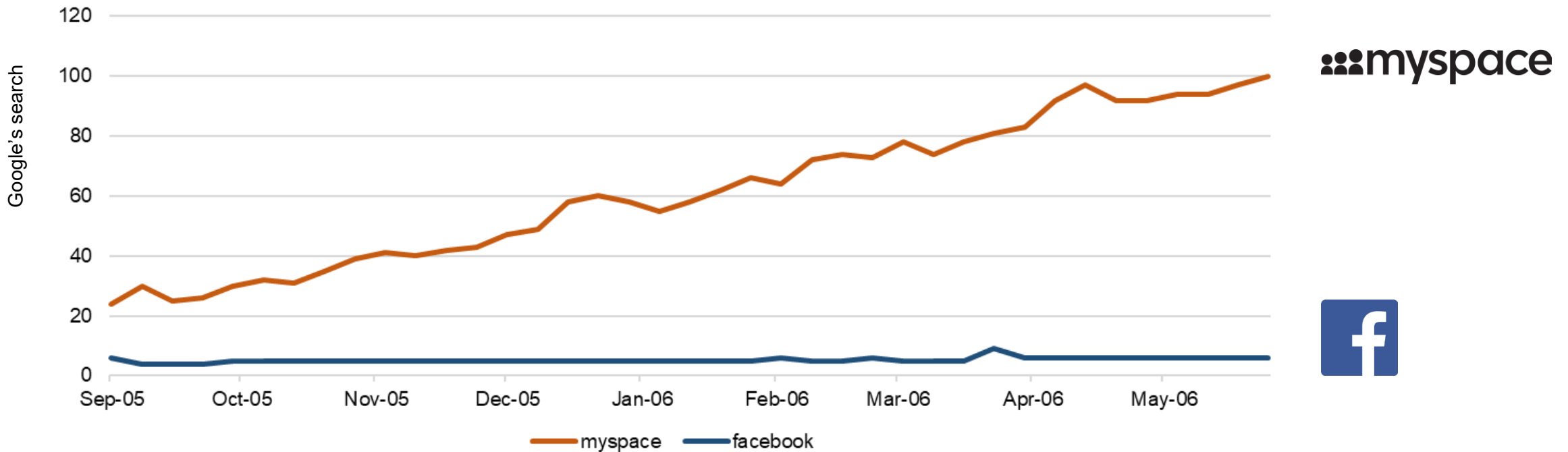
- Potential damages are often subjective or uncertain

Short term vs long term: diffuse and hard to measure effects

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. In the same way that you can't beat eBay by charging lower fees, MySpace won't be beaten by a feature-rich competitor.

Pete Cashmore, founder of Mashable (June 2006)

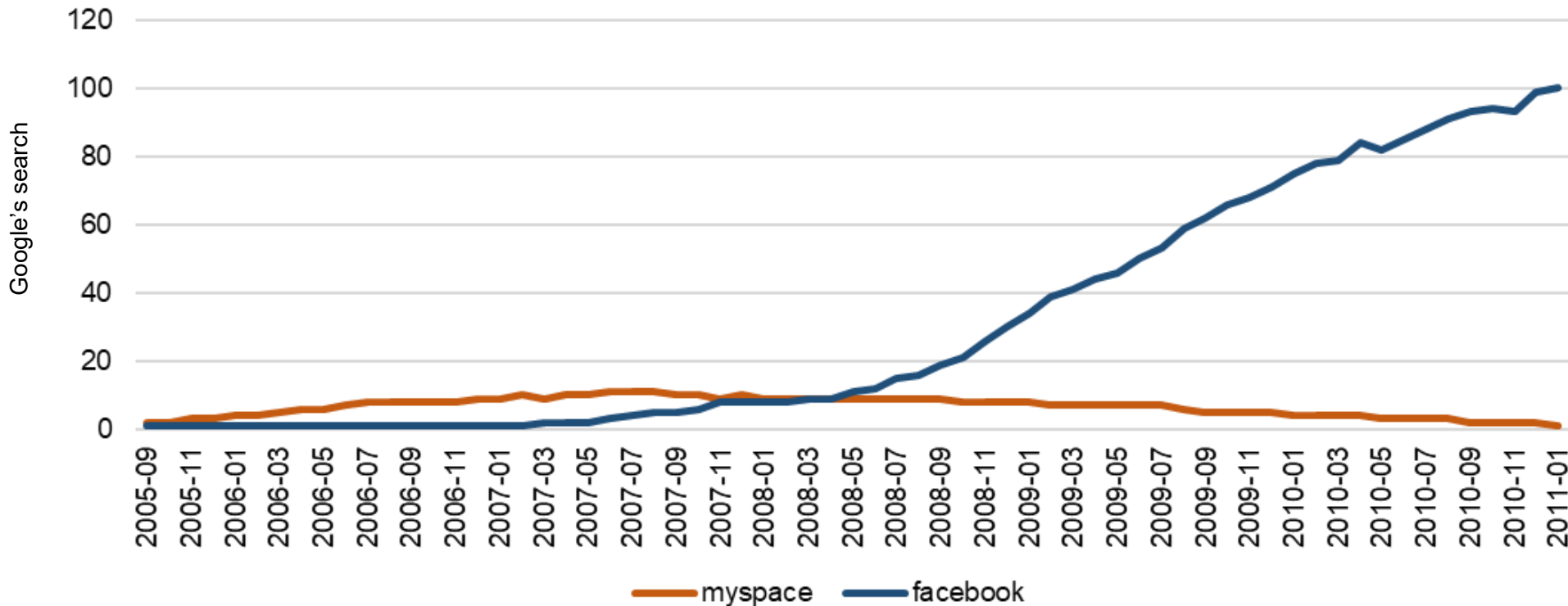
Google Trends: interest over time



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Final remarks

- ▶ Multi-sided platforms impose even more complexities for antitrust analysis
- ▶ Chances of False positive (convicting a procompetitive innovation) may create a negative marking and can undermine innovation path
- ▶ Higher standard of proof is required to assess antitrust concerns related to innovation
 - Similar standard of proof used for predatory price
- ▶ Some types of harm do not affect (only) competition and should not be addressed by competition policy (only)
 - Exploitation may be a competition issue AND/OR a consumer protection matter
 - The conduct may not depend on market power to represent and issue

THANK YOU!

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