

How Google and others upset competition analysis: disruptive innovation and European competition law



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Overview

- Disruptive innovation - framework for innovation in competition law analysis
- Question and starting point
- Disruptive innovation and restrictive agreements
- Disruptive innovation and merger review
- Disruptive innovation and abuse of dominance
- Way forward

Disruptive innovation

- Disruptive innovation
 - Introduction of new technology, displace of existing markets
 - Dynamic competition, competition ‘for’ - instead of - ‘in’ the market
- Framework for innovation in competition law analysis
 - US Antitrust
 - ‘Innovation markets’ (Gilbert & Sunshine) (1990s): merger review; R&D agreements; the 1995 Antitrust Guidelines for the Licensing of Intellectual Property
 - ‘Innovation competition’: The 2010 US Horizontal Merger Guidelines
 - EU competition law:
 - ‘Competition in innovation’: the 2011 EU Horizontal Guidelines

Question

- What challenges disruptive innovation presents for European competition law in the three pillars respectively in the regimes of restrictive agreements (Article 101 TFEU), mergers (EC Merger Regulation) and abuse of dominance (Article 102 TFEU)? *)

*) Starting point:

- ✓ Not arguing that disruptive innovation should get preference over sustaining innovation
- ✓ But: premise that disruptive innovation deserves more prominent place

Disruptive innovation and restrictive agreements

- Offer insights to take disruptive innovation into account
- The EU Horizontal Guidelines and R&D BER are notably important: crucial to equip competition law analysis with a tool in early phase of creating new products
- Standardization guidelines: forward-looking approach
- Technology Transfer (TT) Guidelines and TTBER: prevent use of licensing agreements to hinder the emergence of new products/ technologies

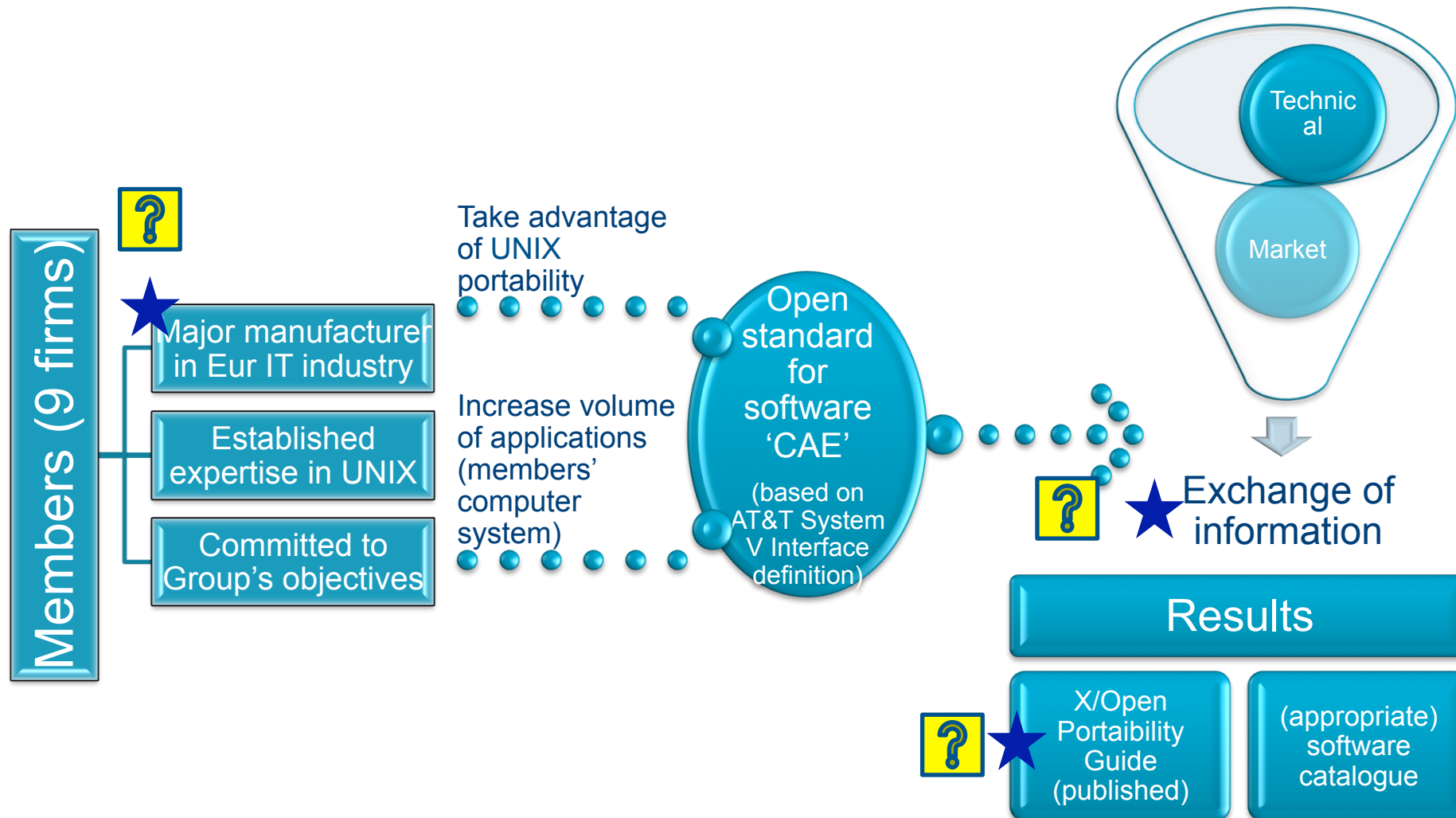
Example: how restrictive agreements may harm disruptive innovation?

- X/Open Group case (1986)



Problem in
standardization?

X/Open Group (Case (1986))



Excluding certain undertakings may increase the risk of bringing restrictive effects to competition in innovation

- No-infringement by *X/Open Group*
- Important point: non-members v members in standardization process
 - cannot influence the results
 - do not get the results related know-how & technical understanding
 - cannot implement the standard to offer NEW PRODUCTS before standard is publicly available (here: standardization # R&D agreements)
- Industry with considerable importance of lead time: appreciable competitive advantage on the members – may directly affect the market entry possibilities of non-members
 - May result in preventing the emergence of disruptive innovation

Disruptive innovation and merger review

- Test for compatibility: whether the concentration will *‘significantly impede effective competition in the common market [...] as a result of the creation or strengthening of a dominant position’*
- Market definition:
 - In US: concept of ‘innovation competition’ applied in merger review
 - In EU: ‘competition in innovation’ only used under Article 101 TFEU
 - R&D investments and specialized assets as relevant proxies
 - Market for the attention of the internet user

Disruptive innovation and merger review

- Dominance:
 - From market shares to potential competition?
 - General Court in *Cisco v. Commission*: ‘*large market shares may turn out to be ephemeral*’ in dynamic sectors
 - R&D investments or access to specialized assets
 - concentration of relevant know-how at one undertaking

Disruptive innovation and abuse of dominance

- Ex post analysis
- European Commission focuses on sustaining innovation in existing markets
 - *Microsoft* 2004: remedies adopted in PC operating system market
 - Ongoing *Google* case: focus is on market for search engines

Disruptive innovation and abuse of dominance

Policy choice in refusal to deal cases:

Scenario 1: access

Scenario 2: no access

Product of
dominant
firm



Comple-
ments

Product of
dominant
firm



Sub-
stitutes

Way forward

- Explicit recognition of innovation in the area of restrictive agreements (Article 101 TFEU)
- Approach of Article 101 TFEU could be followed in merger and abuse of dominance cases regarding market definition and dominance
- Disruptive innovation deserves more prominent place in competition analysis



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THANK YOU

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