

## ***Streetmap.EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch)***

**Julianne Morrison, Monckton Chambers**

***In a judgment handed down on 12 February 2016, the High Court dismissed a claim for abuse of dominance brought against Google Inc., Google Ireland Limited and Google UK Limited (“Google”) by online map provider Streetmap.EU. In doing so, the High Court held that where a pro-competitive innovation by a dominant company is alleged to have harmed competition on a related market, the effect on competition in that market must be serious or appreciable in order to constitute an abuse of dominance.***

All para references are to the Judgment unless otherwise stated.

### **The essential facts**

The case involved the interaction between two related multi-sided markets, namely: (a) the market for online general search engines (which search the whole of the internet for responses to a user’s search query); and (b) the market for online mapping services.

The products offered on the general search and the online mapping markets are free to users. Commercial entities operating on both markets are therefore largely dependent on advertising revenue. The more popular the website is amongst users (in terms of number of users and frequency of use) the greater the advertising revenue earned.

As is well-known, Google operates the most popular online general search engine in the world. In 2005, Google launched an online mapping product called “Google Maps”. Google Maps provides a free version of its map service to third party businesses. However, Google Maps also makes available a premium paid-for service and other services.

Streetmap is another online mapping service provider. The claimant in these proceedings is the successor of a company that went into liquidation in 2009. In the Judgment, Roth J. used the term “Streetmap” to refer to the claimant, its predecessor company and the online mapping service operating under that name. This case note does the same. For its income, Streetmap depends on: (a) selling advertising space on its service; and (b) supplying its mapping service to online

third party businesses so that they can provide a 'clickable' map link to their location or locations.

The visual display of results generated by a search engine is referred to as a search engine results page "**SERP**". The user can click through to his or her preferred search result using hyperlinks, referred to as "blue links". Online mapping providers can be found through general search engines, but their websites can also be directly entered by a user as a web address, 'bookmarked' as one of a user's favourite webpages or accessed through a link provided by a third party website.

General search engines compete on quality, including, *inter alia*, relevance and speed of results. Online mapping services compete on, *inter alia*, style, appearance, responsiveness to different types of queries and functionality (for example, the ability to drag the map around using the mouse or, more recently, touch screen movements). With respect to different types of queries, some online map providers can provide responses to queries such as "Indian restaurants in Birmingham" and not simply in response to, for example, a search for a specific post code or street name.

Originally, the Google SERP only provided a ranked list of "blue links" in response to a search query, which could include a link to a mapping provider or providers. Subsequently, Google introduced what it called a "OneBox": a box at the top of the first SERP filled with key information. Google started providing a Maps Onebox in the UK at some point in 2004. This box simply stated the address searched for, and then provided a choice of "blue links" to different mapping providers (i.e. Google Maps and competitors). Streetmap was not one of the listed providers - but it did not claim that this had put it at a disadvantage.

In June 2007, Google launched its new-style Maps OneBox (which had already been launched in the USA). The new Maps OneBox included, for the first time, the now very familiar clickable thumbnail map generated by the user's search. As with the old-style Maps OneBox, the new version is displayed as one of the top two results on the first SERP. The consequence of this was and is that the other search results generated by Google's algorithms, including a "blue link" to Streetmap's website where appropriate, are 'pushed' further down the page.

Over time, Google introduced a variety of new functionalities to its mapping service, which are made available via the Maps OneBox, including results responsive to queries such as "British Museum" and "Indian restaurants in Birmingham".

Streetmap was one of the first major providers of online mapping services in the UK. In 2007 to 2008, it was one of the three main competitors in the field. However, over time it was slow to introduce major technical developments or

improved functions that other providers, such as Google Maps, were making available to users (see, for example, para 23). By 2007, Google Maps was significantly more advanced in developing functionality and presented its own distinctive user interface (para 119).

### **The claim**

Streetmap alleged that, by displaying a clickable image of a thumbnail map, taken from Google Maps (i.e. the new Google Maps OneBox), at the top of its search engine results page in response to certain search queries, Google gave Google Maps an unfair advantage over other online map providers such as Streetmap, and thereby abused its (assumed) dominant position in the related market for online search. The essence of Streetmap's case was that Google's conduct on the market for general search engines had the actual or potential effect of foreclosing competitors of Google Maps in the market for online maps (see paras 62-63).

It is important to note that by the time of the trial, Streetmap had made clear that its case was not that Google should not have displayed a clickable thumbnail map on its SERP (para 55 ). It was accepted that provision of such a map was clearly of benefit to users. Instead, at the start of the trial Streetmap's argument was that the thumbnail map should not be exclusively or invariably drawn from Google Maps, and so it posited a variety of alternative ways of providing such a map or maps drawn from different mapping services. In response to Google's detailed objections to those alternatives, at the end of the trial Streetmap contended that as an alternative to providing only the Google Maps thumbnail, Google should have also provided a "blue link" to Streetmap and another mapping provider (*id*).

In the light of the arguments summarised above, Streetmap claimed that Google was in breach of Article 102 of the Treaty on the Functioning of the European Union and Chapter II of the Competition Act 1998.

### **Assuming dominance, was Google's behaviour abusive?**

The parties agreed by consent that the question of whether the conduct complained of constituted an abuse should be tried as a preliminary issue. For the purpose of determining that issue, the Court assumed that: (a) the markets for general search engines and online mapping services are separate (if related); and (b) Google is dominant in the market for online general search. Streetmap did not claim that Google, through Google Maps, held a dominant position in the online mapping services market during the relevant period.

As a result of the assumed position, the sub-issues which the Court had to determine were as follows:

- (a) Did Google intend to foreclose competition by introducing the new Google Maps OneBox? <sup>1</sup>
- (b) Did Streetmap have to establish an actual or only a potential effect on the market for online mapping services?
- (c) Does the effect have to be appreciable?
- (d) If the effect had to be appreciable, was it sufficiently serious or appreciable on the facts of this case?
- (e) Could Google objectively justify any abuse of its dominant position?

As Roth J. stated at para 84:

*“... The unusual and challenging feature of this case is that conduct which was pro-competitive in the market in which the undertaking is dominant is alleged to be abusive on the grounds of an alleged anti-competitive effect in a distinct market in which it is not dominant...”*

It was against this unusual background that the sub-issues listed above fell to be considered. As discussed further below, the sub-issue of particular interest to competition lawyers and companies operating in multiple markets is (c), i.e., the question of whether a de minimis threshold had to be met.

## **The Judgment**

### *Intention*

Streetmap relied on certain internal Google documents from 2006 to 2007 as demonstrating that one of Google's deliberate purposes in introducing the new-style Maps OneBox was to boost Google Maps at the expense of its online mapping competitors, i.e. they showed intent to foreclose competition. Having considered the documents in detail, Roth J. rejected that submission. He concluded that Google's main purpose in introducing the new-style Maps OneBox was to improve its general search engine by remedying its perceived deficiencies when compared with the services offered by Google's competitors in that market (see paras 67-81). While Google expected the introduction of the

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<sup>1</sup> It was common ground between the parties that while it was not necessary for the claimant to prove such an intent as abuse is an objective concept, it was a relevant factor to be taken into account, see para 66.

new-style Maps OneBox to increase 'traffic' to its Google Maps site, it was not the goal of introducing this pro-competitive feature to its online search engine (see para 82).

*Effect: the test*

Actual vs potential effect

Roth J. identified the relevant test as being whether the impugned conduct was reasonably likely to harm the competitive structure of the market (Streetmap accepted that the mere possibility of foreclosure would not be sufficient) (para 88). Accordingly, Streetmap did not need to prove an actual effect. However, in assessing the likely impact of the impugned conduct Roth J. made clear that a highly relevant factor would be whether the evidence showed it had in fact had an actual anti-competitive effect (paras 89-90).

Appreciability

The key legal question that had to be determined in this case was whether a de minimis threshold or an appreciability test applied. In *Hoffmann-Law Roche v Commission*, 85/76, EU:C:1979:36 the ECJ stated (para 123):

*"... since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of Article [102] any further weakening of the structure of competition may constitute an abuse of dominant position."*

This passage was relied on by the ECJ in Case C-23/14 *Post Danmark II*, EU:C:2015:651 in which the Court stated:

*"70 As regards... the serious or appreciable nature of anti-competitive effect, although it is true that a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned..., the conduct of such an undertaking may give rise to an abuse of its dominant position because the structure of the market has already been weakened..."*

*72..., since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may constitute an abuse of a dominant position [...]*

*73 It follows that fixing an appreciability (de minimis) threshold for the*

*purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition or even eliminating competition on the market on which the undertaking concerned operates.*

*74 It follows from the foregoing considerations that Article [102] must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking must be probable, there being no need to show that it is of a serious or appreciable nature.”*

Relying on these authorities, Streetmap submitted that it did not need to show that the likely anti-competitive effect of the impugned conduct was of a serious or appreciable nature (para 92). Roth J. rejected that submission at paras 95-97 for the following reasons.

Roth J. distinguished the facts considered by the ECJ in *Hoffmann-La Roche* and *Post Danmark II* from those at issue in respect of Streetmap’s claim on the basis that the ECJ cases involved conduct by the dominant undertaking on the market where it was dominant (para 95). This feature underpinned the ECJ’s reasoning in *Hoffmann-La Roche* and *Post Danmark II* that no appreciable effect had to be shown because the relevant market was already weakened by the presence of the dominant undertaking (id). Having drawn this key distinction, Roth J. concluded (para 96):

*“... it does not follow that conduct will constitute an abuse where the effect is on a separate market where the undertaking is not dominant, if that effect is not serious or appreciable. On the contrary, it must always be borne in mind that the purpose of competition law is to prevent arrangements or practices which distort competition and to safeguard the interests of consumers. That applies no less to Article 102 than to Article 101: see the observations of Jacobs AG in Case C-7/97 Bronner v Mediaprint, EU:C:1998:264, at para 58. And in the jurisprudence under Article 101, it is well-established that an agreement or arrangement will not be prohibited unless it may have an appreciable effect. That is logical, since for Article 101 to be engaged there is no requirement of dominance.”*

In Roth J’s view it would be “perverse” to find that pro-competitive conduct by a dominant undertaking on the market where it is dominant contravenes competition law because: “it may have a non-appreciable effect on a related market where competition is not otherwise weakened” (para 98). Accordingly, for Google’s conduct to be abusive it had to be reasonably likely to have a serious or appreciable effect on competition in the related market for online mapping services.

### *Effect: application*

Roth J. concluded that it was not reasonably likely that the introduction of the new-style Maps OneBox had a serious or appreciable effect on competition in the market for online mapping services (see paras 99 to 141).

In reaching this conclusion, Roth J. acknowledged that he had found this aspect of the case to be the most difficult (para 99). He rejected Google's arguments that the introduction of the new-style Maps OneBox had no effect on competition and that the "presentation bias" afforded to Google Maps by being returned as one of the top entries on the SERP reflected its superior service (and consequentially the higher trust placed in it by its users) (paras 102-105). However, Roth J. found that any effect of the new-style Maps OneBox was not appreciable for, in summary, the following reasons (see paras 107-141):

- (a) the evidence available from the USA did not show that the new-style Maps OneBox had an appreciable effect in diverting users away from other online map services; and
- (b) the evidence available from the UK did not show that the introduction of the new-style Maps OneBox taken custom away from Streetmap. Instead, the relative success of Google Maps when compared with competitors such as Streetmap was "*equally explicable on the basis of features of Google Maps that attracted users: i.e., competition on the merits*" (para 116). From its launch onwards, Google had introduced new technical features which improved its service, including, for example, the ability to search for places such as the "British Museum" or "Indian restaurants in Birmingham" (see paras 117 and 137). By contrast, Roth J. found that there was significant evidence that Streetmap was deficient or lagging behind in the functions it offered (para 118). Any decline in Streetmap's usage was also likely to reflect its loss of business supplying mapping services to third party businesses because Google Maps offered a free service (para 138).

As he noted at para 141, Roth J.'s conclusion that it was not reasonably likely that the introduction of the new-style Maps OneBox had an effect on competition was sufficient to dispose of the allegation of abuse – and therefore Streetmap's claim. However, he went on to consider the sub-issue of objective justification.

### *Objective justification*

The burden of justification rested on Google. Recognising that the full scope of objective justification has not been conclusively determined, Roth J. focused on the following two, in his view, clear aspects of that concept (paras 143-146):

(a) the dominant undertaking may show that any exclusionary effect is counter-balanced or outweighed by advantages that also benefit consumers. Those benefits are not limited to economic considerations such as price, but also include technical or quality improvements; and

(b) the conduct in question must be proportionate in that there are no less anti-competitive alternatives capable of producing the same efficiencies. At para 149, Roth J. reasoned that where the efficiency obtained is a technical improvement, proportionality does not require the adoption of an alternative that is much less efficient in terms of greatly increased cost or which imposes an unreasonable burden (at the very least in a case where there is no suggestion that the conduct impugned was likely to eliminate competition).

Given that Streetmap accepted that the introduction of the inclusion of the thumbnail map in the new-style One-Box was a technical improvement of benefit to consumers, the focus of the case was on the proportionality question, namely: was there a less distortive alternative available that could provide the same benefits as the new-style OneBox without imposing an unreasonable and impractical burden on Google.

As noted above, Streetmap's case on alternatives shifted from arguing that there were ways in which thumbnail maps from alternative providers could have displayed or selected – to arguing at the end of the trial that “blue links” could have been provided to such providers mapping services (see also paras 151-154). While Roth J. permitted Streetmap to rely on what he referred to as the “Links Alternative”, the inclusion of “blue links”, he concluded that it was not an effective and viable alternative because. This was because, inter alia, the Links Alternative imposed a significant and impractical burden on Google because of the need to access and present links from various competitors across Europe that offered different levels of coverage and technical service/functional capabilities (paras 154-159).

At paras 162-175, Roth J. considered the other alternatives originally put forward by Streetmap, which were never abandoned but did not remain at the forefront of its case. He again concluded that the suggested alternatives were impractical and overly burdensome because, inter alia, of the delay caused to displaying the SERP through generating the different thumbnail maps and/or the complex technical steps Google would need to take in order to provide thumbnail maps from other sites with different levels of coverage and technical/functional capabilities.

Accordingly, Google was not obliged to implement any of the alternatives put forward by Streetmap in order to objectively justify any effect of its new-style Maps OneBox on competition in the market for online maps.

## The use of 'hot-tubbing' of the economic experts

A further notable feature of the trial of the abuse issue was the Court's use of a so-called 'hot-tub' for the joint presentation and scrutiny of the economic experts' oral evidence. As Roth J. noted in his judgment, this is believed to have been the first time a court hearing a competition claim has used a 'hot-tub'.

The term 'hot-tubbing' is used to refer to the provision of concurrent expert evidence (see paragraph 11 of Practice Direction 35 to the Civil Procedure Rules). The use of 'hot-tubbing' allows the experts to discuss the issues under the direction and control of the court. Instead of one party's expert giving evidence and then being cross-examined on it consecutively, which may be many weeks apart at hearings of substantial competition claims, the experts are sworn in at the same time and questioned by first the judge and then counsel for the parties. This means that the court can focus on narrowing the areas of dispute it has to determine and make sure that it obtains the assistance it needs from the experts in order to determine the issues before it.

In the Judgment, Roth J. noted that the use of a 'hot-tub' involved considerable preparation by the Court and effectively requires a transcript to be obtained by the parties (para 47). However, he also observed that the use of the 'hot-tub' led to a constructive exchange which considerably shortened the time taken by the economic evidence at trial (*id*). The impression given by the Judgment is that the 'hot-tub' process proved beneficial.

### Comment

#### *Substance*

At paras 2-3, Roth J. referred to the profound effect the internet has had on the way in which goods and services are offered to the public and the challenge this presents for the application of competition law. His judgment is an important example of how the Courts will grapple with the particular features of rapidly developing online markets in applying the concept of an abuse of dominance. But the significance of this judgment is much wider.

This is the first time a court has considered whether an appreciability threshold applies to an abuse of dominance claim where the alleged anti-competitive effect was felt on a separate but related market to that in which the defendant is dominant. This conclusion is not only relevant to inter-related markets online. It is relevant to the application of competition law to the activities of any dominant undertaking operating across multiple separate but related markets. Roth J's conclusion on the substance of the point seems correct. The opposite conclusion would amount to penalising dominant undertakings simply for being dominant

(contrary to the reasoning of the CJEU in *Post Danmark II*, quoted above). Such a broad application of Article 102 would, as Roth J. recognised, also have the absurd potential impact of discouraging pro-competitive behaviour on the market weakened by the existence of a dominant undertaking.

This Judgment is also notable as a case where a Court has held that an abuse of dominance was not only not made out because of lack of appreciable effects on competition, but also objectively justified. Successful objective justification cases are rare. In Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (“Syfait”) and Others v GlaxoSmithKline plc and another*, Jacobs AG considered a preliminary reference from the Greek Competition Commission requesting a ruling on the question of whether (and in what circumstances) a dominant pharmaceutical company may refuse to meet in full orders it receives from wholesalers in order to limit parallel trade. To the extent that this conduct gave rise to a *prima facie* abuse of Article 102, Jacobs AG found that it was capable of objective justification due to the particular special features of the pharmaceutical market, including, *inter alia*, the fact that the market is subject to pervasive regulation. However, the ECJ held that it had no jurisdiction to answer the questions referred.

Roth J. refused permission to appeal.

### *Procedure: ‘Hot-tubbing’*

It remains to be seen whether Roth J.’s use of ‘hot-tubbing’ will set a precedent for the use of that process in other future competition cases.

It is clear from the judgment that Roth J. found the process to be both beneficial and time-saving. At the same time, however, Roth J. observed in the judgment that the process imposes a considerable burden on the Court. Courts may not be willing or able to shoulder this burden in all competition cases, especially when the trial involves evidence from a number of experts covering a variety of different fields. Parties may also prefer traditional cross-examination to exposing their expert to direct comparison with his or her counterpart. However, the positive use of ‘hot-tubbing’ of the economic experts in this case should encourage parties and the courts alike to give early, and on-going, consideration to using this process for some or all of the expert evidence.

*Google was represented by Jon Turner QC, Josh Holmes and Ben Lask.*

*The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.*