

Agenda

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Funda-mentals of Article 102: a dominant platform, but no abuse

In March 2018 the Court of Amsterdam issued a verdict in a long-running abuse of dominance case involving funda, the largest property website in the Netherlands. The Court found funda to be dominant, but did not consider the company’s discriminatory listing of rival estate agents to be distortive of competition. Dr Gunnar Niels, Partner at Oxera and court expert in the case, describes how this makes for an interesting comparison with *Google Shopping* and other competition cases

The case was *Rechtbank Amsterdam, VBO Makelaar v. Funda en NVM*, ECLI:NL:RBAMS:2018:1654, judgment of 21 March 2018. This article is based on information in the judgment and in the public domain, and the views expressed do not represent those of the Court of Amsterdam. Professor Jan Bouckaert, University of Antwerp, who also acted as a court-appointed expert, is now an Associate at Oxera, but was not at the time of the expert assignment for the court. The third expert was Professor Eric van Damme of Tilburg University.

Funda (www.funda.nl) has for many years been the go-to search platform for residential properties in the Netherlands, with 40m visitors per month (Netherlands population = 17m).¹ The company is majority-owned by NVM, a trade association representing approximately 60% of estate agents in the Netherlands. It is well known that funda attracts many ‘recreational visitors’ (*pretbezoekers*)—i.e. those who are not looking to buy a house but are surfing the site for fun. Funda’s number of visitors is four to six times greater than those of its nearest rivals, JAAP.NL and Huislijn.nl.

This market structure, where one property portal is clearly prevalent, is not uncommon in online platform markets, and owes a great deal to two-sided network effects: the more attractive the platform is to one side of the market—prospective housebuyers visiting the site—the more valuable it becomes to the other side—house sellers listing their properties on the site (or, to be precise, estate agents advertising properties on behalf of sellers). If such network effects are strong, they may result in the market ‘tipping’ towards one prevalent platform.

However, this does not occur in all online platform markets. For example, in the UK two major online property portals (Zoopla and Rightmove) compete with each other. The entry of a third, OnTheMarket.com, raised competition issues that were ruled upon by the Competition Appeal Tribunal in 2017²). In other platform markets, such as hotel bookings and price comparison

websites for financial and utility services, there are also often multiple competing platforms.

A lower ranking

VBO, a smaller trade association (representing around 1,000 estate agents compared with NVM’s 4,000) has long complained about discriminatory treatment of its listings on funda. The website allows listings of NVM, VBO and other estate agents, but does not treat them all equally (or did not until the end of 2016, when it changed the way it displayed search results). Following a search by a prospective housebuyer, the default results page on funda first displays all the properties listed by NVM estate agents, and only then (often a few pages down) the properties listed by estate agents affiliated with VBO or other trade associations. VBO argued that this lower ranking in the search results distorted competition in the underlying estate agent market, by favouring NVM members to the detriment of its own members.

Parallels with the *Google Shopping* case immediately spring to mind. In June 2017 the European Commission imposed a €2.42bn fine on Google for abusing its dominant position in general online search services.³ Google displayed its own comparison shopping service more favourably in search results than rival comparison shopping services. This demotion of the rivals in the listings was found to have lowered their traffic from Google’s general results pages. The Commission

concluded that this practice was likely to have anticompetitive effects in the markets for comparison shopping and general search services.

In 2012 the Dutch competition authority (then the NMa, now the ACM) reviewed the property search market, but the case that we focus on in this article was brought through a private action before the Court of Amsterdam in the same year.⁴ In its interim judgment issued in 2015, the court set out the economic questions for the assessment of abuse of dominance, and decided to appoint court experts to help it answer these questions.⁵ Three experts were appointed (Dr Gunnar Niels, Professor Jan Bouckaert and Professor Eric van Damme) to look specifically at the market definition and the potential dominance of funda.

A dominant platform...

In its conclusions on market definition and dominance, the court fully followed the experts' analysis. As funda was a 'two-sided' platform—bringing together prospective housebuyers and house sellers—the experts considered potential substitutes and competitive constraints on both sides, and also the interaction between the two sides. The experts assessed the market in which funda was active, and the downstream markets for estate agent services where competition was alleged to have been distorted due to funda's action of favouring one set of estate agents over another.

On the seller side, estate agents have access to multiple channels to advertise their properties: national property search websites (including funda, JAAP.NL and Huislijn.nl), regional websites, their own websites, other online platforms and social media not dedicated solely to property, and offline channels such as for-sale signs and local newspapers. There was evidence that estate agents mostly view these channels as complementary and tend to use several of them (i.e. estate agents 'multi-home' across various channels). Survey evidence also indicated that prospective housebuyers normally search online in the initial phase, as they wish to have a comprehensive overview of all the offerings in their target neighbourhood.

The court agreed with the experts that the relevant market was that for property websites advertising houses for sale by private sellers. Other (non-dedicated) online channels and offline channels are excluded from this market. This market definition corresponds to that followed by a number of national competition authorities, including those in Denmark, Lithuania, Sweden and the UK.⁶

Within this market, the court found funda to be dominant:

The experts have concluded that Funda Real Estate has a dominant position in the relevant market for property websites in the Netherlands. This conclusion holds for the entire period from 1 July 2009 until the

date of the expert report, 6 January 2017...The experts conclude that the particularly strong position of funda.nl relative to other property sites, and the significant barriers to entry in the market for property sites in the Netherlands, allow Funda Real Estate to behave to a significant extent independently and to distort competition in the related market for estate agent services. Individual estate agents cannot bypass funda.nl, given the high importance that those looking for a house attach to funda.nl. Funda Real Estate therefore has a dominant position, regardless of whether it has actually distorted competition between estate agents. For the latter, the experts did not find any indications.⁷

In coming to this conclusion, the experts relied on a range of indicators of funda's relative market position both on the side of estate agents and on the side of prospective housebuyers. Market shares alone—such as the number of unique visitors—may not be sufficiently informative, given the two-sided nature of the platform and the practical difficulties of measuring market shares. It was therefore considered preferable to assess a range of indicators, from various surveys and market data sources (most of which are confidential).

The evidence showed that estate agents placed greater importance on funda than on the other online channels. A survey indicated that 87% of house sellers (on whose behalf the estate agents act) considered advertising their property on funda to be very important, while for JAAP.NL this was 46%.⁸ Housebuyers also use funda much more extensively than any other property site. As noted above, funda has four to six times more unique visitors than its closest rivals. The survey showed that 87% of housebuyers searched primarily on funda (compared with 3% on JAAP.NL and 1% on Huislijn.nl), and that funda had a brand name recognition of 93%, compared with 64% for JAAP.NL and 19% for Huislijn.nl.⁹

In addition, the experts found that there were high barriers to entry. Setting up a housing website is not difficult, but attracting a critical mass of users on both sides is, especially given funda's established market position and its ownership link with NVM, which represents 60% of estate agents in the Netherlands. JAAP.NL has not gained much traction in the market since its entry in 2009. Many property websites in the Netherlands in fact act as referrers to funda (i.e. users can search properties on the site, but when they click on them they are directed to funda), and are therefore not direct competitors

...but no abuse

While the court found that funda was dominant, it rejected the allegation that funda had abused its dominant position by favouring the listings of NVM estate agents over those of VBO estate agents. Referring to EU case law—including *British Airways* (2007)

and the recent *MEO* case (2018)¹⁰—the court stated that discrimination by a dominant company was not prohibited as such, but rather needed to be assessed in terms of its likely effect on competition.

In reaching this conclusion, the court placed weight on the quantitative analysis carried out by the experts in the context of their dominance analysis, which found no indications of distortive effects in the downstream market:

Based on data analysis, the experts subsequently found that there is no reason to conclude that the disadvantageous positioning on funda.nl had a negative effect on the estate agents of VBO and VastgoedPRO. Their market shares have not decreased since 2009, and in a province such as Zeeland they are strong players. Finally, the experts conclude that, in relation to (the speed of) house sales, NVM estate agents perform better on average at the national level (a statistically significant difference). However, there are also provinces, and certain time periods, where VBO estate agents in fact performed better. In all, they conclude that the effects analysis does not generate any clear-cut indications that the disadvantageous positioning on funda.nl has had an effect on the competitive position of NVM estate agents relative to non-NVM estate agents.¹¹

This rejection of the abuse claim by the court represents an important difference with the *Google Shopping* case, which also concerned a dominant platform and the demotion of rivals in search results, but where an abuse was found. In that case, the European Commission considered that a lower listing in Google search results had a negative effect on competitors. One reason why no clear effect was found in the *Funda* case may be that buying a house is not comparable to buying running shoes or garden furniture online, for example. People are likely to invest significant time in searching for property and wish to have a comprehensive overview of the available options.

It comes with a hot tub

The Court of Amsterdam judgment in the *Funda* case is an important development at a time when online platforms are coming under increasing scrutiny by competition authorities and policymakers around the world. The judgment is an example of an effects-based approach to complaints about abusive behaviour by dominant platforms. Behaviour that is discriminatory is considered to be anticompetitive only if it is likely to result in significant distortions to competition.

In this case the court relied on the findings by the economic experts whom it had appointed. The court was satisfied that the experts' analysis was well founded, and that they had adequately addressed the criticisms by the parties in their final report.¹² The parties had provided data to the experts following an information request, and the experts shared a draft version of their report for comment by the parties.

One feature of the process was that the court-appointed experts organised a hearing with the economic advisers acting for the two parties—a form of expert hot tub. Both parties had submitted their own economic expert reports. During this hearing, the party experts had the opportunity to explain their analysis and respond to the analysis by the opposing side. The court experts had the opportunity to ask questions. This process ensured that the economic evidence on all sides was shared and understood, and given its due weight in the overall case.

Whether through hot tubs or other means, having a dialogue between the experts on all sides seems advisable in any court case with complex economic questions.

Gunnar Niels

¹ See funda, 'Over funda', <https://bit.ly/2zzuz8P>. The number of unique visitors per month is estimated at around 3.2m (i.e. many individuals visit the site multiple times).

² *Agents' Mutual Limited v Gascoigne Hailman Limited*, [2017] CAT 15, judgment of 5 July 2017.

³ European Commission (2017), 'Commission Decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area', Case AT.39740, <https://bit.ly/2CDzUKN>. See also Oxera (2018), 'The Google case: shop till you drop (off the screen)', *Agenda*, March, <https://bit.ly/2NHfK1n>.

⁴ Nederlandse Mededingingsautoriteit (2012), 'Marktscan woningmakelaardij', March.

⁵ *Rechtbank Amsterdam, VBO Makelaar v. Funda en NVM*, ECLI:NL:RBAMS:2015:897, judgment of 25 February 2015.

⁶ Konkurrence- og Forbrugerstyrelsen (2012), 'Konkurrencebegrænsende samordning i ejendomsmaeglerbranche', 4/0120-0204-0259, 25 January, <https://bit.ly/2xH2HOB>; Lietuvos Respublikos Konkurencijos Taryba (2016), 'Dėl atsisakymo duoti leidimą vykdyti koncentraciją AS Eesti Meedia netiesiogiai per OÜ Classify įsigijus 100 proc. bendrovės Allepal OÜ akcijų', 1S-59/2016, 6 May, <https://bit.ly/2zyZvWR>; Konkurrentensverket (2016), 'Blocket köper inte Hemnet', pressmeddelande, 7 July, <https://bit.ly/2R0dKdL>; Office of Fair Trading (2012), 'Anticipated merger between The Digital Property Group Limited and Zoopla Limited', ME/5233/11, April.

⁷ Rechtbank Amsterdam, *VBO Makelaar v. Funda en NVM*, ECLI:NL:RBAMS:2018:1654, judgment of 21 March 2018, para. 2.6.2. Informal translation by the author.

⁸ This was from a survey commissioned during the NMa review referred to above. Rapportage Blauw Research (2011), 'Concurrentie op de markt voor makelaardij – het gedrag van consumenten in kaart gebracht', November.

⁹ Rapportage Blauw Research (2011), 'Concurrentie op de markt voor makelaardij – het gedrag van consumenten in kaart gebracht', November.

¹⁰ CJEU (2007), *British Airways v Commission*, Judgment of the Court (Third Chamber), Case C-95/04 P, 15 March, <https://bit.ly/2zy3P8B>; CJEU (2018), *MEO v Autoridade da Concorrência*, Judgment of the Court (Second Chamber), Case C-525/16, 19 April, <https://bit.ly/2QZT2Lj>. The court referred to Advocate-General opinion in the *MEO* case, as the final judgment was not published at the time. See also Oxera (2018), 'Discrimination or differentiation? Price discrimination as an abuse of dominance', *Agenda*, May, <https://bit.ly/2zyRukF>.

¹¹ *Rechtbank Amsterdam, VBO Makelaar v. Funda en NVM*, ECLI:NL:RBAMS:2018:1654, judgment of 21 March 2018, para. 2.17. Informal translation by the author.

¹² *Rechtbank Amsterdam, VBO Makelaar v. Funda en NVM*, ECLI:NL:RBAMS:2018:1654, judgment of 21 March 2018, para. 2.7.1.