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Digital disruption of competition law: Rethinking market definition

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Market definition has always been instrumental in competition analyses. Defining the market determines the precise parameters within which competition risks arising from particular conduct are to be assessed. In this respect, it is important to note that market definition is not an end in itself, but merely a tool to assist in assessing and identifying the potential competition risks arising from a competitor's conduct in a market. For example, the Australian Competition and Consumer Commission's (**ACCC**) merger guidelines further clarify that market definition assists in identifying and understanding theories of harm associated with a merger, by establishing the relevant 'field of inquiry.' This allows measurement of substitution effects and cross-price elasticities. Accordingly, market definition is inherent to the assessment of competitive effects.

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Traditional economic tools need to account for the new digital currency: User data

However, the digital sector's disruption has also extended into the realm of competition law and policy. Specifically, in the digital space, different interdependent markets may be inextricably linked in such a way, which results in a distorted view of what constitutes the relevant field of enquiry. This may in turn adversely impact and dilute the traditional notion of competition analysis, as informed by, for example, section 50 of the *Competition and Consumer Act 2010* (Cth), which requires an examination of the competitive impact of a proposed merger on markets relevant to the proposed transaction.

For example, a social media platform may cater to both businesses and individuals (the end-users). Whilst the individuals are able to use the platform for free (i.e. at zero price), the businesses pay a fee to be able to access data relating to those individuals (e.g. to allow them to target particular demographics). As such, the value to businesses of utilising the platform is directly linked to the number of individuals using the platform. In this example, one possible market definition might be for access to end-users (or at the very least, their data). That is, consumer data is effectively the product being paid for. However, how would one define the market engaged in by the end-users where they are not paying a fee to access a particular product? Is this limited to functional considerations (e.g. operating systems on mobile devices), or should some other means of defining the market be implemented? This is particularly the case in the context of mergers, where the merging parties are nascent competitors, including with respect to concerns around killer or 'creeping' acquisitions. In this respect, whilst the acquisitions themselves do not necessarily trigger regulatory scrutiny, uncertainty around the competitive effects of the proposed transaction may also stem from the fact that the competitive overlap between the merging parties is unclear. That is, it is not clear what the appropriate market definition is and therefore it is difficult to identify what anticompetitive risks might manifest.

Price has traditionally been a key component of economic analysis, particularly in relation to market definition. For example, the Small Significant Non-transitory Increase in Price (**SSNIP**) test relies on pricing data to assist in determining the boundaries of a market (i.e. to what degree can competitors increase the price of a product without experiencing demand- or supply-side substitution?). However, in the digital sector, the role of 'price' in defining the market has largely become obsolete where markets often involve zero-price products.

The emphasis, rather, is on user data; this being a key currency in the digital sector. As such, instead of paying a fee to use a social media platform, users would offer up personal data, such as their age, gender, location, marital status, ethnicity, etc. This information is of particular value to businesses on the other side of the platform, as it will allow them to more effectively access their target customer base (for example, by creating more targeted advertisements). This is a key driver underlying a number of acquisitions in the digital space, as having access to larger datasets (as well as supplementing current datasets), is proving to be a significant competitive advantage in the digital space.

This concern is recognised in a number of jurisdictions, including in the European Union, which published the *Digital Markets Act* in late 2020 in an attempt to effectively 'level the playing field' by regulating gatekeeper platforms (such as Google and Facebook), being companies that have access to vast depositories of user data.

As such, it is important to recognise that in the digital space, companies offering zero-price products tend to compete on the quality of their product offerings, such quality often being contingent on having access to larger sets of user data. It is therefore appropriate to consider alternate tools to define markets.

Alternate market definition tools

Alternate methods of market definition exist however, and may be more relevant in the context of digital market definition. Such methods involve:

- identifying substitutes (i.e. traditionally referred to as the 'product market'), which can extend to functionality considerations, meaning that products can be deemed interchangeable where their respective functions are broadly similar (e.g. iOS and Android operating systems) – ultimately, this is informed by consumers switching behaviour between products;
- considering the geographic area within which the firm competes (i.e. the 'geographic market'), which can be impacted by users of a multi-sided platform (e.g. businesses might only be interested in users within a particular country, thereby limiting the geographic market to that country);

Ultimately, a key factor when defining markets is the evidence available with respect to qualitative and functional differences in products.

Do market definition tools require an overhaul in the digital context?

While market definition tools such as the SSNIP test may not always be applicable to digital markets (i.e. where there is a zero-price), the notion of market definition is not obsolete in itself, and may simply require that traditional tools be updated. For example, the pricing aspect of the SSNIP test might be replaced with aspects relating to product quality (small but non-transitory increase in quality) or non-currency (such as personal data). Whilst the efficacy of such analyses might be challenging, at least initially, accessing such data should not be problematic as sophisticated players in the digital space can be expected to already be in possession of such information.

Accordingly, market definition is still relevant, and crucial, to facilitate effective competition analysis of conduct in the digital space. However the way in which the market is defined may require reconsideration. Some other form of value may need to be considered, as noted above, which would allow for variations of traditional tools, such as the SSNIP test, to be applied in the context of conduct in the digital space. Given the fluidity of digital markets, identifying anticompetitive concerns and their associated risk profiles becomes increasingly difficult. In this respect, it is important to remember that the purpose of competition laws and policy is to both capture and deter conduct that may have anticompetitive consequences.

Resultantly, aspects concerning market definition raise important policy considerations around where the line should be drawn to effectively mitigate against anticompetitive conduct, whilst also being mindful of the commercial objective of the parties engaged in such conduct.

Accordingly, it will be interesting to see how competition policy adapts to the rapidly evolving digital sector, and how competition authorities will define markets in the digital space going forward. Given effectively regulating the digital sector is considered to be an area of high priority by regulators such as the US Federal Trade Commission and Department of Justice, the European Commission, and the ACCC, it can be expected that the way in which competition risks will be assessed may be updated to address the 'modernisation' of digital markets. Indeed, the ACCC, as part of the re-enlivened discussion around merger reform, has proposed that digital mergers be considered under a unique lens that is distinct from mergers involving brick and mortar businesses. Until such changes are effected in competition regimes and adopted by competition authorities, however, the competitive effects of digital transactions can be expected to remain opaque.

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