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The Evolving Concept of Market Power in the Digital Economy – Note by BIAC

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1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to comment on the assessment of market power in digital markets. The digital economy is all encompassing. The digital economy spans from online retail to real estate listings to concert tickets to travel booking to social media. Consequently, there is not a universally defined digital market. While digital markets are dynamic and evolving, as many markets are, digital market innovations in some segments are not as groundbreaking as they once were. In a similar manner, prominent digital market characteristics are not unique to digital markets. Print newspapers are multi-sided markets. Broadcast radio is zero-price. Just as competition authorities were well equipped to assess market power in these traditional markets, they remain well equipped to assess market power in digital markets. Traditional market power concepts are not static, but rather flexible concepts that can be applied across industries, new and old.

2. Even so, BIAC understands that competition authorities may wish to consider how to better measure market power in digital markets. Such considerations should factor in legal certainty and enforcement predictability, so as not to chill innovation and development efforts, and to engage with market participants before taking action. Legal and evidentiary standards should remain high and the burden of proof should remain with the enforcement agencies when assessing market power in digital markets, especially when novel theories of market power or harm to competition are being proposed or applied.[1] Given the blurry nature of digital markets and the variety of digital platforms, BIAC cautions against "one size fits all" approaches, including the use of default thresholds for creating presumptions, in determining market power whenever a digital market, regardless of precise structure, could arguably be implicated.

3. This submission adds to BIAC's previous contributions on similar topics, including ex-ante regulation and competition in digital markets,[2] abuse of dominance in digital markets,[3] consumer data rights and impact of competition,[4] personalised pricing in the digital era,[5] and quality considerations in digital zero-price.[6] Section 2 examines the unique

[1] OECD, News Media and Digital Platforms—Note by BIAC, DAF/COMP/WD(2021)76, ¶ 30 (Nov. 26, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)76/en/pdf.

[2] OECD, Ex-Ante Regulation and Competition in Digital Markets—Note by BIAC, DAF/COMP/WD(2021)7 (Nov. 23, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf.

[3] OECD, Abuse of Dominance in Digital Markets—Note by BIAC, DAF/COMP/WD(2020)38 (Dec. 8, 2020), https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf.

[4] OECD, Consumer Data Rights and Competition—Note by BIAC, DAF/COMP/WD(2020)46 (May 28, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf [hereinafter BIAC Consumer Data Rights Note].

[5] OECD, Personalised Pricing in the Digital Era—Note by BIAC, DAF/COMP/WD(2018)123 (Nov. 21, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)123/en/pdf.

[6] OECD, Quality Considerations in the Zero-Price Economy—Note by BIAC, DAF/COMP/WD(2018)151 (Nov. 23, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)151/en/pdf.

characteristics of digital markets and explains that not all of these characteristics are exclusive to digital markets. Section 3 provides an overview of competition authorities' robust market power toolset. Section 4 considers some of the market power concepts proposed for digital markets and analyzes their connection to traditional market power concepts. Section V concludes that traditional market power concepts are adaptable to digital markets.

2. Digital Market Characteristics Affecting Market Power Assessments

4. Digital markets are dynamic, but not all are driven by innovative, never-before-seen products and services. Digitalization is instead integrating nearly every aspect of the global economy with a digital market.[7] Digital-first companies, such as Google, may generally exist in a wholly digital universe. Whereas many more traditional companies, such as Walmart, have digitalized offerings to the extent that they compete within a digital market. Given the variety of digital market players, there is not a cohesive set of digital market characteristics. Instead digital markets tend to exhibit at least one of the below characteristics affecting market power considerations, none of which are exclusive to digital markets. BIAC urges competition authorities to carefully consider whether digital markets can be isolated to the extent that newly developed market power concepts are not redefining market power when traditional market power standards can be applied.

5. While zero-price goods and services are prevalent in the digital economy, spanning from search to gaming to social media, zero-price goods are not a new phenomenon. Zero-price broadcast radio, broadcast television, magazines, and newspapers have long existed.[8] Zero-price markets' characteristics can make market power assessments more complicated but have not previously prevented competition authorities from assessing market power.[9]

6. Digital market participants' versatility renders multi-sidedness, where a company operates as a platform selling different products to different consumers, a common consideration when assessing market power in digital markets. Multi-sided markets are not a new concept, though frequently involve a zero-price product or service. Television, newspapers, credit cards, stock exchanges, and real estate are all traditional examples of multi-sided markets.[10] Assessment of market power in multi-sided markets requires consideration of standard market power determinants, such as demand characteristics, cross-platform network and price effects, and profitability.[11]

7. Network effects, where a product, platform, or service has greater value with a greater number of users, are prevalent in digital markets.[12] BIAC appreciates that network

[7] Report of the Digital Competition Expert Panel, Unlocking Digital Competition 21 (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [hereinafter Furman Report].

[8] See David S. Evans, The Antitrust Economics of Free, 7 Competition Pol'y Int'l 71, 76 (2011).

[9] See Joel I. Klein, DOJ Analysis of Radio Mergers, Address at the ANA Hotel (Feb. 19, 1997), http://www.justice.gov/atr/public/speeches/1055.pdf.

[10] See OECD, Rethinking Antitrust Tools for Multi-Sided Platforms 10 (2018), https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf.

[11] See id. at 16-17.

[12] Tim Stobierski, What Are Network Effects?, Harv. Bus. Sch. Insights (Nov. 12, 2020), https://online.hbs.edu/blog/post/what-are-network-effects.

effects can lead to a solidification of market positioning in certain circumstances.[13] However, network effects do not always create insurmountable entry barriers for entrants or isolate high user platforms from competition. This is, in part, due to technological advances, which has made it easier for users to multi-home and seamlessly switch digital services and platforms.[14] For example, users may regularly toggle between Lyft and Uber or post videos on Facebook, Instagram, Twitter, and Tik Tok. Consequently, a higher number of users does not always directly equate to market power.[15]

8. Multi-homing extends beyond digital networks. People may watch television shows on Hulu, Netflix, HBO, Disney+, and Peacock. The pure number of users, once again, can be misleading. Inherent in multi-homing is substitutability and switching that are basic market power concepts with which competition authorities are very familiar. The degree of multi-homing can also be indicative of pricing power or lack of such power, another basic market power concept, as increased multi-homing tends to cause lower prices.[16] Even the mere possibility of multi-homing may drive prices downward.[17] At the same time, multi-homing can increase quality, as platforms vie for users.[18]

9. Finally, data collection and use is prevalent in digital markets. BIAC recognizes that data can be relevant to competition law to the extent that it functions as an important input, or a product, itself.[19] Data often functions as any other input or product does, deriving its value from factors such as utility, demand, volume, and scarcity. Competition authorities, therefore, need not necessarily alter market power considerations when confronted with data implications. Instead, data can be reduced to its most basic concept, such as functioning as an input when assessing market power factors like ease of entry.

3. Competition Authorities Have a Robust Market Power Toolset

10. Over the years, competition authorities have developed a well-rounded toolset for assessing market power—the ability to profitably raise prices above the competitive level for a significant period of time.[20] The extent to which competition authorities rely on specific concepts may vary by jurisdiction, but traditional market power concepts tend to integrate themselves into market power frameworks, one way or another. Below, BIAC provides an overview of some of the more prominent traditional market power concepts, each of which should be considered whenever possible to ensure a thorough and accurate market power assessment. Different industries always present different challenges to

[13] Kenneth A. Bamberger & Orly Lobel, Platform Market Power, 32 Berkeley Tech. L.J. 1051, 1067-68 (2017).

[14] See Catherine Tucker, Network Effects and Market Power: What Have we Learned in the Last Decade?, Antitrust, Spring 2018, at 77, https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/anti-spring18-3-23.pdf.

[15] See id.

[16] Jean-Charles Rochet & Jean Tirole, Platform Competition in Two- Sided Markets, 1 J. Eur. Econ. Ass'n 990, 1008 (2003), https://academic.oup.com/jeea/article/1/4/990/2280902.

[17] David S. Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. Reg. 325 (2003).

[18] See Tucker, supra note 14.

[19] See BIAC Consumer Data Rights Note, supra note 4.

[20] Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 5.01 (4th ed. 2017).

calculating market power. But that challenge alone should not encourage competition authorities to disregard market power concepts that have proven to be flexible and reliable across different markets.

11. Competition authorities have long relied on market shares, which first require defining a market, as a primary indicator of market power. Market shares can be calculated in digital markets, just as they are in traditional markets. High or stable market shares, depending on other factors, may be indicative of market power. For example, depending on the competition authority, market shares between 40-90% can presumptively indicate market power.[21] While market shares can be a reliable indicator of market power, they should not be viewed in isolation. This is especially true with respect to digital markets. Just as other indicators of market power are considered in traditional markets, they, too, should be considered in digital markets to complement market share analysis.

12. Considered alongside market shares, substitutability and consumer switching are key indicators of market power. These concepts often require rigorous market analysis. Demand elasticity, for example, is often used to identify viable substitutes for consideration when analyzing consumer switching in response to price changes.[22] Accordingly, competition authorities generally recognize that a certain price increase, accompanied by little to no consumer switching away from a product or service, could be indicative of some degree of market power, depending on the market dynamics.[23]

13. Entry circumstances—the "cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry"[24]—are also important when evaluating the degree of market power. For example, when a company operates in a market with relatively easy entry conditions, competition authorities consider the extent to which entry conditions restrain market power.[25] Entry conditions vary by industry, depending on factors such as manufacturing/service sophistication, intellectual property, quality, supply chain complexity, capital investment, and scalability. Because no two industries are alike and industries are constantly evolving, a thorough, hyper-specific

[21] See, e.g., German Competition Act, Section 18, Art. (4); Thomas Krattenmaker, Robert H. Lande & Steven C. Salop, Monopoly Power and Market Power in Antitrust Law, 76 Geo. L.J. 241, 259 (1987) (market shares leading to presumption of market power under U.S. antitrust case law range between sixty percent and ninety percent).

[22] See Gregory J. Werden, Demand Elasticities in Antitrust Analysis, 66 Antitrust L.J. 363, 363 (1998).

[23] See, e.g., UK Competition Comm'n, Guidelines for Market Investigations: Their Role, Procedures, Assessment and Remedies, CC3 (Rev.) ¶ 179 (Apr. 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf ("A single firm's level of market power will be related to the elasticity of demand for its product and its rivals' elasticity of supply for that product. The market power of a firm will be strong if the level of demand for its product is insensitive to an increase in price of that product and if its rivals are unlikely to step up their supplies in response to a price rise."). (These guidelines were adopted by the UK Competition and Markets Authority.)

[24] George Stigler, The Organisation of Industry 67 (1968).

[25] See, e.g., OECD, Roundtable on Barriers to Entry—Note by the European Commission, DAF/COMP/WD(2005)59, ¶¶ 2 and 20 (Oct. 7, 2005), https://ec.europa.eu/competition/international/multilateral/2005_oct_barriers_entry.pdf ("Where entry conditions are easy, incumbent firms may be unable to exercise market power without attracting new entry. . . . Immediate and costless entry may render unprofitable a small but permanent increase in price thus leading to broader markets or undermining the relevance of market shares as indicative of market power.").

approach to analyzing entry should be undertaken each time market power is assessed. For example, in digital markets, scaling is much easier. Nothing is fixed and there are limited brick-and-mortar structures to assemble. Instead, companies in the digital space often can scale rapidly by outsourcing to service providers or using software.[26]

14. Sometimes, even without entering, companies can exert competitive pressure on a market, thereby diminishing market power. This is especially true where the outer bounds of competitive markets blur and overlap with each other. Referred to as "potential competition," whether perceived or actual, competition authorities consider the effect of potential competition on market power and should continue to do so.[27] Relying only on market shares when there is significant potential competition could lead to false positives by drastically overstating actual market power. For example, Shopify, an e-commerce platform with hundreds of millions of consumers, does not outwardly compete with companies like Amazon. Shopify relies on its merchants to compete, or "influence," on their own.[28] An overly simplistic reliance on market shares or view of market structure would likely ignore Shopify and subsequently overstate the market shares of other e-commerce platforms.

15. As companies with market power will generally find it easier to price discriminate or sell the same good or service at different prices to different customers, price discrimination can provide some indication of market power.[29] But price discrimination alone is not necessarily sufficient for establishing market power. Price discrimination is one of many useful tools that competition authorities have at their disposal for assessing market power in any market.

16. The rate of industry innovation can also be indicative of the degree of market power, especially in markets where price effects are difficult to assess. Fierce innovation competition can signal limits on potential durability of market power, even in the face of high market shares, and can operate as a restraint on market power, even prior to actual entry.

4. Are Traditional Market Power Concepts Adaptable to Digital Markets?

17. BIAC appreciates that competition authorities are considering implementing, or in the case of Germany have already implemented, new concepts for assessing market power in digital markets. Market power, regardless of how it is assessed, is intrinsically linked to foundational concepts that competition authorities are already familiar with, such as substitutability, quality, entry barriers, economies of scale, network effects, and demand elasticity. Consequently, it is essential that new market power concepts remain

[26] See Feng Zhu & Marco Iansiti, Why Some Platforms Thrive and Others Don't, Harv. Bus. Rev. (2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont.

[27] See OECD, Concept of Potential Competition—Competition Committee Discussion Paper (2021), https://www.oecd.org/daf/competition/the-concept-of-potential-competition-2021.pdf.

[28] Ben Thompson, Shopify and the Power of Platforms, Stratechery (July 11, 2019), https://stratechery.com/2019/shopify-and-the-power-of-platforms/.

[29] See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 517 (4th ed. 2020) ("substantial and persistent price discrimination indicates some market power"); OECD, Roundtable on "Price Discrimination"—Note by the United States, DAF/COMP/WD(2016)69, ¶ 13 (Nov. 21, 2016), https://one.oecd.org/document/DAF/COMP/WD(2016)69/en/pdf ("Price discrimination can be a feature of an exclusionary strategy meant to build or protect market power.").

economically grounded in principles that are identifiably related to an ability to exercise dominance.

4.1. Gatekeepers

18. The Digital Markets Act (DMA) defines a gatekeeper as a company that has a "significant impact on the internal market . . . provides a core platform service which is an important gateway for business users to reach end users and . . . enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future."[30] According to the DMA, this includes online intermediation services, online search engines, online social networking services, video-sharing platform services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services.[31] In digital markets, gatekeeper status manifests where a company has a customer relationship that is critical to the customer accessing services, applications, or products, with a customer's higher usage frequency enabling the company to bettor tailor its offerings.[32] Network effects may also help to solidify gatekeeper status.[33] Thus, in concept, where a company has access to customer data and delivers content or services, it may be able to control other companies' access to these same customers.[34]

19. Competition authorities considering implementing regulations on the basis of gatekeeper status have proposed considering factors such as platform position, data utilization, entry barriers, scale and scope effects, and user lock-in.[35] BIAC notes that some of these market power factors are similar to those considered in traditional markets, but it is not clear whether they will be interpreted in the same way utilizing the same economic tests. For example, two-sidedness, an implicit and key component of gatekeeper status, is not unfamiliar to competition authorities. Even the concepts sounding more exclusive to digital markets, such as user lock-in and data utilization, have roots in traditional market power concepts. User lock-in occurs with any combination of limited viable substitutes, low demand elasticity, high-switching costs, and significant entry barriers. Data utilization could be viewed as an input and may represent an entry barrier or a consumer preference. BIAC believes that the application of these principles should follow the case precedent and economic analysis established and applied in traditional competition cases, lest the new definitions be subject to arbitrary application.

[30] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), art. 3, COD/2020/0374, (May 11, 2022), https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf [emphasis omitted] [hereinafter DMA Proposal].

[31] Id., art. 2.

[32] Peter Alexiadis & Alexandre de Streel, Designing an EU Intervention Standard for Digital Platforms 5 (Eur. Univ. Inst., Working Paper No. RSCAS 2020/14, 2020), https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y.

[33] See id.

[34] Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, Competition Policy for the Digital Era 48 (2019), https://euagenda.eu/upload/publications/untitled-257961-ea.pdf.

[35] DMA Proposal, supra 30, art. 3.

4.2. Bottleneck Power

20. A close relative of the gatekeeper concept, the concept of bottleneck power might arise when there is a "point of congestion which has the potential to lead to objective inefficiencies,"[36] typically where consumers "single-home and rely upon a single service provider."[37] Bottleneck power purportedly can be evidenced by high switching costs, switching barriers, tying, and asymmetric bargaining power, all of which are standard market power indicators or determinants.[38] In this respect, the bottleneck concept appears to be a digital equivalent of the essential facility doctrine.[39] As such, it should be subject to the same economic conditions, principles and limitations as that doctrine.

4.3. Platform Power

21. Platform power, generally relevant to multi-sided digital platforms, focuses on "infrastructural and strategic" power, which ostensibly can be sources of market power.[40] That the definition of platform power is unsettled and somewhat vague is indicative of how new market power concepts can blur with traditional market power concepts. Consideration of platform power includes multi-homing, network effects, substitutability, entry barriers, and gatekeeper power.[41] With the exception of gatekeeper power, which is discussed above, these market power elements are not exclusive to digital markets. Though BIAC recognizes that the amalgamation of so many of these concepts within a single business can create unique challenges, it cautions against the expansion of market power concepts, such as platform power, by considering factors such as "broader notions of citizen wellbeing" and "societal infrastructure."[42] The foundational principles of dominance captured within "platform power" and other newly-created concepts of market power should not be undermined or diluted by application in a new sphere.

4.4. Strategic Market Status

22. Strategic market status is generally defined as having the ability to control others' market digital market access by exercising market power over a gateway or bottleneck, i.e., "enduring market power over a strategic bottleneck market."[43] It is viewed that enduring market power over a strategic bottleneck market can be evidenced by factors such as

[36] Alexiadis & de Streel, supra note 32, at 4.

[37] George J. Stigler Center for the Study of the Econ. & the State, Comm. for the Study of Digital Platforms: Market Structure & Antitrust Sub. Report 9 (2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf.

[38] Id. at 84.

[39] See Alexiadis & de Streel, supra note 32, at 4.

[40] Sally Broughton Micova & Sabine Jacques, Platform Power in the Video Advertising Ecosystem, 9(4) Internet Pol'y Rev. 1, 3 (2020), https://ssrn.com/abstract=3710709.

[41] See Michael G. Jacobides, What Drives and Defines Digital Platform Power? A framework, with an illustration of App dynamics in the Apple Ecosystem, Evolution Ltd. (Apr. 19, 2021), https://events.concurrences.com/IMG/pdf/jacobides_platform_dominance.pdf; Lina M. Khan, Sources of Tech Platform Power, 2 Geo. L. Tech. Rev. 325 (2018).

[42] José van Dijck, David Nieborg & Thomas Poell, Reframing Platform Power, 8(2) Internet Pol'y Rev. 1, 12(2019), https://doi.org/10.14763/2019.2.1414.

[43] See Furman Report, supra note 7, at 10.

buyer/seller dependence, controlling market access, exclusion of rivals from a platform, and advantaging search results.[44]

23. The evidentiary factors suggested by some to establish strategic market status—substitutability, entry, consumer switching, and elasticity—are not unique to digital markets.[45] Bottleneck markets can even be pared down to traditional market power concepts, where buyer/seller dependence and control of market access is informed by elasticity, substitutability, switching costs, and ease of entry. Where such factors begin to tip in the direction away from the company with perceived market power, a bottleneck market no longer exists. The United Kingdom's Competition and Markets Authority, a competition authority proposing regulation incorporating strategic market status, itself acknowledges that, at its core, strategic market status is essentially no different than standard market power assessments, which "are a common feature of existing competition law and can be conducted relatively swiftly and with confidence."[46]

5. Conclusion

24. BIAC appreciates that digital markets can present challenges to assessing market power. Nonetheless, even though the traditional market power framework was established in the context of traditional markets, this framework—at its core—is generally adaptable to digital markets. As BIAC demonstrates above, many of the newly proposed concepts are founded in traditional market concepts. If these traditional market power concepts need to be slightly adapted to better account for some of the additional characteristics of digital markets, BIAC advises against wholesale changes and encourages commitment to effective foundational market power concepts.

25. BIAC recommends that competition authorities continue to predicate the motivation for improving market power assessments on identifying legitimately anti-competitive conduct. If competition authorities are considering adopting or implementing new market power concepts, competition authorities should ensure a thorough understanding of the affected markets' dynamics and solicit substantive input from relevant stakeholders.

[44] Id. at 42, 55, 60-61.

[45] See, e.g., UK Competition & Mkts. Auth., A New Pro-Competition Regime for Digital Markets: Advice of the Digital Markets Taskforce (Dec. 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

[46] Id. ¶ 4.13.