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On Market Power and Economic Dependence - Note by Masako Wakui

Roundtable on the Evolving Concept of Market Power in the Digital Economy

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On Market Power and Economic Dependence

By Masako Wakui¹

During the advent of the digital economy, academic and position papers began to discuss a number of power concepts, including intermediation and bottleneck powers. These concepts reflect how platforms gain power in the digital economy and exercise it over other market participants (Alexiadis and de Stree, 2020^[1]). Yet in some jurisdictions, competition law has not changed since the pre-digital platform era; it remains focused on market power. It is thus critical to examine whether these concepts differ from market power.

For a long time, *market power*, as measured by market share in a particular market, has been used as an indicator of the state of competition. When it comes to digital platforms, however, market share cannot be calculated because services are often provided for free. Digital services are differentiated, which makes market share meaningless. The boundary of the market is blurred, further complicating the market definition and share calculation. The use of alternative parameters, such as price elasticity of a particular service, creates similar issues.

1. Power concepts and functions

Given the difficulties in determining market power, competition authorities began focusing on different factors, such as multi-homing, ability to switch, network effect and access to data. Meanwhile, the UK (Competition and Markets Authority, 2021^[2]) declared the relevant market is not decisive in the revised merger guidelines.

The emergence of new power concepts, such as the *intermediation power*, *bottleneck*, *gatekeeper* and *unavoidable trading partner* coincided with such changes. While certain critics and jurisdictions rely on formulas that indicate a greater power than market power, such as *significant market power (SMP)* or *strategic market status*, others are willing to adopt and apply lesser power concepts (Friederiszick and Reinhold, 2021^[3]), including *economic dependence* and *superior bargaining position*. Although these have been articulated for years, they tend to be marginalised in competition law literature and enforcement (Bougette, Budzinski and Marty, 2019^[4]).

As the name suggests, SMP means one company holds greater market power. The meanings of ‘unavoidable trading partner’ and ‘superior bargaining position’ are also straightforward. As for the rest, different literature assigns these concepts different definitions. Below, I list the definitions I have chosen for these concepts.

Bottleneck power exists ‘where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly’ (Scott Morton et al., 2019^[5]).

Gatekeeper implies a provider is in the position to ‘control access to the other side of the market’ (Federal Ministry for Economic Affairs and Energy, 2019^[6]).

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Intermediation power is when a provider is able to ‘significantly control the decisions of other market participants through the distribution of information and the centralised coordination of supply and demand’ (Podszun, 2018^[7]).

Economic dependence occurs where there are ‘insufficient and unacceptable means of switching to other undertakings’ (Këllezi, 2008^[8]), (Friederiszick and Reinhold, 2021^[3]) explain ‘there is a well-established case-law in Germany over economic dependency’, through which a number of relevant criteria, such as ‘shares of bilateral sales in total sales’ and ‘the identification of trading alternatives and of the gatekeeper character of one of the contractual counterparties’, have been identified. On the other hand, (Bougette, Budzinski and Marty, 2019^[4]) state:

French competition law sanctions abuse of economic dependence by considering:
i) the company’s share of its partner(s) turnover, ii) brand awareness, iii) the importance of partner’s market share, iv) the existence (or not) of alternative solutions, v) the factors that led to the situation of dependence (voluntary choice or ‘imposed’ choice for the business partner).

Strategic market status materialises when a platform is in a position to exercise market power over a gateway or bottleneck in a digital market, controlling others’ market access (Furman et al., 2019^[9]).

As long as the alternative concepts relate to more stringent measures, their relationship with market power is straightforward. When faced with more serious and durable competitive harms, policymakers are prompted to establish enhanced regulatory systems, either under competition laws or through regulation. The resulting remedies may also differ in that they do more than prohibit specific practices (Cabral et al., 2021^[10]); (Competition and Markets Authority, 2020^[11]); (European Commission, 2020^[12]), (Scott Morton et al., 2019^[5]).

Outside this context, the relationship between market power and alternative concepts is more nuanced. Novel power concepts such as the gatekeeper or intermediation may capture anticompetitive harm more easily or before the market tips (Lynskey, 2017^[13]), or ‘where the market share, however measured, is significantly below 40%’ (Crémer, De Montjoye and Schweitzer, 2019^[14]). That said, existing lesser power concepts such as economic dependence can do the same (Schweitzer et al., 2018^[15]).

The greater the risk that the market power concept fails to address anticompetitive harm in a timely manner, the more valuable alternative power concepts become. To assess the value of each, we first must clarify the meaning of market power.

2. Revisiting ‘market power’

Market power is typically defined as the power to raise the price over the competitive level. Such power can be assessed using different metrics depending on the context in which the market operates (OECD, 2018^[16]), (2019^[17]). What is regarded as a power ‘less’ than market power may constitute market power once we liberate ourselves from measuring market power in the conventional manner.

There are thus potentially two ways to enable the competition authority to intervene before the market tips. The first way is to retain the market power concept, but change the method of measurement. The other is to use a lesser power concept, either novel or existent, to supplement market power.

I suggest the second approach.² Further, competition authorities should be able to intervene wherever they find an abuse of economic dependence likely to have an anticompetitive effect in that it would exclude rivals, undermine competitors' ability to actively compete, or soften competition by reducing rivals' incentives to compete vigorously.³

2.1. Contextualised market power

As noted earlier, market power—as defined as the power to raise the price over the competitive level—is a flexible concept. Depending on how we set the competitive benchmark, various positions can constitute market power.

At whatever level we set as the competition benchmark, we will likely reach the point where we must accept that rules of thumb—such as market share exceeding 50%—are often inappropriate. There must be sectors in which conventional metrics and thresholds are functional. In such sectors, there is no reason to depart from the conventional framework. Outside such sectors, however, we must be ready to conduct multifactor analyses and make assessments in a holistic manner.

Furthermore, we can decide that interventions must be made at an earlier stage given the difficulty of reversing the situation once the market tips and dominance is entrenched.

Accepting these ideas may reduce the need to use lesser power concepts.

However, the risk that some factfinders may stick to the old concept and fail to appreciate new methods of detecting market power will remain. One can easily imagine a situation where the competition authority focuses on data and network effect, finding market power despite low market share; the appellate court could then strike its decision, referring to old precedents in which neither data nor network effect matters.

The flexible nature of the market power concept may present another issue: indecisiveness. As suggested earlier, market power cannot be defined without clarifying the competition benchmark. The benchmark is straightforward when we could equate the price taker with the absence of market power. However, such a view assumes an undifferentiated market, which fails to reflect economic reality. Furthermore, we have become more accepting of the 'competitive *for* the market' idea, where such competition is feasible only because of an extensive network effect and large fixed cost (Deller et al., 2021_[18]); (Tirole, 2022_[19]). In regard to competition *for* the market, what matters is durability: how long a particular company can dominate without being contested. In this context, being a price maker for a short period of time does not necessarily imply market power. Instead, we must determine how durable that power must be before finding market power. The same issues exist for *dominant position*. We need to assess how freely a company can act without considering the response from its rivals and trading partners. Here, again, a court may stop the competition authority's enforcement activities if it believes a more lenient threshold is acceptable.

Such indecisiveness issues are not new. In cases where large economies of scale or innovation competition are present, the focus is placed on the dynamic aspect of

² (Teece and Kahwaty, 2020_[43]) also point out that meaningful measures of market power are absent, but propose focusing on key assets like specific types of production facilities.

³ The position advocated in this paper is in line with that proposed by (Schweitzer et al., 2018_[15]), although they require that the practice at issue has a dangerous probability to induce a tipping of the market. Although I, too, focus on harm to the competition, I do not believe the tipping-promotion effect necessary.

competition. It has been a while since we began discussing the manner by which to assess market power where an indirect network exists. Prior to that, we considered how to address closely connected primary- and after- markets (OECD, 2017^[20]). It appears that we have not agreed upon the term we should use when we find the position to engage in price discrimination, either (OECD, 2016^[21]), (Klein, 2008^[22]). In economics textbooks, monopoly rent is distinguished from other types of rent, such as Ricardian rent. The former relates to the profit earned by reducing output in the market, whereas the latter relates to profit obtainable due to superiority or rarity of resource. Where a platform earns a large profit, is this monopoly rent or Ricardian rent (Petit and Teece, 2021^[23])?

The issue is particularly serious where competitive constraints appear to exist. While few competition authorities would doubt Google has market power in digital advertising, there is often room for debate when other sectors are considered. For example, Japan has two major online marketplace platforms: Amazon and Rakuten. More than 50% of sellers use these platforms (Ministry of Economy, Trade and Industry, 2022^[24]), and they report a vast number of cases in which these platforms engage in profit extraction and retrospective changes to contract terms. Still, one could argue neither possess market power, as they compete against one another. Similarly, Yahoo! News occupies the durable dominant position in online news distribution. Yahoo! is part of Z Holdings Group (better known as Softbank), together with LINE, a messaging service with a penetration rate in excess of 90% amongst 13 to 49 year olds (Statista, 2022^[25]). Yahoo! News is part of the Yahoo! Japan service, which is viewed by about 80% of smartphone users and more than 60% of PC users (Yahoo! Japan, 2022^[26]). More than 60% of mobile app users use the Yahoo! News app (ICT Research and Consulting, 2021^[27]). By holding such a prominent position, Yahoo! is effectively forcing local news publishers to sell their content at an extremely low price. In this context, too, one may argue Google exerts competitive constraints over Yahoo! News. Such an argument may sound convincing in light of Google's extensive access to personal data enabling far greater personalisation as well as its dominance in the adjacent digital advertising market. The possible implications are that competition law enforcement is unlikely, or if it does so, it will issue extremely mild measures.

What is needed is a minimum threshold, above which finding a violation is justified. By now, we understand the paramount importance of network effect, access to data, single/multi-homing, and bias. I strongly agree these are all relevant. However, unless we know, e.g., the minimum length or cost at which switching must occur to find a violation, indecisiveness will still exist. Given competition authorities must establish that legal elements are met, such lack of clarity will result in under-enforcement.

Market power is not only an economic concept, but also a legal one. As such, its definition needs to be clear enough for the courts and citizens to understand. Such need is particularly great in regard to a single firm's exclusionary conduct, for which there is neither a *per se* rule nor a prior notification system. Exclusionary conduct is often handled through private litigation, which intensifies the need for courts to have an operational concept. A citizen's ability to comprehend the definition is also vital to ensuring the competition authority's accountability. The competition authority's failure to act upon the issue in a timely manner should be criticised, as much as in cases of overregulation.

Being operational and comprehensive does not mean establishing a clear rule of thumb, such as market share exceeding 50% indicates market power. Nor does it require implementing a single decisive parameter. In most areas (including tort, contract, labour and consumer protection law), multifactor tests are the norm. However, we must be able to expect that citizens and courts can reach reasonable conclusions without needing to engage in the potentially eternal debate over an appropriate competition benchmark particularly in

relation to single firm's exclusionary conduct. In my opinion, the market power concept often fails to satisfy this need.

2.2. Economic dependence

The same issues that arise under market power could do so under newer power concepts as well, unless the law clarifies that a finding of a clearly delineated relevant market or of market power is unnecessary. In contrast, *economic dependence* is relatively straightforward. The concept has been widely adopted in the labour law context. In several jurisdictions, economic dependence already exists in competition law provisions, or is used to explain similar legal terms, including relative dominance and superior bargaining position (Lee, 2022^[28]). In the cases of online news distribution and shopping services mentioned earlier, sellers and news publishers are clearly economically dependent on Amazon, Rakuten and Yahoo! News. Several novel concepts (e.g., unavoidable trading partners and gatekeeper power) are similar to economic dependence; if there is little to no difference, we should incorporate the familiar concept into competition law.

Apart from familiarity, economic dependence has another virtue: its close link with theories of harm recognised with regard to the platform.

2.2.1. Transformation of economy and abuse by digital platforms

The relationship between platforms and business users is often both vertical and horizontal. The vertical relationship may involve no contractual relationship. For instance, Google provides referral services by listing websites in search results without any contract. With regard to horizontal aspects, competition can take place at more than one level, such as when a platform sells its own brand along with third-party brands (e.g., Amazon). Another level of competition involving brand recognition and channels can occur outside the platform. Consumers may associate particular products with a specific independent brand (e.g., Nike, Accor hotel chain, Guardian), or with the platform (e.g., Amazon, booking.com, Google news). This manner of competition becomes evident where a particular brand establishes a direct-to-consumer online channel to restore direct engagement with its loyal customers (Gielens and Steenkamp, 2019^[29]).

As consumers increasingly rely on platforms as gateways to procure goods and services, independent brands become more embedded in the platform's ecosystem, engaging in search engine optimisation daily and adjusting their products and services accordingly. The platform also initiates promotional activities and encourages brands to tailor their business activities to fit such initiatives. Although most platforms are regarded as providing only intermediary, matching or referral functions, platforms have become more involved in contractual terms between sellers and consumers by setting rules relating to the liabilities, defects and defaults and providing dispute resolution and payments systems. Unlike an employer/parent company, the platform may not command and control the business users. However, those who dependent on platforms have little option but to comply with their requests and suggestions. The laws and regulations that make platforms accountable for defective products sold through their channels, such as the rules established by the EU Digital Services Act (European Commission, 2020^[30]), can further marginalise independent brands in the eyes of consumers. Finally, a platform's exclusivity requirement is another way to integrate brands into platform's ecosystem.

Most business users are legally independent from platforms, serving neither as subsidiaries nor subcontractors. By keeping them independent, platforms remain free from legal and contractual obligations arising from close relationships. Companies hire employees and conclude long-term contracts, reducing transaction costs and mitigating issues relating to

information asymmetry, moral hazards and opportunistic behaviour. They also commit to having sufficient resources to continue operating. In contrast, platforms address information asymmetry and moral hazard issues by referring to data flowing on its own platforms. Platforms can also provide service seamlessly by securing countless good and service providers, be they companies, freelancers or sole traders. They will work hard where within-platform competition is fierce. Double marginalisation, another reason for a company to vertically integrate, is not present where brands compete vigorously within a platform. Of course, the platform can expand its boundaries to launch its own line of services when it wants (Gawer, 2021_[31]).

The legally independent nature of platform users can mask the actual state. As noted earlier, where business entities depend on a platform, the platform can have a predominant influence over them. What is happening in the digitalised economy could be thus described as the process of a platform's integration of business entities into its ecosystem, through which the latter lose their independence and autonomy and become subject to the rules set by the platform, or the 'ecosystem orchestrator' (Jacobides and Lianos, 2021_[32]). Once the platform achieves sufficient scale at which the competition within the platform stays active and diverse consumers' needs are met, it no longer has an incentive to maintain extra independent brands. To cut redundancies, the platform can delist products, or simply demote them in ranking, without bearing costs associated with internal production or long-term subcontract agreements.

Most competition issues relating to digital platforms arise against such a background, including Google's self-preferencing its own shopping service,⁴ Amazon's copycatting of third-party products,⁵ Google and Facebook's forced free-riding over news content (OECD, 2020_[33]), (2021_[34]) and Apple's forcing app developers to use its own payment service (Japan Fair Trade Commission, 2021_[35]). Economic dependence, a relational concept, is well suited to capture this source of harm.⁶

Such integration is inevitable as long as the platform generates value and efficiency. In particular, the platform brings outstanding informational efficiency to busy consumers by selecting and showing information likely to be relevant to them. The platform also facilitates competition amongst brands by broadening the range of products accessible to consumers.

⁴ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763

⁵ European Commission, Case AT.40462 (*Amazon Marketplace*) https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462

⁶ Similar issues exist with grocery stores or other large-scale retailers when they engage in unfair practices such as copycatting, delisting, unilateral transfer of shrinkage loss and inventory risk from the retailer to suppliers (Competition Commission, 2008_[42]). Platforms differ from retailers in that they provide information and other imperishable intangible products (or products for which transportation cost is negligible) and are not limited to a narrow geographical boundary. Platforms also differ in their potential scale to dilute the value of independent brands and the manner by which they avoid commercial risks. At retailers, consumers are aware of the brand name of products they buy. A grocery store may sell its own private labels, but the store itself knows from whom it is buying the product. In addition, it buys and resells the product at its own risk. In contrast, on platforms a particular brand is merely one of dozens or potentially hundreds who provide the same or similar products. As explained earlier, platforms largely do not bear the risk associated with commercial transactions, either.

2.2.2. Regulation of abuse of economic dependence

This evolutionary process does not mean competition law has no role to play. Where the economic system evolves, active competition both amongst platforms and between the platform and independent brands is critical to better outcomes for consumers, businesses and workers. Vigorous enforcement is also vital to ensure platforms are unable to exploit those who are dependent on them.

Independent economic entities, be they companies or individuals, are crucial to competition, innovation and growth. As explained earlier, they may be actual or potential competitors themselves. A challenger to a dominant company often starts as complementor, securing its footage in an adjacent sector (Tirole, 2022^[19]). Alternatively, they may activate competition by joining a rival's ecosystem or moving from one ecosystem to another. Undermining their ability to compete may well constitute a platform's exclusionary strategy. Although competition law does not protect competitors in general and it is inevitable that inefficient rivals lose out to more efficient ones, a different policy question arises when a company exploits those who are economically dependent (Bakhom, 2018^[36]). No competitor should be allowed to exploit its trading partner/rival to grow. Competition must be based on merits rather than willingness to exploit trading partners.

Regulation of exploitative abuse inevitably involves the question of wealth allocation and fairness. It is thus understandable that competition authorities are cautious about wading into such cases. Their resources are limited, and better equipped regulatory bodies usually are present. Furthermore, under normal circumstances we can expect that contract and civil, consumer and unfair competition laws would address these fairness issues. In contrast, cartellists, merging parties and sometimes those who engage in vertical restrictions happily lessen the competition, allowing consumers and society as a whole to suffer. This is where a competition authority's law enforcement activities are critical.

Although similar caution is warranted with regard to platforms, there are significant differences. First, multi-sided platforms are more likely to leverage a strong position in one sector to gain economic power in another market. Being in both vertical and horizontal relationship, platforms may also be more willing to exploit their trading partners. Rapid evolution of business relations means there is no clear rule governing transactional relationships, which increases the likelihood of 'exploitation to grow' scenarios. Furthermore, there exists substantial information asymmetry between platforms and users and often only the platform knows the true state of business and the possible outcomes. It is unrealistic to expect those who are dependent on the platform to protect themselves through contracts.

Where the market transforms itself, competition law can provide citizens with a forum to discuss and examine the way the market operates. Ultimately, we may conclude that regulatory and law enforcement tasks may be better trusted to other agencies, or that competition law should only be used where laws and contracts do not function due to fear factors and obstacles to accessing civil courts (Wakui and Cheng, 2015^[37]). However, there is no reason to believe competition authorities should refrain from examining and establishing rules and principles when the issue relates to competition. Where there is no agency to protect market participants from exploitative abuse caused by loopholes or regulatory gaps created by unexpected changes to the economy, some agency must protect participants. By enforcing competition law to prohibit an abuse of economic dependence likely to harm competition, competition authorities can also assist courts, policymakers and legislators in adopting new principles, or establish new regulations if necessary (OECD, 2021^[38]).

In a jurisdiction with provisions that address anticompetitive harm without requiring market power, implementing the proposed rule will be easy; adjusting the manner of applying such a provision is all that is necessary. A few competition authorities around the world enforce their competition laws in such a way. On the other hand, where there is no such provision, an amendment to the competition law is needed. I consider such an effort worth taking.

2.2.3. Over-regulation, under-regulation

An immediate response to the above proposal, namely the regulating of abuse of economic dependence that will in turn result in the exclusion or softening of the competition, could be considered over-regulation (Këllezi, 2008^[8]). In particular, by not requiring market power to be considered, such a rule would significantly lower the threshold for a finding of economic dependence. Although rejecting strict adherence to conventionally measured market power and broadening coverage of competition law is exactly what I intend to do, I want to address this concern by noting a few points.

First, those who are accused should be given the opportunity to justify their practices. If justifiable, they will not be deemed abuse. Second, by definition, abuse of economic dependence presumes a trading relationship. This implies that low price is not regulated as an abuse of economic dependence. Mergers and horizontal agreements also fall outside the rule. Such activities will remain within the market power (or its likelihood) standard. Third, we can address over-regulation concerns by adjusting the level of fines and other sanctions. Legislators and policymakers can opt to calculate fines based on harms proven to be caused by the practice. Most imperative is to denounce and stop a violation in a timely manner.

On the other hand, the abuse of economic dependence rule may also result in under-regulation. Those who are not dependent may accept exclusivity when offered better deals, which can lead to depriving third parties of the opportunity to compete. For this reason, too, the proposed rule should be an addition to the current competition rules focusing on market power.

3. Concluding Remarks

This paper focuses on contexts where the existence of market power is unclear and proposes adopting a rule that prohibits abusing economic dependence that excludes or softens competition. This ‘abuse of economic dependence’ regulation will supplement existing competition rules, to which the market power concept remains relevant.

To conclude, based on observations about Japan—the jurisdiction I know intimately—, I would like to touch upon another set of issues; how we should approach digital platforms that hold SMP.

As I noted earlier, most digital markets in Japan are characterised by one or two global players (e.g., Google, Apple, Amazon, Microsoft, Meta) and Japanese platforms. In such markets, the rule I propose may be convenient to addressing underenforcement problems. In several instances, the dominance of a particular global player is clear. However, the competition authority (Japan Fair Trade Commission [JFTC]) has never issued cease-and-desist orders; Japan instead tends to rely on policymaking and legislative initiatives led by the Cabinet Office. This allows the government to deal with such matters coherently and flexibly. At the same time, cross-ministerial dialogues take longer, creating a period in which the JFTC could apply existing competition rules. Permitting the JFTC to conduct enforcement activities would only help the government enforce its initiatives.

Although the reason behind the current lack of JFTC formal law enforcement cases is unclear to me, it may be partly due to the agency's inability to collect evidence abroad and or to enforce competition law against foreign entities. Geopolitical, diplomatic and national security concerns may also inhibit the JFTC from adopting a tough stance against US tech giants. If JFTC enforcement activity is deterred for such reasons, competition authorities in, e.g., Southeast Asian countries likely find it even more difficult. I would like to reiterate that closer international cooperation at the regional and global levels will help strengthen domestic competition law.

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