AAI AMERICAN ANTITRUST INSTITUTE

MARKET DEFINITION IN THE DIGITAL ECONOMY: CONSIDERATIONS FOR HOW TO PROPERLY IDENTIFY RELEVANT MARKETS

Sarah Oxenham Allen, Brian Christensen, Joseph Conrad,
Nicholas Grimmer, and Jennifer Pratt[1]

June 17, 2020

Technological advancements have led to the development of new markets, while also giving us new understandings of more traditional marketplaces. Despite the welfare gains brought about by these innovations, serious concerns persist about dominant technology firms' abilities to impermissibly leverage the inherent characteristics of platform competition to maintain market power. These characteristics include immense direct and indirect network effects, vast economies of scale, near zero marginal costs, and effective price discrimination enabled through big data. New questions about the proper role of market definition have arisen as antitrust analysis grapples with the consumer welfare consequences of large digital platforms dominating their respective markets. Recent decisions in *Amex*[2] and *Sabre*[3] provide controversial updates to how market definition is treated in conduct and merger cases involving multi-sided platforms. These decisions have also raised economic questions about the proper way to analyze zero price markets and how to adapt existing analytic tools to the novel markets in which these platforms operate.

In this paper, we address our understanding as state enforcers of the proper role of market definition in digital markets and how the emphasis on market definition in *Amex* and *Sabre* reframes the antitrust inquiry to the detriment of sound competitive effects analysis. We also discuss market definition problems for zero price markets and consider other methods of identifying and defining digital markets beyond the traditional *Brown Shoe*[4] analysis.

Market Definition's Role

First, it is important to understand what a proper market definition is designed to accomplish. Delineating markets is not useful for its own sake; rather, market boundaries are helpful in identifying the anticompetitive effects of firms engaging in exclusionary conduct or merging to thwart the competitive process. To accomplish this, market definition requires an examination, using

---

[1] The authors are attorneys in the Virginia, Utah, Nebraska, Texas, and Ohio Offices of the Attorney General, respectively. The opinions expressed in this article are the authors' alone and do not necessarily reflect those of our respective Attorneys General. The authors are indebted to Jonathan Sallet (Colorado), Max Miller (Iowa), Nicole Demers (Connecticut), and Tyler Henry (Virginia) for their valuable review and comments on this paper.

[2] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) [hereinafter *Amex*].

[3] *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020).

[4] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

economic tools to measure substitution effects and cross-price elasticities, of whether a firm is effectively constrained by competitors or potential competitors, which would allow consumers to vote with their dollars and mitigate any harm that would otherwise flow from the conduct or merger.[5]

Market definition is not always a legal requirement for antitrust claims, nor is it usually the driving force behind the analysis. Claims arising from Section 1 of the Sherman Act or Section 7 of the Clayton Act both provide illustrations of why market definition can inform competitive effects, but not necessarily determine them. In some Section 1 cases, plaintiffs can prove harm to competition without defining markets or showing market power by establishing *per se* restraints of trade.[6] Moreover, even when restraints are not naked, evidence of detrimental effects can obviate the need for detailed market definition analysis.[7] In horizontal mergers where a full rule of reason analysis is used, market definition has traditionally played a large role because of the structural presumption, but the federal enforcement agencies have moved away from a market definition-centered approach. The 2010 Horizontal Merger Guidelines confirm that competitive effects are the foundation for merger review, not market definition.[8]

The economic significance of market definition is tied tightly to the insight it provides to the competitive effects analysis.[9] Imagine, for example, that a company required buyers of its primary product to also purchase one of its add-on products. That would not be the end of the analysis of whether the company was engaged in illegal tying under Section 2. Any sound antitrust analysis must account for consumers' ability to substitute away from the primary product in light of a price increase, quality decline, or other requirements of sale, such as tying.[10] Although market definition and competitive effects analyses can overlap to a significant degree, market definition is not necessarily a first step and may not be required at all in some cases.

Simply stated, competitive effects should always play the starring role in proper antitrust analysis. Market definition reinforces and assists in understanding theories of harm by helping practitioners identify demand-side substitution and evidence that can be used to illustrate both factors. However, focusing on market definition before considering competitive effects puts the cart before the horse and may cause both false negatives and false positives in enforcement decisions. Recent decisions in *Amex* and *Sabre* highlight the danger of legal formalism by potentially detaching market examination

---

[5] Herbert Hovenkamp, *Response: Markets in IP and Antitrust*, 100 GEO. L.J. 2133, 2134 (2012) ("Further, a relevant antitrust market consists of firms that are not merely rivals, but also that are sufficiently close rivals that the competition of the others is able to hold each firm's prices relatively close to its costs. That is to say, mere substitution is not sufficient; it must be substitution at a price close to cost.")

[6] *Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109–10 (1984).

[7] *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986).

[8] Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 52 (2010).

[9] *Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines*, § 4, at 7 (2010) [hereinafter "Merger Guidelines"]. ("Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.").

[10] *Id.*

from the actual circumstances of a particular case, whereby market definition becomes a roadblock instead of the path to competitive effects analysis.

Recent Platform Market Definition Decisions

The Supreme Court's 2018 decision in *Amex* focused attention on "transaction platforms" and two-sided markets. Although debate continues about whether the rule articulated in *Amex* is consistent with previous economic understanding, the decision has broader implications. It re-frames antitrust analysis in digital markets and generates new market definition disputes. It also raises new administrability questions, as demonstrated by the recent *Sabre* decision.

Amex created a new rule for "transaction platforms" in which plaintiffs must show the impact on all sides of the platform in order to prove "net harm" in the overall market that encompasses all sides. Justice Thomas's opinion concludes that courts must treat what has traditionally been considered two separate markets as one for cases brought against "transaction platforms."[11]

Regardless of whether this rule makes economic sense, it changes litigation incentives and has the unfortunate effect of emphasizing market definition over competitive effects. Establishing whether the market qualifies as a "transaction market" is now critical in determining the ultimate resolution of the case because it dictates if a plaintiff needs to show harm on all sides of the platform as part of its *prima facie* case. This offers defendants an opportunity to raise the plaintiffs' evidentiary burden and encourages preliminary market definition disputes, leading litigants and courts to improperly prioritize issues relating to market definition over a competitive effects analysis.

The "net harm" requirement in *Amex* effectively re-casts the market definition query as a central figure in antitrust litigation. By doing so, the Court has encouraged two perverse consequences.

First, the Supreme Court gave no detailed guidance on what products and services constitute "transaction platforms." Because the opinion offers little insight to practitioners about how to identify two-sided transaction markets, defining relevant markets is ripe for misuse and confusion by both parties in litigation.[12]

Second, *Amex* encourages plaintiffs to over-prioritize market definition. Instead of using market definition as a framework for the competitive effects analysis, *Amex*'s approach incentivizes plaintiffs to shift focus from competitive effects to market definition contortions, such as avoiding the label of "transaction platforms," even when the facts might weigh in favor of doing so, or spending valuable resources developing theories of harm on sides of the platform that are not ultimately important to the resolution of the claim. This has the potential to pervert the analysis and the outcome of the case. Likewise, defendants will take all possible steps to shoehorn the facts into

[11] *Amex*, 138 S. Ct. at 2287.

[12] *See* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2151 (2018).

the ambit of the "transaction platform," forcing courts and litigants into expensive and difficult analysis that is likely to cause more Type 2 errors (false negatives) in antitrust cases.[13]

The issue was recently on display in the Department of Justice's unsuccessful challenge to the Sabre/Farelogix merger. Judge Stark ruled that the government failed in its burden to show that the companies compete in the same market because he incorrectly believed that—under *Amex*—only two-sided platforms can compete with transaction platforms.[14] Leaving aside the shaky legal ground on which the *Sabre* opinion rests, economic realities run contrary to that proposition.

In certain markets, companies vigorously compete with one side of a two-sided platform and constrain prices in that market. Indeed, the opinion contains factual findings that support the conclusion that Sabre and Farelogix do compete in a cognizable market—internal company documents showed that they recognized each other as competitors and engaged in the competitive process with each other.[15] Nevertheless, Judge Stark ruled that the law does not recognize competition between the two firms. The internal inconsistency and logical problems of the decision makes the problematic *Amex* framework unworkable for future antitrust litigation. The decision also highlights the dangers of disregarding competitive effects in favor of a rigid market definition inquiry. The *Sabre* decision was so troubling that the Department of Justice took the rare step of asking the Third Circuit to vacate the district court's holding as moot after the parties abandoned the deal.[16]

Sabre aptly illustrates that market definition, while a useful tool, is best utilized in establishing the framework for the competitive effects analysis. Lower courts should seek to interpret *Amex* more narrowly than Judge Stark did in *Sabre*, which would be consistent with *Amex*'s discussion of free and ad-supported content in newspaper competition.[17] Courts should also resolve before trial whether a transaction platform is involved.

What Is "Zero Price"?

As the name implies, "zero price" products are simply "products for which firms set the price to customers at $0."[18] Business models built around zero price products or services are not particularly new; ad-supported broadcast TV and radio, as well as many types of publications and credit cards, have long provided products for "free." However, with the rise of the Internet, zero price business

[13] *Cf. Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (Breyer, J. dissenting) ("The Court's invitation to consider the existence of 'market power,' for example, . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.") (citation omitted).

[14] *Sabre*, 2020 WL 1855433, at *34 (citing *Amex* 138 S. Ct. at 2287).

[15] *Id.* at *31.

[16] United States' Suggestion of Mootness and Motion to Vacate the District Court's Decision and Order Granting Judgment to Defendants, *United States v. Sabre Corp.,* No. 20-1767 (3d Cir. May 12, 2020).

[17] *Amex*, 138 S. Ct. at 2286.

[18] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 151 (2015).

models have become considerably more prevalent.[19] This makes sense in light of the "near-zero" marginal cost typically associated with digital distribution.[20]

Indeed, zero price offerings are a central component of many of today's most successful tech companies, and many new types of zero price business models have arisen in the digital economy, particularly in platform businesses with network effects. Many companies offering products and services relating to social media, online search, email, and online storage now offer "free" products and services.

It is important to consider the old adage that "there's no such thing as a free lunch." Indeed, "zero price" does not necessarily mean "free" or that there is no cost to a consumer.[21] Instead of making a monetary payment, consumers of zero price products or services pay with something else. For example, a "free" online service may grant a user access, but in return, the user may be paying with their attention to advertisements, creative labor, privacy, or personal data. In this regard, many zero price markets may be thought of as "attention markets," wherein users also act as producers, supplying the input—their personal data or browsing activity—to a platform that acts as a distributor by selling access to or products based upon that input, such as targeted advertising services, with advertisers in this scenario counter-intuitively playing the role of consumer.[22] As Professor Newman describes it, "[t]his is the dynamic implied by the oft-repeated adage that 'if the product is free, you are the product.'"[23]

Behavioral economics helps explain consumer preferences for "zero price" products. In traditional models, demand curves are relatively orderly and linear (i.e., if price moves down, demand moves up), but we now know that this ceases to be true when prices drop to zero. As recent studies have shown, when price shifts from any positive amount to zero, demand can actually skyrocket in response; this is known as the "zero price effect" or the "free effect."[24] In other words, when a price hits zero, consumers tend to act in ways that neoclassical economics would call irrational.

---

[19] *See, e.g.*, Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521 (2016); Chris Anderson, FREE: THE FUTURE OF A RADICAL PRICE (2009); Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861 (2011); John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409 (2013).

[20] *See, e.g.*, Chris Anderson, *Free! Why $0.00 Is the Future of Business*, WIRED MAG. (Feb. 25, 2008), https://www.wired.com/2008/02/ff-free/.

[21] *See, e.g.*, John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1558 (2019).

[22] *See, e.g.*, John M. Newman, *Attention Markets and the Law*, at 33–34 (Univ. of Miami Legal Studies Research Paper, Forthcoming) (last revised Jan. 29, 2020), *available at* https://ssrn.com/abstract=3423487.

[23] *Id.* at 34 (citing John Lanchester, *You Are the Product*, 39 LONDON REV. BOOKS (2017)).

[24] Gal, *supra* note 19, at 528–31. In one recent study, consumers were given a choice between a high quality chocolate and a lower quality one; when prices for each were positive (i.e., $0.26 and $0.01), the consumers' choices were roughly even between the two. But when prices dropped by just $0.01 each (i.e., high quality for $0.25, low quality for free), dramatically more consumers chose the lower quality (free) chocolate. *Id.* at 528–29 (citing Kristina Shampanier, et al., *Zero as a Special Price: The True Value of Free Products*, 26 MKTG. SCI. 742 (2007)). This study showed that "a price of zero is more powerful than a five times larger price reduction that remains within the range of positive prices," and that this "zero-price effect is not driven solely by a difference in transaction costs." *Id.* at 529. Another recent study showed that consumers "overvalued the free products" by "prefer[ing] getting one product for free over getting a 50 percent

Market Definition and Zero Price Products

Generally speaking, for-profit firms provide products at a price of zero only if they can somehow monetize those "giveaways" on another side of their business. So, does the fact that a firm offers zero price products automatically mean that the market in which they operate fits within *Amex*'s definition of a two-sided transaction platform market? The answer is unequivocally no. An easy example is a zero price newspaper or magazine. Even the *Amex* Court recognized that on one side of a publication's platform, advertisers value ads more as the readership increases, while on the other side of the platform, readers do not similarly value an increased number of advertisements.[25] Because of these weak indirect network effects, the Court found that such platforms should be analyzed as one-sided markets.[26]

Further complicating the appropriate definition of markets for zero price products are those who claim that market definition involving those products is simply impossible and therefore, antitrust law does not apply to the providers of zero price products. The court in *Kinderstart.com*, for example, dismissed antitrust claims against Google for failure to adequately allege a relevant "Search Market."[27] That court reasoned that a relevant market must be a "grouping of sales," but that Kinderstart did "not claim that Google *sells* its search services" or "that anyone *pays* Google to search," ignoring, of course, that users receive those services only *in exchange* for non-monetary consideration, including their privacy and attention. The court ultimately found "no authority indicating that antitrust law concerns itself with competition in the provision of free services."[28] This reasoning is mistaken and dangerous.[29] Just like traditional price-positive markets, "[z]ero-price markets present opportunities for the creation, enhancement, or abuse of market power—precisely the evils that antitrust laws are intended to remedy. . . . [And] [c]onduct that raises costs or restricts output of zero price products can harm welfare just as seriously as conduct that raises price or reduces output in other markets."[30]

Technology companies offering zero price products typically compete largely on the quality of their products because they are not competing on price. Traditional methods of defining markets, such as the SSNIP test,[31] do not capture non-price forms of consumer harm in zero price markets and are likely to lead to erroneous identification of markets and more Type 2 enforcement errors. Luckily, antitrust law provides additional market definition tools, which are discussed below.

---

discount on each of two products." *Id.* (citing Uriel Spiegel, et al., *Free Product as a Complement or Substitute for a Purchased Product—Does It Matter?,* 2 MODERN ECON. 124 (2011)).

[25] *Amex*, 138 S. Ct. at 2286.

[26] *Id.*

[27] *Kinderstart.com LLC v. Google, Inc.*, C06-2057JFRS, at *4–5 (N.D. Cal. Mar. 16, 2007).

[28] *Id.* at *5.

[29] *See, e.g.*, Newman, *supra* note 18, at 160–74.

[30] *Id.* at 173–74.

[31] The SSNIP (small but significant non-transitory increase in price) test evaluates the switching behavior of consumers in response to a relatively small 5–10% price increase in order to define a market by measuring consumer substitution to potential other competitors and the elasticity of demand. Merger Guidelines § 4.1, at 9–10.

Brown Shoe **and Other Analytic Tools for Defining Markets**

Irrespective of the role it plays within antitrust analysis, courts and enforcers aim to define markets consistent with the "actual market realities" of an industry,[32] including those within rapidly evolving platform and digital markets. The market definition process "is deeply fact-intensive and requires a factual inquiry into the commercial realities faced by consumers."[33]

Whether traditional or multi-sided, markets are defined by identifying (1) products that are reasonably interchangeable "for the purposes for which they are produced — price, use and qualities considered"[34] (the "product market"), and (2) the geographic area in which the firm at issue competes, if geography affects some consumers' ability to substitute or some suppliers' ability to supply (the "geographic market").[35] Neither the *Amex* nor *Sabre* courts purported to alter these fundamentals.[36]

To identify the product market, plaintiffs may identify reasonably interchangeable products using the "practical indicia" enumerated in *Brown Shoe*, which have proven versatile and durable, and include both price and non-price factors.[37] Of course, the primary price-based quantitative tool used by enforcers to identify such product substitutes is the hypothetical monopolist test, or SSNIP test, discussed above.[38]

In addition to such price-based indicia, "courts routinely rely on *qualitative* economic evidence to define relevant markets."[39] For example, and related to the "product's peculiar characteristics and uses" criterion in *Brown Shoe*, enforcers and courts have also concluded that "functionally interchangeable" products belong in the same product market.[40] For instance, glass jars and metal cans were considered interchangeable,[41] but property-protection services that differed in their

---

[32] *Amex*, 138 S. Ct. at 2285.

[33] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499, at *12 (S.D.N.Y. Feb. 11, 2020).

[34] *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 404 (1956).

[35] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); Merger Guidelines § 4.2, at 13.

[36] *See Amex*, 138 S. Ct. at 2285 (defining "relevant market" as the "arena within which significant substitution in consumption or production occurs" (internal quotation marks and citation omitted)); *Sabre*, 2020 WL 1855433, at *32.

[37] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (relevant market to be defined with use of "practical indicia" including (1) industry or publicly recognized separate markets, (2) a product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors); *see also Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 27 n.2 (D.D.C. 2015) ("*Brown Shoe* remains the law, and this court cannot ignore its dictates.").

[38] Merger Guidelines § 4, at 7–8. Courts commonly utilize this test when defining product markets. *See, e.g.*, *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3d Cir. 2016); *Fed. Trade Comm'n v. Advocate Health Care Network*, 841 F.3d 460, 473 (7th Cir. 2016); *United States v. Am. Express Co.*, 838 F.3d 179, 198 (2d Cir. 2016), *aff'd sub nom. Amex*, 138 S. Ct. 2274; *Fed. Trade Comm'n v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019).

[39] *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 829 (11th Cir. 2015) (emphasis added) (alteration, quotation marks, and citation omitted).

[40] *du Pont*, 351 U.S. at 403.

[41] *United States v. Cont'l Can Co.*, 378 U.S. 441, 453–57 (1964).

"utility, efficiency, reliability, responsiveness, and continuity" were not.[42] Similarly, in *Microsoft*, the court defined the relevant product market as "Intel-compatible PC operating systems," thus excluding Apple's Macintosh operating system ("Mac OS").[43] The court concluded that Microsoft's customers, who use the Windows operating system, would not switch to Apple's Mac OS in response to even a substantial price increase because of high switching costs and price differences, "the effort involved in learning the new system and transferring files to its format," and the fact that Mac OS "support[ed] fewer applications" than Windows.[44] Consumer responses to qualitative and functional differences may thus reveal close substitutes and relevant product markets missed by merely price-based analysis.

To that end, enforcers may rely on "*any* reasonably available and reliable evidence," including "*all* . . . evidence of customer substitution,"[45] in identifying product markets. This evidence includes switching behaviors in response to price and non-price changes; industry participants' behavior in tracking and responding to rivals' price changes; and evidence of "sellers' informed beliefs concerning how customers will substitute among products in response to relative changes in price.[46] Such evidence of customer substitution may be equally evident where only qualitative data is available; price effects are not necessarily "more important than non-price effects."[47] Indeed, as noted above, "evidence of competitive effects can inform market definition," and anticompetitive effects "can also be manifested in *non-price* terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[48]

Consumer substitution behavior in response to quality changes might potentially be measured as a modification to the SSNIP framework. Commentators have suggested SSNIP variants like "SSNIQ," which is a small but significant non-transitory change in quality and "examines switching

---

[42] *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966).

[43] *United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001).

[44] *Id.*

[45] Merger Guidelines § 2 at 2, § 4.1.3 at 12. The Merger Guidelines are not binding, but federal courts, including the Supreme Court, have looked to them for guidance or, at a minimum, "a point of comparison." *See Comcast Corp. v. Behrend*, 569 U.S. 27, 44 (2013); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 194 n.5 (D.D.C. 2017).

[46] Merger Guidelines § 4.1.3, at 11–12 (evidence to be considered in implementing hypothetical monopolist test and assessing predicted loss).

[47] *Id.* § 4.1.2, at 10; *see also id.* § 4.1.3, at 12 ("Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition.").

[48] *See id.* § 1 at 2, § 4 at 7 (emphasis added). Other competitive effects evidence, including the effects of mergers on the prices or quality of particular products, may reveal a product market: "evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly" (or causes *non-price* features such as quality, privacy, variety, service, or innovation to decrease significantly) can itself establish that those products form a relevant market. *See id.* § 4, at 7. Similarly, in identifying the relevant market, enforcers may also consider whether merging firms have been, likely will be, or *would have* been (absent a merger or anticompetitive conduct) substantial head-to-head competitors. *See id.* § 2.1.4, at 3 ("The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. . . . This evidence can also inform market definition.").

once quality is reduced (rather than when price is increased)."[49] Another possibility is "SSNIC," which measures changes in the costs consumers pay for a free good in a non-monetary currency, such as attention or information.[50] While reliably measuring such changes may be challenging compared to measuring price differences, sophisticated suppliers in digital markets likely already have data needed for such analyses.[51]

Enforcers' consideration of demand substitution evidence also begs deeper questions into "the commercial realities faced by consumers,"[52] including the primary product(s) for which platforms actually compete. For example, numerous commentators have concluded that consumer attention is the actual currency sought by platforms and their upstream suppliers.[53] And just as indirect network effects strongly influenced the market definition analysis in *Amex*,[54] enforcers and courts should likewise consider the unique economic features of digital platforms in the market definition process such as:

> i) strong network effects (the more people use a product, the more appealing this product becomes for other users); ii) strong economies of scale and scope (the cost of producing more or of expanding in other sectors decreases with company's size); iii) marginal costs close to zero (the cost of servicing another consumer is close to zero); iv) high and increasing returns to the use of data (the more data you control, the better your product); and v) low distribution costs that allow for a global reach.[55]

The combination of these features makes markets tend towards a single dominant player, ultimately reaching a point at which "tipping" occurs and the winner takes all.[56] Once a market has tipped, entrants will find it extremely difficult, if not impossible, to quickly and cost-effectively surmount the barriers to entry presented by the incumbent's control of massive amounts of data and economies of scale.[57] This also highlights the dangers of requiring evidence of "net harm" to all sides

---

[49] Gal, *supra* note 19, at551.

[50] John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 64–69 (2016).

[51] *See, e.g.*, McKinsey & Company, BIG DATA, ANALYTICS, AND THE FUTURE OF MARKETING & SALES 52 (2015) ("Loyalty analysis—for instance, measuring purchase frequency or penetration among high-priority customer segments—allows retailers to understand product categories from a customer perspective. By measuring customer 'switching' behavior, retailers can also identify which SKUs play a unique role and which are redundant. Such analyses helped a European retailer reduce its assortment by 10 percent across 100 categories while improving margin by one percentage point.").

[52] *Amex*, 138 S. Ct. at 2285.

[53] David S. Evans, *Attention to Rivalry Among Online Platforms and Its Implications for Antitrust Analysis*, 9 J. COMP. L. & ECON. 313 (2013); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771 (2019); Andrea Prat & Tommaso M. Valletti, *Attention Oligopoly* (May 30, 2019), *available at* https://ssrn.com/abstract=3197930; John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743 (2020).

[54] *Amex*, 138 S. Ct. at 2286.

[55] Stigler Center for the Study of the Economy and the State, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 111 (2019), *available at* https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.

[56] *Id.*

[57] *Id.*

of platforms with high network effects and in markets with high concentration. Without the ability to consider quality and innovation improvements by nascent competitors on only one side of a platform, the dominant incumbent's position could be further entrenched and more Type 2 errors will cause under-enforcement of antitrust law.

Conclusion

"Market definition is not an end to itself. The purpose of defining a relevant market and assessing market power is to identify competitive constraints that limit a firm's ability to engage in behavior that harms competition and consumers."[58] To the extent that the *Amex* and *Sabre* opinions have obscured the correct analysis of competitive constraints and elevated arbitrary market definition concerns ahead of economic realities of consumer harm, enforcers will continue to advocate for needed course correction. Likewise, even when conducting an *Amex* analysis of multi-sided transaction platforms, lower courts should always return to competitive effects as their polestar.

[58] Makan Delrahim, AAG, DOJ, Keynote Address at Silicon Flatirons Annual Technology Conference: *"I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy* (Feb. 11, 2019), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons.