

DEVELOPING INTERNATIONAL PERSPECTIVES ON MARKET DEFINITION IN DIGITAL MARKETS

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How should we think about market definition in digital markets? This is a practical question, as antitrust cases are often won or lost on market definition. As one of many examples, Judge Mehta remarked in *FTC v. Sysco* that market definition “has been the parties’ primary battlefield in this case.”¹ Will market definition be the battlefield in cases involving digital markets? And should it be?

The year 2019 saw three major policy reports on digital markets by experts in the United Kingdom, Europe, and the United States. These reports consisted of a review by an expert panel in the United Kingdom entitled “Unlocking Digital Competition”²; a report commissioned by the European Commission entitled “Competition policy for the digital era, Report to the European Commission”³; and, in the United States, a non-governmental report prepared under the auspices of the Stigler Center at the University of Chicago entitled “Committee on Digital Platforms, Market Structure and Antitrust Subcommittee Report.”⁴

The three policy reports have many points in common. All see digital markets as conferring great consumer benefits but also raising significant competitive issues. All identify similar economic drivers in digital platform markets including strong (global) economies of scale and scope, substantial network effects, the crucial importance of data, and the influence of consumer behavioral biases. All find that digital platform markets have a tendency towards concentration and towards the creation of ecosystems within which market power may be extended across markets. And finally, all consider government actions to address competition concerns to have been insufficient so far, and recommend strengthened antitrust enforcement and perhaps also regulation.⁵

I thought it would be useful to discuss how the three reports view the role of market definition. As discussed below, there are similarities here as well. The reports mention the complexities of market definition in platform markets, the frequent occurrence of multiple interrelated markets, the fluidity of market boundaries, the need to think about data and attention in market definition, and the

¹ *FTC v. Sysco*, 113 F.Supp.3d 1, 24 (2015).

² Jason Furman et al., “Unlocking Digital Competition: Report of the Digital Competition Expert Panel,” available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

³ Jacques Crémer et al., “Competition policy for the digital era,” available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

⁴ Fiona Scott Morton et al., “Committee on Digital Platforms, Market Structure and Antitrust Subcommittee Report,” available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf>. Although the Stigler Center Report is non-governmental, the antitrust subcommittee included several former antitrust enforcement officials.

⁵ See Sean Ennis and Amelia Fletcher, “Developing International Perspectives on Digital Competition Policy,” available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565491.

limitations of traditional tools. Where does all this end up? In the words of the EC Report: “[I]n digital markets, less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.”⁶

In terms of mergers, the three reports also identify similar issues. When competition is “for the market” rather than “in the market,” competitive threats will more often come from the fringe than from close head-to-head competition. This requires significant rethinking of merger policy. In the words of the Stigler Center Report: “The law needs better analytical tools to take into account the impact of potential and nascent competitors and competition.”⁷

Below, I highlight some of the points on which the reports, in broad strokes, agree on the role of market definition in digital tech, and also point out where each report makes its own contribution.

Market Definition Complexity in Multi-Sided Markets

Each of the reports zeros in on the multi-sided nature of many technology markets as a feature that complicates market definition. As the UK Report puts it, multi-sided markets “have prices which are dependent between sides, meaning they may not closely reflect costs on each side of the market. This could appear to suggest either uncompetitively high margins or below cost predatory pricing when in fact neither is the case.”⁸ Relatedly, “prices may be zero on one side of the platform, and the true competitive price may even be negative, making typical market definition exercises more complex.”⁹

The EC report suggests that in most platform markets one would generally want to define different markets on the different sides: “The test should be the following: would the platform, when considering the competitive threat, see different competitive threats on both sides?”¹⁰ The interrelationship between sides means that demand estimation may be extremely complicated. Some tools (like the SSNIP test) will not work with zero prices. And it is not clear that trying to adopt such tools to measure quality declines “could be made operational in practice without a precise measurement of quality that would allow competition authorities and courts to determine an equivalent to a 5-10% price increase, and without a way to quantify the effects of the quality degradation on the firm’s revenues in order to determine whether such a degradation would be profitable.”¹¹

The Stigler Center Report notes that market definition “will vary according to what consumers are substituting between, whether there is competition on the platform between complements, or competition between platforms, or competition between a platform and potential or nascent competitors regarding possible future markets.”¹² It further notes: “Pinpointing the locus of competition and therefore the relevant market in which technology platforms compete can also be challenging because the markets are multisided and are often ones with which economists and

⁶ EC Report at 46.

⁷ Stigler Center Report at 8.

⁸ UK Report at 89.

⁹ *Id.*

¹⁰ EC Report at 46.

¹¹ *Id.* at 45.

¹² Stigler Center Report at 8.

lawyers have little experience. This complexity can make market definition another hurdle to effective enforcement.”¹³

Markets in which Consumers Barter their Attention and Data. Another theme that emerges across these reports is that market definition in tech markets must incorporate the fact that these markets often involve barter systems, where consumers “pay” for products with their attention and their data. Per the UK Report: “Consumers may pay for services implicitly through their personal data or their attention. This means that competition may take place at broader levels than are frequently analysed, for example as attention markets.”¹⁴

The EC Report picks up on this same point:

Of course, the fact that some platforms charge zero price to consumers does not imply that they do not obtain benefits from serving these consumers — they typically subsidise the nonpaying side by profits made on a different side of the platform (frequently the advertising side), that is they sell to that other side the attention of the users. A second consideration has become increasingly important: by using the service, the non-paying side provides data to the platform, which the platform uses both to provide a better service to consumers, but also to increase the benefits that the other side derives from the platform. These forms of “exchange” have facilitated recognition that the zero-price side of a platform can be part of a market.¹⁵

The Stigler Center Report also makes a similar observation:

Another reason to be pessimistic about measuring traditional surplus concepts is related to the barter nature of the exchange: Users barter attention and personal data for services. With a “free” service, consumers are paying for any expansion of activity with their attention to content. When facing a zero-money price, and when quality is difficult to observe, consumers are not receiving salient signals about the social value of their consumption because the price they believe they face does not reflect the economics of the transaction, and they are ignorant of those numbers.¹⁶

Consequences for Market Definition

The reports conclude that tech markets do not fit neatly into the metes and bounds of markets drawn according to traditional business models. As the EC Report puts it:

[T]he importance of market definition, and the methodologies developed for identifying it, were built for standard goods and services. In the digital world, it is less clear that we can identify well-defined markets. Furthermore, in the case of platforms, the interdependence of the markets becomes a crucial part of the analysis whereas the role of market definition traditionally has been to isolate problems. Therefore, in digital markets, less emphasis should be put on the market definition part

¹³ *Id.* at 70.

¹⁴ UK Report at 89.

¹⁵ EC Report at 44.

¹⁶ Stigler Center Report at 45.

*of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.*¹⁷

The idea here is that in non-digital markets, market definition helps us identify the firms and products that act as constraints. But in platform markets, it is harder or perhaps impossible to isolate competitive issues in the same way. Market definition as a concept and methodology did not develop with these markets in mind, and so placing the same weight on the definition exercise cannot be expected to yield the same results.

Market Definition in Digital Mergers

Each of the reports highlights that a critical aspect of tech merger enforcement, which antitrust currently lacks the tools to effectively control, is the acquisition of nascent competitors by dominant companies with whom they do not directly compete.

The EC Report identifies a competitive concern, limited to a relatively small group of cases, when a dominant platform and/or ecosystem which benefits from strong positive network effects acquires a target with a currently low revenue but a large and/or fast growing user base and a high future market potential. According to the report, it is in such cases that competition law should be particularly concerned about protecting the ability of competitors to enter the market, as competition “in the market” will typically be limited. Competitive threats will typically come from the fringe. Buying up promising start-ups that offer fringe products or services may therefore result in early elimination of potential competitive threats — which may be particularly problematic if done systematically.¹⁸

In terms of market definition, the EC Report notes that the horizontal overlaps between the acquirer and the target may look rather innocuous. The target may be considered as a potential competitor to the acquirer’s core market — but frequently, the uncertainty of whether the target will truly turn into a competitor in that market will be high and the relevant time horizon long.¹⁹

Conceptually, many of these mergers fall into the category of a “conglomerate merger.” This is almost by default, as they don’t fit well under either horizontal or vertical categories. The issue for the EC is that according to current case law and the European non-horizontal merger guidelines, conglomerate mergers are generally less likely to raise competition concerns, as they provide substantial scope for efficiencies. Theories of harm are essentially limited to the foreclosure of actual or potential rivals who may be hampered in their access to supplies or markets, or to coordinated effects.²⁰

It is in this context that the EC Report recommends that competition authorities should inquire whether acquirer and target operate in the same “technological space” or “users’ space.”²¹ Viewing the “product market” in this light in the case of digital ecosystems, the report suggests that the analysis should follow the logic of the analysis of a horizontal merger: is the target a potential or actual competitive constraint within the technological/users’ space or ecosystem? Does its

¹⁷ EC Report at 46.

¹⁸ *Id.* at 116.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 117.

elimination increase market power within this space? If so, is the merger justified by efficiencies — for which, however, the merging parties bear the burden of proof?²²

Even though the incumbent may not be dominant in a complementary service market when that market is analyzed as a separate market, a broader view of the position of the incumbent in a “market for the digital ecosystem” may justify a finding of a significant impediment to effective competition, as the acquisition both expands the scope of network effects that protect the incumbent’s core service to the complementary services, and “appropriates” the network effects that the target has managed to establish to the benefit of its own customers in such a way that, after the merger, they increase network effects in the incumbent’s ecosystem as a whole.²³

The Stigler Center Report likewise zeros in on nascent competitors as critical in tech markets:

*In the view of this committee, protecting entry for existing and potential competitors is the most important way to protect or improve consumer welfare in digital platforms. Initial competition for a market should be conducted on the merits without any anticompetitive practices, and later entrants should face a level playing field and no exclusionary conduct as they contest the market. Regulation may be required to prevent incumbents from erecting improper barriers to entry.*²⁴

However, better analytical tools are needed:

*The law needs better analytical tools to take into account the impact of potential and nascent competitors and competition. Market definition will vary according to what consumers are substituting between, whether there is competition on the platform between complements, or competition between platforms, or competition between a platform and potential or nascent competitors regarding possible future markets. The need to identify the specific anticompetitive exclusionary conduct and analyze it may raise enforcement costs given all the possible variants of exclusionary conduct possible in digital markets.*²⁵

Like the EC Report, Stigler Center Report suggests that the most problematic mergers may involve small or nascent competitors that are not in the same market but that would otherwise be able to develop into competitive threats to an incumbent. The report similarly recognizes that there may be difficulties in enforcement because it is often difficult from the outside to identify which of these nascent competitors could have developed into full-fledged competitors. The Stigler Center Report notes that a pattern of repeated purchases of small potential competitors that could have developed into substitutes, or an acquisition price that reflects a sharing of monopoly rents, might be useful indicators of possible competitive risks.²⁶

The report discusses two converse situations. One is that a complement may develop into a platform. Initially, the original platform wants complements in order to attract users. But later, such

²² *Id.*

²³ *Id.* at 122.

²⁴ Stigler Center Report at 12.

²⁵ *Id.* at 8.

²⁶ *Id.* at 68.

complements may evolve in a way that threatens the platform, which may take action to protect itself with a foreclosure strategy.²⁷

The second situation involves conduct in the other direction. If the platform observes that a complement is earning strong profits, the platform may seek to enter that complementary market. Because the platform and the complement providers are now horizontal competitors, the platform has the incentive—and, often, the ability—to foreclose those competitors. According to the report, this could take the form of banning rival complements from the platform, reducing their ability to interoperate, raising their costs, steering customers elsewhere, and so forth.²⁸

In the Shadow of *Amex*. Only the Stigler Center Report really grapples with the *Amex* decision, perhaps reflecting the fact that the decision presents a uniquely American problem. That report recognizes that although direct evidence of competitive effects is often superior to going through the exercise of product market definition, the Supreme Court in the *Amex* case went in the opposite direction. *Amex* held that a plaintiff in a case involving a vertical restraint must define and prove a relevant market and may not rely on direct proof of harm to competition. The Stigler Center Report criticizes the decision, saying it is based on the notion that vertical restraints almost always enhance efficiency and almost never harm competition, a conclusion that has been called into question by contemporary economics.²⁹

And the decision in *Sabre/Farelogix*, which postdated the three reports, suggests that the centrality of market definition is not going away any time soon in the U.S. In criticizing the *Sabre* decision, Randy Stutz has pointed to how *Amex* may be casting a long and unhelpful shadow.

In his opinion for the district court, Judge Stark made factual findings that Farelogix helps airlines lower distribution costs by bypassing Sabre and other GDSs—in other words, that Farelogix competes with them. The opinion even unequivocally states that “Sabre and Farelogix view each other as competitors” and that “the record reflects competition between Sabre’s and Farelogix’s direct connect solutions for airlines.” But Judge Stark relied on Amex to hold that the government nonetheless failed to prove the most basic element of a Section 7 case. He held that, because “the Sabre GDS is a two-sided platform, Sabre and Farelogix do not compete in a relevant market.”³⁰

The decision has been roundly criticized. And, now that the parties have scuttled the merger, it is immune from appeal. While the DOJ has moved to vacate the decision, for now it remains the last word from the American courts on market definition in tech markets.

Conclusion: The Emerging Consensus

The UK, EU and US reports take generally similar positions on digital markets. Other country reports, not considered here, also seem to be moving toward a consensus. The consensus involves rethinking how competition plays out in digital markets, and working to make sure that intervention, when necessary, takes into account how these markets are different from what has come before. That includes thinking about the role of market definition. However, in the U.S., the *Amex* and

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 77.

³⁰ Randy M. Stutz, “We’ve Seen Enough: It Is Time to Abandon *Amex* and Start Over on Two-Sided Markets,” available at <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf>.

Sabre decisions are out there, for better or worse. These decisions appear to represent the victory of form over substance. They also suggest that the U.S. courts are continuing to swim against the tide.