Abuse of Dominant Position Part 2: Measuring Market Dominance

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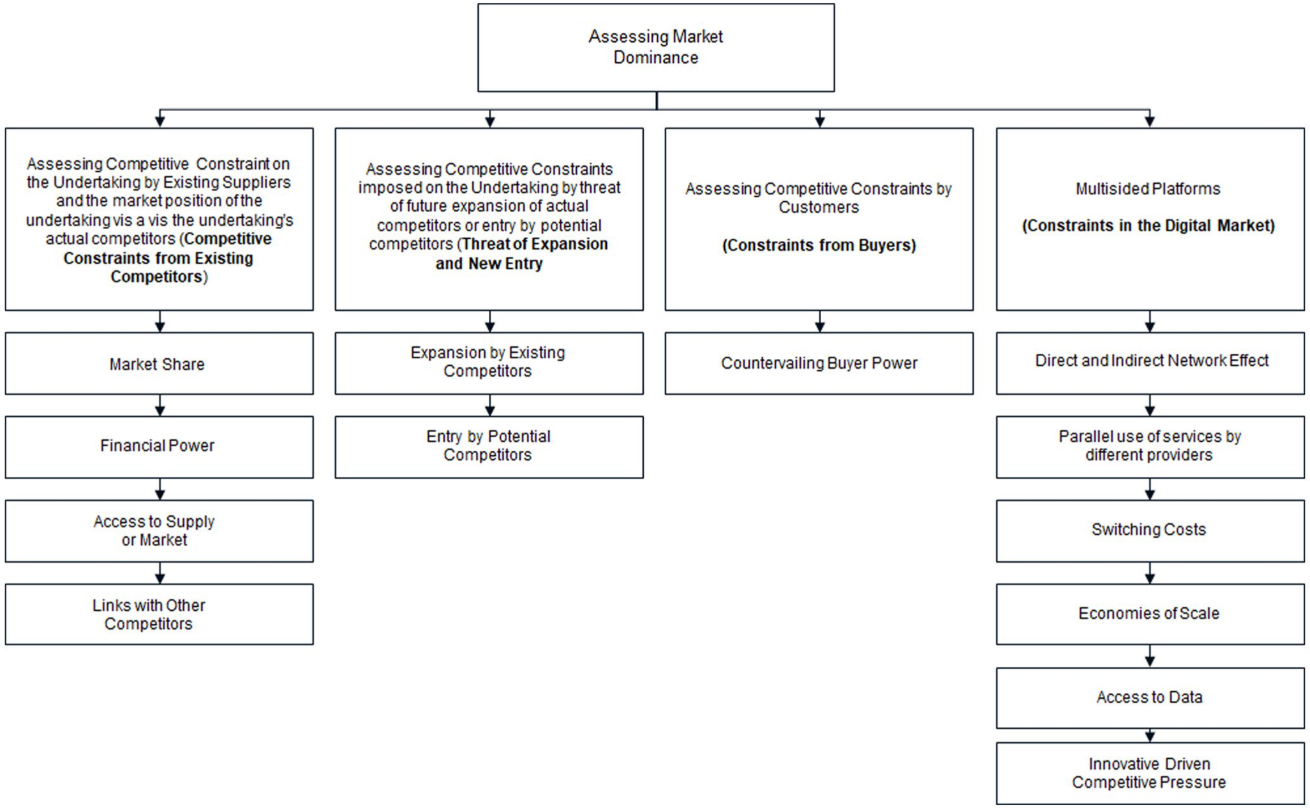
INTRODUCTION

Assessing the market dominance of an undertaking is not a straight-forward task which involves the analysis of several factors discussed in this Part B of our Competition Law Series on Abuse of Dominance. Assessing market dominance entails an examination of a combination of factors which cannot be considered in isolation but in relation to each other. Thus, the Abuse of Dominance Regulations (2022) ("Regulation") provides that a determination dominance is derived from a combination of several factors which taken separately, are not necessarily determinative and that the Federal Competition and Consumer Protection Commission ("Commission") will examine the facts underlying each specific circumstance and the characteristics of the relevant market in which the undertaking operates before concluding whether the undertaking under investigation is dominant or otherwise[1].

Determination of dominance can be diagrammatically represented below.



[1] Regulation 5(5) of the Abuse of Dominance Regulations ("Regulations")

We will be discussing Competitive Constraints from Existing Competitors in Section A, Threats of Expansion and New Entry in Section B, Constraints from Buyers in Section C and Digital Platforms in Section D.

SECTION A

I. Market Share

- **Why is Market Share Important?**

Data on market shares provides the Commission with useful information about the structure of the market and the presence or otherwise of market power. With respect to investigation on market dominance, knowledge of market shares provides the Commission with information on the market position of the undertaking under examination and that of their competitors.

- **Why is Dominance attributed to Undertakings with High Market Share and Vice Versa?**

The rationale for attributing dominance to market share is quite simple. Where a Firm A has very little market share, it is deemed to have very little market power because its competitors will need very little expansion to compete away business from Firm A in the event that Firm A charges prices above competitive level or provides goods below quality. Conversely, if Firm A has large market share, quick and/or sufficient expansion by Firm A's competitors may not be possible for several reasons. For example, the competitors may lack sufficient production capacity to satisfy consumer demand. Thus, the higher the market share of Firm A, the more the probability that Firm A has market power. The case for dominance is more compelling where Firm A holds the large market share over a sustained period of time[2]. That is, an undertaking will be deemed dominant if the undertaking has very high market shares and holds the high market shares for a considerable period.

- **When is an Undertaking Presumed Dominant?**

Pursuant to Section 70(3) of the Act, the Commission has the responsibility of setting the threshold for a presumption of dominance. Thus, Regulation 6 of the Regulations provide that the Commission will presume:

- an undertaking with 40% market share and above as a singly dominant undertaking in the relevant market. Similarly, Regulation 20 of the Nigerian Communication Act- Competition Practices Regulations, 2007 provides that the Nigerian Communication Commission will presume that any licensee whose gross revenue in a specific communications market exceed 40% of the total gross revenues of all licensees in that market is a dominant licensee. However, pursuant to Regulation 18.15.12 of the Air Transport Economic Regulations made pursuant to the Civil Aviation Act one or more airline service providers or operators will be treated as holding a dominant position if, singularly (by itself) or collectively they have a share of more than twenty-five percent (25%) of the relevant market;
- collective dominance where 3 or fewer undertakings have a combined market share of 50% and above in the relevant market;

[2] Reg. 6(2)(b)

- collective dominance where 5 or fewer undertakings have a combined market share of 2/3rd or above of the relevant market

- **What is the importance of Market Share Threshold in Assessing Dominance?**

The data on market shares allows the Commission filter undertakings worthy of expending considerable regulatory time and cost from undertakings whose conducts are unlikely to give rise to appreciable competitive concerns. Putting it differently, by setting market share thresholds, the Regulation creates a safe harbour for undertakings whose market practices are not likely to result in impactful competitive harm.

- **Can an Undertaking be Dominant even if it holds Market Shares below the above Thresholds?**

Yes, the Commission may still hold an undertaking with market shares below the above thresholds where the Commission considers other relevant factors that provide strong evidence of dominance. For example, where the undertaking in question operates in a highly concentrated market[3]. Concentration being the extent to which a handful of large firms control supplies or purchases of goods and services in the relevant market.

- **Will the Commission adopt a Static or Dynamic Approach in Assessing Market Shares?**

In calculating market shares, the Commission will not adopt a static approach. While relying on present market indices, the Commission will consider other indicators in such a way that the current market shares of undertakings in the market are likely to reflect the future competitive significance of the undertakings currently competing in the market and future market patterns. Therefore, the Regulation explicitly states that the Commission shall interpret market shares in the light of the relevant market conditions, the dynamics of the market and the extent to which products in the market are differentiated[4].

- **How are Market Shares Calculated?**

Market shares can be measured in several ways such as measuring dominance in terms of sales value, volume, capacity and reserve:

- **Market Shares by Sales:** This means calculating market shares in terms of sales as derived from available data on the monetary value of sales made by the undertakings in the relevant market.
- **Market Shares by Volume:** Calculating market shares in terms of volume is derived from data on the volume of sales/unit sales made by undertakings competing in the relevant market.
- **Market Share by Capacity:** Market shares can also be calculated in terms of the production capacity of the undertakings competing in the relevant market.

[3] Reg. 6(3)(d) of the Regulations
[4] Reg. 6(5) of the Regulations

- **Market Share by Reserves:** In certain natural resources industries, market shares may be calculated in terms of the quantity of reserves that the undertakings in the market own and/or control. As stated above, in calculating market shares the Commission will adopt a dynamic approach and not a static analysis. For example, in a merger scenario, the Commission's Merger Review Guidelines provides that where there is evidence that substantial new capacity is due to come-on stream in the relevant market, new licenses are up for issuance in the market or that some undertakings competing in the relevant market are running out of reserves, the Commission will adopt the current market share accordingly to anticipate such future occurrences. In the United States case of United States v. General Dynamics Corp, the United States Supreme Court discounted the large historic market share of the coal mining of an undertaking on the premise that the undertaking did not reflect the future competitive significance because the undertaking's coal reserves were either depleted or committed to long-term contracts.

- **Is the Market Share of the Undertaking under Investigation Examined in Isolation of the Market Shares of Undertaking's Competitors?**

  No. The market shares of the undertaking under investigation is assessed and examined vis a vis the market share of its competitors especially the market shares of undertaking that have the next largest market share.

- **Are Market Shares Determinants of Dominance?**

  No. While market share is an important factor in determining the market position of the undertaking under investigation, market share by its own does not determine whether an undertaking is dominant. Rather, market shares are examined together with all other factors highlighted in the Diagram 1 above[5]. In practical terms, market shares merely serve as working proxy to determine the market power of the undertaking under investigation. Hence, all other things being equal, the higher the market share the more persuasive or compelling is the case for a finding that the undertaking under investigation has market power. And the burden of proof shifts to the undertaking that it is subject to competitive constraints from competitors, customers and consumer which prevent it from increasing price, decreasing output, reducing quality or stifling innovation[6]. Hence, Regulation 6(3)(e) of the Regulations explicitly states that the presumptions of dominance in respect of the thresholds discussed above will only apply where there are no significant competition between undertakings in the market and that these undertakings do not face external competition. A very good example is the Nigerian brewery market which is dominated by three major brewers, Nigerian Brewery Plc, Guinness Nigeria Plc and International Breweries Plc. As of 2020, these dominant brewers collectively accounted for more than 70% of the market share. Nonetheless, the brewery market is characterised by fierce competition among these brewers who have over the years constrained each other from increasing price despite the high cost of doing business in Nigeria.[7] Jean-Francois, the chief executive officer of Heineken, the parent company of Nigerian Breweries Plc in an interview with *Business Day* said:

  > 'Nigeria is my most difficult thing for the moment to be honest . . . it remains a very tense competitive environment, I do not know where we are going there. We are still the market leader.'[8]

[5] Reg. 6(1)
[6] Reg 6(4)
[7] We Invested More in Nigeria in 2020 Than Any Other Year Since 2013'.
[8] Ibid.

- **Why are Market Shares not dispositive of Dominance?**

  There are several challenges associated with the use of market shares as a means of determining market dominance, such as:

  - Market share calculations attribute figures with respect to sellers existing in the market at the time of the analysis and does not take cognizance of undertakings that are not yet in the market but can timeously, profitably and sufficiently enter the market to constrain any exercise of market power by the undertakings under examination. Thus, the critical question is not the market share held by the undertakings at the time of analysis, but whether any price increase, quantity or quality reduction or innovation stifling will be unprofitable because too many consumers/customers could switch to the actual or potential competitors of the undertakings under investigation.

Box 1: Cisco Systems Inc & Messagenet SpA v. European Commission and Microsoft Corp- Case T-79/12

Cisco instituted the suit challenging the decision of the EU Commission approving the acquisition of Skype by Microsoft in Case COMP/M/6281 on the grounds that the transaction anticompetitive especially in view of the high market share held by the Parties. The court affirmed the decision of the EU Commission to the effect that while market shares of 50% or more is liable to constitute evidence of a dominant position, it is important to note that market shares are only used as an indicia of competition concerns to the extent that the market to which those shares relate has been defined beforehand. The court stated that the consumer communications sector is a recent and fast-growing sector which is characterized by short innovation cycles in which large market shares may turn out to be ephemeral. Against the background of such dynamic markets, high market shares are not necessarily indicative of market power.

  - Secondly, market share is at the risk of being considered a static analysis which may not be well equipped with dynamic markets such as the digital markets which are characterized by fast paced innovation and what Joseph Schumpeter described as the perennial gale of creative destruction. In simple terms, the perennial gale of creative destruction means that no firm perpetually remains the market leader or perpetuate its market dominance for long, because actual and/or potential competitors will always out-innovate incumbent firms[9]. For example, when social networking sites took-off, MySpace was the early market leader with about 76 million users in 2008. However, in the same year Facebook overtook MySpace as the usage of social networking sites kept rising. At some point when Facebook had more than 1.2 billion users MySpace went down to a paltry 36 million users.

  - Thirdly, market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from one market to another according to the structure of the relevant market especially as production, supply and demand are concerned.

[9] Alison Jones, Brenda Sufrin and Niamh Dunne "EU Competition Law- Text, Cases and Materias" p.60

II Financial Power

In markets that require high investment to enter and/or to operate, an undertaking that has ready and easy access to finance may be considered dominant, especially where its competing undertakings do not have access to such finances. Thus, the Commission will in addition to the factors highlighted in Diagram 1 above consider whether the relevant undertaking has access to considerable finance. For example, whether the undertaking has access to debt and/or equity financing from the capital market by listing its equity and debt securities on recognised securities exchanges in Nigeria. Also, the fact that the undertaking under investigation is the Nigerian subsidiary of global multinational can support a finding of dominance especially where the Nigerian undertaking can access substantial capital injection in form of cash, equipment, intellectual property and other assets from its parent company, which may not be the case of other competing undertakings. Furthermore, dominance could exist where the undertaking has high revenue or is very profitable. Profitability is however not dispositive of dominance because the absence of profitability does not contradict the finding of dominance. For example, the fact that a company sustains temporary losses may be evidence of an economic strength sufficient to sustain losses[10].

III Access to Supplies and Markets

That the undertaking under investigation has ready access to supply of input and ready market is important in measuring dominance. For example, where the undertaking in question is vertically integrated backwards which enables the undertaking source input and raw materials. Or where the undertaking is vertically integrated forward by owning extensive distribution channels. This way, the undertaking is largely assured of production input and ready market for sales. Furthermore, a finding of dominance is more likely where the undertaking under investigation is the owner or controls to intellectual property assets which is not readily available to its competitors. Similarly, an undertaking may be found dominant where the undertaking has access to and control of essential facilities such as certain infrastructures in network industries in respect of which competing undertakings require interconnection if the competing undertakings are to compete effectively.

IV Links with Other Competitors

The undertaking under investigation may have structural and/or operational links to its competitors which may influence the ability or incentive of the competitors to wield any competitive constraints on the undertaking under investigation. The different kinds of links that may raise competitive concerns include cross shareholding with competitors, cross directorship with competing undertakings, joint venture agreements with competitors, shared ownership or use of distribution channel or common membership of the same trade association.

[9] Ibid

SECTION B: THREAT OF EXPANSION AND NEW ENTRY

I. Expansion by Existing Competitors

One of the competitive forces identified by Michael Porter is rivalry amongst existing competitors. Hence, in assessing dominance, the Commission will examine the ease with which existing suppliers can expand production in response to an attempted exercise of market power by the undertaking under investigation since an increase in output will put a downward pressure on price. In assessing the competitive constraints to be imposed by the expansion of existing competitors, three questions need to be answered, namely; do existing competitors have the incentive to expand output (**"Incentive to Expand"**); do existing competitors have the ability to expand (**"Ability to Expand"**); and whether customers/consumers perceive the existing competitors as credible alternatives to the undertaking under investigation (**"Credible Alternative"**).

- **Incentive to Expand**

Competitors will have the incentive to expand in response to the exercise of market power by the undertaking under investigation if such expansion will be profitable. The competing undertakings will not expand output if its cost structure inhibits the profitability of such expansion. For example, competitors may lack economies of scale which the undertaking under investigation already enjoys. Also, the competing undertaking has less incentive to expand where the competitors' available assets will be more profitable if the assets are deployed to alternative ventures.

- **Ability to Expand Output**

It is important that the existing competitors have access to capital and possess the capacity to drive expansion by utilizing their existing production capacity or adding new production capacity[11]. Otherwise, such competing undertaking will have limited incentive and capacity to respond to the exercise of market power by the putative dominant undertaking. Similarly, the competitors' ability to expand may be restricted by contractual commitments in respect of their existing production capacity (e.g. long-term contracts) such that there is no available capacity to increase output.

- **Credible Alternative to Customers**

There must be a sufficient number of customers/consumers who see the existing competitors as a credible alternative to the undertaking under investigation and such customers/consumers must be able and willing to switch to the competing undertakings.[12]

II. New Market Entry and Barriers to Entry

Porter also identifies one of the five forces that shape competition in an industry as the threat posed by new market entrants.[13] Theoretically, if an industry offers high returns, new entrants will be gravitated to the market thereby putting pressure on price towards competitive levels[14]. However, entry barriers may exist (or are erected by incumbent undertakings) to prevent market entry such that incumbents are able to enjoy sustained high returns.[15] Thus, any analysis of the competitive constraints that potential entrants may impose on incumbent undertakings require an examination of barriers to entry. In the absence of barriers to entry, the threat of new market entry is expected to wield considerable competitive constraints on incumbent undertakings in the market.

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[11] Alistair Lindsay and Alison Berridge "The EU Merger Regulation: Substantive Issues" Fourth Edition p. 506
[12] Ibid 507
[13] Porter On Competition - Updated and Expanded Edition 4.
[14] Bruner Applied Mergers and Acquisitions 132.
[15] Bruner 132.

- **Types of Barriers to Entry**

The Regulation and the Act recognise legal barriers and other factual barriers which may impede or delay the entrance by potential competitors.

A. Legal/Regulatory Barriers to Entry

Legal/regulatory barriers to entry typically include tariffs and other regulatory (non-tariff) barriers to entry, such as production quotas[16]. Regulatory barriers will also include licensing, environment and safety regulations and other regulatory requirements which should be perceived as an unintended but unfortunate by-product of the government's policy objective to ensure safety, protect the environment or to generally preserve the sanctity or efficiency of the relevant industry rather than an inimical barrier to entry.[17] Categories of legal/regulatory barriers to entry include:

- ***Licensing:*** In some regulated markets, the relevant regulators have licensing requirements which may be cumbersome and expensive. For example, minimum capital requirements, regulatory bureaucracies, territorial restrictions and other licensing requirements may make entry costly and/or protracted. While licensing requirements serve important beneficial policy objectives (such as preserving the integrity of the industry or protecting consumers), they may also deter and/or delay market entry.

- ***Intellectual Property Rights:*** Intellectual property law generally are barriers to entry which are however necessary to protect proprietary technology. For example, a patent grants the patent holder monopoly rights in respect of the patented invention for a period of not less than 20 years. The grant of a patent or other intellectual property right deters rivals from entering a market for the patented product unless they obtain a license from the patent holder if they are to successfully enter the market.

B. Factual Barriers

The term "factual barriers" will include and is not limited to the following:

- **Sunk cost**

Sunk costs are costs that cannot be recovered if the business is unsuccessful.[19] Where market entry is associated with considerable sunk costs, the increased risks associated with a business failure may disincentivize a market entry. Examples of sunk costs include advertising and promotions expenses, costs of constructing specialized facilities and developing specialized assets, investments in human capital, research and development costs. Where the incumbent undertaking has already incurred sunk costs, the incumbent is better positioned to ignore the sunk costs when making pricing decisions in response to new market entry. Conversely, a market entrant who recently incurred significant sunk costs and is faced with price competition from incumbents, will lack the ability to cut prices below the point that covers its sunk costs.

- **Economies of scale**

Economies of scale means that the average production cost of an undertaking reduces as its output increases. The ability of an undertaking to enjoy economies of scale may be attributed to factors such as the ability of the undertaking to spread its fixed costs over more units or because

[16] FCCPA s 94(2)(b).
[17] Niels, Jenkins and Kavanagh "Economics for Competition Law Lawyers" 109.
[18] Kokkoris and Shelanski "EU Merger Control: A Legal and Economic Analysis" 386
[19] Schmalensee R. "Ease of Entry: Has the Concept Been Applied too Readily" 46.

incumbent undertaking employs more efficient technology or commands better terms from input suppliers.[20] Economies of scale can act as a barrier to entry in two ways, namely

- if the entrant can operate only below the minimum efficient scale,[21] it would have a significant cost disadvantage relative to the incumbent, thereby limiting the degree to which it can compete effectively.[22] Hence, economies of scale deter entry by forcing an aspiring entrant to either enter the market on a large scale which requires dislodging entrenched competitors or to accept a cost disadvantage;[23] and

- flowing from the first point above, where the entrant chooses to enter the market on a large scale, such entrant may be required to add significant market capacity if it is to make an efficient entry,[24] in which case the entrant will be wise to consider the risk that after adding significant capacity, he might be compelled to price below pre-entry market level in anticipation of the incumbents' response to the market entry.[25] This state of affairs generally makes market entry less attractive for an aspiring entrant.

- **Economies of scope**

  'Economies of scope' means that it is cheaper to produce two or more goods/service together than producing them separately. The more powerful the economies of scope is, the more likely it is that entrants would have to enter two or more product market at the time of entry if they are to have a chance of being competitive.[26]

- **High customer switching costs**

  Switching costs are costs that buyers face when they change suppliers. Switching costs will include the cost of searching for alternative suppliers, negotiating with alternative suppliers or modifying product specifications or other market specific factors. Thus, market entry may be deterred where the customers are faced with high switching costs when they intend to switch from an incumbent undertaking to a new entrant. Other than costs incurred by the customers, the barrier to entry may also include reluctance or inertia of customers/consumers to switch suppliers for several reasons, including the time and effort required by the customers to switch[27] or brand loyalty.

SECTION C: COUNTERVAILING BUYER POWER

Countervailing buyer power is essentially the power of a buyer/customer to create or enhance competition on the sellers' side of the market by imposing competitive constraint on the undertaking under investigation. Countervailing buyer power can be manifested in several ways, such as where the buyer can; self-supply by backward integration; assist new market entry to compete with the incumbent undertakings; play one incumbent undertaking against another undertaking by threatening to switch purchases especially where switching costs are negligible.

[20] Porter 9.
[21] Minimum efficient scale refers to the point at which the firm is able to minimize its per-unit costs in both the short and long term.
[22] Niels, Jenkins and Kavanagh110-111.
[23] Porter 9.
[24] Schmalensee 48.
[25] Ibid.
[26] Mergers and Acquisitions: Understanding the Antitrust Issues 202.
[27] Anderman "The Interface between Competition Law and Intellectual Property"11.

SECTION D: CONSTRAINT IN THE DIGITAL MARKET

The concept of multisided platforms and the digitalization of the economy has been discussed in the Part A of this Competition Law Series. As such we will restrict our discussions in this part to barriers to entry in the Digital Market.

1. Significant network effect

The digital economy is characterized by the economic concept of 'network effects' whereby a product or service is as valuable as the number of consumers that use the platform. An increase in the number of users increases the possibilities of transactions to be consummated on the platform. Furthermore, the larger the number of customers using the network product, the more valuable the product is for the next potential customers.[28] There are two types of network effect, namely, direct network effect and indirect network effect. Direct network effect refers to the effect that more users have on demand for the relevant product or service. For example, take the hypothetical case of a GSM operator that has 500 subscribers on its network; assuming that it is impossible for the users of the GSM operator to communicate with subscribers on a competing networks. If a new consumer subscribes to the GSM operator the 500 original subscribers can now make contact with an additional person, without having incurred any additional cost themselves. Therefore, the more consumers subscribe to the network, the more valuable it becomes to everyone that subscribes to the GSM network of the operator in question.[29] Indirect network effects, on the other hand, is a situation whereby complementary goods are more readily available or are available at a lower price due to the increase in the number of users.[30] For example, the Google search engine is free to users conducting searches on the search engine but advertisers pay for services. An increase in the number of users make the search engine more attractive to advertiser. The more users search on the platform, the algorithm for the platform gets better thereby increasing the usefulness and functionality of the search engine, begetting more users who beget more advertisers in an endless virtuous cycle.[31]

Network effect gives rise to a barrier to entry when the network has achieved a critical mass such that the market is said to have tipped in favor of the network.

a. Critical mass

When a network product or service attains a significant number of users, the network is said to have attained a 'critical mass'.[32] For example, as at the year 2019/2020: Amazon accounted for 40% of online shopping in the US; Facebook recorded more than 2 billion users monthly and as at June 2021 crossed the one trillion mark; Google processed 90% of web searches globally; Facebook (now known as Meta) owns the world's biggest pool of personal data and the biggest social graph; Amazon has more pricing information than any other firm. This critical mass of users serves as a barrier to entry because new entrants may be required to acquire a comparable critical mass of user as a condition for an effective and profitable market entry[33]. In reality, many of the entrants may lack the ability to develop a critical mass for the creation of a vibrant and profitable network that can efficiently enter the market and efficiently compete with the incumbents.

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[28] Anderman "The Interface between Competition Law and Intellectual Property"11.
[29] Whish & Bailey Competition Law 10th edn 13.
[30] Anderman 11
[31] Jones, Sufrin and Dunne "EU Competition Law: Text, Cases and Materials" 61.
[32] Kokkoris and Shelanski 390-391 The possibility of expansion for Tech Incumbents appears boundless considering the fact that even in western countries, a significant part of the economy is yet to be digitized, e.g., only 1/10th of retail is online, approximately 1/5th of computing workload is hosted on cloud platforms owned by Amazon and Microsoft. The opportunity for expansion becomes more apparent where these Tech Incumbents expand into emerging economies with relatively low cost on digital technology. Though the Tech Titans have recently been the subject of significant fines and punishments by tax, privacy and competition regulators, these fines are worth less than 1% of the Tech Titan's value and are tolerable transaction costs for them.
[33] Evans and Schmalensee 'The Antitrust Analysis of Multisided Platform Businesses' 411

b Tipping

The barrier erected by a network product that has attained a critical mass may result in a situation of the winner takes all and the relevant market has 'tipped' in favour of the dominant undertaking[34]. This is known as the 'tipping-effect'. Once the market has tipped, it is extremely difficult for entrants to quickly and cost effectively surmount the barriers to entry presented by incumbents who control massive amounts of data and economies of scale.[35] The possibility of tipping is heightened where the relevant network product or service have become a market standard such as Microsoft[36] or where consumers exhibit an inertia to alternative and/or better network products.[37]

Box 9.6

The EU Commission found that Google had abused its dominant position on the market for online general search services in 13 countries in the European Economic Area by favouring its own comparison shopping service, a specialized search engine service, over competing comparison shopping services. The EU Commission found inter alia that the results of product searches made using Google's general search engine were positioned and displayed in a more eye catching manner when the results came from Google's own comparison shopping service than when they came from competing comparison shopping services. In reaching its decision, the EU Commission concluded that Google had market shares in the market for general search services in each EEA country in excess of 90% and the fact that Google enjoyed significant direct and indirect network effects. Hence, the tendency for the market to tip in favour of Google.

Google and Alphabet v Commission Case T-612/17 (Google Shopping). See Also, the Google Android Case AT.40099.

2. Parallel Use of Service

The Commission will enquire whether some consumers will engage in multi-homing by maintaining membership of two or more platforms.[38] There are markets where several network platforms can co-exist and compete despite the presence of the network effects. For example, in the market for smartphone operating systems there is a fierce battle between a number of different operating systems such as the Apple IOS, Android and Windows 8, and it is not clear who will win or even whether there will be only one winner.[39]

3. Switching Costs

In addition to tipping effects associated with network effect, the nature of some platforms can cause markets to be 'locked-in' to existing technologies despite the existence of new and more efficient network technologies. The lock-in is attributable to the switching costs incurred by consumers or technological impediments faced by consumers when they intend to switch from the network product of the incumbent to that of the new entrant. Where such switching costs or technical hindrances exist, consumers are dissuaded from switching platforms. In other cases, consumers

[34] Whish & Bailey "Competition Law" 9th edn 13.
[35] Ibid.
[36] Spulber and Yoo 'Antitrust, The Internet and the Economics of Networks' 387.
[37] Kokkoris and Shelanski 391.
[38] Evans and Schmalensee 416
[39] Niels, Jenkins and Kavanagh 114.

may have established habits and routines that form part of their daily lives such that the use of the incumbent's network product or services are incorporated into the consumer's routine lives. This way the incumbents have established strong relationships with their users and stand a good chance of keeping consumer regardless of price.[40] Furthermore, once these technology companies have established strong relationships with users, they stand a very good chance of keeping them regardless of price.

4. Economies of scale

Economies of scale is discussed above. The digital markets provide a classic example of economies of scale as a barrier to entry. Digital markets are characterized by extreme and increasing returns to scale whereby the cost of producing more or of expanding in other sectors decreases with the Company's size[41]. This means that large digital platforms are far more efficient than small ones.

5. Data

As discussed in Part 1 of our Competition Law Series on Abuse of Market Dominance, data is the currency and the raw material for the digital economy and incumbents grow more useful to customers when they attract more users and when they gather ever more data about those users.[42] The data collected and stored by dominant incumbents may be needed by new entrants in the digital economy if the new entrant is to compete with the incumbent and/or develop innovatory products and services. There are two overlapping issues when it comes to users' data: First, data binds the users to the platforms. Secondly and concomitantly, where data binds users to a platform, a platform with a critical mass of users have an anticompetitive edge over new entrants.[43] In fact the Commission's Notice on Market Definition attributed market dominance in digital markets to high and increasing returns to use of data because the more data the relevant player controls, the better its product[44]. The issues surrounding data as a barrier to entry may however be mitigated by portability of data espoused in data protection laws.

6. Other Factor of Dominance in Multisided Platforms

In addition to the factors discussed above, the Commission's Notice on Market Definition identify that the tendency of digital platforms to move towards a single dominant player with a critical mass is reinforced by factors such as:

a. marginal costs close to zero because the costs of servicing another consumer is close to zero;

b. low distribution costs that allow for a global reach.[45]

[40] The Economist Magazine 'Special Report: The Rise of the Superstars' 9.
[41] Notice on Market Definition, para. 59(ii)
[42] The Economist Magazine 'The Giant Problem' 11.
[43] The Economist Magazine 'Silicon Valley, We Have a Problem' 23.
[44] Market Definition Notice Para. 59(iv)
[45] Ibid

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