Regulating the New Media Economy

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The new media economy operates differently from other industries when it comes to regulation. The marginal costs of technological giants mean that their interactions are distinct from other industries where governments try to prevent cartels from occurring.

As result of the dramatic increase in the importance of delivering relevant content, the understanding of locality has changed. Accordingly, shared interest has become the predominant feature in markets these days, and physical or geographic locality in turn has become of less determinative of a market.

The relation between high-tech firms and antitrust policy depend upon numerous factors, all are inextricably related to firms and end-consumers, interacting in a market with increasing intervention.

The New Media Economy (NME)

Downward pressure on the costs of transmitting information is transforming the relative costs of transmitting information and producing content. Consumers now are more concerned with the content of the ideas themselves than the means of transmission.

The new media economy has radically altered the manner in which media and high technology firms compete with each other. Many firms now compete with each other across multiple platforms. Consumers also more pro-actively seek out information across channels, rather than being passive receivers of it as they have been in the past. This has also changed the market dynamics. There is a convergence between telecommunications, broadcasting, audio-visual and related services.

> The EU has typically had a more interventionist approach than the US, finding abuse of dominant position much more readily based on doctrines like the duty to deal.

The EU accepted this reality back in 1997 in its *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation*. The EU accepted that the regulatory approach adopted could negatively impact these developments and leave EU citizens "in the slow lane of the information superhighway". It also noted that a pro-competitive regulatory policy was necessary to ensure that this sector could deliver benefits. An overly intrusive antitrust policy will have the same effect as an anti-competitive regulatory framework.

Convergence and the NME have combined to radically change the way consumers process information. As we noted above, these developments have resulted in a framework where content is far more important to consumers than the manner of transmission. This has fundamentally altered what is local and what is free.

As content becomes more significant, the definition of locality has changed. Now locality is not bound by transmission. Communities are bound together by interest in content regardless of their geographic locality.

Definition of Free

When public service broadcasters had to compete with others for the limited commodity of spectrum, government intervention was needed to preserve spectrum, and regulation was necessary to ensure pluralism, diversity, independence and cultural offerings that it was assumed the free market would not provide.

Public broadcasting was heavily subsidized in order to enable it to compete with private broadcasters. As the market has expanded to encompass other platforms for receiving content, and the need to support public broadcasting has diminished, the need for public subsidy and other regulatory barriers is lessened.

Ensuring Vigorous Inter-Platform Competition

In the NME world of declining marginal cost to zero, ensuring vigorous inter-platform competition will be very important. The industries in this area must seek as wide a market as possible, in order to compete with other platforms. There is an important dimension related to intellectual property protection here. Weakening of intellectual property protection will actually damage inter-platform competition because it will erode the ability of these platforms to actually compete with each other.

High tech firms and antitrust policy

There are a number of contexts which are important to consider that are unique to high tech firms and that determine the best antitrust approach to them.

First, the marginal cost curve of high-tech sectors is decidedly different from that for more basic goods. The U-shaped marginal costs curve of a basic good has been replaced by a marginal cost curve which is declining to zero. The reduction in the marginal cost means firms in this sector are under considerable pressure to rapidly build as large an installed base as they can.

> If threats of antitrust compulsion hang over the heads of innovators they will innovate less, and the world will be poorer for it.

Second, market power is much less durable than it is for less high-tech products. This is a sector where a whole technology can become obsolete more or less overnight. Given this, legalistic and formalistic approaches to market share as a proxy for power over price may not hold good.

Third, and related, it is much easier for potential entrants to break into these markets. The barriers to entry are relatively low – new companies that become global giants start on university students' laptops for example.

Fourth, market definition is changing. Increasingly, across geographies and products, markets are expanding. The traditional approach to market definition is to apply the classic SSNIP test (Small But Significant Non-Transitory Increase in Price) – the test asks will consumers switch if there is a small but significant, not transitory increase in price? If they do, then these products are included within the product market definition. If they do not, you keep expanding what is included in the hypothetical product market definition. In the new media economy, where different platforms compete for users, the relevant market can contain a print-based newspaper company, a search engine, or a website.

All of these can compete together in the same market place. A principal complaint of the sector is that regulators apply far too strict definitions of product markets (based on historic views of what constituted a relevant product market) that unduly narrow the markets in which firms compete. Clearly, market share declines dramatically as the relevant product market expands.

Fifth, network industries have powerful, positive feedback loops. This is because the development of new products and the development of new consumers who buy that new product are mutually reinforcing.

Sixth, often tech markets are two sided rather than one sided. A two-sided market occurs when a particular firm or technology is serving different types of consumers. Credit card markets are an example of two-sided markets. The credit card service involves two different types of consumers – the merchants that must accept the credit card, and the end consumer who wishes to use the credit card to buy things from the merchant. In two sided markets, often one offering is free (or heavily subsidised), because the goal of the firm is to increase installed base, and revenue is made in some other way related to the size of the installed base (such as advertising). This makes market shares both harder to calculate but less useful as an indication of power over price.

Any antitrust enforcement in the high-tech space needs to take full account of the key factors that are set out above.

References

Commission Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation (COM (97) 623, 3 Dec. 1997

For a general treatment of this subject, see Shanker A. Singham, A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets (CMP) (2007)