Getting beyond "big is bad": rethinking the impact of platforms on competition through the lens of market distortion

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Platforms and competition reform

Are platform operators, online marketplaces, and digital gatekeepers, however defined, beneficial engines of disruption or damaging agents of distortion?

From the perspective of competition law and policy, the answer is a maddening "both," depending on the conduct or the circumstances. As certain platforms have emerged and grown in size and influence, so have concerns about the impact of the features of this business model, typically characterized by network effects, multi-sided markets, and access to/control over data, on the economic landscape.

It should come as no surprise, then, that developing a platform governance framework that can distinguish between benefits and harms in the dynamic, rapidly changing conditions of digital markets has been top of mind among major competition authorities. However, as certain platforms have emerged and grown in size and influence, so have concerns about the impact of the features of this business model, typically characterized by network effects, multi-sided markets and access to/control over data, on the economic landscape.

The pace of competition reform internationally has varied. The European Union has advanced furthest in terms of formal legislative instruments adopted, such as the Digital Markets Act. In the United States, a sextet of bills before Congress, including Senate Bill 2992, the *American Innovation and Choice Online Ac*t were introduced in 2021 with the goal of modernizing antitrust and reigning in the power of platforms. Though these legislative efforts have stalled, the Federal Trade Commission (FTC) and Department of Justice, Antitrust Division (DOJ) have nonetheless moved forward on some fronts, relying on President Biden's Executive Order and conducting a 2022 joint public inquiry into modernizing merger guidelines.

In comparison, Canada lags its peers on determining how to use competition law and policy to respond to digital and data-driven markets, including platform behaviour. A limited set of preliminary reforms was enacted in June 2022 as part of Bill C-19, an omnibus budget bill, the first amendments to the Competition Act in 13 years. In a nod to the digital transformation of the economy, the changes included a prohibition on drip pricing and the addition of new factors to consider when assessing the conduct of dominant or merging firms, such as network effects, non-price impacts such a choice, quality, and consumer privacy as well as impacts on the nature and extent of innovation and entrenchment of an incumbent's position.

However, these express references to artefacts of technoscientific capitalism are unlikely to have much effect until a second, more substantial stage of reforming competition law is complete. Though the timing is unknown, it is expected to begin in the next year now that a recent public consultation on modernizing the Competition Act has concluded.

Policymakers' preoccupation with a small group of enormous platforms is behind the momentum to develop rules specifically tailored to them, particularly as competition agencies recognize the importance of compatible regimes to enable what they see as the needed collective enforcement to check the power of the largest global digital players. The challenge has been to fit these new business models into existing methods of analysing competitive harm. While many naturally include towards seeing platform behaviour as a form of unilateral conduct by a dominant player, bringing abuse of dominance cases against them is challenging. In Canada, successful abuse cases are exceedingly rare; applying the exacting technical rules to platforms is expected to be exceedingly difficult as it requires both evidence that platforms are "dominant" and that they have engaged in abusive conduct that causes quantifiable harm to either a competitor or to competition in the market (a 2022 addition).

While the direction of Canadian reform on abuse of dominance remains unclear, it may follow reform efforts in other countries, which have sought to change how we view the competitive impact of "dominant" firms by drawing bright lines between the largest platforms and all others based on readily determinable metrics, such as market share, volume of commerce, number of users, or market capitalization. Where platforms meeting these thresholds engage in certain practices, like self-preferencing or exclusionary gatekeeping, this is treated as either inherently harmful (no evidence of harm required) or presumptively harmful (rebuttable with evidence).

While few debate the need to scrutinize the behaviour of the largest platforms carefully, size-based *ex ante* regulation of platforms chafes against a core tenet of classical economic theory – that neither market share nor absolute size should be presumed to confer market power. The perception that emerging platform governance rests, even partially, on the idea that "big is presumptively bad" has fueled strong criticism in competition circles and mobilized those opposed to competition reform more broadly.

Market distortion

Against this backdrop, I believe we should explore an alternate basis for *ex ante* regulation of certain platform behaviour that remains faithful to the basic economic principles embedded in competition law. Tying regulation to sheer size may not be the best path forward. Why not instead draw on the underlying rationale of prohibiting deceptive marketing – market distortion – to focus on platform conduct that by its nature suppresses or otherwise interferes with the competitive rivalry that would otherwise occur?

Deceptive marketing creates market distortion by allowing dishonest or careless market participants to exploit their counterparty (consumers, suppliers, etc.)'s expectation that they

can make choices based on accurate and reliable information. Without the existence of this expectation (trust), and the resulting reliance it produces, deception would be much more difficult and costly to pull off.

The expectation of sufficient transparency to allow informed rational choice is considered a necessary condition for the existence of market-based competition. Where this expectation does not hold, the resulting market distortion has two different negative effects on aggregate allocative efficacy (the ability of markets to foster efficient use of scarce resources).

The first is on customers or consumers, who will either pay higher prices or who will acquire goods and services on suboptimal terms because they have been misled on a material point.

The second effect is on other market participants who have not been deceptive and are hampered in their ability to compete. The harm to them is twofold. First, they are deprived of the chance to compete for customers under conditions that allow customers to make informed comparisons. This may cause honest firms to lose market share, be unable to continue to participate in the market, or to abandon entry or expansion efforts. The second impact is intangible and general – it undermines confidence in the market mechanism itself if cheating (or carelessness) goes unchecked. This could cause withdrawal from the market or create a perverse incentive by honest firms to resort to the deceptive behaviours that have given cheaters an advantage. In this latter case, market participants may be better off, but customers – and the market itself – are worse off with even less ability to determine which products or services best meet their needs.

There is already precedent for sanctioning platform behaviour as deceptive marketing. The most prominent example is the FTC's 2019 Stipulated Order issued against Facebook in 2019, following revelations that Facebook had failed to inform users about its data-sharing arrangements with third-parties. The Competition Bureau brought a similar action against Facebook in relation to Canadian users that was settled in 2020. While both these cases are counted as successful enforcement actions against platforms, the Canadian settlement is short and does not offer much insight into the rationale for its decision to apply the deceptive advertising provisions beyond the obvious allegation of deceiving users.

What I propose is to intentionally build on the idea of market distortion to create a principled basis for extending the ambit of the prohibition to include other forms of platform conduct beyond what has conventionally been understood to constitute deceptive or misleading conduct.

Can the concept of market distortion create a foundation for robustly analysing the impact of platforms on competition?

Essentially, the prohibition on deceptive or misleading marketing sanctions unilateral conduct by a market participant, independent of size or economic power, where this conduct is presumed to distort the normal interaction between the forces of supply and demand.

This approach offers certain advantages over size-based regulation. The most obvious is that platforms are engaged in a wide number of promotional and advertising activities that fit within the conventional deceptive marketing paradigm.

Next, many platforms operate in a business environment characterized by multi-sided markets. They could thus be subject to the dual concerns of prohibiting deceptive marketing: protection of consumers and protection of rule-abiding firms. Beyond this, focusing on the features and conditions that enable platforms to disregard the basic rules of engagement creates conceptual space to think about the novel ways that platforms may unfairly or abusively leverage information asymmetries and new business models, particularly around the collection, analysis, and sharing of data.

Finally, aside from avoiding the pitfalls of reliance on size, this approach offers a workable solution that addresses two important considerations for Canadian enforcement. First, the proposal can be implemented immediately using existing rules; there is no need to wait for a second phase of competition reform. Second, it is tailored to the core mandate of the Competition Bureau (promoting competition in Canada). Reframing the central concern of enforcement against platforms as one of market distortion and not size will empower the Bureau to concentrate its scarce resources on investigations focused on what happens in Canadian markets and to Canadian consumers, with particular attention on the potential for Canadian-based firms that may otherwise be overlooked given their smaller size to engage in market-distorting conduct. This kind of targeted enforcement also affords Canada a way to contribute meaningfully to the international effort of platform governance within the limits of institutional capacity and geopolitical status as a trade-dependent middle power.