

Attention Markets and European Competition Law

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Summary: Following the economic literature attention initially treated as „fictitious commodity“ became an important component of the market; in attention market users supply time for content they are interested in. Attention market differs from conventional market in several aspects and becomes a new challenge for antitrust. The article therefore analyses attention markets from competition point of view. Starting with economic background it discusses different approaches to the relevant market analysis and the tools used for relevant market assessment (SSNIP, SSNIC and SSNDQ test). It explores also changes in identification of market power and new forms of anticompetitive behaviour in these prevalently zero-price markets. Attention is drawn also to the benefits of functioning competition. Outcomes of analysis are summed up in the conclusion.

Keywords: attention economics, attention markets, zero-price market, antitrust, market power, anticompetitive practices, benefits of competition.

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1. Introduction

The present information society with digitalization changing gradually many aspects of the life in society thanks to the use of information technologies influences economics at the same time. The other side of the wealth of information brought by this new era is limitation in their perception conditioned by human attention concentrated in particular time on one piece of information only. So, there is no direct proportion between wealth of information on one hand and human attention on the other hand. As a result, attention becomes a precious phenomenon; its value is reflected by attention economics. Attention economics

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perceives attention as a commodity; „*human attention, valuable and limited in supply, is a resource.*“¹

There is a relatively new concept dealt with by attention economics – the attention market. „*In the attention market consumers supply time in return for content that entertains or informs them. Attention platforms assemble bundles of content to acquire that time and sell advertisers access to those consumers.*“²

The attention market is a substantial part of economics; Evans states that in 2019 American adults spent 514 billion hours engaged with content interspersed with Ads compared to 325 billion of hours working.³ The attention market using content facilitates exchange between consumers and advertisers.⁴

2. Economics of Attention Platforms

In platform's economics content plays a substantial role attracting consumer's attention. „*Attention platforms use content to get consumers to spend time on their platform and sell marketers the ability to expose those consumers to messages.*“⁵ Attention market is a two-sided market comprising „*buy-side market in which platforms acquire consumer time and a sell-side market in which platforms sell slices of that time to marketers.*“⁶ Advertisers are willing to pay more depending on the size of audience; therefore motivation of the platform is to increase value of content in order to attract more consumer.⁷ As far as content is concerned, there is no need for homogeneous content; „*attention platforms can compete offering different types of content to attract time.*“⁸ They specialize in different types of content to meet differentiated demands. But the advertisers are ready to pay more as a result of indirect network effects.⁹ Jones and Sufrin explain difference between direct and indirect network effects. „*Direct network effects means that the product becomes more valuable the more users it has ...*

¹ WU, T. Blind Spot: The Attention Economy and the Law. *Antitrust Law Journal*. 2019, vol. 82, no. 3, pp. 771–806

² EVANS, D. S. *The Economics of Attention Markets*. p. 2. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044858

³ Ibid.

⁴ Ibid.

⁵ Ibid, p. 8.

⁶ Ibid, p. 12.

⁷ Ibid, p. 9–10.

⁸ Ibid, p. 13

⁹ Ibid, p. 10.

indirect network effects means that increases in the usage of one product increases the value of complementary ones (such as software and operating systems). “¹⁰

Attention markets in fact trade content for time¹¹, therefore importance of platform or its size is determined by time. Evans estimates the time spent on ad-supported content at about 8,8 hours daily. So, attention industry being larger than retails industry represents an enormous part of the U. S. economy.¹²

From the terminological point of view, two- (or multi) sided markets are described as „platforms“. Parker et al. define platform as „a business based on enabling value creating interactions between external producers and consumers“. ¹³ However, „the exact definition of what constitutes a „platform“ is a matter of dispute.“¹⁴ Therefore some authors reject this notion. J. Newman e. g. recommends to use more precise notion „attention intermediary“, reasoning, that the attention markets are essentially top-down distribution systems. Natural persons are producers and suppliers of attention trading it to intermediaries „in exchange for valued products like online search, personal social networking services, etc. These are barter (product for product) exchanges.“¹⁵ Thereafter intermediary distributes the attention to advertisers as its final consumers for a positive price¹⁶; compared to classical antitrust there is a change in the role of consumer performed no longer by natural person but an undertaking.¹⁷

Attention markets are often described as zero-price markets. This tempts many authors to describe attention as a price paid for the desired service: „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

¹⁰ JONES, A., SUFRIN, B. *EU Competition Law. Text, Cases and Materials*. Oxford: Oxford University Press, 2016, p. 48.

¹¹ EVANS, D. S. *The Economics of Attention Markets*, p. 14 [online] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044858

¹² Ibid, p. 16, 17, 21.

¹³ PARKER, G. G., VAN ALSTYNE, M. W., CHOUDARY, P. S. *Platform revolution: how networked markets are transforming the economy and how make them work for you*. New York: W. W. Norton & Company, 2017, cited according to CRÉMER, J., DE MONTJOYE, Y.-A., SCHWEITZER, H. *Competition policy for the digital era*. Luxembourg: Publications Office of the European Union, 2019, p. 21.

¹⁴ JONES, A., SUFRIN, B. *EU Competition Law. Text, Cases and Materials*. Oxford: Oxford University Press, 2016, p. 49.

¹⁵ NEWMAN, J. M. Antitrust in Attention Markets: Definition, Power, Harm. (Dec. 9, 2020) *University of Miami Legal Studies Research Paper*. No. 3745839, p. 17 [online]. Available at: SSRN: https://ssrn.com/sol3/papers.cfm?abstract_id=3745839

¹⁶ Ibid.

¹⁷ Ibid, p.19.

*a user access, but in return, the user may be paying with their attention to advertisements, creative labour, privacy or personal data.*¹⁸

Although attention is often understood as a „new currency“ Newman defines attention as a product, „a direct output of human activity and cognition“. ¹⁹ Attention has all features of product being scarce, rivalrous and tradeable.²⁰ This new conception of attention economics with a human being as a producer of attention and advertiser as its consumer at the same time evokes interest of antitrust, ignoring for a long time zero-price markets as a whole.²¹ Big tech-firms such as Google really force antitrust to analyse attention markets from the competition point of view, as there is a real „cost of thinking“²², Absence of positive price does not mean that there is no market activity.²³

In case of big-tech firms is often emphasized their access to data as their competitive advantage. In fact, as stated by Newman, „data demand is derived demand“.²⁴ Although there is primary demand for attention, attention markets involve also personal data. Data is used for personalization of advertisements and for improving the quality of own products.²⁵

3. Relevant market

Assessment of the relevant market is usually a first step in the competition analysis both in antitrust and merger control. Relevant market as an important and specific tool of competition law is used to identify competition boundaries between undertakings, respectively competition constraints the undertakings are exposed to. The European competition law Notice on the definition of relevant market (1997)²⁶ defines a product relevant market taking in account products/services that are substantially interchangeable. „It includes identical products, or products considered by consumers to be similar by reason of their characteristics, price

¹⁸ OXENHAM, A. S., CHRISTENSEN, B., CONRAD, J., GIMMER, N. and PRATT, J. *Market Definition in the Digital Economy: Considerations for how to Properly Identify Relevant Markets*, p. 5 [online]. Available: <https://www.antitrustinstitute.org>

¹⁹ NEWMAN, J. M. *Antitrust in Attention Markets: Definition, Power, Harm*. (Dec. 9, 2020) *University of Miami Legal Studies Research Paper* No. 3745839, p. 7 [online]. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839

²⁰ *Ibid.*, p. 7–8.

²¹ *Ibid.*, p. 19.

²² *Ibid.*, p. 8.

²³ *Ibid.*, p. 9.

²⁴ *Ibid.*, p. 9.

²⁵ *Ibid.*, p. 10.

²⁶ 97/C 372/03 Commission Notice on the definition of the relevant market.

or use.²⁷ This is, of course, a definition tailored for the standard market built on classical transaction including monetary exchange. But the specific feature of the attention market is a barter exchange; so, it is a zero-price market with absence of a monetary price. Attention intermediaries (platforms) compete for attention and users supply time for the desired content offered by the platform, that entertains or informs them.²⁸ Under this broad conception „*attention platforms can compete by offering different types of content to attract time*.“²⁹ So, everything what competes for attention should be comprised in market definition regardless the use of the service for consumer. Using this approach would lead to one „*massive unconcentrated market ... within such a massive market each rival's individual share would be miniscule. Through a lens this wide even giants would appear tiny*.“³⁰ So, there would be „*antitrust immunity for attention intermediaries*.“³¹

Compared to broad Evan's definition Newman considers as not correct to situate different intermediaries on one relevant market unified only by ambition to attract attention. By contraries, following his opinion, „*relevant markets do not include all substitutes. Instead, they include only products that are ,reasonable substitutes*‘.³² His main argument is that „*from a user's perspective there are appreciable differences between general search results and personal social-networking*“³³, so it is not enough for situating them all on the same market only because all of them seek human attention.³⁴

As far as technical means for assessment of relevant market are concerned, it is first of all SSNIP test (small but significant non-transitory increase in price) that is being used for the relevant market analysis depending on small but non-transitory increase in price of the given commodity (5-10 %). So, this test can be applied only on that parts of distribution system on the attention market where attention is distributed to the advertisers for the positive price; barter exchange of attention between producer and intermediary requires due to the absence of price some modifications.³⁵

Usually, SSNIC test (small but significant non-transitory increase in cost) or SSNDQ test (small but significant decrease in quality) is used to replace

²⁷ STEINER, J., WOODS, L. *EU LAW*. Tenth Edition. Oxford: Oxford University Press, 2009, p. 691.

²⁸ EVANS, D. S. *The Economics of Attention Markets*, p. 2 [online]. Available at: https://papers/ssrn.com/so13/papers.cfm?abstract_id=3044858

²⁹ Ibid, p. 13.

³⁰ NEWMAN, J. M. Antitrust in Attention Markets: Definition, Power, Harm. (December 9, 2020) *University of Miami Legal Studies Research Paper* No. 3744839 [online]. Available at SSRN: https://papers.ssrn.com/so3/papers.cfm?abstract_id=3745839

³¹ Ibid.

³² Ibid, p. 26.

³³ Ibid, p. 27

³⁴ Ibid.

³⁵ Ibid, p.21.

SSNIP test developed for conventional market. Concerning SSNDQ test, „it is unclear until now how this test could be made operational in practice without a precise measurement of quality, that would allow...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...“³⁶

It appears, there are not so many problems connected with the application of SSNIC test based on question whether the hypothetical monopolist could be able to increase attention costs in form of more time or space used for advertising purposes or more distracting advertisements. In any case there is a change in the „ratio between desired content to advertising load.“³⁷

Regarding the fact that relevant market is an abstraction not a real market existing in practice there is a lot of space for individual approach and essential reasoning. Russo and Stasi emphasize that there is no universal approach in case of relevant market assessment.³⁸ Practical approach is often preferred. European commission has turned e. g. to assessing service functionalities and OECD recommends to use the new test (SSNDQ) rather „as a loose conceptual guide than a precise tool.“³⁹ Evans underlines that „there is no direct measure of the value of the content, ... nor is it generally possible to estimate consumer surplus... Attention markets are based on trading content for time“⁴⁰.

Finally, thanks to the development of new business models, there are rapid changes in the market definition. Therefore Drobný suggests „the relevant market should be treated as a function of company's activities.“⁴¹ It is of concern that some intermediaries build their business model using knowledge of neuroscience in order to keep the users on their platforms the longest possible time with the threat of developing addiction e. g. of social networks.⁴²

³⁶ CRÉMER, J., DE MONTJOYE, Y.-A., SCHWEITZER, H. *Competition policy for the digital era*. Luxembourg: Publications Office of the European Union, 2019, p. 45.

³⁷ NEWMAN, J. M. Antitrust in Attention Markets: Definition, Power, Harm (Dec. 9, 2020). *University of Miami Legal Studies Research Paper*. No. 3745839, p. 21 [online]. Available at: SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839

³⁸ RUSSO, F., STASI, M. L. *Defining the Relevant Market in the Sharing Economy*. <https://policyreview.info/articles/analysis/defining-relevant-market-sharing-economy>

³⁹ CRÉMER, J., DE MONTJOYE, Y.-A., SCHWEITZER, H. *Competition Policy for the digital era*, Luxembourg: Publications Office of the European Union, 2019, p. 45.

⁴⁰ EVANS, D. S. *The Economics of Attention Markets*, p. 14 [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044858

⁴¹ DROBNÝ, P. The attention markets as a challenge for competition policy. *Prace naukowe Uniwersytetu Ekonomicznego We Wrocławiu*, 2019, vol. 63, no. 5, p. 37 [online]. Available at: <https://doi.org/10.15611/pn.2019.5.03>

⁴² CASTELHANO ARAÚJO, C. *The Attention Economy and the EU Competition Law Policy – a Case Study of Facebook*. Faculdade de Economia Universidade do Porto, p. 17 and literature there cited. Available at: https://sigarra.up.pt/fep/pub_geral.show_file?pi_doc_id=314109

4. Market power

The concept of market power is used to define the market dominance. By means of market power it has to be concluded whether company's conduct is sufficiently controlled by competition. Traditionally the market power has been measured by market shares depending on sales of the firm compared to total sales in the market.⁴³

As in case of attention markets, there are zero-price markets, assessment of the market share has to be based on other criteria than price. So, the price is replaced in many cases by time spent on particular platform or number of users that might be quite indicative e. g. in case of social networks.

5. Anticompetitive practices and competition benefits

Obviously, assessment of the relevant market requires individual approach and case-by-case analysis. As market boundaries might be not as clear as in conventional economy and they might be subject to rapid changes, Cr  mer et.al recommends to „*put less emphasis on analysis of market definition and more emphasis on theories of harm and identification of anti-competitive strategies*.“⁴⁴

Market power enables an undertaking in a dominant position to control some aspects of competition, to act independently in relation to its competitors and consumers.⁴⁵ Abuse of intermediary's market power might be manifested either towards advertisers or towards users. Abuse can take different forms; towards advertisers there is typically increase in price of advertisements, price discrimination among advertisers or reduction of the space for advertisements.⁴⁶ Abusive conduct towards users in general means „*negative change in the attentional cost-benefit mix*.“⁴⁷ Change in this ratio might have form of higher level of attention costs, resembling „*monopoly price overcharge or monopsony price reduction*“⁴⁸ or

⁴³ CR  MER, J., DE MONTJOYE, Y.-A., SCHWEITZER, H. *Competition Policy for the digital era*. Luxembourg: Publications Office of the European Union, 2019, p. 48.

⁴⁴ Ibid, p. 3–4.

⁴⁵ 27/76 United Brands.

⁴⁶ NEWMAN, J. M. Antitrust in Attention Markets. Definition, Power, Harm (Dec. 9, 2020), *University of Miami Legal Studies Research Paper*. No. 3745839, p. 32. Available at: SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839

⁴⁷ Ibid. p. 35.

⁴⁸ Ibid, p. 34.

increase in advertising loads (more distractive advertisements).⁴⁹ This can be interpreted also as quality reduction.

Except for these abusive practices dominant attention intermediary might also „*anticompetitively exclude or acquire a nascent innovator*“⁵⁰ and thus reduct future competition.

On the other hand, the benefits of functioning competition should be mentioned. First of all, the reduction in costs can be beneficial to users. Not to forget is the incentive for intermediaries to bring higher quality especially in content they offer to attract more users who would be otherwise ready to switch to another intermediary, if there is a better proportion between costs and quality for them. Last but not least is that competition can be contributive to control over spreading of biased information in media sector.⁵¹

6. Conclusion

Following the literature, attention markets based on exchange of attention, time and data for access to content offered by intermediaries facilitate user's choice depending on the quality of the content. Quality is a key element platforms compete for. The role of competition is to fight against the change in ratio between the benefits and costs unfavourable for users.

Growing importance of attention economics raises also interest for attention markets. It is very important to study and understand mechanism of their functioning. Obviously, the complex analysis of the market taking in account both attention and different content offered by intermediaries corresponds better with the aims of enforcement practice – to protect and foster competition in attention markets and to restore competition environment that might be threatened by dominant position of high-tech corporations. Profound knowledge of attention markets and mode of their operation is decisive because rule of reason is of major significance in enforcement practice. It is namely necessary to thoroughly balance the present benefits for users generated by functioning competition with benefits brought about by appropriate concentration of the market enabling creation of enough space for innovations.

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⁴⁹ Ibid, p. 33–35.

⁵⁰ Ibid, p. 37.

⁵¹ Ibid, p. 41–42

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