

An Examination of Relevant Market Definition in the Digital Platform under the Nigerian Competition Legal Framework

Aliyu Abdullahi¹, Hussaini Bala², Hassan Bala³

^{1,3}Department of Private Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria

²Department of Accounting, Faculty of Administrative Science Economics, Tishk International University-Erbil, Kurdistan Region, Iraq

ABSTRACT

Relevant market definition is key to any determination by the court or competition authority when ascertaining the level of competition in an industry or the likelihood of anti-competition conducts by the players in an industry. Using doctrinal method of research, this paper examines the provision of the Act in line with the peculiar nature of the digital market which operates on zero pricing with no possibility of price increase. The paper finds inter alia that the pricing criterion for relevant market definition does not fit digital market. The theory of harm introduced by the Act as an omnibus criterion for relevant market definition is not either very much helpful. The paper recommends the adoption of a modified Small but Insignificant Non-Transitory Increase in Cost (SSNIC) test. When using this test, the cost should be defined as consumer's attention that amounts to the 5% to 10 % of the digital content.

Keywords: Relevant Market Definition, Digital Platform, Nigerian Competition Legal Framework

1. INTRODUCTION:

Digital ecosystem holds many untapped possibilities. It is so dynamic in nature and seems to defy convention. It expands the scope of our lives by introducing different ways of doing many things (Ferronato, 2004). Part of the inventions brought by the digital ecosystem is the digital economy. Digital economic space has today provides a platform for virtually all sectors of the traditional economy to operate within. Thus, aside from the popular search engines on the digital space comprising world-wide Web, Google Search, Bing, Yahoo and the DuckDuckGo and the Social media platform, such as Facebook, Instagram, Snapchat, Tik tok, Twitter and LinkedIn, there are other platforms that are more peculiar to specific industries. In the transportation industry we have Bolt and Uber as the

major players, Retail industry has Alibaba, Jumia, Jiji among others. In video streaming we have Netflix, iKOROTV.com and digital content aggregators platforms which include Google News, Apple News and Flipboard and AWS just to mention but a few. For its continuous growth and relevance, the digital economy like its non- digital counterpart needs to be regulated. It is in this light that the Federal Government of Nigeria places it under the supervision of the Federal Ministry of Communication now designated as Ministry of Communication and Digital Economy. The supervisory power of the Minister may not however be sufficient when it comes to the regulation of competition in the digital market.

Regulation of competition by the digital platforms within the digital market is the responsibility of the Federal Competition and Consumer Protection Commission pursuant to Section 17 of the Federal Competition and Consumer Protection Commission Act which provides, "the Commission shall be responsible for the administration and enforcement of the provision of this Act and any other enactment with respect to competition and protection of consumer ..." The Act does not however seem to recognize the peculiar nature

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Corresponding author's e-mail: hussaini.bala@tiu.edu.iq

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of the digital market which is different from the conventional markets. One of such areas of peculiarities relates to relevant market definition. Relevant market definition is a condition precedent to determining whether there is a dominant firm in a given market and if so, whether such a dominant firm abuses its dominance in the market to the impairment of minor competitors (Shenefield & Stelzer, 2001). According to Whish and Bailey (2001) prohibition of abuse of leading position within a relevant market is one of the three major contours of competition law. It is important to note that the Nigerian Competition and Consumer Protection Commission (NCCPC) has the authority to regulate and enforce competition laws in Nigeria thanks to the country's legal framework for competition, particularly the Federal Competition and Consumer Protection Act (FCCPA), which took effect in 2019.

The goal of this paper is to study the provisions of the Act particularly sections 71 and 72 viz-a-viz the peculiar nature of the digital market with the view to determining whether, the provisions of the Act can conveniently be used to define relevant market in the digital market for the purposes of any anti-competition investigation by the Federal Competition and Consumer Protection Commission. In achieving this, the paper is structured into five units in all. Unit one lays background to the paper with a brief introduction, stating the problem and the objective that the paper seeks to achieve. Unit two of the paper clarifies some key concepts to aid readers understanding. Unit three states law as it is as per relevant market definition is concerned from the Act. Unit four reveals the point of divergence between the criteria in the tradition economy and that of the digital ecosystem. The last unit concludes the work with the findings and recommendation.

The paper adopts doctrinal method of research and examines both primary data and secondary data to come about the findings made. In legal circle, legislations like the Federal Competition and Consumer Protection Commission Act are also considered as the primary data. The secondary data used in the paper are books and articles that provide commentary on the contents of the legislations. In order to ensure healthy competition and consumer welfare within the Nigerian market, the NCCPC may use this study along with other pertinent considerations, to examine and review market definition in the context of digital platforms.

2. Conceptual Clarification of Key Terms

This rubric clarifies certain concepts that are germane to the understanding of the topic examined by this paper. The concepts clarified are, the concept of competition

law, and the concept of digital market or the platform market.

2.1 The Concept of Competition Law

Before defining the concept of competition law, it will be pertinent to commence defining what the term 'competition' means (Gryder, 2002). *Simpliciter* competition means, "a relationship that exists among any number of firms engaged in selling goods and services of the same type at the same time to an identifiable group of persons." Whish defines competition to mean, "a struggle or contention for superiority, and in commercial world in terms of striving for the custom and business of persons in the market place." The later definition sounds more comprehensive because it brings out the fact that competition is not an ordinary relationship among firms in the same industry but a "contention for superiority" by those firms for customers and business profits (Whish & Bailey, 2001). In a nutshell, competition simply means striving for dominance in a market place by two or more goods or service providers with a view to maximizing profit (Oliver, 2005).

Competition law as a concept is variously defined and some of the definitions are as follows. Competition laws "...are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental freedoms." It is also defined as "a set of rules of the game meant to preserve the competitive process, to enable markets to direct resources to the uses that will best satisfy consumers. By preserving the competitive integrity of markets, the laws make it unnecessary for the government to arrogate to itself the function of deciding what gets produced, where, and by whom.", Shenefield and Stelzer (2001) and Okaphor (2016) viewed it as a law that "is all about securing free trade or open market..." he added, it is also referred to as "law for promoting competition and outlawing unlawful trade restraints such as monopoly and other anti-competitive practices".

From the above definitions, competition law is generally negative and prohibitory. This is obvious since it does not directly promote competition, but rather seeks - through the use of legal systems to prevent any form of anti-competitive conducts in the marketplace. By prohibiting the anti - competitive conducts, the market players in the economy have level playing ground for fair competition among themselves hence competition is promoted. The idea is to allow the competitive forces to direct the market on what to produce, how to produce and where to produce (Dabbah, 2003).

2.2 The Concept of Digital Market

Digital Market is defined as “market in which companies develop and apply new technologies to existing business or create new services using digital capabilities (World Economic Forum, 2019).” Digital Market also known as Online Platform, Digital Platform or the Platform Market is also defined as “a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the internet.” A digital platform connects people, technology, and information to create a value network that enables access to a wide range of goods and services in a variety of markets (OECD, 2019). Digital platforms produce a multiplicity of effects by facilitating networked commerce between many parties. As a result, the demand for goods and services rises swiftly, and there are generally more benefits for different users as well as the platform itself. Again, Digital platform is defined as “a service whose role it is to allow end users to access other providers located upstream in the value chain.” Ecorys in a study for the European Parliament defined Digital Market to mean, a platform that provides a technological basis for delivering or aggregating service/content from service/content providers to end-users (Subramaniam, 2020). Simply put, digital markets are the service outlets, goods selling point or information sharing platforms on the internet.

Digital platform is a two-sided market that provides advertisement space for business undertakings in exchange for money on one side of the market and information and entertainment to customers on the other side of the market in exchange for attention and data. The consumer side operates on no monetary cost which makes it a zero-pricing platform (Allen, 2020). It is this side of the market that this paper concentrates upon.

2.3 Meaning of Relevant Market (definition)

Relevant market definition is not useful for its own sake; rather, it helps in identifying the market boundaries within which anticompetitive conduct of dominant firms thwart competitive process. It also helps in determining whether a given firm occupies a dominant position in the market and if yes, whether or not the dominant player is abusing its position also known as abuse of leading position which is proscribed by the Act (Oliver, 2005). A market player occupies a dominant position in a relevant market when such player has “ a position of economic strength ... which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independent of its competitors, its customers and ultimately of the consumers.” Abuse of

leading position is any conduct by a leading market player that has the influence of distorting competition in a relevant market (Whish & Bailey, 2001). Before the conduct of a dominant market player is determined by the competition authorities, the relevant market within which the player operates must be properly delineated or defined to ascertain its extent and scope (Hylton, 2003). This exercise is necessary in order to ascertain the position of that player in the delineated or defined market, i.e. whether the company attains dominant position within it or not. Thereafter, assessment of its conduct follows as to whether the conducts amount to abuse of the dominant position or not.

Therefore, the exercise of relevant market definition is a very crucial one as it is the condition precedent to determining whether an important anticompetitive conduct is committed in the relevant market by a dominant player. It therefore follows, an accurate definition of the relevant market leads to an accurate finding of the position of every player within, and which may lead to accurate finding of the legal effect of the market player’s conduct. Contrarily, an incorrectly defined relevant market may lead to a wrong determination by the competition authority of whether an alleged conduct extends to abuse of leading position. Therefore without relevant market definition, anti-trust investigation on abuse of dominant position or merger control cannot proceed (Ghosh, 2017).

The term relevant market in antitrust sense means, “markets around the competitive constraints on particular economic entities which is relevant to the factual possibility of particular conduct, and the legal desirability of that conduct, in the contest of a specific legal enquiry.” It denotes a place or point of contact between buyer and sellers in which competition exists in the process of buying and selling. That is to say, not the market as a whole but a specified portion of it that is subjected to antitrust investigation. Hence, the word “relevant” is used to qualify the market. The Act is salient on what a relevant market is, it however provides the criteria of defining relevant market for the purpose of antitrust investigation. The Act provides,

- “For the purpose of delineating the relevant market under this Act, the criteria that shall be taken into account” include the -
- (a) “geographical boundaries that identify groups of sellers and buyers of goods or services within which competition is likely to be restrained”;
 - (b) “goods or services which are regarded as interchangeable or substitutable by consumer by

reason of their characteristics, price or intended use"; and

- (c) "Suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer" (Eben, 2020).

The provision of Section 71 is not clear enough to guide the Commission in the onerous task of defining relevant market beyond indicating that, there are two types of relevant markets which are the topographical market and the product market flowing from the provisions of Section 71 (a) and (b). Paragraph (a) provides for the relevant geographic market in the following words: "geographical boundaries that identify groups of sellers and buyers of goods or services within which competition is likely to be restrained." What this provision simply means is that, relevant geographic market is the identified geographical boundaries where the buying and selling of goods and services or group of buyers and sellers is likely to constrain competition. This provision does not give hint on how the geographical boundaries can be identified and how the buying and selling can constrain competition within it?

Paragraph (b) seems to be clearer than paragraph (a). Paragraph (b) provides for the relevant product market in the following words: "goods or services which are regarded as interchangeable or substitutable by consumer by reason of their characteristics, price or intended use." This provision is simply saying that, relevant products market is the aggregate of goods and services considered by the customers as interchangeable or substitutes because they have similar characteristics, use or price. Hence, goods or services that are interchangeable or substitutes to one another belong to the same relevant product market especially when the goods or services share the same character or price. Section 71(b) would have been sufficient guide on how to define relevant product market but for the fact that character of goods or their use does not however always make goods or services to belong to the same market.

Nevertheless, the practice of defining relevant market for the purposes of an anti-competition investigation is to approach the definition from two dimensions which are the product market dimension and the geographic market dimension (Daljord, 2008). Commenting on these dimensions, Peter and Eliana submitted,

...we also describe the fact that a market definition exercise usually proceeds along two dimensions: (i) a product market definition dimension and (2) a geographical market - definition dimension. Product

and geographic market definition should in principle be considered together. However, it is "common practice as a practical matter to examine first product market substitution on the demand and supply sides and then to go on to consider geographic market substitution, again on the demand and supply sides" (Peter & Eliana, 2010) ...

This paper considers the concept of relevant market from the product dimension before going to look at the relevant market from the geographical dimension as it is the common practice in competition law.

2.4 Relevant Market - Product Dimension

The appropriate market - product dimension, means "goods or services that consumers view as realistic substitutes, one for the other (Buccirossi, 2018)." It is the aggregate of goods and services that consumers actually substitute for one another. Section 2(t) of the Indian Competition Act aptly defines the relevant product market as "a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use". To illustrate these definitions, let us take example from the platform market using the advertisement as our relevant product. In Nigeria, we have variety of advertisement platforms like, the Facebook, Twitter, YouTube among others all used for virtually the same purpose as far product advertisement is concerned. Any other kind of platform that may come to Nigeria with similar purpose(s) like the ones listed above belongs to this product market.

Often, when delineating a product market, reliance on the product features and purposes only may not be sufficient (Francis, 2017). In some instances, recourse to economic tools becomes necessary. The most commonly accepted economic tool is called "hypothetical monopolistic test." This kind of hypothetical test implies a situation whereby the competition authority picks a hypothetical company that produces a type of good or service in a market under investigation. The essence is to see which set of goods or services are close substitute to the good or service produced by the hypothetical company. To determine whether the good or service under investigation is a close substitute to the hypothetical product, "small but significant non-transitory increase in price" test popularly abbreviated as SSNIP is used to measure demand elasticity.

Using this tool (SSNIP) the competition authority starts with the narrowest possible market by assuming the hypothetical monopolist produces only one kind of product. Then ask, can the hypothetical monopolist

increase the price of that produce in a small but significant non-transitory period without shift in demand from that good to other goods having the same purpose? If the answer is yes, that is to say the consumers are likely to switch over to other products with the same purpose due to small but significant non-transitory increase in price of the hypothetical product to make the increase non-profitable, then those other products to which the consumers will switch would be added to that market. This exercise continues until the authority finds that no any other good or service to which customers may switch as a result of small but significant transitory increase in price exist (Laura, 2012). If this is achieved, then the relevant market is properly delineated or defined. The minimum percentage of increase in price that is considered significant but non-transitory is pegged at 5 - 10 % of the previous price.

3.1 Relevant Market - Geographic Dimension

The relevant geographic market comprises of "the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas" (Peter & Eliana, 2010). This simply means that, once the conditions for the demand of goods and services or the requirements for the provision of goods and services in one geographic location, become different from that of another geographic location, to the extent that, the consumers of the goods and services in one location can move to the other location for those goods and services, then both the locations would belong to the same geographic market (Khemani, 1999).

Under this dimension too, the SSNIP tool is also used by the competition authority. Here, the competition authority starts by asking where else should a consumer or supplier of good or service go for the same product or service if there is small but significant non-transitory increase in price of the product or service at the location he normally buys the product or service (Utton, 2003). All the locations that the consumer or supplier may turn to for the product or service as a result of small but significant non-transitory increase in price will then form part of the same geographic market. The identification continues until all the locations are not identified in which case the relevant geographic market is properly delineated or defined.

3. Demand Side and Supply Side Substitutionalities

Whether in pertinent product market or the pertinent topographical market definition, the hypothetical monopolistic test uses the SSNIP tool to measure either the demand side substitutionality or the supplied side

substitutionality as a result of the increase in price. The tool measures the demand side substitutionality and the supply side substitutionality for goods and services from one location to another as a result of change in price that is small but significant non-transitory (Bebeji et al., 2020; Jonathan, 2007). Demand side substitutionality occurs when, small but substantial non-transitory rise in price of a good or service can cause the consumers of the goods or service to shift their demands for alternative goods or service which makes the increase non-profitable. The supply side substitutionality occurs when the supplier of goods or services in one location can shift his supply of the goods or services to the location where there is small but substantial non-transitory rise in the price of the goods or services that makes the increase non-profitable.

Paragraph (c) of Section 71 provides only for the supply side substitutionality leaving aside the demand side substitutionality in the following words: "suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer." One wanders, why leaving out the demand side substitutionality from the provision of Section 71? Testing the demand side substitutionality is equally as important as the supply side substitutionality during relevant market definition whether of product or geographic dimension.

4. The Point of Divergence

From the provision of Section 71 of the Act and the postulation of Small but Significant non-transitory Increase in Price (SSNIP) test discussed above, it is obvious that increase in price is a necessary requirement to relevant market definition both in the cases of product or geographic dimension. When there is no price increase, the SSNIP cannot be used to give effect to the provision of Section 71 of the Act, thus relevant market definition is not possible. The test therefore cannot be useful when defining relevant market in the digital market or the platform industry which operates on zero pricing of products or services where small but significant non-transitory increase in price cannot occur. The digital market has zero pricing system of product which means setting the price of product or service to customers at zero price or zero naira (#0). That means offering the product or service to customer for free. Since the digital market operates on zero pricing with no possibility of price increase, how else can the relevant markets in that industry is defined?

The concluding part of Section 71 (c) sought to provide an omnibus criterion for relevant market definition where the price requirement fails. The paragraph

provides “suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer.” “... other detrimental effect upon the consumer” provided for in the paragraph is popularly called the “Theory of Harm” that affects consumer welfare. Literature proposes the use of detrimental effect upon the consumer or the theory of harm on consumer to be the alternative tool to relevant market definition in place of price. The theory of harm on consumer in the competition law parlance simply means a story that explains why an agreement between two or more firms or practice engaged by a firm may harm competition and adversely affect consumer (Christine et al., 2019). It does not only take into account the structural features of the market but also the incentives and the ability of the firms involved.

To illustrate how theory of harm works, let’s assume, platform A and platform B are the only platforms in a topographical market and the two platforms compete for customers’ attention in exchange for messaging services to the customers at zero pricing. If the two platforms were to merge, the freshly formed entity could hypothetically exercise market power for example by increasing the length of time devoted to advertisements by consumers. If the newly formed entity succeeds on this strategy, it would cause welfare harm on consumers who spends longer time on advertisement (Lorenzmeir, 2009). Hence, sometimes, certain conducts are prohibited by competition law simply because they are capable of causing harm to the consumers (Motto, 2003).

Judicial authorities in other jurisdictions like in the United States are unanimous on the fact that, there can be no welfare harm of the type that competition law seeks to prevent in a zero price market. Since there is no price charging on the consumer, there cannot be monopoly overcharge on the consumer and therefore, there is no need for anti-competition scrutiny in those types of markets. A case decided by the United States District Court illustrates this position. In *Kinderstart.Com vs. Google, Inc.*, the court was faced with the challenge of making pronouncement on whether there can be anti-competition conducts in a zero pricing market. The facts of the case were, the Plaintiff, *Kinderstart.Com* that is operating a childcare-focus website complained that the Defendant *Google Inc.*, the search giant is anti-competitively manipulating search services in a scheme to monopolise the search market. This claim of the Plaintiff was dismissed. In terminating the claim, the court coherent that, the Plaintiff, *Kinderstart.Com* failed to assert that the quest market is a “grouping of sells.” “It does not claim that the Google sells its search services or any search provider does so.” The Court further held that, the Plaintiff does not rely on any authority

indicating that competition law concerns itself with competition in the provision of free services.

The thesis behind the above decision is simply that customers do not exchange anything for the zero-priced goods; hence there is no two-way exchange to generate the usual economic rewards from deals. There is neither trade nor commerce; hence competition law as provided by both the Sherman Act of 1890 and Clayton Act of 1914 both of the United States cannot apply. Same reasoning also applies to the new Nigerian competition legal framework which in Section 72 empowers the Federal Competition and Consumer Protection Commission to among other things protect the consumers’ economic interests. More so, the provision of Section 71 of the Nigerian legal framework on relevant market definition is on all fours with that of the United States. Certainly, if digital markets actually operate on zero pricing of products to the consumers, then the consumer may not have any economic interests to be protected. The foregoing therefore shows, the detrimental effect upon the consumer popularly called “the theory of harm on consumer” provided by Section 71 of the Act cannot be a good substitute tool for relevant market definition in the digital platforms markets.

Another proposal to address the challenge of zero price is the use of SSNIC test in place of the SSNIP test for the sake of the digital market. SSNIC stands for Small but Significant Non-transitory Increase in Cost. The test postulates a shift away from a price oriented model to a cost oriented model since the digital market operates on zero pricing. The SSNIC test was proposed by Newman (Allen, 2020). This test is premised on the fact that though the consumer in the digital market does not pay for the goods or services offered to him on the digital platforms with monetary price, he doesn’t nonetheless have the product or services absolutely free from any form of payment. Instead of monetary payment, the consumers of digital market pay with cost. He classified the cost into two to wit, attention cost and the information cost. Attention cost means the disclosure of customers to advertisement during their usage of zero-priced product or service. On the other hand, the information cost means the amount of data the digital market consumer is expected to supply before using the zero-priced product or service. In both cases the digital consumer actually offered something of value to the digital platform which it can use for price at the other side of the market.

While this postulation is absolutely correct, measuring those costs (both attention and information costs) with reliability or accuracy may be challenging as they are obscure compared to measuring price differences. In

order to apply SSNIC, the consumer must first experience an increase in either of the costs. Both costs may come in variety of forms or shapes or a combination of both at a time (Allen, 2020). Attention cost can take the forms of advertisement display, length of the display, the size of the advertisement, or the frequency of their appearances or all of these at a time. The information cost on the other hand can be sensitive or insensitive information or a demand for both the sensitive and the insensitive information from a consumer (Mandrescus, 2018). The question is, if either the attention or information cost that is required for the test, which of these forms or shapes of attention or information must increase before SSNIC becomes applicable? Ascertaining the relevant form or shape of the attention or information for the test is therefore very important. Again, what percentage of the increase in either attention or information can distort competition or may be sufficient for the test to be conducted seeing that attention and information cannot be measured in statistical terms? These challenges make the SSNIC test unsuitable in cases concerning online platforms or digital market.

A year after Newman proposed SSNIC discussed above, Gal and Rubinfeld proposed another test which is also a modification of the SSNIP (Allen, 2020). The proposed test is the SSNIQ which means, Small but Significant Non-transitory Increase in Quality. The test postulates the use of quality as the benchmark for assessing the demand or supply side substitutionalities in order to define relevant digital market for anti-competition investigation. This alternative test could have been a better substitute for the SSNIP test in the platform industry that operates on zero pricing. The Small but Significant Non-transitory Increase in Quality (SSNIQ) also suffers the same challenges as using cost – attention and information under the SSNIC. For instance, determining the appropriate good or service quality for the assessment is more difficult than choosing prices in the case of SSNIP. A generic phrase like "quality" might have many different meanings. Online platforms may utilize several forms, such as privacy, user friendliness, security, and others. Similar to SSNIC, a methodology must be created first in order to determine the quality that should be assessed in each instance. Should the competition authority concentrate on the increase in privacy, user friendliness, security or other qualities when conducting market definition; or should all the qualities be taken into account at a time?

Again how much percentage of the increase in quality should be sufficient to cause a shift in demand or supply of goods or services by digital consumers that competition authority can rely on when conducting relevant digital market definition? Almost all the qualities are unquantifiable in nature thus ascribing

them quantitative values in terms of percentage is not possible. This difficulty further constrained the viability of using Small but Significant Non-Transitory Increase in Quality (SSNIQ) to define relevant digital market.

5. Conclusion

Pricing is very fundamental to relevant market definition. It is fundamental because it is used to check substitutionalities on both the "demand and supply sides of the market". Thus, when market operates on zero pricing system, relevant market definition becomes very difficult as it is necessary to search for other criteria to serve as substitute for pricing criterion. The foregoing discussion has so far shown that, the common tool which is the "Small but Significant Non-Transitory Increase in Price" (SSNIP) used for relevant market definition is not suitable for relevant market definition in the platform market which operates on zero pricing system. The alternative criterion provided by Section 71 (c) of the Act which is the detrimental effect on the consumer popularly called the theory of harm is also found not to be suitable for relevant market definition in the platform market because of the market's inability to sustain trade or commerce (mutual economic gains from both sides of the market).

Efforts were made by scholars to propose further alternative tools like the "Small but Significant Non-transitory Increase in Cost" (SSNIC) which sought to replace price with cost. Difficulties are however pointed on its workability as a tool for relevant market definition in the platform market. For example, while the SSNIP pegs the required "Small but Significant Non-Transitory Increase in Price" (SSNIP) at 5% to 10% to be sufficient in causing substitution in either demand or supply, it is difficult to peg the percentage of increase in cost that may be sufficient to cause substitution in either demand or supply. Another challenge that the tools suffer from is: which of the cost components (attention or data) should the competition authority be concern with? This difficulty makes the tool not satisfactory alternative to SSNIP. The "Small but Significant Non-Transitory Increase in Quality" (SSNIQ) which is yet another proposed alternative tool also suffers the challenge of identifying the quality needed to be increased and to what percentage should it be increased to cause substitution in either demand or supply.

In the absence of a better alternative tool, the paper recommends the adoption of the "Small but Significant Non-Transitory Increase in Cost" (SSNIC). Before the adoption of the tool, however, the legal framework must be certain on the kind of cost to be assessed when conducting the relevant market definition. Here, the paper recommends that the adoption of attention as the relevant cost to be assessed. This is notwithstanding the

fact that the data used by the consumer does not go to the platform service provider, nonetheless, the long period of time (attention) spent by the consumer viewing particular advertisement gives the platform service provider economic advantage as a result of the profit to be made from the advertisement hosted by the platform. Another reason for choosing attention as the relevant cost is that it seems the only measurable variable than information and quality. While it is very difficult to quantify information and quality, it may not be so difficult to quantify attention. For example, the increases that may be necessary to cause substitution may also be pegged at 5-10% of the content on the platform that the consumer is willing to access. If the consumer will take 10 minutes to access content on the platform, then any advert that pops up and last between thirty (30) seconds and one (1) minute occupies 5-10% of the content is thus sufficient to cause substitution of the content for another by the consumer. Therefore, new paragraph- (d) should be added to the provision of Section 71 of the Act and the new paragraph 71 (d) should read thus to capture the peculiarity of the zero market:

Section 71 “For the purpose of delineating the relevant market under this Act, the criteria that shall be taken into account” include the –

(d) Suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in attention cost of a consumer by 5 – 10% of the period required to access a content on the platform.

“Data Availability Statement”

“Data sharing not applicable to this article as no datasets were generated or analysed during the current study”.

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