

The New Economy and Its Challenges for Traditional Antitrust Tools: The Prospect of Data as a Price

These are exciting times: society changes at an astounding pace, driven by rapid innovation. One area in which this change is prominent is the New Economy, in which new business models and technologies recurrently challenge established legal principles. Authorities and academics are increasingly confronted with Internet businesses. In antitrust (competition law) difficulties arise with market definition, the assessment of market power, or regarding practices specific to a type of online business. The traditional antitrust tools (such as the hypothetical monopolist test or SSNIP¹ test) are not adapted to these cases. The question arises how practitioners, authorities and regulators should respond to this challenge.² This is a broad discussion, involving many facets of law and antitrust more specifically. This paper aims to contribute to one part of the debate: how to define the market for free online goods or services. Specifically, the study focusses on the possibility of conceptualizing personal data as the price consumers pay for free goods or services, for the purpose of performing the SSNIP (Small but Significant and Non-Transitory Increase in Price) test to define the market. To that aim, the paper assesses the concept of price and the requirements for a good to be considered a medium of exchange.

The first part of the paper discusses the notion of ‘free’ on the Internet and its challenges. It explores the concept of market definition when no monetary price is charged for the service provided. The possibility of personal data as the price paid by the consumer is put forward.

The second part discusses the requirements data have to meet to be considered as a price. Traditionally, eight requirements are put forward as the qualities of the ideal medium of exchange (stable value, durability, acceptability, portability, divisibility, storability, recognisability and homogeneity). The paper further analyses two of them, value and acceptability, engaging with the literature on media of exchange, and with research regarding consumer behaviour and economics.

Finally, the paper recognizes the difficulties raised by this new notion of data as a price. Many argue that data is ‘the currency of the 21st Century’, invoking an exciting prospect for new economic and legal thinking. Nonetheless, an in-depth analysis of the limits of this categorization is required before this can be accepted in future practice, which is what this author’s research aims to do. The paper shows that rapid changes in society need not be an obstacle to legally sound decisions. With the necessary flexibility and creativity, traditional tools can become modern solutions.

¹ Small but Significant Non-transitory Increase in Price

² Is it necessary to adopt specific regulation, or conversely draft general legal principles that could encompass almost anything? Or should we be wary of new regulation that might stifle innovation and, to the contrary, try to work with the legal tools we already possess?