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This Much Attention?

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I. INTRODUCTION

The antitrust community talks perennially about multisided or two-sided markets. At first glance, this attention may appear misplaced. The courts have not reached a final decision in a litigated case involving a multisided market since 2003, when the Court of Appeals for the Second Circuit affirmed the U.S. Government's win in *U.S. v. Visa*.² So, why do multisided markets receive so much continued focus? And is this focus warranted?

I think there are three main reasons why multisided markets continue to be a hot topic. First, economic thought on multisided markets has progressed since *U.S. v. Visa*, providing analysts with opportunities to debate how the courts and antitrust agencies should define relevant markets and review competitive effects. Second, the relative newness of online platforms has generated speculation in the legal community about whether and how they should be viewed as multisided markets. Third, the absence of guidance from the courts on whether traditional one-sided market tests need to be modified or abandoned when reviewing mergers or competitive practices involving markets with two or more sides has left a void that has been filled by commentary.

Given these driving factors, it is no wonder that there is so much focus on multisided markets. And, particularly in light of continued litigation involving multisided markets without court guidance, this interest seems appropriately placed.

II. ANALYZING MULTISIDED MARKETS REQUIRES CARE

Multisided markets are not recent additions to our economy. Advertising platforms,³ real estate listing services,⁴ and financial exchanges⁵ have been subjected to antitrust review for years.

Credit card networks represent a classic example of a multisided market. Credit card platforms have two sets of independent customers—merchants and cardholders. Both are required for a credit card network to exist. The value each set of customers derives from the network increases as usage by customers on the other side increases because the ability to complete credit card transactions increases both as a broader set of merchants accept a card and as more consumers carry the card in their wallet.

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² *U.S. v. Visa U.S.A. Inc.*, 344 F.3d 229 (2d Cir. 2003) *affirming* 163 F.Supp.2d 322 (S.D.N.Y. 2001).

³ *E.g.*, *U.S. v. NAT, L.C.*, 892 F.Supp. 1146 (W.D. Ark. 1995).

⁴ *E.g.*, *U.S. v. Realty List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *U.S. v. National Ass'n of Realtors*, 2006 WL 3434263, No. 05-CV-5140, (N.D. Ill. 2006).

⁵ *E.g.*, *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231 (1918); *U.S. v. American Stock Exchange*, 2000 WL 33400154, No. 1:00-CV-2174 (D.D.C. 2000).

That is, the credit card network exhibits positive indirect network externalities.⁶ A price structure that draws both sets of customers may involve the platform offering a subsidy to one side and prices that may be higher or lower than the marginal cost. Indeed, the presence of prices that cross-subsidize between sets of customers distinguishes multi-sided markets from other structures, such as wholesaling, that feature positive network externalities.⁷ Credit card networks routinely offer cardholders rewards programs subsidized by the fees earned from merchants. Likewise, newspapers may use advertising revenues to subsidize subscription fees below the marginal cost of home delivery.

In the past decade, there has been a growing debate as to whether standard antitrust tools used to define relevant markets and evaluate competitive effects need modification when applied to multisided markets. Multisided markets often charge prices that are below marginal costs to attract a group of customers, raising questions about whether, for example, one could infer that a price may be predatory. Some academics have questioned the appropriateness of the “small but significant and non-transitory increase in the price,” or SSNIP, test to multisided markets because it was designed for ordinary one-sided markets.

Undoubtedly, antitrust agencies need to be cognizant of the degree of interdependence between the customer groups of a multisided market. Defining the relevant market provides a good demonstration of how the standard hypothetical monopolist test may lead to incorrect results if the interdependence of demand is ignored.

Say that the demands of each set of customers are highly sensitive to changes in the usage of customers on the other side of the platform. When applying the SSNIP test to one side of the market, customer demand on the other side drops because of the negative externalities. Due to this sensitivity, the decreased usage by the second side of the market will feed back and further reduce demand on the side experiencing the SSNIP. This may render the SSNIP unprofitable. If this feedback is not taken into account, the relevant market may exclude relevant substitutes. A SSNIP on newspaper prices, for example, causing a reducing in subscriptions might result in reduced advertising revenues as the audience decreases. If the loss of advertising revenues is large enough, it could render the SSNIP in newspaper prices unprofitable.

Pointing to complications, however, does not necessitate jettisoning the SSNIP test, or the hypothetical monopolist test for defining relevant markets, for two reasons:

1. Careful application of the test will avoid potential errors. The DOJ accounted for the potential interdependence of demand when it imposed a SSNIP on merchants of PIN

⁶ There is a key distinction between direct and indirect network effects. When the value a consumer derives from using a product increases as its adoption or use by others increases, the network effects are direct. A classic example is the telephone. As more people install and use telephones, the telephone’s value increases to each telephone user. A network effect is indirect when the increase in demand of a complementary good increases the value of the first product.

⁷ Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1(4) J. EUR. ECON. ASSOC. 990, 1017-18 (2003).

debit networks in its *First Data* case.⁸ After analyzing whether the SSNIP on merchants would cause cardholders to reduce their demand for PIN network services and further reduce merchant demand, the DOJ concluded that the initial SSNIP would have a minimal effect on merchant demand and therefore would cause very little further reduction in merchant demand due to the feedback causing negative externalities.⁹ This approach, when applied to other cases, ensures that the SSNIP test will be appropriately applied in multisided markets.

2. The law may not require heightened precision. Relevant markets are defined in order to aid competitive effects inquiries. As such, market definition is not an end in itself. Rather, the hypothetical monopolist test is intended to identify those substitutes that act to constrain the exercise of market power. The SSNIP test provides a check that ensures no meaningful competitor is excluded from the market—but it is not necessary to establish exacting contours.

A reasonable market definition should be achievable as long as the plaintiff acknowledges and accounts for the potential effects a SSNIP on one set of customers may cause on both sides of the market, as the DOJ did in *First Data*.¹⁰ Defendants may wish to raise additional hurdles for the plaintiffs and undermine the proposed relevant market. But the real question is whether the additional precision will materially affect the outcome of a competitive effects analysis and whether it is worth the additional costs.

III. INTERNET-BASED MULTISIDED MARKETS

Public awareness of multisided markets has increased as general media reporting on online platforms that are multisided has increased. Is the focus on online platforms as multisided warranted? Sometimes, but not always, it may be.

Certain platforms discussed in the literature conform to the definition of a multisided market. For example, the value vendors derive from an online auction site such as eBay increases as the pool of potential bidders and their activity increases, and vice versa. The same is generally true of online classified sites like Craigslist, reservation systems like OpenTable, and dating sites.

Companies placing advertising on internet search sites and online publications (e.g. magazines, newspapers, blogs) presumably value those sites more as their audience volume increases. The reverse, however, is probably not true. Users may care that the websites they visit attract a sufficient critical mass of advertising revenue to keep the service or content free. Beyond that point, users are not likely to derive additional pleasure out of websites as the volume of advertising increases. In fact, the value of a website may diminish if the advertising becomes too intrusive or pervasive.

Users of search sites and social media sites do experience network effects, but the effects occur on the same side of the market. Social network users, for example, prefer networks that

⁸ Complaint, *U.S. v. First Data Corp.*, No. 03-CV-2169 (D.D.C. 2003), available at <http://www.justice.gov/atr/cases/f201400/201400.pdf>; see Renata B. Hesse & Joshua H. Soven, *Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases*, 73 Antitrust L.J. 709, 731-32 (2006).

⁹ *Hesse & Soven* at 732.

¹⁰ *Id.* at 731-33.

have a large pool of other users with whom they can interact. Internet search users may not realize it, but the quality and accuracy of the search results returned in response to their queries increase as the search engine reviews and learns from a growing number of tail queries submitted by other users. These direct positive network externalities occur without contribution or feedback from advertisers on the other side of the platform.

If two competing social networking sites were to merge, the antitrust agencies might investigate whether users would face consumer harm, including whether the merger would likely raise the post-merger price to use the network (above zero, for networks that do not charge a fee). During the investigation, it would be appropriate for investigating agencies to try to determine whether a SSNIP in the price users face would reduce advertiser demand for the platform and render the SSNIP unprofitable because of the negative externalities.¹¹

Yet, when reviewing competitive effects on the advertiser side of the platform, it seems questionable to investigate whether a possible increase in advertising prices would cause user demand to drop. Because the DOJ historically has focused on the competitive effects resulting on the advertising side of multisided media platforms,¹² it is not clear that advancements concerning how multisided markets are investigated would alter the competitive effects analysis when investigating advertising markets.

IV. LACK OF GUIDANCE ON HOW ONE-SIDED MARKET TESTS APPLY TO MULTISIDED MARKETS

Discussions of multisided markets over the last thirteen years—including this article—have been, in large part, speculative because U.S. courts have not yet had an opportunity to determine whether interdependent multisided market demand requires modified or new analytic tools.

U.S. v. Visa was the last major litigated case in the United States dealing with a two-sided market that did not settle before trial. There, the District Court for the Southern District of New York considered how both merchants and issuing banks would respond to a price increase when finding network services for general purpose cards to be a relevant market. In doing so, the court implicitly acknowledged that credit card networks are two-sided markets. The court did not, however, discuss the interdependency of demand between merchants on the one side and card issuers or cardholders on the other.

¹¹ The DOJ considered whether the aggregation of user queries improved the quality of search results and search advertising placement when deciding not to challenge the Microsoft-Yahoo! joint venture. Closing Statement, Department of Justice, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.* (Feb. 18, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/255377.pdf. This is an example of an occasion when the DOJ concluded that changes in demand and quality on one side of the market would likely garner efficiencies on the advertiser side of the market because of the indirect positive externalities that advertisers experience.

¹² *E.g.* Competitive Impact Statement, *U.S. v. Univision Communications, Inc.*, No. 03-CV-758 (D.D.C. 2003) (advertising time on radio), available at <http://www.justice.gov/atr/cases/f201000/201006.pdf>; Competitive Impact Statement, *U.S. v. Raycom Media, Inc.*, No. 08-CV-1510 (D.D.C. 2008) (broadcast television spot advertising), available at <http://www.justice.gov/atr/cases/f236600/236618.pdf>.

Since the *Visa* decision, other major litigations involving multisided markets either have settled before trial or are still pending. The DOJ reviewed a series of multisided market cases in the last few years but they too did not result in a judicial opinion. Google abandoned its merger with Yahoo! in the face of a challenge, the DOJ cleared Microsoft-Yahoo!, and the DOJ reached a settlement in *First Data* and *U.S. v. Deutsche Börse AG* (later blocked by the European Commission).

In the absence of judicial opinions on point, plaintiffs do not have guidance on whether they should incorporate interdependent demand into their relevant market definition or competitive effects allegations.

V. CONCLUSION

Ultimately, with new analytic approaches to multisided markets, increased public interest in specific, modern examples of multisided markets, and a void of substantial judicial opinions about the appropriate approaches to multisided market antitrust analysis, the attention being given to two-sided markets is natural. Right now the antitrust community is waiting for the next decision in a litigated multisided market case.