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**Not Enough Girls in the Club: The  
European Antitrust Approach  
Towards Multisided Markets**

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## Not Enough Girls in the Club: The European Antitrust Approach Towards Multisided Markets

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### I. INTRODUCTION

Long before the era of e-commerce, girls would be let into nightclubs for free (or get bonus drinks) while guys would be charged often “excessive” prices to get past the bouncer. Multisided markets involve economic platforms that provide related goods or services to two or more distinct customer groups where the value of the product to one customer group is dependent on the number of users or participants “on the other side.” An obvious contemporary example is smartphone operating systems that connect users of handsets with application providers: the larger the number of handset users, the more attractive is the platform to application providers (and vice versa). For online dating—in some ways the internet equivalent of a traditional nightclub—meanwhile, the match-making platform’s attractiveness to men is, again, dependent on the number of participating women (and vice versa).

The task of platform operators in multisided markets is to overcome co-ordination problems and to bring both (or all) sides “on board.” In setting prices for the various groups, they take into account the relationship among the various groups and the interdependencies of their demands, i.e. they internalize the network externalities between the various groups. Platform operators often achieve this balancing act by charging very different prices to the different groups of customers even where the underlying costs for the various users are the same.

In fact, there are frequent examples where for “one side” the use of the platform is free: Google makes available its search engine for free while charging advertisers (the same is true for Microsoft or Yahoo). Similarly, certain daily or weekly newspapers receive all their revenues from advertisers and stock exchanges charge “liquidity takers” a commission for every share bought or sold, while “liquidity makers” get a significant rebate (or sometimes even paid for providing additional liquidity).

While economists have made significant progress over the last decade in describing and understanding multisided markets,<sup>2</sup> competition authorities have struggled to come to terms with their specific characteristics (such as the interdependencies between markets and the implications for pricing) and in adapting traditional antitrust tools accordingly. In Europe, the competition authorities and courts have developed three distinct approaches to the analysis of multisided markets.

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<sup>2</sup> Rochet & Tirole, *Two Sided Markets: A Progress Report*, 37(3) RAND J ECON., p. 645 et seq. (2006); Evans & Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, OXFORD HANDBOOK ON INTERNATIONAL ANTITRUST ECONOMICS (Blair & Sokol, eds. forthcoming).

## II. VARIANT 1: THE “OSTRICH” APPROACH

At one extreme end of the spectrum is what might be called the “ostrich” approach, i.e. simply to ignore the fact that the markets are multisided and to apply the standard methodology designed for the analysis of one-sided markets.

A classic example of the ostrich approach is the recent judgment of the Tribunal de Commerce de Paris in the case of *Bottin Cartographes vs. Google*.<sup>3</sup> The Tribunal upheld a lower court’s ruling that Google France had abused its dominant position by providing its maps services free of charge to businesses.

In its judgment, the Tribunal held that Google enjoyed “a *de facto* monopoly in France on the search engine market” and that this had led to holding a “dominant position on connected markets, which are advertising and online mapping.” Further, the Tribunal found that due to a “clear connection between the search engine market and online advertising and online mapping,” the dominant market position of Google’s search engine could be “seamlessly transposed to online mapping services.” The claimant, Bottin Cartographes, was also active on the market for B2B online mapping, but, unlike Google, charged a fee to businesses using its services.

The Tribunal therefore concluded, “the sale at a price equal to zero of the mapping program of Google does not allow for the production costs that were inevitably generated by developing and distributing the products to be recouped.” The Tribunal then proceeded by applying the standard one-sided market test for predatory pricing developed by the European Court in *Akzo vs. Commission*<sup>4</sup> and found that, as Google had offered its product for free (i.e. had priced below average variable cost), “Google’s intention to exclude competitors from the market [was] established in law” and that this was “part of a wider exclusionary strategy.” On this basis the Tribunal ultimately awarded damages of EUR 500,000 to compensate Bottin Cartographes for an “unquestionable loss of clientele and a restriction of its future expansion” and ordered the publication of the judgment in a number of national and international newspapers. Further, the Tribunal ordered Google to pay a fine of EUR 15,000.

In its judgment the Tribunal did not acknowledge the multisided nature of the market with its three groups of users: businesses, consumers, and advertisers and thus applied the analytical tools for one-sided markets. This ostrich approach has two clear benefits: first, as it ignores the complex relationship between the multisided markets and the fact that pricing to the related user groups is not independent, the analysis can be kept very simple; secondly, and contrary to other approaches discussed further below, the approach is internally consistent.

However, these two benefits come at a price; under the ostrich approach, the world is suddenly full of predators: predating publishers of newspapers, predating stock exchanges, and predating discotheque operators and the only bar to wide ranging antitrust interventions in what

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<sup>3</sup> 15<sup>th</sup> Chamber of the Tribunal de Commerce de Paris, Judgement of 31 January 2012, Case RG 2009061231 – *Societe Bottin Cartographes v. Societes Google France et Google Inc.* (currently under appeal).

<sup>4</sup> Court of Justice of the European Union, Judgement of 3 July 1991, Case C-62/86 – *Akzo Chemie BV v. European Commission*, [1991] ECR I-3359, ¶ 66 et seq., ¶ 71.

otherwise appear to be well-functioning markets is a finding of dominance. It can safely be assumed that the ostrich approach is not consistent with the enhancement of consumer welfare.

Fortunately, the ostrich approach seems to have gone out of fashion among European competition authorities, but it still has its followers among national courts.

### III. VARIANT 2: THE “PLACEBO” APPROACH

Under the placebo approach, the authorities acknowledge the multisided nature of the markets in question, but then fail to act on this insight and proceed with a standard analysis for one-sided markets.<sup>5</sup>

The General Court’s judgment<sup>6</sup> regarding MasterCard’s multilateral interchange fees (as well as the underlying decision by the European Commission<sup>7</sup> which the General Court upheld) provides a good illustration of the European placebo approach. The case concerned the question whether MasterCard’s MIF, i.e. the fee paid by the merchants’ banks to the customers’ banks for the acceptance of transactions made by using MasterCard’s credit cards, led to an unlawful restriction of competition (fixing of prices by setting a floor price). The General Court accepted the multisided nature of the markets in which MasterCard operates, namely a systems market and the related market of “issuers” (where “issuing banks” serve cardholders) and merchants (where “acquiring banks” serve “merchants”) and the positive network effects between the groups (i.e. that a card system for merchants is more attractive the greater the number of cardholders and vice versa), but the court failed to draw any conclusions from this insight.

One of the reasons for the placebo approach can be found in the structure of the EU provisions on restrictive agreements which separate clearly (and some might say, artificially) between the analysis of “restriction of competition” and the assessment of efficiencies. This leads invariably to an isolated analysis of individual markets: The Commission and the General Court assesses the MIF impact on the acquiring market in isolation from the overall efficiencies of the platform.

The structure of the EU provisions is, however, by no means the only or even the main reason for the General Court’s placebo approach in the MasterCard case. Indeed, the court went out of its way to cement the traditional one-sided market approach. Three aspects of the MasterCard judgment in particular make this clear:

First, in response to a challenge from interveners that the Commission had failed to consider the multisided nature in its market definition, the General Court set a very low standard for the required quality of the market definition. It held that the Commission was not required to

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<sup>5</sup> Also see the German Federal Cartel Office’s prohibition decision of 19 January 2006 in *Axel Springer / ProSiebenSat.1 Media* (Case B6-103/05), a merger between two media conglomerates, the FCO did not discuss readers or viewers attitudes towards advertising but only recognized that, in the markets for TV and newspaper advertising, the number of viewers or readers is key for the demand from advertisers. Similarly the Commission ignored the question whether readers of newspapers like or dislike advertising in its decision of 21 December 2010, Case COMP/M.5932 – *News Corp/BSkyB*.

<sup>6</sup> General Court, Judgement of 24 May 2012, Case T-111/08 – *MasterCard v. European Commission* (under appeal, Case C-382/12 P).

<sup>7</sup> European Commission, Decision of 19 December 2007, COMP/C.34.579 – *MasterCard*, [2009] OJ No. C 264, p. 8.

take into account the multi-sided nature of the market as the only purpose of market definition was to assess the material impact and effect on trade. As long as the market definition allows the correct assessment of these two points (which it did, according to the court), it was not “manifestly erroneous” and therefore the court did not object to it.

Second, in MasterCard the General Court introduced the requirement that the agreement, in order to be exempted from the prohibition on restrictive agreements, not only had to generate a net benefit for all consumers (which had to directly stem from the agreement), but in addition a net benefit for each group of consumers separately (i.e., in this case, net benefits for cardholders and merchants). This raised the bar considerably. Not only does this requirement assume that the various multisided markets are not sufficiently related (which has been held to be a requirement<sup>8</sup>), but it is also hard to reconcile with the consumer welfare standard. On this basis, an economic platform will be prohibited, even if it is overwhelmingly in the interests of consumers, as long as there is one group of consumers that may be worse off at first blush.

Third, and finally, the General Court demonstrated again that the bar for establishing efficiencies under the relevant EU law provisions governing restrictive agreements is very high and it seems much higher than for establishing the restriction of competition. This has particular severe consequences for the analysis of multisided markets where the various network effects may be hard to quantify. The Commission (and also the General Court) thus held that MasterCard failed to provide “sufficient empirical evidence” quantifying objective advantages for the merchants. Ironically, after having adopted its decision, the Commission launched a call for tenders for a study on “Costs and benefits to merchants of accepting different payment methods,”<sup>9</sup> implicitly acknowledging that it also did not know how to objectively quantify such advantages.

While the placebo approach acknowledges the multisided nature of the market, it fails to draw the right conclusions. As a result, the placebo approach raises the same policy concerns as the ostrich approach, namely the risk of significant over-enforcement. In the context of the MasterCard MIF case, it is not clear whether the assessment under an analytical framework suited for multisided markets would have led to a different outcome, but it would have recognized the concerns regarding the MIF for what it is: namely an issue of price regulation rather than a classic antitrust problem. In addition, the placebo approach also raises an issue of internal consistency; this is the *quid pro quo* of being able to claim to pursue a “more economic approach” while maintaining an “old style” enforcement policy (a strategy which the European Commission has also pursued successfully in the area of abuse of dominance).

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<sup>8</sup> European Commission, Guidelines on the application of Article 101(3) of the Treaty on the Functioning of the European Union, [2004] OJ No. C 101, p. 97, ¶ 43 states that the assessment of benefits flowing from restrictive agreement is in principle made within the confines of each relevant market or in related markets. In light of this statement, the court’s view that the different sides of a multisided market are not sufficiently related, is barely understandable.

<sup>9</sup> COMP/2008/D1/020.

#### IV. VARIANT 3: THE “APPLIED” APPROACH

But not all is doom and gloom: in an increasing number of cases, European competition authorities adopt an “applied approach” in which they not only acknowledge the multisided nature of a market but also adjust their analytical framework accordingly.

Examples include the UK Office of Fair Trading merger clearance decision of June 1, 2012 in *Northcliffe/Topper*,<sup>10</sup> a *de facto* 2-to-1 merger of a daily paid (*The Post*, published by Northcliffe) and a weekly free (*Topper*) newspaper, which lead to a 90 percent share on the reader-side of the market. Here, the OFT acknowledged that due to the two-sided nature of the market, following the merger Northcliffe would have neither the incentive nor the ability to profitably raise prices for its newspaper as a resulting drop in newspaper circulation would have meant lower advertising revenues.<sup>11</sup>

The competitive constraint from the multisided nature of the market was also a key factor of the Dutch competition authorities clearance decision in *Bloemveiling Aalsmeer/FloraHolland*,<sup>12</sup> a merger of two flower auction houses that act as intermediaries between growers and buyers and the German competition authorities’ clearance decision in *Intermedia/Health & Beauty*, a merger of two publishers of beautician magazines with a combined market share of around 70 percent.<sup>13</sup>

#### V. CONCLUSION

As illustrated above, competition authorities in Europe still struggle with multisided markets, which is, in part, due to factors which apply universally, in particular the complexity of the inter-relationship of multisided markets against the very blunt instruments of antitrust law.

In addition, there are a number of Europe-specific problems, including the structure of the provisions governing restrictive agreements, the lack of sophistication of the courts (both at a national level and, in particular, at the EU level), and the deference that the courts grant to the Commission. The combined effect of the European factors magnifies the problem significantly.

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<sup>10</sup> OFT, Decision of 1 June 2012, Case ME/5386/12 – *Northcliffe Media / Topper Newspapers*.

<sup>11</sup> However, the OFT did not undertake a comprehensive analysis of the readerside of the market but solely focused on the advertising side.

<sup>12</sup> NMa, Decision of 21 August 2007, Case 5901 - *Bloemveiling Aalsmeer/FloraHolland*.

<sup>13</sup> FCO, Decision of 29 August 2008, Case B6-52/08 - *Intermedia / Health & Beauty*.