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Multi-sided platforms - Legal implications of definitional gaps

By Christian Bergqvist and Elisa Faustinelli¹

The matter of digital platforms and their treatment in competition law have attracted much attention. Not only through investigations into *Google*, *Facebook* and *Amazon*, but also with the issuing of several reports. The antitrust debate surrounding digital platforms is huge and encompasses polarized discussions on e.g. killer acquisitions, algorithm collusions, or the role of Big Data for market power. Some even refer to gaps when it comes to regulating platforms adequately. However, more practical, and somewhat overlooked, is the need for a solid definition of *multi-sided platforms*, allowing for their identification in the first place. A matter with direct legal implications for the enforcement of competition law as detailed below.

The term “multi-sided platform” is often used interchangeably with “digital platform” or simply “platform”, and applied to an extremely wide variety of digital entities, including general search engines, marketplaces, or online travel agents. Yet, in the economic scholarship it is commonly accepted that not all “digital platforms” are the same. Rather, in light of distinctive features, such as the presence of different sides with interdependent demands, indirect network effects, and skewed price structures, an emerging economic theory, known as “the two-sided market theory”,² draws a line between firms **i)** adopting a multi-sided business model, and firms **ii)** relying on traditional ways of doing business. Transposed in the digital realm, the label *digital multi-sided platforms* would be reserved to platforms relying on a multi-sided business model, whereas platforms acting as e.g. resellers of content should be considered as one-sided entities,³ outside of the con-

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² See e.g. JC Rochet, J Tirole, *Platform Competition in Two-Sided Markets* (2003) 1 Journal of the European Economic Association; DS Evans, *The Antitrust Economics of Multi-Sided Platform Markets* (2003) 20 Yale Journal of Regulation; M Armstrong, *Competition in Two-Sided Markets* (2006) 37 RAND Journal of Economics.

³ Examples could be Netflix, which acts as distributor of video streaming, and Expedia, which offers travels services relying, at least partially, on a traditional merchant business model.

cept. The presence of indirect network effects and the two sides may in fact provide a strong economic rationale for e.g. skewed pricing practices, which in a traditional one-sided context would be evaluated as forms of excessive or predatory pricing. Differently, in a multi-sided context, where both sides are taken into consideration, these same practices would be a by-product of the business model, and should not be viewed as necessarily anti-competitive. Applied wrongly, it can lead to wrong conclusions and both over-and under enforcement. This explains why economists have cautioned competition enforcers to “refrain from mechanically applying standard antitrust ideas where they do not belong”.⁴

The lack of a uniform definition of “multi-sided platforms”

Yet, substantial uncertainty still surrounds the identification of *multi-sided platforms*. It is generally acknowledged that the economic scholarship has failed to provide a universally accepted definition for these entities.⁵ Similarly, in the Public Consultation on platforms and online intermediaries⁶ (2015) the European Commission proposed a formal definition that has been criticized for its over-inclusiveness,⁷ and subsequently not utilized in cases. Neither does the report *Competition Policy for a Digital Era* (2019), commissioned by the European Commission, expound on the matter.⁸ The merging picture is therefore one of uncertainty when it comes to understanding multi-sided platforms and the legal implications of this business model for the legal analysis.

The lack of a clear-cut definition of multi-sided platforms will translate into case law, where multi-sided platforms are not identified on the basis of well-established criteria. Rather, competition authorities refer to different multi-sided features, such as the presence of indirect network effects or the intermediary function played by

For an overview, see F Ye, L Zhang, Y Li, *Strategic choice of sales channels and business model for the hotel supply chain* (2018) 94 *Journal of Retailing*, p.33.

⁴ See J Tirole, *Market failures and public policy*, Nobel Prize Lecture (December 8, 2014), p.518, on the distinctiveness of the multi-sided business model; see also OECD, *Re-thinking the use of traditional antitrust enforcement tools in multi-sided markets*, DAF/COMP/WD(2018) 31/FINAL.

⁵ See e.g. JC Rochet, J Tirole, *Two-sided markets: a progress report* (2006) 37 *RAND Journal of Economics*, p. 665; M Rysman, *The economics of two-sided markets* (2009) 23(3) *Journal of Economic Perspectives*, p.125; and A Hagiu, J Wright, *Multi-sided platforms* (2015) 43 *International Journal of Industrial Organization*, pp.162-174.

⁶ See *Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy*, Consultation Survey, (2015) p.5.

⁷ *Study on online platforms – Contrasting perceptions of European stakeholders: A qualitative analysis of the European Commission’s Public Consultation on the Regulatory Environment for Platforms*, (2016) para.1.

⁸ Nor have useful definitions been utilized in Reg.2019/1150 *on promoting fairness and transparency for business users of online intermediation services*, which confines itself to the broad concept of “online intermediation services” – see Art.2.

the platform. Yet, it is not clear whether these features are considered as cumulative, or decisive for the qualification of a platform. The case law even lacks a uniform approach as to what to consider *multi-sided*, as this attribute has been referred to the platform,⁹ the products,¹⁰ or the market,¹¹ respectively.

While the confusion could be remedied as the case law matures, the uncertainty surrounding the identification of multi-sided platforms inflates the risk of developing the legal analysis based on an incorrect understanding of the economic context, potentially translating into “mistakes”.

The multi-sided business model can have far reaching legal consequences

In the aftermath of the landmark cases *Cartes Bancaires*¹² (2014) and *MasterCard*¹³ (2014), the distinction between one-sided vs. multi-sided businesses has also acquired a certain legal relevance. In both cases, the European Court of Justice clarified that the “*two-sided nature*” of an undertaking’s business is part of the economic and legal context of the involved competition law case. Regrettably, the Court did not follow up on clarifying the legal consequences stemming from such a requirement, albeit some valuable indications would still emerge from case law. For instance, in *Cartes Bancaires*¹⁴ the European Court of Justice refused to consider an agreement establishing a certain ratio between members of different sides of a multi-sided platform as a restriction by object. This was in contrast with the position held by the EU Commission and General Court, which had essentially negated the two-sided nature of the undertaking. Furthermore, in the UK case *Arcadia v. Mastercard*¹⁵ (2017), the UK High Court, contrary to settled EU case law, rebutted the anticompetitive nature of Multilateral Interchange Fees (MIFs). Such an outcome was the result of a counterfactual analysis (i.e., so-called death spiral argument) based on the economics of multi-sided platforms. While merely examples, they do give indications of the potential far-reaching legal implications of including, or failing to include, the two-sided nature of a platform in the legal analysis.

The absence of a worktable definition translates into market definitions

The current definitional gap surrounding the notion of a *multi-sided platform*, and the uncertainty associated with its identification and characterization, appear capable to undermine several aspects of the legal analysis, including the relevant market definition. Generally speaking, when confronted with different non-competing products offered over a multi-sided platform, enforcers can either define a)

⁹ COMP/M.5727 - *Microsoft/Yahoo! Search business*, para.47.

¹⁰ *TicketMaster*, CMA decision of 26 March 2015, para.27.

¹¹ *Streetmap v Google* [2016] EWHC 253, para.8.

¹² Case C- 67/13P - *Cartes Bancaires v. Commission*, paras.78-79.

¹³ Case C-382/12 - *MasterCard v. Commission*, paras.179-180.

¹⁴ Case C- 67/13P - *Cartes Bancaires v. Commission*, para.71.

¹⁵ *Arcadia v. Mastercard* [2017] EWCH 93(Comm), paras.163-260.

one single relevant market comprising all the sides adhering to the platform, or b) different, though related, relevant markets. The report *Competition Policy for a Digital Era* would suggest that besides the “less common case” of pure matching platforms, “one would generally want to define different markets on both sides”.¹⁶ Thus, it appears that the expert groups prefer option b) where the two-sided nature entails two separate markets. Nevertheless, the group does not provide a clear indication of what they consider “matching platforms”.¹⁷

A different and generally accepted categorization of platforms would instead consist in distinguishing between:¹⁸

- a) *Transaction* multi-sided platforms, which are characterized by the presence of an observable transaction between sides. In this case, it is suggested that *one single relevant market* is defined. Substitutes and the hypothetical monopolist’s ability to increase the price should not be assessed for each side adhering to the platform in isolation. Rather, the focus has to be on the overall transaction that the platform ultimately enables.¹⁹
- b) *Non-transaction* multi-sided platforms, where there isn’t any observable transactions between the sides, even though an interaction between them is present. Due to the lack of any observable transactions, each side would be subject to different competitive constraints, thus leading to some economic scholarship to suggest the definition of *different, though related, relevant markets*.²⁰ However, this approach is still heavily debated in the literature.²¹

¹⁶ See Report, *Competition policy for the digital era*, p.46.

¹⁷ The group takes the example of dating apps, which are considered as “*matching platforms*” as long as they have “*no ads, no selling of data, and no partnership with restaurants for a first date*”, so that overall, the only product sold is “*the matching process*”. Ibid.

¹⁸ For the distinction between *transaction* and *non-transaction* platforms see L Filistrucchi, D Geradin, E Van Damme, P Affeldt, *Market definition in two-sided markets: theory and practice* (2013) TILEC discussion paper DP 2013-009. This classification appears endorsed by the Commission, which also contemplates other categorizations e.g. a distinction between *market makers, audience makers, and demand coordinators*. See Commission Staff Working Document, COM(2016)288 – *Online Platforms, Accompanying the document - Communication on online platforms*, pp.2-3.

¹⁹ See L Filistrucchi, D Geradin, E Van Damme, P Affeldt, (n 18).

²⁰ Ibid.

²¹ See e.g. JD Ratliff, DL Rubinfeld, *Is there a market for organic search engine results and can their manipulation give rise to antitrust liability?* (2014) 10(3) *Journal of Competition Law & Economics*; see also, S Broos, JM Ramos, *Google, Google Shopping and Amazon: the Importance of competing business models and two-sided intermediaries in defining markets*(2017) 62(2) *The Antitrust Bulletin*; and JD Wright, JM Yun, *Ohio v American Express: Implications for Non-Transaction Multi-Sided Platforms* (2019) *CPI Antitrust Chronicle*.

Multi-sided platforms - legal implications of definitional gaps

The matter becomes even more complex when subsequently called to define the relevant market, and thus, translates the above-mentioned categorization into a legal concept that can be used for a competition analysis.

When it comes to *transaction* multi-sided platforms, the case law appears to have found some common ground opting for one single relevant market encompassing all sides, as endorsed by most economic theory.²² Differently, the lack of consensus in theory is reflected in the EU and national case law of *non-transaction*, ad-supported, multi-sided platforms, where uncertainty and inconsistent solutions emerge, as illustrated in the table below.

	<i>One single market</i>	<i>Different, but related markets</i>	<i>Only one side included</i>	<i>Market definition left open</i>
<i>Magill</i> ²³ [EU, 1991]			X	
<i>Aberdeen Journals</i> ²⁴ [UK, 2003]			X	
<i>Intermedia/Health&Beauty</i> ²⁵ [DE, 2008]		X		
<i>Edda Media</i> ²⁶ [SE, 2012]		X		
<i>Microsoft/Yahoo</i> ²⁷ [EU, 2010]			X	
<i>Microsoft France</i> ²⁸ [FR, 2012]				X
<i>Verband</i> ²⁹ [DE, 2013]				X

²² See e.g. the UK-case *Just Eat and Hungryhouse*, Final Report of 16 November 2017, para.4.11 and footnotes 60 and 62; and the US-case *Ohio, et al., Petitioners v. American Express Company, et al.* 585 U.S., pp.14-15.

²³ Joined Cases C-241/91P and 242/91P - *RTE & ITP v. Commission*.

²⁴ *Aberdeen Journals*, OFT 16 September 2002, no.CA98/14/2002, upheld in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT11.

²⁵ Bunderskartellmat B6-52/08, *Intermedia/Health & Beauty*, decision of 29 August 2008.

²⁶ Konkurransetilsynets V2012-11, *A-pressen AS – Mecom Europe AS (Edda Media AS)*, decision of 28 June 2012.

²⁷ Case COMP/M.5727 – *Microsoft/Yahoo! Search Business*.

²⁸ Autorité de la concurrence, Decision n.12-D-14 of 5 June 2012 on «*des pratiques mises en œuvre par Microsoft Corporation et Microsoft France*».

²⁹ District Court of Hamburg, *Verband*, 408 HKO 36/13.

<i>Facebook/WhatsApp</i> ³⁰ [EU, 2014]	X	
<i>Verizon/Yahoo</i> ³¹ [EU, 2016]	X	
<i>StreetMaps</i> ³² [UK, 2016]		X
<i>Google Shopping</i> ³³ [EU, 2017]	X	

As illustrate in the table, a level of inconsistency has been demonstrated in case law delivered within EU, regardless of an in principle uniform regime and embedded level of coordination. This inconsistency might be a consequence of the outlined uncertainty surrounding the definition of the relevant market for non-transaction platforms, and it's difficult not to contemplate its implications for the subsequent legal analysis. The most imminent being the failure to recognize the interdependence between the different sides leading to wrongful assessments and failure to recognize the two-sided nature of a platform. When this occurs, the real dynamics of the multi-sided business model are overlooked and the entire economic narrative of the case affected, thus compromising e.g. the assessment of dominance and the solidity of the theory of harm.

The absence of a definition also undermines analysis on market power

The lack of a workable definition of “multi-sided platform” is also capable to impact the analysis of market power. In fact, the assessment of dominance of digital platforms must rest on a solid understanding of the multi-sided business model upon which many tech companies rely. This, in turn, feeds into the legal assessment of the distinctive features of the multi-sided business model, including the presence of indirect network effects and multi-homing, which can have implications in determining the presence of dominance.

On the one hand, *indirect network effects* could be used to corroborate the presence of barriers to entry,³⁴ but also have counterweighting effects. The later aspect, often ignored, would come from the positive feedback loops between interdependent sides that could fuel the growth of new potential competitors at unprecedented pace, and thus, softening the effect of entry barriers or the ability of established tech companies to exercise market power. The digital sector is rich with examples where incumbents have been eliminated within a short time span. On the other hand, the consumers' parallel use of different platforms offering – *multi-homing* –, which has also so far received limited attention in the case law,³⁵ could amount

³⁰ Case COMP/M.7217 - *Facebook/Whatsapp*.

³¹ Case COMP/M.8180 - *Verizon/Yahoo*.

³² *Streetmap v Google* [2016] EWHC 253.

³³ Case AT.39740 - *Google Search (Shopping)*.

³⁴ See e.g. case COMP/C-3/37.792 - *Microsoft*, paras.448 et seq.

³⁵ See e.g. case AT.39740 - *Google Search (Shopping)*, para.316.

to an important factor in the assessment of countervailing buyer power, especially given the low switching costs and high product differentiation typical of digital markets.

Attention should be allotted to providing a better definition on platforms

Overall, it appears that the categorizations of platforms currently utilized are insufficient to close the definitional gap characterizing multi-sided platforms, with several far-reaching legal consequences for e.g. the analysis of the relevant market and market power. By contrast, a clear identification and understanding of multi-sided platforms appears relevant and necessary for a realistic and economically sound competition assessment. This, in turn, calls for a more thorough reflection on the meaning and legal implications of digital platforms relying on a multi-sided way of doing business.