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I. INTRODUCTION

At the 2013 American Bar Association Section of Antitrust Law Spring Meeting I had the honor to chair a session entitled *Both Sides Now: What's Special About Two Sided Markets?* The program benefitted from the participation of some of the leading legal and economic thinkers on this issue, including Dr. David Evans, who is a leader in the economics of two-sided markets; Renata Hesse of the Department of Justice, who has had cases involving and written about two-sided markets; Joseph Simons of Paul Weiss, who similarly has worked on a number of two-sided market matters; and Christian Ahlborn of Linklaters with the European perspective on two-sided markets.

The interesting take away, as an observer, was that there was general agreement on the existence and theoretical relevance of two-sided markets—or more properly, two-sided platforms—but where the speakers failed to come to agreement, and where the jurisprudence seems to have failed to come to ground, is the question of what the practical, case-altering implications of market platforms being two-sided means. There can be no debate that meaningful portions of the economy—in the range perhaps of 15 percent - 25 percent—operate in two-sided systems. So, this is not merely an academic debate, it has huge practical implications for the economy.

Dr. Evans explained why a number of the traditional antitrust tools which we employ, including the Lerner Index, the SSNIP test, critical loss formulas, upward pricing pressure formulas, elasticity demand—to name a few—are not applicable, or must be applied differently, in the case in two-sided platforms.[2] There does not appear to be any significant debate about this, but the question is, given the acceptance of these facts, why don't we see very much impact on cases?

II. THE MINIMAL IMPACT, TO DATE, ON CASE LAW

The concept of two-sided markets or two-sided platforms is not new. The *NaBanco* case[3] which recognized the concept was decided almost thirty years ago. However, the significant detailed academic work is really little more than a decade old. One reason, therefore, why we may not being seeing a lot of case law results from this thinking on two-sided markets is that law, and

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[2] *See* David S. Evans, *The Consensus Among Economists on Multisided Platforms and Its Implications for Excluding Evidence That Ignores It*, in this issue of the *CPI Antitrust Chronicle* (June, 2013).

[3] *National Bankcard Corp. (NaBanco) v. Visa U.S.A., Inc.,* 596 F. Supp. 1231 (S.D.Fla. 1984), aff'd 779 F. 2d 592 (11th Cir. 1986), cert. denied 478 U.S. 923 (1986).

the process of jurisprudence, is a conservative business. New ideas are developed in and enter from the academy. They are debated, discussed and then through that process become orthodox.

But, judges and lawyers are slow to adopt the latest thinking. There is the inherent conservatism of a system of thought based on precedent. There is the lack of economic training and expertise in the bar and judiciary. And there is also, and perhaps somewhat more positively, the caution appropriate in making decisions which will themselves become precedential. That is surely at least a significant reason why economic concepts that are now regarded as beyond debate do not find their way into case decisions to any great extent. If this is at least a meaningful contributing factor to the lack of jurisprudence recognizing the significance of two-sided platforms, perhaps we are on the verge of change.

Turning, from the economic concepts to an exploration of a few—but only a very few—cases, in the U.S. Department of Justice's case involving the exclusion of American Express and Discover from the Visa and MasterCard networks[4] the networks each maintained rules that did not allow their banks to enter into agreements with other third-party networks. The fact that the networks were two-sided platforms may not, it is submitted, have made a significant difference to the analysis, since the issue was not whether adjustments on one side of the platform affected the other, but rather dealt with competition between networks, each having two sides.

By contrast, the current litigation by the Department of Justice against *American Express*[5] does, arguably, significantly implicate the two-sided nature of the credit card system. In that case the DOJ is seeking to require American Express to allow merchants to offer discounts to customers who pay by other methods. Visa and MasterCard settled the same case by agreeing to allow (or to continue to allow) discounts. American Express' argument is that a discount and a surcharge are two sides of the same coin, and that allowing discounting is, therefore, no different than preventing merchants from surcharging for different payment options. What surcharging—or discounting—does is effectively to allow merchants to re-adjust the balance between the two sides of the market that the network operator has established. What the court will ultimately do with the case is of course an open question, but the issue does clearly implicate the two sidedness of the market.

III. TWO-SIDEDNESS REQUIRES ADJUSTMENTS TO, BUT NOT NECESSARILY REPLACEMENT OF, THE ANALYSIS RESPECTING EXCLUSIONARY CONDUCT, MERGERS, OR COLLUSION BETWEEN TWO-SIDED PLATFORMS

At least in principle a merger between two-sided platforms; or exclusionary conduct engaged in by two-sided platforms aimed at competing two-sided platforms; or a cartel between the two-sided platforms, should give rise to different implications—*vis a vis* the two sidedness—than conduct which involves changing the balance between one side of the platform and the other.

Excluding competing two-sided platforms from a market, with the result that competition among remaining such platforms is less robust than it otherwise would be, and/or

[4] *United States v. Visa U.S.A., Inc.,* 163 F. Supp. 2d 322 (S.D. N.Y. 2001), aff'd 344 F. 3d 229 (2nd Cir. 2003).

[5] *U.S. and Plaintiff States v. American Express Company, et al.,* CV-10-4496, online: Department of Justice <http://www.justice.gov/atr/cases/americanexpress.html> (E.D.N.Y.) [*American Express*].

competition among the existing platforms and the potential new entrant is prevented, should be able to be analyzed in a relatively traditional way—similar to analysis of competition in one-sided markets involving exclusionary conduct. Of course, the dynamics of market power and barriers to entry and the like enjoyed by two-sided platforms may be different than in a one-sided market. Whether conduct is actually exclusionary needs to be considered in light of the two-sided aspects of the platform,[6] and the conduct must be analyzed taking into account that those different dynamics. But if, taking those facts into account, the exclusionary conduct has kept out or diminished the vigor of competing platforms in a material way, then in that sense a traditional abuse of dominance or monopolization paradigm is suggested.

Similarly, with respect to mergers between two-sided platforms, again the market power of the platform, along with barriers to entry and the like,[7] have to be analyzed taking into account the two sidedness but, having done that, in principle a merger between two two-sided platforms—in a relatively concentrated market and involving material barriers to entry—may have anticompetitive implications in much the same way as would a merger in a concentrated one-sided market with barriers to entry. The difference may be in determining whether the two sidedness of the platform has implications on the market power and barriers to entry, but having completed that analysis the subsequent questions are likely to be similar to those that one would ask in a one-sided market.[8]

This approach may also be applicable with respect to allegations of collusion among two-sided platforms. Here the difference, however, may be that in a *per se* regime barriers to entry may not be relevant to the analysis. Nevertheless, as Judge Posner in the recent *Sulfuric Acid* case[9] cautioned, determining whether or not conduct falls within the category of *per se* prohibited price-fixing, in respect of relatively novel marketplace situations, can be dangerous.

Consequently, it may be appropriate that allegations of cartel behavior between two-sided platforms not, at least yet, be classified as *per se* prohibited conduct—until sufficient experience is developed. The question should, it is submitted, be open to consideration for some period of time until we gain sufficient confidence in that conclusion. For instance, if there were collusion which set prices on one side of a platform, but not the other, that may turn out to be different than price-fixing in a one-sided market—and may not justify *per se* condemnation.

IV. TWO-SIDEDNESS DOES IMPACT ANALYSIS WHERE BALANCE IS CONCERNED

The scenarios explored above—exclusionary conduct by a two-sided platform, mergers between two-sided platforms, and collusion between two-sided platforms—are, it is submitted,

[6] The discussion of predatory pricing, below, being an example.

[7] One of the characteristics of a two-sided market is that there may be chicken and egg challenges, such that a firm that has successfully entered two sides of a market has greater advantages *vis a vis* barriers to entry to rivals than in a traditional one-sided market situation. That is probably true, but in that sense may be analogous to other types of entry barriers. That is, this may be a fact which means that in these cases the entry barriers are higher than they would otherwise have been, but that does not make the case fundamentally different from other cases in one-sided markets—it is an entry barrier—although one arguably peculiar to a two-sided platform.

[8] But *see* Office of Fair Trading, *Anticipated acquisition by Northcliffe Media Limited of Topper Newspapers Limited* (16 July 2012), ME/5386/12, *available at* OFT <http://www.oft.gov.uk/shared_oft/mergers_ea02/2012/Northcliffe.pdf>.

[9] *In re Sulfuric Acid Antitrust Litigation*, 703 F. 3 1004 (7th Cir. 2013).

different in kind from conduct which affects the balance between one side of the platform and the other. While the mechanics of the two-sided platform may require that the conduct be analyzed with care—the underlying approach, once such care is exercised, need not *necessarily* change.

On the other hand, conduct involving the balance between the two sides of the platform is a different beast. Conduct which involves determining whether credit card consumers or merchants pay most of the freight; or whether men or women in a singles bar pay more for drinks; or whether restaurants or diners pay for Open Table; or whether software developers or software users pay for the system—to take a few common examples—is of a different nature than conduct as between or among platforms. These balancing situations involve a fundamentally different set of questions and concerns.

Perhaps the clearest and simplest example of how two-sided platforms are different is the question of predatory pricing on one side of the platform. Whatever the cost comparison standard (whether marginal cost, incremental cost, long run average variable cost, avoidable cost), when comparing costs to prices on one side of a two-sided platform the price on one side is likely—or is at least entirely capable—of falling beneath cost, without being in any way inappropriately exclusionary. The relative prices are, as is touched on below, balancing devices. It may be appropriate to analyze the total price achieved on both sides of the platform as against total costs, but analyzing the price charged on only one side against costs (however costs are allocated as to sides of the platform—a difficult question in itself) will lead to nonsensical results.

Predatory pricing is just the most obvious example of a situation in which traditional antitrust approaches, applied to mechanisms to balance the two sides of a platform, makes no sense. Price-fixing, and other forms of allegedly exclusionary conduct are, likewise, inappropriate ways to think about conduct that adjusts the balance between the two sides of the platform.

Here is where, it is submitted, the fundamental divergence between standard antitrust approach in a one-sided market, and that which has to be applied in a two-sided market, will be most acute. Overlooking this difference—as arguably occurred in the *Bottin Cartographes v. Google* case[10] by the French court, or noting the existence of a two-sided platform, but then ignoring the outcome as was done by the European Commission in the *MasterCard MIF* case,[11] or as the DOJ risks doing in the ongoing case against *American Express*[12] with respect to discounts, and certainly as the private plaintiffs did in the recently settled *Visa/MasterCard* merchant class action,[13] is a serious mistake.

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[10] Trib. Com. Paris (Commercial Court), 31 January 2012, *Bottin Cartographes v. Google France, Google Inc.,* (2012).

[11] *MasterCard I* (Case COMP/34.579) Commission Decision (19 December 2007), online: European Commission <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC1106(03):EN:NOT>, aff'd Case T-111/08 *MasterCard v. European Commission* (24 May 2012), online: Curia <http://curia.europa.eu/juris/document/document.jsf?docid=123081&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=840684>.

[12] *American Express, supra* note 5.

[13] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* (19 October 2012), MD-1720 (E.D.N.Y. 2012), *available at* Payment Card Interchange Fee Settlement

Insofar as a two-sided platform is engaged in activity to balance demand on one side with demand on the other, with the goal of maximizing total output (the singles bar being the most intuitive example), that is likely to be an efficiency enhancing, output expanding exercise. That balance requires, in one way or another, rules to move money from one side of the platform to the other, and to prevent a re-balancing (through surcharging, for example). Analyzing this balancing conduct with traditional antitrust tools is virtually certain to lead to an incorrect outcome.

This issue of the balancing device leads me to the final question explored in this brief note, which is the question of how a balancing device (interchange, and ancillary rules in the credit card business; the relative price of women's versus men's drinks in a singles bar contest; the relative price to developers and users of software in that context) functions. In each case the rules deal with the allocation of price to the different sides of the platform and, as noted above, it is not at all clear that traditional antitrust analysis has anything to say about this exercise, however it is undertaken.

However, in the credit card context a particular problematic issue has arisen, in that competing credit card platforms do this balancing in different ways. A unitary platform such as American Express negotiates prices with merchants and with cardholders. These separate negotiations give rise to the implicit transfer of value from the acquiring side of the business to the issuing side of the business—merchants pay most of the freight. Because it is a unitary system, however, there is no express interchange—the money is just collected at a different rate from different sides of the platform—in the same way that differential pricing of men's and women's drinks in the singles bar. On the other hand, a multiparty credit card system (often called a four-party system) such as Visa and MasterCard employs rules and the device of interchange to achieve the exact same economic outcome.

This different mechanism has resulted, as noted above, in significant litigation challenges to these rules—which are in economic effect identical to the outcome in the unitary system. It is far from clear that this is a sensible antitrust outcome, particularly when the existence of a multiparty system allows for the participation of smaller innovative card issuers or card transaction acquirers—thereby introducing more competition in the system. Antitrust rules that are biased against multiparty systems that achieve the same economic effect as unitary systems are, it is submitted, likely to be problematic for the competitive outcome of these marketplaces. More fundamentally, however, attempts to analyze rules and mechanisms that transfer revenues from one side of the platform to the other in order to achieve the optimal balance are themselves, it is submitted, an inappropriate application of antitrust principles.

V. CONCLUSION

The question of properly accommodating two-sided platforms in the antitrust universe has proved to be a challenge. The modest goal of this short comment is to note some of the difficulties, and to suggest that there is a difference in kind between conduct (e.g. mergers, collusion, exclusionary conduct) occurring between two-sided platforms, which requires that

<https://www.paymentcardsettlement.com/Content/Documents/1656-1%20part%201%20Exhibit%201%20to%20Notice%20of%20Motion.pdf> (Definitive Class Settlement Agreement).

note be taken of the effect of the two-sided platform, but which may be able to draw upon traditional antitrust principles once appropriate adjustments are made; and conduct with respect to the balance between the different sides of the platform. In this latter situation, it is submitted, antitrust analysis and tools are of little or no use—and risk giving rise to false, and economically harmful, conclusions.