THE EMERGING HIGH-COURT JURISPRUDENCE ON THE ANTITRUST ANALYSIS OF MULTISIDED PLATFORMS

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I. INTRODUCTION

Matchmakers help two or more different kinds of customers, such as drivers and riders in the case of ride-sharing apps, find each other and engage in mutually beneficial interactions.[1] They typically operate a physical or virtual place, which we call a platform, to help these customers find each other and interact. The different groups are called "sides" of the platform. Shopping malls, for example, operate physical platforms where retail stores and shoppers can find each other and do business. Search engines operate virtual platforms where users looking for information, websites that want to make their content available to users, and advertisers looking to reach users can get together.

Several modern technologies, particularly the Internet, have drastically reduced the cost of creating and running platforms resulting in the global proliferation of this type of business. Matchmakers now account for many of the most valuable companies. Three of them — Apple, Google and Microsoft — are regularly in the top five companies by market cap. Matchmakers are also the source of significant disruptive innovations. Seven of the largest startups in the world, such as Airbnb, operate multisided platforms. Matchmakers are behind what's been called the sharing economy, the gig economy and the app economy.

Economists, following pioneering work by Rochet and Tirole, have developed significant theoretical and empirical work that has deepened our understanding of matchmakers.[2] The new economics of multisided platforms shows that there are material differences between businesses that facilitate matches among several interdependent groups of customers and traditional businesses that transform inputs into outputs. These distinctions are often relevant to the analysis of competition, regulatory and other public policy issues involving platform-based businesses.[3]

1 David S. Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Boston: Harvard Business Review Press, 2016). (*"Matchmakers"*).

2 Jean-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association,* 1(4) 990-1029, June 2003. For an overview of the literature and an extensive bibliography see David S. Evans and Richard Schmalensee, "Antitrust Analysis of Multisided Platforms," in Roger Blair and Daniel Sokol, eds., Oxford Handbook on International Antitrust Economics (Oxford: Oxford University Press, 2015) and in particular the bibliography in the appendix available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214252.

3 David S. Evans, Antitrust Economics of Multi-Sided Platforms, *Yale Journal of Regulation*, Summer 2003, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=363160 and Evans and Schmalensee, Antitrust Analysis of Multi-Sided Platforms, above.

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Between September 2014 and September 2016 high courts in China, the European Union, France and the United States have issued decisions that examine particular issues concerning how to apply competition law to matters involving matchmakers.[4] These decisions recognize, at least implicitly, the new economics of multisided platforms. The emerging jurisprudence shows that the courts realize the need to adapt traditional antitrust analysis to matchmakers in light of the differences in the economics of these businesses and how they compete. Although high courts have just begun to touch on several complex issues involving these businesses, it is apparent that parties involved in matters involving matchmakers should pay close attention to the new economics of multisided platforms and its implications for conducting sound antitrust analysis.

After summarizing the key differences between matchmakers and traditional businesses, this article reviews the recent high court decisions and their implications for antitrust analysis of matters involving multisided platforms.

II. WHAT MAKES MATCHMAKERS DIFFERENT?

Matchmakers create value for participants in a variety of ways. Most simply, the platform provides a way for two parties to enter into mutually beneficial exchange.[5] Participants are often more likely to find a good match if there are many potential trading partners.[6] Matchmakers can increase these chances by encouraging more participants to join their platforms. In fact, the main challenge for new platforms is securing enough participants on one side to make the platform valuable enough to participants on the other side. Matchmakers also create value by discouraging participants from engaging in bad behavior that could harm other participants.[7]

BlaBlaCar illustrates these methods of creating value. Consider a driver who is traveling from Paris to Barcelona and would appreciate a passenger to help share the cost and a person who would like to get a ride. BlaBlaCar's ride-sharing platform makes it much easier for them to find each other, ensure they are comfortable traveling together, and making an agreement. By encouraging more people to join the platform, particularly between heavily trafficked city pairs, it also increases the odds that a driver and passenger will find a good match for a particular time and destination. BlaBlaCar also discourages bad behavior on the platform through a rating system for participants and through disabling accounts for people who violate community rules.[8]

Economists have developed significant theoretical and empirical work that has deepened our understanding of matchmakers. That work shows that there are material differences between businesses that operate platforms and those who don't.

The firms are different. A traditional firm buys inputs, such as capital, material and labor, transforms those inputs into products or services, and sells them to distributors or end consumers. BMW makes cars and sells them to people. A matchmaker recruits one type of customer, and makes those customers available to another type of customers. Uber gives drivers and riders access to each other. This difference between selling products and selling access is fundamental.

4 These are all situations in which a decision by a court of first instance was appealed and there was a ruling by an appeals court or a supreme court. I focus on the decisions by the highest court in the jurisdiction to address multisided platforms. On January 30, 2017, as paper was being prepared for publication the High Court of Justice in the UK issued a judgment, which I also discuss briefly.

5 Rochet and Tirole (2003) refer to this as a usage externality.

6 Rochet and Tirole (2003) refer to this as a membership externality; it is an example of what economists refer to more generally as positive indirect externality.

7 In *Matchmakers* Evans and Schmalensee examine the case of behavioral externalities for platforms.

8 See David S. Evans et Richard Schmalensee, De précieux intermédiaires: Comment BlaBlalaCar, Facebook, Paypal et Uber créent de la valeur (Paris: Editions Odile Jacob, 2017) (French translation of *Matchmakers* with additional content) and BlaBlaCar, Inside Stories available at https://www.blablacar.com/blog/inside-story/think-it-build-it-use-it.

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The economics are different. The demand by one side of the platform depends on the interest, and therefore the demand, of the other side of the platform. The demand by buyers to patronize online marketplaces depends on the volume of sellers on these marketplaces, and the demand by sellers depends on the volume of buyers on the marketplaces. The existence of multiple distinct, and interdependent, types of customers results in fundamental differences between the economics of businesses that have multisided platforms and those that don't. Traditional firms don't have multiple interdependent customers.

The math is different. Economic models of platforms have terms that account for multiple customer groups with interdependent demand. For traditional firms, profit depends on the demand for the product; demand for the product in turn depends on the price of that product and the prices of substitutes and complements. For platforms, profit depends on the demand for the products consumer by both sides and that the demand for each product depends on the demand for the other. Most economic models of firm behavior are built from conditions for profit maximization and therefore the math of these models is different for platforms than for traditional firms.

Profit-maximizing pricing is different. For traditional firms, long-run profit-maximizing prices generally exceed marginal costs. In practice, it is rare for traditional firms to charge less than marginal cost for long. For platforms, long-run profit-maximizing prices to one customer group can be less than marginal cost. In practice, it is common to see platforms charge less than marginal cost, to provide platform services for free, and to give customers rewards for joining or using the platform.

Competition is different. Traditional firms compete with each other for customers that buy their products. Platforms compete by increasing the value of each side to the other side. They typically must compete for customers simultaneously on all sides. Payment entities are competing to get consumers to use their wallets online and for merchants to offer those wallets as a payment method.

Governance is different. Platforms often require governance systems to harness externalities among members and, particularly, to prevent members from harming each other on the platform. Sometimes they have self-regulatory systems such as ratings. Other times they prohibit specific behavior, monitor behavior and punish violators. Online marketplaces such as eBay, for example, have rules for buyers and sellers and penalties for violating those rules. Traditional firms don't have similar institutions because customers are not interdependent. BMW's customers don't interact with each other and therefore there is no reason why BMW would have rules for how customers behave with respect to one another.

These distinctions between matchmakers and traditional businesses are important to antitrust analysis involving platform-based businesses and high courts have already highlighted several of these differences.

III. HIGH COURT DECISIONS ON PLATFORMS

Courts have encountered matters involving platform-based businesses, such as newspapers, for much of the history of competition policy.[9] They didn't have, however, the benefit of the theoretical or empirical work conducted by economists since 2000 in analyzing the issues in these cases.[10] The courts and the other parties involved in these matters didn't recognize platforms as a class of businesses that had much in common. The high court decisions since September 2014 that have addressed platform issues have reflected evidence and arguments, presented by the parties involved, based on the new economics of multisided platforms. I discuss these decisions starting with the most recent one at the time this paper was completed, which is also the most comprehensive.

9 See, for example, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

10 The High Court in the United Kingdom declined to follow the Commission's analysis in part because it predated some of the relevant economic literature. See *Ada Stores et al. v. MasterCard*, High Court of Justice, Queen's Bench Division Commercial Court, United Kingdom. 2017 EWHC 93, January 2017. ("It is also the case that economic theory has developed over the relevant period in a way which was simply not considered by the Commission [in 1992-2007]") ("*Mastercard UK*")

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A. American Express

American Express issues credit and charge cards to consumers as well as corporate customers. It charges cardholders an annual fee and, in the case of credit cards, interest on outstanding balances. It also offers reward points based on the amount of transactions made on those cards. It enters into contracts with merchants to accept its cards and to reimburse the merchant for transactions made with its cards. It charges a "merchant discount fee" which is a percentage of the transaction amount.

Merchants that enter into contracts with American Express have to agree to "nondiscrimination provisions" that prohibit merchants from giving customers a discount, or other incentive, for using another card brand, express a preference for another card brand, or disclose information to consumers about the cost of accepting these cards. Visa and Mastercard have had similar provisions for their cards. The nondiscrimination provisions prevent merchants from steering consumers to use cards that have lower merchant fees.

The U.S. Department of Justice, joined by a number of states, sued the three card networks. MasterCard and Visa settled. A U.S. District Court found against American Express after a trial before the judge. The U.S. Court of Appeals for the Second Circuit reversed.[11] The Second Circuit decision is the only U.S. appeals court case that has specifically addressed the antitrust analysis of multisided platforms in light of the new literature. The Court relied extensively on the economic literature on multisided platforms, and on payment systems, in its decision.[12]

The Second Circuit Court of Appeals concluded that it was inappropriate to separate out the two interdependent sides of the platforms in defining a relevant product market. The District Court defined a separate market for acquiring merchants. The Second Circuit found that "[t]he District Court erred in declining to define the relevant product market to encompass the entire multi-sided platform … because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)."[13] The Court noted that separating the two markets results in penalizing legitimate competitive activities "no matter how output-expanding such activities may be."[14] The Court found that evidence of demand interdependence between the two customer groups was sufficient to conclude that the relevant product market analysis must consider the platform as a whole.

The Second Circuit concluded that it was necessary to consider both sides in assessing market power. It rejected the lower court's market power analysis for failing to account for the interdependencies between the two sides of the platform."[15] The District Court failed to "acknowledge that increases in merchant fees are a concomitant of a successful investment in creating output and value." The Second Circuit rejected the lower court's decision to ignore price calculations "intended to capture the all-in price charged to merchants and consumers across [the] platform" because "the two sides of the platform cannot be considered in isolation."[16] The District Court had found that American Express had market power over merchants in part because of the desire on the part of its cardholders to use its cards. The Second Circuit concluded that desire was what makes it worthwhile for merchants to accept Amex cards and pay its fees.

The Second Circuit concluded that the analysis of competitive effects had to consider both sides of the platform. The lower court found that it was sufficient to show "anticompetitive harm to merchants" that constituted the market that it had

11 *United States et al. v. American Express Company, MasterCard International Inc, Visa, Inc.*, No. 15-1672 (2d Cir. 2016). The Second Circuit denied a petition by the U.S. Department of Justice to hear the case, which was decided by a three-judge panel, en banc. As of this writing it is not known whether the Justice Department will seek Supreme Court review.

12 Many of the citations are to articles I've authored, many with colleagues, on multisided platforms or on the payment industry. I was not involved as an expert economist in this particular matter for any of the parties.

13 *United States et al. v. American Express Company, MasterCard International Inc, Visa, Inc.*, No. 15-1672 (2d Cir. 2016), p. 43.

14 Id. p. 38.

15 Id. p. 38.

16 Id. p. 49.

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found. The Second Circuit said that the lower court's "analysis erroneously elevated the interests of merchants above those of cardholders" and that "the market as a *whole* includes both cardholders and merchants, who comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform." (emphasis in original).[17]

Throughout its analysis, the Second Circuit determined that it was necessary to account for the interdependent demand of the two sides of the platform in conducting each prong of an antitrust analysis.

B. Groupement des Cartes Bancaires

Groupement des Cartes Bancaires ("CB Group") is a bank association that operates the domestic debit card and ATM networks in France.[18] Members can issue CB branded cards to their customers for payment at merchants and cash withdrawals from ATMs. They can also promote the acquisition of card transactions for those cards by signing up merchants and installing ATMs. The CB Group manages the network of these participating banks, consumers and merchants. Members can chose the extent to which they issue cards, install ATMs and acquire merchants. Members pay various membership fees to the CB Group to support the operation of the network.

In 2002, the CB Group decided to alter its fee schedule so that members that focused mainly on issuance rather than acquiring would pay higher fees.[19] The CB Group notified, under the procedures at the time, the schedule to the European Commission and decided to wait for approval before implementing the fees. The Commission examined the proposed rules under Article 101, which prohibits agreements that have as their "object or effect the prevention, restriction or distortion of competition within the internal market."[20] Restrictions by object are those that are "regarded, by their very nature, as being harmful to the proper functioning of normal competition."[21] It isn't necessary to examine whether the effect of a restriction is anti-competitive if it is a restriction by object. The Commission found that the proposed rule had a restrictive object — to restrict entry and raise card prices to the benefit of the major banks that belong to the association — and was therefore unlawful.

In 2012, following an appeal by the CB Group, the European General Court ("EGC") upheld the Commission's determination that the agreement involved a restrictive object. CB then took the matter up with the European Court of Justice ("ECJ"). In September 2014, the high court found that the EGC erred in concluding that the agreement had a restrictive object given the two-sided nature of CB and the role of the fees in balancing issuing and acquiring.

The EGC had recognized that CB was a two-sided payment system. It found that issuing and acquisition activities were "essential" to each other; that there were "interactions" between issuing and acquiring; and that those interactions gave rise to "indirect network effects." It also acknowledged that the rules sought to establish a balance between issuing and acquiring. The ECJ found that, given these findings, "the General Court could not, without erring in law, conclude that the measures had as their object the restriction of competition within the meaning of Article [101](1)) EC."

The ECJ provided insights into the relationship between market definition and the analysis of anti-competitive behavior. The EGC had, following the Commission, found that there were distinct markets for issuing and acquiring despite the inter-dependencies it acknowledged. The EGC then concluded "the analysis of the requirements of balance between issuing and

17 Id. p. 55.

18 For an analysis of the ECJ's judgment in *Cartes Bancaires*, and the related judgment in *Mastercard*, see Frederic Pradelles and Andreas Scordamaglia-Tousis, "The Two Sides of the *Cartes Bancaires* Ruling: Assement of the Two-Sided Nature of Card Payment Systems Under Article 101(1) TFEU And Full Judicial Scrutiny of Underlying Economic Analysis, *Competition Policy International*, Volume 10, No. 2. Autumn 2014, pp. 139-156.

19 Banks that were largely inactive would also have to pay a "wake-up" fee to remain in the association.

20 Article 101 TFEU. The case itself refers to Article 81, which became Article 101 under the Treaty on the Functioning of the European Union ("TFEU") came into force amending the previous treaties. For *Cartes Bancaires* and *MasterCard* I refer to the current numbering.

21 *Groupement des Cartes Bancaires (CB) v. European Commission*, Case C-67/13 P, September 11, 2014, para. 50, citing to the case law. ("*Cartes Bancai*res")

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acquisition activities within the payment system could not be carried out … on the ground that the relevant market was not that of payment systems … but the market, situated downstream for the issue of payment cards…."[22]

The ECJ found that the EGC had confused the market definition issue with the context for analyzing whether an agreement restricts competition. Therefore, when a platform competes in separate but interdependent markets it is necessary to consider both markets in analyzing restraints on competition.[23] This conclusion only applies, strictly speaking, to the analysis of whether an agreement is a restriction "by object" in the context of Article 101(1). The reasoning would appear to apply to an effects analysis under Article 101 EC — *MasterCard*, discussed next, confirms that — and to an analysis of abuse by object or effect under Article 102.[24]

C. Mastercard

The ECJ released its decision in *MasterCard v. Commission* the same day as *Cartes Bancaires*. MasterCard, like Cartes Bancaires, is a four-party payment platform. It has two sides. The issuing side consists of banks that issue cards to consumers that they can use to make payments at merchants that accept the brand. The acquiring side consists of banks that sign up merchants and acquire their transactions when consumers use the brand for payment. When an issuing bank cardholder uses her card to pay for a transaction at a merchant, the acquiring bank for that merchant pays the issuing bank an interchange fee.

The Commission found that the interchange fee rule had been adopted by an agreement of banks, that it had the effect of restricting competition under Article 101(1), and that it did not have countervailing efficiencies that could save it under Article 101(3). It did not reach a conclusion on whether the object of the interchange fee rule was to restrict competition. Instead, it relied on an analysis of effects to support its finding that there was a restriction of competition. MasterCard appealed to the EGC, which sided with the Commission. The ECJ upheld the lower court but in the course of doing so provided guidance on the analysis of competitive effects and efficiencies.[25]

The ECJ concluded that there was no dispute that MasterCard is a "two-sided" platform, that issuing and acquiring are interdependent, and that there are indirect network effects between the two sides.[26] In that case the "economic and legal context of the coordination concerned includes … the two-sided nature of MasterCard's open payment system, particularly since it is undisputed that there is interaction between the two sides of that system…." That economic and legal context must be considered in analyzing whether a practice restricts competition.[27] *Cartes Bancaires* and *MasterCard* therefore find that it is necessary to consider both sides of the platform, and their interactions, in determining whether coordinated behavior among firms has the object or effect of restricting competition under Article 101(1).

The ECJ also addressed the analysis of countervailing efficiencies. European competition law has a unique framework for doing so for coordinated practices provided under Article 101(3). Even if a practice has the object or effect of restricting competition, it may be lawful if it "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."[28] The ECJ's analysis was based on the

22 Id. para. 76.

23 Market definition was not before the ECJ. Nevertheless, the ECJ noted the inconsistency in the EGC referring to a payment systems market with interdependent issuing and acquiring, and then defining separate issuing and acquiring markets.

24 The European General Court then considered the matter again given the ECJ's guidance. My understanding is that it determined that the MasterCard agreement was a restriction by effect; as of this writing they have not published the judgment in English.

25 *MasterCard et al. v. Commission*, C-67/13 P, September 11, 2014.

26 The ECJ noted that there "are certain forms of interaction between the 'issuing' and 'acquiring' sides, such as the complementary nature of the services, and the presence of indirect network effects, since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other." Id. para 177.

27 The ECJ did not delve into whether the Commission had failed to do so because it found that this issue was not raised in the appeal.

28 Article 101(3) goes on to say that the restrictions must be indispensable for achieving the objectives and must not eliminate competition.

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finding, not subject to the appeal, that issuing and acquiring were two separate but linked markets. The ECJ found that the analysis of efficiencies in two-sided markets should account for the benefits obtained by customers in both markets and not just the benefits realized by the customers in the market subject to the restriction.[29] Therefore, just as it would be an error to analyze the object or effect of a restriction only in the market for one side of a two-sided platform, it would be an error to analyze efficiencies only in the market for one side of a two-sided platform.

The high court, however, imposed some limitations on the use of benefits in one market to save a restriction in a related market. The consumers in the market subject to the restriction have to secure an appreciable benefit in order to place any weight on the benefits obtained by consumers in the related market. As a result, if consumers in the market subject to the restriction don't receive appreciable benefits, no amount of benefits in the other market could save the restriction. If consumers in the market subject to the restriction receive appreciable benefits then, even if those benefits aren't enough by themselves to save the restriction, it is possible to consider the benefits in the other market and determine whether the benefits in both save the restriction. It is difficult to discern the logic, as a matter of economics or policy, behind this approach and perhaps it is an artifact of European case law.[30]

D. Google Maps

Bottin Cartographes ("Bottin"), a Paris-based firm, and Google both provide mapping software that retailers can use for their websites to show location and provide directions. Bottin charges retailers for using its software. Google provides a basic version of its Google Maps API for free for a similar purpose; in this case Google makes money from selling advertising. It offers other versions, with more functionality and support, for a fee.

Bottin claimed that Google was engaging in predatory pricing. The Commercial Tribunal of Paris agreed in December 2012. It found that Google had abused its dominant position in maps to exclude competition and to exploit its dominant position in targeted advertising. Google appealed to the Paris Court of Appeals which, as required under French law, referred the matter to the French Competition Authority ("FCA") for advice. The FCA found that Google was not engaging in predatory pricing because it was recouping its costs through the sale of advertising based on a number of cost-based tests it devised. In November 2015, the Paris Court of Appeals agreed with the FCA and overruled the lower court.[31]

For the purposes of assessing predatory pricing by a multisided platform, the appeals court found that it was appropriate to consider the recovery of costs in a related market:

> [T]he irrationality of the economic model of Google Maps API is obviously not established. [T]he Authority has rightly observed that for operators on multisided markets 'it may be rational … to provide free products or services in a market not to foreclose competitors but to increase the number of users on the other market [and that] the free business model is quite widespread in electronic markets.[32]

As with the ECJ decisions, the Paris Court of Appeals decided that even if there were distinct markets defined for each side of a two-sided platform it was necessary, given the interrelationship between the multiple sides of the platform, to consider both sides in evaluating whether a practice — or at least a predatory practice — was anti-competitive.

29 Id. para. 237.

30 As noted above, as this paper was in press, a high court in the UK dismissed claims brought by retailers that Mastercard's interchange fee rule was a restriction by effect. It recognized following the ECJ that the analysis needed to consider the interactions between the two sides of the platform. It concluded that Mastercard would not be viable with a significantly lower interchange fee because issuers would have switched to Visa, which was not a party to this particular matter, and that the interchange fee was therefore necessary for it to compete. See *Mastercard UK*, above.

31 *Evermaps v. Google,* Paris Court of Appeals, November 25, 2015. Evermaps was formerly Bottin Cartographe.

32 Id. at 11.

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E. Tencent

Qihoo 360 v. Tencent is the first antitrust case decided under the Anti-Monopoly Law ("AML") by the China's Supreme People's Court.[33] The high court presented extensive discussion concerning defining markets and assessing market power for online platforms.

Tencent is one of the largest online firms in China. Its major products include instant messaging ("QQ"), micro-blogging ("Weibo"), and online games ("QQ Games"). It provides many products for free to attract users. It makes money from selling premium versions of its products, online advertising, and artifacts for playing games. Qihoo 360 provides Internet security software and operates a gaming platform for third party developers. It makes money from selling online advertising, commissions from game developers and premium products.

In November 2010, there was a highly publicized scuffle between Qihoo 360 and Tencent. At the time Qihoo 360 was the leading provider of Internet security software and Tencent was the leading provider of instant messaging. Tencent introduced security software as a feature in one of its products. It also required QQ users to use Internet security software from a provider other than Qihoo 360 following claims that there were problems with Qihoo 360's software. A few days later, following intervention by the Chinese government, Tencent reversed the policy and allowed QQ users to use Qihoo 360's security product.

About a year later, Qihoo 360 filed an antitrust lawsuit against Tencent over this episode. The case was heard in the first instance by the Guangdong High People's Court, which ruled against Qihoo 360 in March 2013.[34] Qihoo 360 appealed to the Supreme People's Court, which upheld the decision in October 2014. The high court found Tencent did not have significant market power and therefore was not dominant under the AML. In the course of its decision, it provided extensive discussion concerning the analysis of market definition and market power for online platforms particularly where some products are provided for free.

The Supreme People's Court recognized the importance of platform competition for evaluating the issues in the case. It noted that, "Internet providers compete not only for users but also for advertisers in order to gain profits in the advertising business and value-added businesses."[35] However, it decided that market definition should focus on the side in which the alleged anti-competitive practices were taking place. Instead, it concluded that platform competition should be considered "in order to recognize correctly the business's market positions and its market control power." In other words, it favored an approach where market definition is considered on each side of the platform but where the linkages between those two sides are considered in evaluating market power.

In analyzing whether Tencent had significant market power, the Supreme Court examined the interdependencies between the free and paid sides of the platform. "To gain profit from advertising business and value-added business," the high court noted, "the instant messaging service proprietors have to attract a large number of users at the client end continually. In order to attract more users, the proprietors should constantly improve the quality of their service, constantly develop news services." It concluded that, even though Tencent had a high share of the market for instant messaging and related services it had defined, Tencent lacked significant market power because it could not decrease quality, or raise price, significantly in that market given the loss of revenue for paid services.

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33 *Qihoo 360 v. Tencent*, Supreme People's Court of People's Republic of China, Civil Judgment No. Minsanzhongzi 4/2013, October 2014. For an English translation see: https://www.competitionpolicyinternational.com/assets/Uploads/EvansetalMay-2.pdf. I was an economic expert for Tencent in the lower court and high court proceedings and presented extensive written testimony to, and responded to written questions, from the Supreme People's Court.

34 For citations and links to English translation of the decision see David S. Evans, Vanessa Yanhua Zhang, and Howard Chang, "Analyzing Competition among Internet Players: *Qihoo 360 v. Tencent*, CPI Antitrust Chronicle May 2013 (1).

35 Id.

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IV. CONCLUSIONS

As I noted earlier, multisided platforms are not a new type of business. They've been around for millennia. The courts have examined antitrust cases involving platforms for many years. In seeking a rehearing before the Second Circuit, for example, the U.S. Department of Justice emphasized that the Supreme Court had already examined two-sided platforms and decided that it was appropriate to just consider the market on one side.

> In *Times-Picayune*, the Supreme Court addressed a tying restraint imposed by a newspaper — a classic two-sided platform. The Court recognized that 'every newspaper is a dual trader in separate though interdependent markets,' serving advertisers and readers. 345 U.S. at 610. Nonetheless, because '[t]his case concerns solely one of these markets,' the Court defined the relevant market around just the competition for advertisers.[36]

The Times-Picayune case was decided, however, in 1953. That was almost half a century before Rochet and Tirole circulated their now classic paper on the economics of multisided platforms. Prior to the circulation of their paper, there wasn't an economic theory of multisided platforms or systematic empirical studies on how these businesses behaved.

Competition authorities, courts and practitioners now benefit from the theoretical and empirical work that has been conducted since 2000. It has taken time, or course, for the recent economic work to filter its way through decisions. Remarkably, between September 2014 and September 2016 — four high courts, in Luxembourg, Beijing, New York City and Paris, issued five decisions that relied on this new learning to address antitrust issues involving these matchmaker businesses. All five decisions recognize that matchmakers serve multiple interdependent groups of customers and that the interactions between these groups matter substantively for analyzing antitrust issues.

Four of those decisions find it is necessary to take the several sides of the platform into account in assessing whether a practice has an anti-competitive purpose of effect; the Chinese Supreme People's Court did not address that issue but dismissed the competition concern finding a lack of market power. Two decisions addressed whether market definition should be conducted at the level of the overall platform or for the individual sides. The U.S. Second Circuit Court of Appeals concluded that it should be at the platform level while the Chinese Supreme People's Court decided that it should be conducted for the individual sides with the two-sided constraints brought back in for market power assessment.

These cases are likely just the beginning of new jurisprudence on how to apply competition laws to a type of business that is increasingly important in economic life. Nevertheless they signal that the courts will expect that parties before them to have considered the economic characteristics of matchmakers and in particular the interactions between the groups served by them.

36 See: https://www.justice.gov/atr/case-document/file/910116/download.

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