RULE OF REASON ANALYSIS IN TWO-SIDED MARKETS

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Abstract

It is now conventional wisdom that the economics of two-sided markets have important implications for the application of competition laws. The paper suggests that there is however an important potential mismatch between the economic consequences and doctrinal impact stemming from the two-sided nature of a market. Even once the fallacy of applying a single-sided approach is avoided, there remains a fundamental question as to how to correctly incorporate the specific features of two-sided markets into legal doctrines. The paper uses the question of market definition and the balancing of anticompetitive and procompetitive effects to show how such a mismatch can occur. In particular, it compares different procedural routes that have been applied across jurisdictions under a rule of reason framework, to show how the boundaries of the relevant market have obtained the undue role of determining the allowed welfare trade-offs and burdens of proof in platform cases. The paper concludes that a correct balancing framework should be independent from how market definition is carried out and should remain substantially equivalent in platform and non-platform cases.

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OUTLINE

I. INTRODUCTION

A recent OECD paper summarizing the results of a Hearing on Multi-sided Markets[1] suggests that "[t]here may be little value in carrying out a market definition exercise in markets involving multi-sided platforms."[2] Taken literally, such claim would appear to suggest that when carried out, the definition of the relevant market does not play an important role in platform cases. Yet the opposite could not be truer in practice.

Not only is the market definition exercise replete with additional complexities because of multi-sidedness – among other things choosing how many markets to define or applying the Hypothetical Monopolist and SSNIP test to account for cross-market effects – but the boundary of the relevant market has de facto fundamental consequences for the legal framework sustaining the balancing of anti and pro-competitive effects. By practically becoming the proxy for answering complex normative welfare-trade-off questions between the sides of a platform and by delineating different burdens of proof depending on the size of the relevant market, market definition is in fact the central determinant of any multi-sided platform case outside per se illegality. This paper suggests that this is an unfortunate development in competition policy.

One of the most important questions raised by the economics of platforms, if not the most important with regard to adjudication of competition law disputes, is structuring a legal framework that incorporates multi-sidedness while remaining consistent with the general principles guiding a rule of reason analysis, and equivalent standards across jurisdictions.[3] Such framework becomes more complex in platform cases because the presence of multiple sides with interrelated demand coordinated by an intermediary platform raises additional questions that need to be confronted: a) How many markets should be defined, a single platform market or separate markets on each side?

[1] http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm
[2] OECD, DAF/COMP/WD (2017) 55, *Hearing on Rethinking the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets*, Chapter One: Introduction and Synthesis, at 11.
[3] Legal standards and procedures are not perfectly equivalent across jurisdiction, but they converge in tackling forms of conduct that are not per se illegal and require a detailed analysis of competitive effects. For the sake of simplicity, the paper will at times refer to 'rule of reason' to refer more generally to a legal framework outside per se illegality based on balancing anticompetitive and procompetitive effects, despite important differences between the rule of reason as developed in US antitrust law and other forms such as the EU's restrictions of competition 'by effect.'

b) Should the welfare effects on users on one side be aggregated with the welfare effects on different users on the other side of the platform or treated in isolation? c) How should the burden of proof of anticompetitive and pro-competitive effects be allocated?

This paper suggests that while courts across jurisdictions have recognized and applied many lessons from the economics of two-sided markets as developed in industrial organization, they have yet failed to develop a coherent legal framework for platform cases, and it suggests possible answers to each of these questions in order to provide a more appropriate balancing of competitive effects. The paper in particular attempts to distant itself from the first question on market definition, and contrary to the developments emerging from case law across jurisdictions, it suggests as its central claim that the second and third of these questions should be answered in the same way, regardless of how market definition is carried out. Although most of the issues have emerged from case law of major jurisdictions pertaining to the payment card network industry – most recently with the *United States v. American Express*[4] case under review by the US Supreme Court – the paper also abstracts from the specificities of such markets and attempts to provide a more conceptual framework of analysis that could be applicable to any platform industry and incorporated into any balancing standard prevailing in a given competition law regime. This framework may become of increasing relevance in future applications to digital and technological platforms.

At a fundamental level, the central critique of the paper is that the legal and economic literature has often focused excessively on the shortcomings that may arise when legal doctrines remain 'illiterate' as to the economics of platforms, but has to some extent neglected the important question of how to correctly absorb the distinguishing features of two-sided markets into law. By highlighting the importance of this procedural dimension stemming from market definition in the incorporation of two-sided market economics in antitrust cases, and by providing a comparative perspective on these issues that can shed light on possible shortcomings in the analysis of platform

[4] *U.S. v. Am, Express Co.* (AmEx II), 838 F.3d 179 (2d Cir. 2016), cert granted sub nom *Ohio v. Am. Express Co*., 138 S.Ct. 355, No. 16–1454 (U.S. Oct. 16, 2017).

cases, the paper contributes to the literature on two-sided markets and points to a critical legal aspect in the debate on platforms. Even when the potential error of ignoring the economic features of multi-sided markets is avoided, failing to incorporate these features into legal doctrines in a grounded way carries the risk of creating ad hoc, rather than equivalent rules for single-sided and multi-sided platform markets.

The structure of the paper is as follows. Section II explains why and how the rule of reason is affected in platform cases, first by reviewing the economics of two-sided markets, and second by highlighting how these different economic features raise additional questions for the balancing of anti and procompetitive effects that need to be addressed. Section III compares the different procedural routes that have emerged across selected jurisdictions (US, Canada and Europe), and highlights the shortcomings in each of them. Section IV develops a legal framework for the application of a rule of reason analysis and its equivalents across jurisdictions that is both consistent with the economics of platforms and the general principles guiding the assessment of competitive effects in competition policy adjudication. Section V concludes.

II. WHY A RULE OF REASON ANALYSIS IS AFFECTED BY THE ECONOMIC FEATURES OF PLATFORMS

Since two-sided markets generally involve multiple sides with inter-dependent demand, there are often cross-market effects implicit in the assessment of competition policy issues concerning platforms, and any rule of reason analysis needs to incorporate this feature of two-sided platform markets. Hence, in platform cases parties will not only have different incentives with regard to market definition, but also an argument will usually be advanced that, while there is a negative effect on competition on one side of the market, there is a countervailing positive effect on the other side that must be taken into account. The issue of inter-dependency between the different sides of the platform, therefore, will be central and will have to be addressed at one stage or another of enforcement under a rule of reason analysis or its equivalents across jurisdictions. In order to untangle the issues, this section first reviews the economics of two-sided markets and its relevance for competition law. Then, it highlights the central questions that the distinguishing features of platforms entail in the assessment of competitive effects in competition law cases.

1. The Distinguishing Features of Two-Sided Markets

The economics of two-sided or multi-sided markets (often referred to also as two-sided or multi-sided platforms)[5] have become in the past years a very active area of research in industrial organization. While platforms are not novel and have not been outside the realm of competition laws (notable examples can be found in the newspaper or payment card network industries), starting from work of Rochet and Tirole,[6] Caillaud and Jullien,[7] Parker and van Alstyne,[8] Evans and Schmalansee,[9] Armstrong[10] and Rysman[11] the economics of two-sided markets has gained prominence in competition policy discourse. In general terms, platforms serve two or more distinct groups of customers with interrelated demand that fail to transact or match on a bilateral basis due to transaction and coordination costs. Because of the interdependency of the two or more groups of consumers, platforms need both sides 'on board' in order to operate; without one side of the platform, the other side will not join, and vice versa. The role of the platform is to solve the transaction cost and chicken-and-egg problem and facilitate the interaction between such distinct but interdependent groups of customers.[12]

[5] The paper will use the terms interchangeably, although multi-sided platform is the most accurate term to refer to this form of intermediation.

[6] Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, (2003) 1 J. Eur. Econ. Ass'n. 990; Jean-Charles Rochet & Jean Tirole, *Two-sided markets: A progress report*, (2006) The RAND Journal of Economics, 37(3).

[7] Bernard Caillaud & Bruno Jullien, *Chicken and Egg: Competition Among Intermediation Service Providers* (2003) 34 Rand Journal of Economics 309-328.

[8] Parker and Van Alsyne, *Two Sided Network Effects: A Theory of Information Product Design* (2005) 51 Management Science 1494-1504.

[9] David Evans and Richard Schmalensee, *Industrial Organization of Markets with Two-Sided Platforms* (2007) Competition Policy International 3; David Evans, *The Antitrust Economics of Multi-Sided Platform Markets* (2003) 20(2) Yale Journal on Regulation 325-382.

[10] Mark Armstrong, *Competition in Two-Sided Markets* (2006) 37 The RAND Journal of Economics 668-691.

[11] Marc Rysman, *The Economics of Two-Sided Markets* (2009) 23 The Journal of Economic Perspectives 125-143.

[12] David Evans and Richard Schmalansee, *The Antitrust Analysis of Multi-Sided Platform Businesses* in Oxford Handbook of International Antitrust Economics 404 (Roger D. Blair and Daniel D Sokol et al., 2014)

A classic example of a two-sided market is payment card systems, which provide a method of payment for cardholders and merchants. Cardholders benefit from holding a card only if a wide range of merchants accept the card, and merchants benefit from accepting a card only if a sufficient number of consumers use it. In order to effectively balance the demand on the two sides of the platform, a card network might price cardholders and merchants differently, according to their sensitivity to price changes, costs of charging each side, and the value that each user groups obtains from the presence of more users on the other side of the platform.[13] Another classic example is advertisement-based media, where the intermediary platform connects users, viewers or readers with advertisers. Because advertisers value the platform more when there are more eyeballs, the platform might decide to charge more to advertisers and subsidize readers by providing them with the service for free or at a price below the cost to create a large enough audience. Other examples of two-sided markets include online search engines, operating systems, social networking sites, video game consoles, ride-sharing platforms, and so on.

Although there is no consensus on the definition of a two-sided market, it is generally recognized that the presence of indirect network externalities (the extra value that users on one side of the platform generate for a different category of users on the other side) is one of the salient features of platforms: their role is to coordinate users that value the platform depending on the number and type of users on the other side. Users generally do not internalize such indirect network effects, and thus they are externalities that need to be internalized by the platform intermediary. As a result, pricing in two-sided markets can often differ from standard markets: a profit maximizing two-sided platform may depart from single-sided firms in that the profit-maximizing, non-predatory price may include an asymmetric price structure where one side is charged below marginal cost, zero, or even a negative price, and where the volume of transactions and profit depends not only on the total price charged to all users, but also on the structure of prices charged to different user groups. Following Rochet and Tirole, it is the non-neutrality of the price structure that makes the

[13] David Evans & Richard Schmalensee, *The Economics of Interchange Fees and Their Regulation: An Overview* (MIT Sloan Sch. of Mgmt., Working Paper No. 4548–05, 2005).

market two-sided. They note that if the volume changes with the reallocation of the total price between the two sides, the market is two-sided. If, on the contrary, the volume of transactions depends only on the aggregate price level the market is one-sided.[14] Two-sidedness therefore depends on the level of pass-through of the fees charged by the platform, which suggests, despite the specificities of these markets, the lack of a black-and-white or clear-cut distinction between markets that are multi-sided and standard single-sided markets.[15]

It is now conventional wisdom that the economics of two-sided markets has several, profound implications for competition law, and that is necessary to avoid the traditional one-sided approach in such markets. The impact of multi-sidedness on completion law can be thought of as lying along a spectrum of increasing relevance, where at one end of the spectrum multi-sidedness is either not present or irrelevant (a standard retailer or using the example offered by Rysman an automobile, which is not a 'platform' connecting mechanics and drivers);[16] in between multi-sidedness is present and affects the economic analysis and competitive effect of conduct such as predation or the evaluation of mergers (the 'economic' impact); and at the opposite end of the spectrum its impact is not only economic, but also requires substantive changes to competition law doctrines and enforcement (the 'doctrinal' impact).

Examples of the 'economic' impact include considerations that pricing on either side of a two-sided platform in isolation can yield incorrect results, because the low price side could mistakenly appear as an attempt at predation and the higher price on the other side an exercise of market power. Moreover, practices traditionally considered anticompetitive might be welfare-enhancing in a two-sided context, and in a specular way additional risks of anticompetitive conduct might arise due to multi-sidedness. As a result, the specificities of multi-sided platforms affect the

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[14] Rochet and Tirole, supra, note 6.
[15] Lapo Filistrucchi, *How Many Markets are Two-Sided?* (2010) 7 Antitrust Chron, online: <https://econpapers.repec.org/article/cpiatchrn/7.2.2010_3ai=5616.htm>.
[16] Rysman, supra note 11.

evaluation of efficiencies, collusion, mergers, predation, tying and other forms of unilateral conduct in competition law disputes.[17]

With regard to the 'doctrinal' impact of competition law doctrines, multi-sidedness has induced a general shift away from per se illegality to forms of analysis where pro-competitive effects and anti-competitive effects are balanced. Not dissimilar to the developments that have occurred in the area of vertical restraints, courts have acknowledged that practices and agreements that may appear per se illegal may often reflect efficiencies or more ambiguous effects that need to be evaluated under a rule of reason approach because of multi-sidedness. In particular, seminal cases that have arisen in the payment network industry with regard to interchange fees in various jurisdictions have opened the door to such shifts.[18] However, this shift has left the substantial majority of cases to be resolved under a balancing framework, which as the paper argues is still underdeveloped in the context of platforms. The sources of such shortcomings are the additional questions that need to be tackled in platform cases, particularly in the determination of market definition, evaluation of welfare effects, and legal burdens of proof. As a fundamental guiding principle for the development of such framework, the central insight taken from the economics of two-sided markets is that competition law analysis needs to take into account all sides and their inter-dependent relationship.

In theory, the identified spectrum of relevance is useful because it sketches when and how analysis and policy should take into account the two-sided feature of a market and implement changes in the way competition law is applied. As such, the main goal of adjusting its application is to remain consistent with the established principles and framework of this body of law. However, as the paper shows below, in practice there is a risk of creating a mismatch between the relevant economic and doctrinal impact that can create unwelcomed consequences for the development of competition law.

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[17] Julian Wright, *One-Sided Logic in Two-Sided Markets*, (2004) 3 Rev. Network Econ. 44.

[18] *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc*., 779 F.2d 592 (11th Cir. 1986), at 57; Case C-67/13, *Groupement des Cartes Bancaires (CB) v. Comm'n,* 2014 EU:C:2014:2204

2. Central Questions In Balancing Competitive Effects

Standards and doctrines for balancing competitive effects vary across jurisdictions, and are not fully congruent. However, terms such as the rule of reason, or restrictions of competition by 'effect' and other equivalent standards have a fundamental similarity in their approach in that they apply to conduct outside per se illegality that require to be analyzed not based on its form (for example, collusion), but by looking at the actual economic effects. Generally, the analysis starts with market definition for the purposes of assessing market power, followed by a burden-shifting framework for balancing anti and procompetitive effects. Usually, public or private enforcers must show anti-competitive effects in the relevant market, and once this burden is discharged, then firms accused of anti-competitive conduct can advance pro-competitive rationales to rebut the claim of anticompetitive effects. Competition authorities and courts have the task of balancing such competing effects. In the realm of platforms, there are three central additional questions that need to be addressed when applying such a balancing framework:

a. How Many Markets Should Be Defined?

In addition to the traditional questions surrounding the definition of product and geographic markets, in platform cases there is an additional choice to be made as to whether one should define separate markets on each side, or a single platform market as a whole. One view is that there should always be narrow relevant markets on each side, since separate, interrelated markets provide careful consideration of competitive conditions and do not preclude accounting for the linkages between the markets on the different sides of a platform.[19] Another view is that incorporating multi-sidedness requires in most cases defining a market that encompasses the platform as a whole.[20] A more refined version of this approach suggests a distinction between 'transaction' and 'non-

[19] Michael Katz & Jonathan Sallet, *Multi-Sided Platforms and Antitrust Enforcement*, Yale L. J. (forthcoming, 2018)
[20] David Evans & Richard Schmalensee, supra, note 12; David S. Evans and Richard Schmalensee, *Applying the Rule of Reason to Two–Sided Platform Businesses* (2018) 26 U. Miami Bus. L. Rev. 1.

transaction' markets.[21] 'Transaction' markets are characterized by the necessary presence, in fixed proportions, of two different users and by a transaction between end-users that is observable to the platform (for example, payment card networks, auctions, a buyer and a seller on a e-commerce platform), while 'non-transaction' markets do not involve the necessary complementary presence of distinct users and transactions are not observable by the platform (for example, ad-based newspapers). In the first case, because the two parties are necessary for the transaction, markets should be defined broadly as encompassing the platform market as a whole. Conversely, in non-transaction markets two separate, interrelated markets need to be defined.

These differences in views do not stem from a disagreement that the interrelationship between the different sides of a multi-sided platform needs to be taken into account; on the contrary, all approaches acknowledge the need to incorporate this feature of platforms in the analysis, but diverge on how to best define a market for the purposes of identifying market power. Both approaches may theoretically be valid depending on the context, but as explained below, the way market definition is carried out has additional, fundamental, repercussions for the legal procedure that follows after the definition of the relevant market.

b. How Should The Different Welfare Effects Across Sides Be Balanced?

Generally the welfare effects of a conduct are evaluated within a given relevant antitrust market. Platforms raise a conundrum: a conduct may have a positive effect on one side of the platform, and a negative effect on the other side. For instance, often platforms impose some restrictions on one group of users, which while reducing price competition on that side may serve the purpose of subsidizing participation of the other user group. Examples could be fees and related restrictions imposed on merchants by credit card companies which are then used to provide rewards to cardholders; or similar restrictions imposed by reservation platforms for hotels, restaurants, etc., which are then used to subsidize and provide discounts to buyers. This raises two fundamental

[21] Lapo Filistrucchi, Damien Geradin, Eric van Damme and Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice'* (2014) 10:2 Journal of Competition Law and Economics 293-339.

questions: (i) should the opposite welfare effects be treated in isolation, or should they be aggregated? This normative question is particularly relevant under the prevailing consumer welfare standard, where users on one side may be final consumers, and users on the other side intermediate customers, and brings into the picture considerations of both fairness as well as welfare economics; (ii) should it matter for this question whether one side is within or outside the boundary of the relevant market? In narrow relevant market cases, one side of the platform will by default be outside the relevant market, while in broad relevant market cases, all sides will be within the same market. Following the emerging case law and standard antitrust approach, welfare aggregation will likely be allowed in the latter case but not in the former, although it is dubious whether the boundaries of a relevant market can serve as an adequate proxy for resolving such normative issues.

c. How Should The Burden Of Proof Be Allocated?

Finally, the legal procedure generally followed under a balancing framework allocates respective burdens to parties that are best positioned to provide evidence of anticompetitive (usually public or private enforcers) and procompetitive effects (usually the firm accused of anticompetitive behaviour). As a by-product of the previous considerations regarding market definition and welfare-trade-offs, a third central question is who should be required to prove what in platform cases. In narrow market cases, a platform may theoretically be either not be allowed, allowed, or face a different standard in relying on pro-competitive effects or efficiency arguments occurring on the other side of the platform outside the relevant market. Conversely, when the market is broad and all users belong to the relevant market, public or private enforcers may face the alternative burdens of either proving anti-competitive effects on one side of the market, or proving net anti-competitive effects on all sides.

III. EMERGING PROCEDURAL ROUTES ACROSS JURISDICTIONS

These questions have been addressed differently between (and through time even within) jurisdictions. A comparative assessment of case law in Europe, Canada and the United States shows the emergence of the following procedural routes, which are discussed in turn: the first approach defines separate markets without allowing any welfare balancing across sides; the second defines separate markets and allows for some form of welfare balancing, but with explicit restrictions; the last approach defines a single platform market and balances welfare effects at the stage of proving anticompetitive harm.

1. Separate Markets And No Welfare Balancing

The first approach is the most restrictive with regard to multi-sidedness in that it requires separate relevant markets on each side, and does not permit welfare effects on one side to be balanced against the welfare effects on the other side. This approach is based on the idea that each consumer group is entitled to enjoy the benefits of competition, and restrictions of competition on one side cannot be traded-off with gains to a user group on another side arising from such restriction. Early US case law followed this approach.[22] The approach under US antitrust law has generally been to treat each side as a separate relevant market. In *Visa*, a case involving exclusivity rules imposed by Visa and MasterCard prohibiting the issuance of Amex and Discover cards by member banks, two interrelated, but separate, product markets on each side of the platform were identified. Even earlier in the *Times Picayune* decision concerning tying of morning and evening newspaper advertising space, the US Supreme Court stated that "every newspaper is a dual trader in separate though interdependent markets" and concluded that that the case involved "solely one of these markets."[23]

Staring from a narrow market definition approach, US antitrust law has also taken the position that anticompetitive effects in one market cannot justify procompetitive effects in

[22] *United States v Visa USA Inc*, 344 F.3d 229; *Times Picayune Publ'g Co v United States* 345 US 594, 610 (1953)
[23] Ibid, at 610.

another.[24] The original development of such position can be traced to *Philadelphia National Bank*,[25] which involved a challenged merger of the second and third largest banks in the Philadelphia Metropolitan area that created the risk of substantially lessening competition in the relevant market defined as commercial banking in the four-county Philadelphia Metropolitan area, but that would have allowed more competition for large loans in a separate market.[26] This traditional approach under US antitrust, where two sides of a two-sided market belong to separate, although interdependent markets,[27] and where a restraint that causes anti-competitive effects in one market may not be justified by greater competition in a different related market,[28] has however recently come under attack in the *American Express* case currently under review by the US Supreme Court.[29]

Canadian jurisprudence on platforms is scarce and more ambiguous on these issues. In the *Visa-MasterCard* case[30] in particular, the Canadian Competition Bureau challenged merchant restraints imposed by Visa and MasterCard based on Section 76 of the *Competition Act,* provision that prohibits resale price maintenance. In that case, the Competition Tribunal rejected the claim that increased competition for cardholders resulting from increased interchange fees could be considered an offsetting procompetitive benefit. In particular, the Tribunal held that although the merchant rules may have increased demand for credit cards by providing issuers with both the means and incentive to promote card use more heavily, this should not be interpreted as an offsetting pro-competitive effect of the No-Surcharge Rule. This statement indicates that the Tribunal did not believe that the increased interchange fees imposed on merchants could be offset by increased competition for cardholders, but it remains unclear whether it is also an application of a more general approach against balancing welfare effects in related markets under the rule of

[24] *United States v Topco Inc.,* 405 US (1972). For a discussion, see also: Gregory Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should it Be?* (2017) 43 The Journal of Corporation Law 119; Daniel Crane, *Balancing Effects Across Markets* (2015) 89 Antitrust L.J 391-411
[25] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).
[26] Ibid.
[27] *United States v Visa USA Inc,* 344 F.3d 229; *Times Picayune Publ'g Co v United States* 345 US 594, 610 (1953)
[28] *American Express Co*, 2015, WL 728563, at 69.
[29] Supra, note 4.
[30] CT-2010-010, *Visa-MasterCard* (23 July 2013).

reason. However, the Consultation Draft on Abuse of Dominance Enforcement Guidelines recently published by the Competition Bureau states that depending on the facts of a case, the Competition Bureau may define a relevant product market as one side of a multi-sided platform, and in other cases the Bureau may view it as appropriate to define a market to include multiple sides of the platform.[31] It adds on a footnote that when assessing competitive effects in cases where the Bureau has defined a market as one side of a platform the Bureau may, where appropriate, consider effects of conduct on multiple sides of the platform.[32] Future case law on platforms will need to refine the application of these general principles, but such statements suggests that the approach is closer to the second procedural route, which the paper now discusses in turn.

2. Separate Markets And Out-Of-Market Efficiencies

The second approach can be seen as a compromise between a narrow market definition and the need to account for cross-market welfare effects, by starting from separate relevant markets on each side, but then allowing for the evaluation of so called out-of-market efficiencies, namely efficiencies occurring on users of the platform outside the boundaries of the relevant market. EU competition law has opted for this procedural option under Article 101 TFEU. In general terms, the Guidelines on Article 101 TFEU[33] suggest that where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are' substantially the same.' Case law has then refined this position in the context of two-sided platforms in another credit card market case about interchange fees, when the relevant market was defined as including only one side of the platform (merchants), and the interchange fee was found to be detrimental to merchants.

A question emerged as to whether efficiencies and positive effects outside the boundaries of the relevant market benefitting cardholders should have been considered, particularly given that

[31] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf/$FILE/cb-draft-AbuseOfDominance-EnforcementGuidelines-eng.pdf at 10.
[32] Ibid, footnote 16.
[33] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427(07), at 43.

Article 101 TFEU requires explicitly that consumers be awarded a "fair share" of the possible efficiency gains that are claimed by producers and result from an anticompetitive agreement.[34] The Court concluded that only if there are "*appreciable objective advantages*" for consumers in the relevant market (merchants) the advantages for different consumers on the connected market (cardholders) could justify the restriction if, taken together, they are sufficient to compensate for the restrictive effects. On the contrary, if there are no appreciable objective advantages for consumers in the relevant market, any advantages for the consumers in the connected market cannot in themselves sufficiently compensate for the restrictive effects, unless consumers in both markets are substantially the same.

As a result of these doctrinal developments, platforms can use arguments based on pro-competitive effects and efficiency arguments that pertain to a side of the platform that is outside the boundaries of the relevant market. However, platforms face a higher burden for these forms of out-of-market efficiencies compared to the burden of proof generally required to avoid an infringement of Article 101 TFEU. It is unclear whether the 'appreciable objective advantage' requirement reflects a normative perspective based on fairness between the different sides of the platform or some undefined economic rationale.

3. Single Market And Net Anticompetitive Effects

The third approach is the most permissive with regard to platforms and takes multi-sidedness to an extreme. Under this framework, the market is first defined as the platform as a whole. As a result, all sides of the platform are included within the relevant market and the analysis does not exclude any user group. This approach practically eliminates the welfare trade-offs question, but implements the balancing exercise at the stage of proving competitive harm. In other words, bringing a cases against a platform requires proof that on net there are anti-competitive effects after

[34] Ioannis Lianos, *Some Reflections on the Question of the Goals of EU Competition Law* (CLES, Working Paper Ser. 3, 2013).

balancing all effects on all sides. Only then does the burden shift to defendants to provide pro-competitive and efficiency arguments.

The Second Circuit has pushed for this approach in US antitrust law in the *American Express* decision. In the case, the district court first found that American Express's no surcharge rules (which prevent merchants from charging an extra fee to cardholders when they use their credit cards) restricted price competition among alternative platforms on the merchant side, resulting in a price increase in the charges imposed by the network to merchants.[35] American Express urged the district court to depart from the narrower market definition on the merchant side in favour of a broader market definition defined by transactions encompassing both the services provided to merchants as well to cardholders.[36] The district court rejected this approach following the traditional procedural route based on a narrow market definition. The district court also concluded that, even if the market were viewed as broadly as American Express argued, there would be no legal ground to accept a restriction of competition on the merchant side as a result of increased inter-brand competition on the cardholders side; and that even if such cross-market balancing is appropriate under the rule of reason in a two-sided context, the defendant failed to establish that no-surcharge rules are necessary to robust competition on the cardholders side, or that any such gains offset the harm done in the network services market.[37] The Second Circuit however took a different position from the district court and concluded that the Department of Justice placed excessive emphasis on the merchant side of the platform and paid inadequate attention to the role of cardholders. The Second Circuit found that the district court did not take the concept of two-sidedness far enough and that the market definition was a fatal error because it ignored cardholders. It concluded that the relevant market should comprise the platform as a whole and that, with regard to anticompetitive effects, the plaintiff should satisfy the burden of proof of showing that Amex

[35] *American Express*, 2015 WL 728563. 57-59.
[36] Ibid, at 21-22.
[37] Ibid, at 34-35.

consumers, both merchants and cardholders, are on balance worse off, as a result of the restrictions imposed by the platform.

4. Evaluation of Current Approaches

The major source of departure between the identified procedural options – that is, the different treatment of welfare effects and different burdens of proof – stems from a different approach to market definition. The literature has debated extensively the question of market definition in two-sided markets in assessments of market power, but far less so for the determination of the anticompetitive and procompetitive effects that can be taken into account in two-sided market cases.

In the first option based on narrow relevant market and no welfare aggregation, the choice of market definition dictates which side of the market will be the focus of the analysis, and the other side is not taken into account. In the second case, the cross-market effect is left to the last stage, but with limitations. Since there are often limitations as to whether efficiencies outside the boundaries of the relevant market can be taken into consideration, the fundamental shortcoming of approaches based on narrow markets is that they may not sufficiently incorporate the two-sidedness of a market. The last approach based on a broader market definition, in the subset of cases where it is applicable, has the virtue of adopting a holistic approach from the start, so that each side of the market is at the centre of the analysis from the beginning, and eliminates the need to rely on out-of-market efficiencies (because both sides are within the relevant market). Yet, this approach may elevate multi-sidedness to an extreme where anti-competitive effects become the sum of negative and positive effects on all sides, which makes it harder to bring a case against a platform. Moreover, because the broad market definition may not be applicable in cases where the sides are not strictly complementary as it can be in the case of advertisement-based media where the product provided to eyeballs do not necessary requires a second side with advertising, it basically creates a different standard of analysis and balancing for a subset of platforms that provide complementary matching such as marketplaces and payment networks.

In sum, market definition has become central in platform cases because it gives rise to major differences and points of departure with regard to allowed welfare aggregation and resulting burdens of proof. However, neither normative questions regarding welfare effects, nor the way the burden-shifting framework is structured should depend on such arbitrary boundaries. This specific issue reflects a broader problem at the intersection of the economic and legal impact of two-sidedness: on the one hand, the economic literature suggests that in most circumstances there is no right of wrong approach between a broad or narrow relevant market; on the other hand, the legal developments show that the doctrinal impact of two-sidedness can go well beyond what the economic literature recommends, showing that not only recognizing the specific features of platforms is important, but also that legal principles adapt in a principled way.

IV. TOWARD AN APPROPRIATE LEGAL FRAMEWORK FOR THE EVALUATION OF COMPETITIVE EFFECTS

An appropriate legal framework for the balancing of competitive effects in platform cases should be consistent with both the economics of two-sided platforms, and the legal and doctrinal principles that guide the balancing of competitive effects. The first consideration means that no side should be ignored and all anticompetitive and procompetitive effects, including the feedback effects across sides, should be considered at one stage or another. The second consideration suggests that incorporating such analysis should give rise to a procedure that is substantially equivalent between platform and non-platform cases, and also within platform cases. The paper argues that the best way to develop such a framework is to accept different approaches to market definition (as long as they are correct in determining market power), and rather than allowing the boundaries of the relevant market to affect legal procedures, develop a form of balancing of competitive effects that is substantially equivalent in broad and narrow market definition cases.

1. An Approach Independent From Market Definition

Perhaps the clearest and most straightforward policy suggestion that can be drawn from a comparative analysis of cases involving platforms is that the same legal standards should apply to two-sided market cases regardless of the choice between narrow or broad market definition. The goal of market definition is to determine market power, not to determine different legal procedures and standards applicable to a specific case. Hence, two-sidedness, which is an inherently vague concept, should not influence a case by delineating arbitrarily the scope of welfare trade-offs that are available in a case. All procompetitive and anticompetitive effects across the sides of a platform should ideally be accounted for and the same legal framework should support such analysis regardless of whether one side is within or outside the relevant market.

On the one hand, it must be said that there are both economic and procedural reasons as to why adopting in all cases a narrow market approach and allowing out-of-market efficiencies could in theory solve such discrepancies. First, there are compelling economic reasons why a narrow market may be preferable. As Katz and Sallet suggest, competitive conditions may differ on the different sides of a platform.[38] Competitors may differ on each side, as may users' patterns of multi-homing or single-homing and in their evaluation of platform services, and there may be different degrees of vertical integration on each side.[39] A single-market approach looks at substitutability in terms of transactions, but the interests of users are not necessarily aligned and the competitive conditions on each side may differ.[40] Second, there are procedural reasons why a narrow market approach may be preferable in terms of consistency. Even accepting the idea that both narrow and broad markets approaches are valid, a broad relevant market can be applied only to a subset of markets, 'transaction' markets, but the distinction between them and 'non-transaction' markets can become unclear, giving rise to a situation where there may be different procedures for single-sided markets, 'non-transaction' two-sided markets and 'transaction' two-sided markets. For the sake of

[38] Katz and Sallet, supra, note 19, at 12.
[39] Ibid.
[40] Ibid.

consistency, it may be desirable to always define separate narrow markets on each side, given the procedural differences that can arise between cases based on a broad or narrow relevant market.

On the other hand, despite these considerations and an explicit preference for narrow relevant markets, the paper argues that tackling the development of rule of reason through market definition is inconclusive and perilous. For one thing, competition authorities and courts may take a different approach based on the circumstances of each case, and the specificities of each jurisdiction. For another, a well-established principle in competition law is that market definition is just a tool and it seems unnecessary to impose a straightjacket on the way market power analysis is carried out: in some cases, a broad market definition may be appropriate; in other cases, direct evidence and econometric tools can be used, in which case there are no relevant market boundaries. The paper instead suggests a framework based on the following starting point: assuming that courts and jurisdictions may diverge in the question of market definition, perhaps adopting a broad or narrow market definition depending on the context, or at times discounting the market definition exercise, what form of legal analysis should be developed for platform cases that would remain consistent with either choice, namely regardless of whether the market is narrow, broad, or not the defined at all.[41]

2. Beyond Welfare Trade-Offs

The history of many competition laws reveals concerns for a plethora of broad objectives, including the protection of small competitors, market integration, efficient markets, fairness, but there is a general convergence in mature competition law regimes toward maximizing economic welfare, usually in the form of consumer welfare. The consumer welfare standard is however not always applied literally as maximization of final consumer surplus. In many cases, consumer welfare is not just concerned with final consumers, but also with intermediate customers; and even when it focuses on final consumers, it remains indifferent as to the distributional differences within such

[41] See for example Louis Kaplow, *On the Relevance of Market Power* (2017) 130 Harvard Law Review 1303.

category. In various cases, policies reflect more the logic of preserving the competitive process as a way to enhance consumer welfare rather than a strict maximization of consumer surplus; for instances, jurisdictions like the US do not consider high prices and exploitative use of market power as problematic; on the contrary, US antitrust law considers high prices as the prize that will lure firms to enter the market; European law formally restricts such exercise of market power but such provision is rarely enforced. Yet a literal application of the consumer welfare standard should be concerned with high prices that reduce short-term consumer surplus. The same logic can be applied to the opposite of excessive pricing, predation, where condemnation based on its exclusionary effects supersedes the positive short-term consumer surplus increases for some consumers due to prices below cost.

These considerations are arguably very important when thinking about welfare trade-offs in two-sided market cases. At first glance, platforms raise complex normative questions in this regard: users on the platform may on one side be final consumers, and on the other intermediate customers or producers (think of cardholders and merchants; or advertisers and readers), but they may also be thought of as both being customers of the platform. If a platform practice creates a negative effect on one side and positive effect on the other side, what normative framework should be followed to analyze a case? And if one side of the platform is outside the relevant market, should it be considered?

A welfare perspective would suggest aggregating the welfare of all platform's users by treating them as customers of the platform. A more equity-based perspective would instead give more weight to considerations of fairness between sides, whether it is based on distributional grounds or simply based on not allowing one side to benefit at the expense of the other. The European approach perhaps can be read as a being concerned with fairness in asking that consumers in the relevant market receive at least some 'appreciable objective advantage.' However, such fairness-based reasoning can be an extremely vague rationale: when is differential treatment across sides unfair, and what is its connection with the economic and competitive effects of a given practice? It is clear, in any event, that regardless of the position taken on these normative issues the answer to this normative question should not be based on the boundaries of the relevant market, contrary to the prevailing relevant market-dependent approach.

The paper argues that the most compelling rationale for analyzing welfare effects in a competition law case involving platforms is to look at the competitive effects of a platform's restraint as a whole, and it suggests that the benchmark for developing such analysis can be found by analogy with the application of competition law principles in markets where there is only 'one side' and identifying what the presence of multiple sides adds to the analysis. As was explained at the beginning of this sub-section, consumer welfare as the goal of intervention is rarely interpreted literally as a net calculation of consumer surplus. Returning to the example of exploitative abuses through high prices, the general lack of concern for these stems, beyond institutional capacity, from the fact that price above marginal cost is considered a price signal that will induce market entry, despite the short-term negative effect of higher prices on consumers. Similarly, in predation cases, the concern is, as Katz and Sallet note, exclusionary conduct through below cost pricing and not whether pre-predation, during-predation, and post-predation consumers benefit on net from predatory pricing.[42]

The same logic applies to various forms of price discrimination, tying, rebates and discounts. These types of conduct can provide examples of exclusionary conduct leading to foreclosure despite a countervailing benefit to a group of consumers arising from the restraint. The concerns about price discrimination, for instance, are generally based not on a net welfare calculus among consumers, but whether it is exclusionary despite there being at least a sub-group of consumers that may benefit from it. This difference appears also in the context of tying. Tying is generally considered not problematic as a demand-metering device, but it may warrant antitrust scrutiny if it creates exclusionary effects. In both cases, a sub-group of customers may still benefit from the tie (for example, the consumers that enter the market because of the tie or consumers that

[42] Katz and Sallet, supra, note 19.

benefit from the lower price of the tying good).[43] The analysis of foreclosure through tying will rest on balancing an exclusionary theory of harm and efficiency explanations, such as quality and reputational externalities or sorting costs, not on different welfare effects on different consumers.

Finally, loyalty rebates and discounts can be used as an exclusionary device even though they provide a benefit to some buyers. In fact, there is a loose analogy between the financial inducement provided through discounts and the subsidy provided by a platform to a group of users. Loyalty discounts can raise anticompetitive concerns in creating de facto exclusivity that may foreclose a market, where the discount offers a short-term benefit to a group of buyers that however may create long-term negative effects because of reduced competition. What gives rise to this dynamic is an externality problem where each buyer individually has incentives to agree to the anti-competitive loyalty discount for a short-term benefit, although collectively they lose from a reduction of competition. This is not significantly different from a platform that subsidizes participation of one group of users (which can be a de facto inducement to be exclusive) and then restrains competition through market power on the other side derived by indirect network externalities. In both cases, there may be valid benefits and efficiencies arising from a discount/platform subsidy, which need to be balanced against anticompetitive effects, but whether efficiencies offset anticompetitive harm is somewhat unrelated to the short-term benefit occurring to a group of customer through a low price or subsidy. In these areas of enforcement, competition policy does not intervene with the intent of balancing the various effects on consumer surplus, but rather with the goal of balancing a restriction of competition and possible justifications for such restrictions based on efficiency, product differentiation, quality and promotion, free riding, and so on.

Is there anything about the presence of multiple, distinct sides, that makes the analysis different compared to cases where there is only one side? What is specific about platforms is not necessarily that there are two distinct categories of welfare that need to be calculated, but platforms'

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[43] Herbert J. Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust* (2013) Faculty Scholarship 1868.

role in balancing participation across those groups by coordinating interdependent demand and reducing various transaction costs. This means that the comparison between anti and pro-competitive effects typical of competition law intervention should center on distinguishing between conduct that promotes efficient coordination between user groups on the one hand, and conduct that restricts competition between platforms (or between platforms and single-sided firms) without redeeming virtues based on enhanced coordination, on the other hand. In the same way that many vertical restraints often coordinate incentives along a vertical supply chain, but can also be used to suppress competition across supply chains, platform restraints can serve the goal of eliciting efficient users' behaviour but also distort platform competition.

These issues have been particularly prominent and debated with regard to "contracts that reference rivals" imposed by platforms on users. This category of restraints includes a variety of exclusivity-inducing restrictions that requires users of the platform not to steer the other group to other competing platforms or competing methods or transacting. This could include explicit bans or subtler pricing conditions where users on the platform (sellers) cannot charge a lower price when transacting on different (often lower cost) platforms or providers. Examples include the well-known and heavily litigated no-steering rules imposed by credit card network on merchants that do not allow them to steer customers to alternative methods of payment, or MFN clauses in online reservation platforms for hotels, restaurants and so on, that do not allow sellers and providers to steer customers on competing platforms through price parity clauses that prevent offering at lower price that the one offered on the platform.[44]

Such clauses restrict price competition and can give rise to both collusion and exclusion, but they may also have a pro-competitive rationale by preventing free-riding, especially so-called narrow MFNs that only restrict price differences between the platform and the provider's own

[44] See Jonathan Baker and Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs* (2018) Yale Law Journal, Forthcoming; Jonathan Baker and Judith A. Chevalier, *The Competitive Effects of Most-Favored-Nation Provisions* (2013) 27 Antitrust 20; Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry* (2016) 59 J. L. & Econ. 105.

website.[45] With regard to exclusionary conduct,[46] the balancing framework will assess first whether a dominant platform foreclosed entry by restricting price competition and then evaluate the pro-competitive justifications provided by the platform as to why the restraint protects platform investment incentives. In certain context, but not always, part of the higher fees charged to sellers and resulting from such restrictions of price competition is allegedly used to subsidize participation on the other side of the market. In such a case, because there is the additional competition law question whether the subsidy to users on one side should count against the negative effect on users on the other side due to a restriction of competition, there has been a tendency to shift the traditional balancing that compares a restriction of competition with pro-competitive explanations to a calculus of welfare effects across the users of a platform.

To be more concrete, in may of these cases the platform charges sellers a transaction fee that is a given percentage of the transaction price and provides subsidies to buyers. In absence of restrictions, intermediaries would compete on the bundle of these prices and users would be expected to coordinate on the best available intermediary. With platform's restraints, on the contrary, price competition on one side is eliminated. For example, a restaurant, hotel, or merchant could steer buyers to a better or cheaper intermediary that charges a lower commission, by for example lowering the price when the transaction occurs through an alternative platform or non-platform intermediary. The platform's restraint eliminates this form of competition and possibly excludes lower-cost entrants. The fact that buyers are subsidized is not in itself automatically a pro-competitive effect that can be balanced against reduction of price competition on the other side. In fact, because a rational buyer would always use the intermediary that offers a higher reward for the same transaction price, the subsidy has the power of harnessing network externalities to create market power on the seller's side and divert transactions from potentially more efficient providers. In principle it is unclear that credit cards are better than debit cards, online reservation better than

[45] A hotel may charge a lower price on its website than the platform, and the buyer may free ride on the platform's investment by finding a hotel on the platform but then concluding the transaction on the hotel's website.
[46] Collusion will not involve a balancing framework but will be subject to per se illegality.

reservations made by phone, or bookings through price comparison platforms better than on the provider's own website.

While there may be reasons why a restraint and related reward may be efficient, by preventing free riding and protecting platform's investments or increasing the number of transactions to the benefit of both buyers and sellers, it may also simply divert transactions away from more efficient intermediaries harming competition. Hence, the key competition question is whether a restriction imposed by a platform distorts competition by shifting transactions away from more efficient or lower-cost platforms or it can be justified by procompetitive explanations that enhance efficient matching. This is why looking at the effects on both sides within and outside the relevant market is necessary, not because one side of the platform benefits from being subsidized. And even if one were to take such pure welfare calculus approach, two important issues should be considered: first, it would require evaluating the levels of pass-through of high prices on one side to lower prices on the other side (it is not necessarily the case that this entails a full pass-through); second, it has been noted that restraints such as MFN clauses and contracts that reference rivals have been shown to effectively be a "tax" on rivals' products and non-platform customers (consumers paying cash, buyers reserving in traditional offline ways). If one were to pursue a pure welfare aggregation, why not add the welfare effects on those consumers not using platforms?

3. The Role of the Platform in Advancing Efficiency and Pro-competitive Claims

The general competition law principles applied in balancing anticompetitive and procompetitive effects should apply to platform cases, and examples of such principles can be found in the jurisdictions where the previously discussed platform case law has emerged. US antitrust law's rule of reason under Section 1 and monopolization claims 2 of the Sherman Act are based on a framework that weighs all circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.[47]The analysis generally starts

[47] *Cont'l TV, Inc. v. GTE Sylvania Inc*., 433 US 36, 49 (1977).

with the plaintiff's prima facie initial burden to show harm to competition, followed by the defendant's burden to show a legitimate objective is served by the restraint, and in response, the plaintiff's opportunity to show that the objective can be achieved by a substantially less restrictive alternative. The court then balances whether the challenged behaviour is unreasonable.

European competition law's balancing framework derives from Article 101 TFEU, which prohibits agreements and concerted practices that may affect trade between member states and which has their 'objective' (price fixing, vertical agreements imposing territorial restraints that undermine the single market objective) or 'effect' (vertical restraints) the prevention, restriction or distortion of competition within the common market. Article 101(3) does however not condemn restraints that contribute to improving the production of distribution of goods or promoting technical and economic progress, while allowing a fair share of the resulting benefits to consumers when the restriction is indispensable to the attainment of those results and does not eliminate competition in respect of a substantial part of the product in question. The burden is on the party alleging an infringement of Article 101(1) to provide sufficient and coherent proof of infringement, and then the burden shifts to the firm in question claiming the benefits of Article 101(3) to establish that the required saving criteria are met.[48] Article 102 on abuse of dominance does not contain an explicit exception, but it remains open to a dominant firm to advance claims that the conduct is justified because of objective necessity[49] or efficiencies.[50]

The Canadian framework for the application of the rule of reason is based on a dual-track system, where section 45 of the Competition Act covers per se illegal restrictions and Section 90.1 covers agreements that do not fall within the per se illegality rule and are civilly reviewed by the Competition Bureau. With regard to single-firm conduct, section 79 contains a general abuse of

[48] Block Exemption Regulations also exempt automatically agreements from Article 101(1) prohibition (which apply for certain vertical and horizontal agreements involving R&D, technology transfers, etc.).
[49] See Case 27076 *United Brands v Commission* [1978] ECR 207; Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601; Case C-95/04, *British Airways v EC Commission* [2007] ECR I-2331.
[50] The efficiencies must relate to the conduct at issue; the conduct must be indispensible to their realization; the efficiencies must outweigh any negative effect on competition and consumer welfare; and the conduct must not eliminate effective competition. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/2.

dominance provision, but the Competition Act also contains specific sections for particular behaviour, such as s. 75 refusal to deal, 76 price maintenance, and 77 exclusive dealing and tied selling. Section 77 and 79 follow a substantial lessening of competition test, while 75 and 76 adopt a lower threshold of adverse effect on competition. Both forms of balancing under Section 90.1 and single-firm conduct impose on the firm the burden of advancing efficiency and pro-competitive considerations. Notable about the Canadian regime is also the explicit efficiency defence for mergers, which adopts a modified version of the total welfare standard (a balancing weigh approach).[51]

Different forms of balancing share a similarity in that the firm accused of anti-competitive conduct generally has to advance justifications. Implicit in the concept of a platform is the idea of 'balancing' multiple sides and because of this central role, platforms will set up a number of rules and restrictions to coordinate users efficiently and maximize participation. Restrictions imposed on users will therefore be expected and necessary; however not all will be efficient or serving a pro-competitive goal. Some will possibly restrict intra-platform behaviour for efficiency purposes, other will be masked forms of inter-platform restrictions even when applied only to a single side. It is in fact the nature of platforms and the presence of cross-market network externalities that makes this anticompetitive goal possible even when the restraint applies only to one side of the platform. The bulk of competition policy questions dealing with platforms will likely be an attempt to develop a dividing line between these different kinds of restrictions. Consistent with the general principles followed in the vast majority of jurisdictions, the platform is in the best position to advance claims as to why a given conduct or restriction serves a legitimate purpose. This is both fair and efficient: burdens are allocated and calibrated to minimize the sum of costs of using the legal process and the

[51] The Tribunal is required to exercise discretion in determining how negatively the wealth transfer should be viewed in a particular case and where the Commissioner has the burden of quantifying the anti-competitive effects of a merger. See *Canada (Commissioner of Competition) v. Superior Propane, Inc*. [2003] 3 F.C. 529. For a discussion, see Edward M. Iacobucci, *The Superior Propane Saga: The Efficiencies Defence in Canada* in Landmark Cases In Competition Law Around The World In Fourteen Stories (Barry Rodger, ed., The Netherlands: Kluwer Law International, December 2012), 63-87.

costs of erroneous resolution of claims,[52] and because enforcers cannot anticipate defences, it is inefficient and unfair to assign to them the burden of pre-emptively disproving defences.

This is not the direction observed in the development of case law across jurisdictions. A broad market definition and the determination of market power risks being conflated with the question of anticompetitive effects, where the burden of proof for anticompetitive effects requires proof of net anticompetitive effects on all sides, making it de facto harder to bring a successful antitrust case. Carlton and Winter show this discrepancy by suggesting two alternative analysis for the evaluation of vertical MFN clauses in credit card markets, one based on a vertical framework and the other on two-sided market theory.[53] Despite the two analyses being substantially equivalent from an economic perspective, they show that they may give rise to two different ways of balancing effects, where the two-sided market framework is more favourable to firms accused of anti-competitive behaviour. By failing to treat the cross-market effect as a defence rather than a weighing of welfare trade-offs, this approach takes the characteristics of two-sided markets to an extreme.

In a specular way, a narrow market definition risks creating a higher burden of proof for a platform to rely on out-of-market efficiencies. European law does not ban such balancing, but it appears too formalistic on out-of-market efficiencies in requiring a prior showing that the side within the relevant market gains from a 'appreciable objective advantage.' EU law's fairness perspective that allows cross-market effects only if those benefitting from the efficiency gains are substantially the same that are affected by a restriction of competition is rightly modified for platforms, where by default the two groups are distinct. However, the additional standard of proof that platform's customers in the relevant market should obtain a share of the benefits resulting on the other side of the market, while not necessarily unworkable, places on the platform a vague and possibly unnecessary burden.

[52] Richard Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 2014).
[53] Dennis W. Carlton and Ralph A. Winter, *Vertical MFN's and the Credit Card No-Surcharge Rule*, September 2017 (unpublished). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982115

A final major problem of current balancing frameworks, beyond the creation of inconsistent procedures that depend on market definition, is that they discourage the jurisprudential developments on important legal and economic issues that are central to platforms. Adjudication has the ability to highlight and refine the understanding of when a platform-imposed restriction is anticompetitive or serves a procompetitive purpose. Blocking the litigation of such issues through excessively restrictive burdens of proof (either for a platform that relies on out-of-market efficiencies or for public or private enforcers when showing anti-competitive harm) undermines the development of case law in an area that is in need of further clarification.

4. Suggested Approaches Under Narrow and Broad Relevant Market Frameworks

All approaches suffer in some respect from excessive formalism and risk neglecting the real economic question at stake in a platform case. In order to properly account for multi-sidedness, the applied balancing framework should be substantially equivalent in single-sided markets, multi-sided 'transaction' and 'non-transaction' platforms and should be independent of market definition. This sub-section brings together the considerations advanced in the paper and sketches possible approaches under a narrow and broad relevant framework.

a. Narrow Relevant Market

Under a narrow market definition framework, proving anticompetitive harm will entail evidence of restrictions of competition that do not explicitly serve coordination and balancing purposes. Because the analysis starts from a market definition on one side, this first stage of balancing is generally uncontroversial, and it is also correct in focusing on the side where the restriction is imposed. A restraint can distort inter-platform competition even when it is applied to one group of users only, due to network externalities. Then, the platform will have the opportunity of showing a restriction of competition finds justification and pro-competitive role by looking at the platform as a whole, including out-of-market efficiencies. Because the arguments advanced by the platform are likely to be claims that a restraint is necessary to elicit optimal levels of participation across both sides and increase the volume of matching and transactions, the platform should be able to rely on the effects on all sides, irrespective of the boundaries of the relevant market.

The suggested framework contrasts at a superficial level with the prevailing relevant doctrinal approaches that depend on the relevant market.[54] However, there are many important exceptions[55] to this principle that may apply to multi-sided platforms. Areeda and Hovenkamp in fact acknowledge (with respect to mergers) that an anticompetitive restriction should be assessed "in all markets affected and should be absolved where substantial economies in one market outweigh adverse competitive effects in others"[56] but that the market-specificity rule imposing a focus on the relevant market is generally justified due to statutory, administrative, and practical reasons except in rare exceptional cases.[57] The 2010 US Merger Guidelines provide an example of possible exceptions, stating that agencies sometimes by exercising their procedural discretion consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in other market(s).[58]

The European approach can at least in part accommodate out-of-market efficiencies, but as it was note earlier, platforms will have to show that a conduct detrimental to side A also creates an 'appreciable objective advantage' to side A, and not only side B. Under this requirement, a platform may attempt to argue that increased participation on side B also benefits side A. A more flexible position would however be more desirable, similar to the one suggested in the Canadian Draft Abuse of Dominance Guidelines, which would simply state that in narrow relevant market cases the

[54] The principle affirmed in US antitrust laws is that it is not possible to weigh destruction of competition in one sector against promotion of competition in another sector. See *United States v Topco Inc.,* 405 US (1972).
[55] Werden, supra, note 24.
[56] Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3ed, 2009), at 49.
[57] Ibid, at 50-53.
[58] US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, s. 10 (2010).

pro-competitive effects on the other side outside the relevant market will be considered when appropriate. This would allow a less formalistic analysis of competitive effects across sides.

b. Broad Relevant Market

A similar logic would apply to broad relevant market cases. The first step should involve a claim that a platform's restraint creates a harmful restriction of competition, and the platform would be required to show how such restriction serves a pro-competitive purpose, regardless of the side where it takes place. In contrast, requiring proof of net negative welfare effects on all sides can be misleading because subsidization of one group, in and of itself does not say much about whether the restraint and the resulting subsidy can serve as a justification for the restriction of competition (namely whether it reflects an attempt to bring more users on board and increases transactions that would not have occurred otherwise) or whether it is a restriction of competition that simply shifts matching to less efficient forms of transacting due to subsidization of one side and the resulting force of network effects on the other side. Requiring net anticompetitive harm at the first stage of balancing is inappropriate because it involves the wrong type of balancing (a net calculation of positive and negative effects on all sides rather than a procompetitive defence for a restriction of competition) and places the evidentiary burden on the wrong party (public of private enforcers showing anticompetitive harm), in so doing also blocking the development of case law where central economic issues about platforms would be litigated.

To recap how this has played out in *AmEx*, the relevant market defined by the district court was AmEx's sales of network services to merchants, but not its interaction with cardholders. Following the rule of reason, the court found that there was harm in the merchant-side market that was not outweighed by pro-competitive effects in that market. The Second circuit reversed on market definition grounds, arguing that market definition should have included both sides of the platform, and that the rule of reason required the initial burden of proving net harm to Amex consumers as a whole, both merchants and cardholders. Market definition played the central role of defining where in the rule of reason procedure multi-sidedness is incorporated. What if market power was determined without market definition at all? It would be plausible to suggest that in such a case the plaintiffs' role should be to advance a claim that platform competition has been restricted by a restraint, because it prevents users on one side to use price signals to coordinate on the best medium of transaction, and that the platform should justify why the restraint in fact enhances inter-platform competition and solves a coordination problem. A more promising approach would be to remain agnostic on the issue of the relevant market, and clarify the respective burdens of proof under both market definition frameworks.

V. CONCLUSION

Platforms are becoming an endemic form of organizing production and delivery of many goods and services, and these trends are likely to continue in the future with the growth of digital markets and phenomena such as the sharing economy. Getting competition analysis right when balancing the anticompetitive and procompetitive effects of conduct would therefore appear a central concern for the development of competition policy. The examples provided by the case law that has emerged in more 'traditional' two-sided markets, payment card networks, shed light on the issues that still remain to be resolved and are likely to arise in the future in tech platform markets. The paper has provided suggestions for the development of an appropriate legal framework for such balancing that is independent of the way market power is analyzed, whether it is through a broad relevant market that includes the platform as a whole, through separate markets on each side, or by avoiding market definition altogether. At a more fundamental level, the paper has highlighted that the important task of accounting for the specific economics of platform markets also requires a correct incorporation of such specificities from a doctrinal perspective that is consistent and substantially equivalent across platform and non-platform markets.