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The double duality of two sided markets

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Alfonso Lamadrid's paper[2] has the merit to throw the ball of two-sided markets in the field of the legal community, in a game which has been so far largely played by economists. I, therefore, appreciate his attempt to discuss the legal implications of this new theory and his effort to provide some guiding principles for competition law practitioners.

The two-sided platforms theory has greatly enriched the toolkit of the competition authorities: indeed, the economics of two-sided platforms has provided several insights into the analysis of market definition and market power, by underlying how externalities combined with network effects play an important role in the functioning of many modern industries.

In particular, the two-sided platforms theory has contributed to highlight the existence of efficiencies from the demand side, which were not much considered. It also has the merit to bring forward the concept of buyer power which has received little recognition in competition enforcement so far (and perhaps could be the object of a future Pros & Cons Conference).

However, despite being a hot topic in many conferences around the world, I concur with Alfonso's contention, that the two sided-market theory is not used in antitrust cases, as much as its intrinsic merits would warrant.

I may point out to several reasons for this.

1) Conceptual uncertainties

First, there are conceptual uncertainties about two sided markets or platforms, despite economists have identified certain essential features that characterize this typology of markets.

In this respect, look for instance at the extensive literature produced by Prof. Filistrucchi, which basically concludes that "two sidedness" is a matter of degree.

[1] Commissioner of the Italian Competition Authority. The views expressed here are those of the author alone. The usual disclaimer applies.
[2] Alfonso Lamadrid, Senior Associate, Garrigues, Brussels: *The Double Duality of Two-Sided Markets*.

Conceptual uncertainty may end up attributing the two-sidedness "label" to industries and sectors that, albeit sharing some features, aren't in fact two-sided markets. For instance, one could get the idea that all intermediaries are two-sided platforms as they connect producers to consumers. In this respect, can supermarkets be included in this definition?

Therefore, some authors suggested that the application of this theory should be used with caution as it may imply a wider market definition when dealing with transaction markets, and parties may (opportunistically) invoke the application of this theory to justify their claims of wider relevant markets.

Another conceptual uncertainty pertaining to two-sidedness is what Alfonso, in his paper, defines as the competition ambiguity. Such ambiguity concerns market concentration and market power. The presence of indirect network effects and scale economies would support the view that two sided-markets tend to be "naturally" concentrated. However, in two-sided markets an increase in concentration, even if it increases market power, may improve welfare due to indirect network effects between the two groups of customers.

Antitrust agencies, instead, have typically viewed network effects in their negative potential, as barriers to entry and expansion, and in Alfonso's words, "*we have so far proven unable to trade off the benefits and the perils of having one large scaled platform as well as the circumstances in which one platform is preferable to having several*".

My personal view on this is that two-sided markets need not be necessarily concentrated; horizontal differentiation and congestion may be two factors that oppose concentration.

The existence of heterogeneous consumers on one or on both sides of the market creates the opportunity for platforms to differentiate themselves from each other by choosing features and prices that appeal to particular groups of customers. Horizontal differentiation allows the coexistence of several platforms, each catering to different groups of customer on each side of the market. In absence of horizontal differentiation, customers may still adhere to several platforms at the same time. A practice known as "multi-homing".

2) Dealing with no-transaction markets

A second reason for under-utilizing two-sided market theory is that often, in these markets, one side of the platform exhibits zero pricing. Such is the case, for instance,

in newspaper or TV[3]. Given that no price exists and no trade relationship is apparent, practitioners have difficulty to talk about markets in the economic sense; to think that firms are truly competing; to identify a relevant market for antitrust purposes.

For instance, in Italy the existence of an antitrust market for viewers of free-to-air TV has not yet been recognized, because no direct commercial transactions occurs between broadcasters and viewers, the latter receiving contents for free.

In general, non-transaction markets pose great challenges to competition law practitioners, although they are increasingly common and rapidly developing in the "online" world.

3) Complexity and the need to 'keep it simple'

The third disincentive to the use of two-sided market theory is that it injects an objective degree of complexity in the analysis of issues such as the definition of the relevant markets or the competitive and welfare effects analysis.

The adaptation to a two-sided market setting of the traditional toolkit used for market definition does not come free: it generates more sophistication, which may slow down the investigation, at least until these tools are understood and properly used.

The competitive and welfare effects analysis also become more complex in a two-sided setting, as price variations might not track welfare variations - if anything - because of the asymmetric price structure. Therefore the welfare effects have to be measured directly. In addition, the welfare of all parties should be taken into account (i.e., the welfare of the platform, as well as the welfare of consumers on both sides of the market). This requires analysing much more information, on both sides of the market, rather than just tracking simple proxies like the price paid by a particular consumer group.

Managing this complexity might not be an easy task for competition authorities, which in principle should strive to "keep it simple" - if anything - because most, if not all, of their decisions have to stand against judicial review. Moreover, such complexity might hinder the efforts of agencies in deriving key principles from their practice.

4) Acknowledging demand-side efficiencies as pro-competitive element

[3] See L. Filistrucchi, D. Gerardin, E. van Damme and P. Affeldt, "Market definition in two-sided markets: Theory and Practice", *Journal of Competition Law and Economics*, 10(2), 293-339, 2014.

Last, but not least, two-sidedness and demand-side efficiencies play as limited role in defence, because they are often overlooked by defendants themselves, at least in my experience.

Generally speaking, given the significant asymmetric information, only the parties themselves are able to advance and substantiate efficiency claims. Therefore, I would expect more efforts from undertakings and their counsellors in this regard, in order to avoid situations in which efficiency defence are not considered even in cases in which competition agencies are willing to take into account these arguments.

Recently in Italy, in a merger between two book distributors, the parties did not corroborate their efficiency claims with any in-depth analysis; the Italian Competition Authority used the qualitative evidence gathered from competitors to support the efficiency claims and clear the merger.

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I now turn to Alfonso's proposal of considering efficiencies related to two-sided markets at the beginning of the competitive analysis and not at the end as a "defence".

While I concur with Alfonso on the thrust of his proposal, on his practical solution I do have a different view, which also stems from the recent ECJ ruling in *Groupement des Cartes Bancaires*[4], highlighted in his paper.

This ruling invites competition authorities, when determining whether there is an object restriction, to consider the following elements[5]:

- the content of the provisions (of the agreement) and its objective;
- the economic and legal context;
- the nature of the goods or services affected; and,
- the real conditions of the functioning and structure of the market.

[4] C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission*, Judgment of the European Court of Justice (Third Chamber) of 11 September 2014, available at: http://curia.europa.eu/juris/liste.jsf?num=C-67/13&language=en.

[5] Paragraph 53 of ECJ judgment in *Groupement des Cartes Bancaires* states that: *"[in order to determine whether there is an object restriction], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160), paragraph 36 and the case-law cited).*"

This line of reasoning is not a novelty. In fact, it can be traced back to the jurisprudence of the 1980s; see, for instance, Cases 29 and 30/83 *Compagnie Royale Austrienne des Mines SA.*

I contend that, by taking into consideration all the above elements to determine whether there is an infringement by object, a competition authority is necessarily asked to analyse, in the context of a multi-sided market, demand-side efficiencies. Such exercise, in turn, could be performed the stage of Art. 101(1), rather than at the subsequent stage of Art. 101(3). Thus with no need to invert the burden of proof, as proposed by Alfonso.

Indeed, the modernization of EC competition law and the decentralization of the application of Art. 101(3) facilitate and, to some extent, naturally lead to the adoption of a holistic approach to Art. 101.

Hence, the possibility to overcome the formalistic approach, in line with the essence of Alfonso's proposal, is already there. However, I do recognize that in some cases competition agencies may have failed to consider all these elements, focusing primarily on the content and the objective of the restriction, in an attempt - some critics would say - to find "by object" infringements, perhaps because effects can be more difficult to prove.

In the same vein, in cases of abuse of dominance, although the jurisprudence has not foreseen a defence based on objective justifications, the enforcement of Art. 102 does not allow a shift of the burden of proof to the dominant firm. It is always up to the competition agency to prove that the conduct of the dominant firm has led to the exclusion of an equally efficient competitor with consequent harm to end-users.

Conclusions

I would like to conclude with three considerations.

First, the possibility of closing antitrust proceedings with commitments may reduce the scope for a development of the efficiency analysis: companies may find it less burdensome to submit commitments, rather than engaging with competition agencies in the analysis of efficiency justifications and accepting the risk of a non-favourable outcome of the antirust proceeding.

To this regard, I concur with the contention of Nicolas Petit, in his recent article[6], that commitments should be used for "mature" legal cases and not for addressing legal novel issues, such as – I would add – those raised by two-sidedness.

At the same time, an unbalanced use of commitments, by reducing the opportunities for competition agencies to carry out a full assessment, may inhibit agencies' capacity and confidence in using this new tool, thus reinforcing the disillusion with this type of argument.

Second, the increasing spread of online platform operators that are trans-national will require more efforts from the competition authorities in Europe to monitor each other's developments and cooperate to ensure a consistent and effective antitrust enforcement across Europe. This may be challenging if one considers that competition cultures and agency approaches may be different in these new areas of enforcement.

My final consideration is a word of caution when dealing with two sided markets in high-tech and innovative sectors. I concur with Alfonso: *when in doubt, don't chill competition.*

I believe competition law and policy should not discourage pro-competitive behaviour especially in its dynamic perspective. Competition authorities often focus only on a limited subset of the relevant factors such as price, disregarding other competitive drivers such as quality and innovation.

In this respect, we, as competition law enforcers, should always keep in mind the words of Friedrich Von Hayek in his seminal Nobel Lecture, delivered here in Stockholm precisely forty years ago:

"In the study of such complex phenomena as the market, which depend on the actions of many individuals, all the circumstances which will determine the outcome of a process [...] *will hardly ever be fully known or measurable"*[7].

[6] Gautier, Axel and Petit, Nicolas, *Optimal Enforcement of Competition Policy: The Commitments Procedure Under Uncertainty* (October 14, 2014). Available at SSRN: http://ssrn.com/abstract=2509729 or http://dx.doi.org/10.2139/ssrn.2509729

[7] F. Von Hayek, The Pretense of Knowledge, Nobel Prize Lecture,11 December 1974.