

# The double duality of two-sided markets

Pros and Cons Conference

Stockholm, 28 November 2014

Alfonso Lamadrid de Pablo

GARRIGUES

# Introduction – a practical approach

- Increasing relevance of multi-sided markets and business models reflected in academic writings and recent competition law enforcement
- **Most literature is eminently theoretical and market-specific**
- Most competition authorities adopt a “too early to tell” approach= **Majoritarian position is that more economic research is needed prior to advancing changes in the way the law is applied**
- **BUT, perhaps we know all we need to know about two-sided markets to refine our legal approach to them**
- **Takeaway: What is missing is not empirical work but practical articulation of well established principles**

# On the Inapplicability of Traditional Tools and Rules

“It’s the best possible time to be alive, when almost everything you thought you knew is wrong”

Tom Stoppard, *Arcadia*, Act I, Scene Four

- Multi-sided scenarios pose unique practical problems that take competition law out of its comfort zone
- Interdependency, the pattern of cross-responses and velocity make everything a bit more complicated
- Having to apply competition law to multi-sided markets breaks the inertia and forces us not to do things like we used to, thereby obliging us to think
- Asymmetrical thinking:
  - Economists centered on how to adapt and make practicable the tools we are most accustomed to (e.g. the SSNIP test or the Areeda-Turner/AKZO test)
  - Lawyers: ¿?

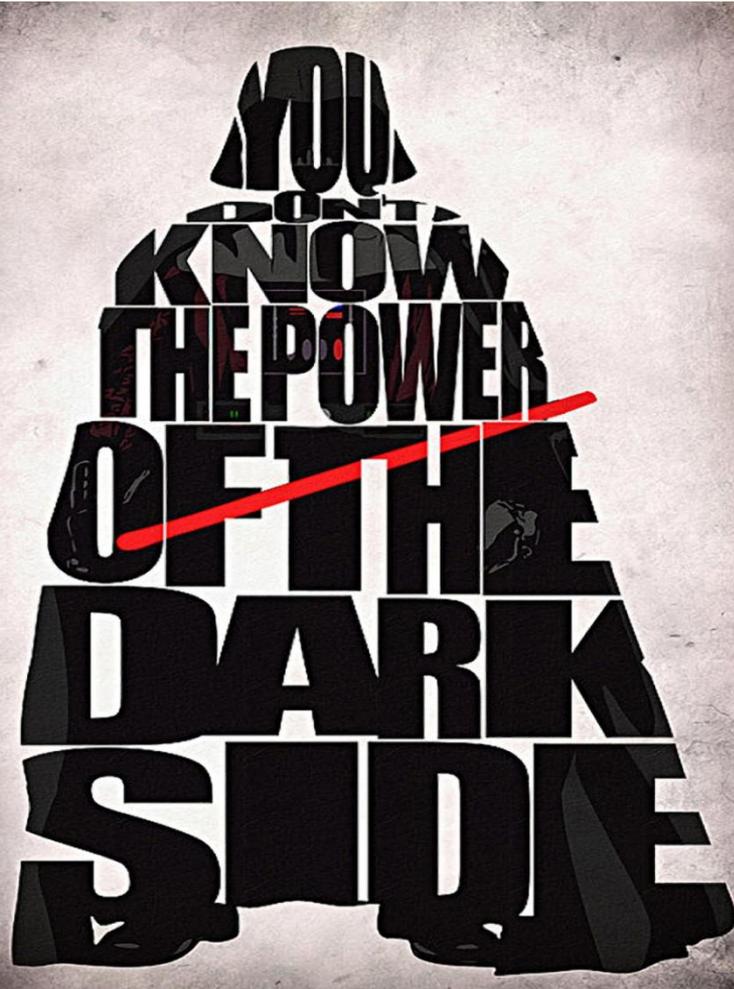
# On the double duality of business practices in multi-sided platforms (I)

*“There are always two sides to every story”*

- MSPs receive special attention when they involve two (or more) sets of users that interact with each other through the platform (1<sup>st</sup> duality)
- A second element of duality of two-sided markets has not received equal attention= competitive ambiguity of the practices carried out in these settings
- The circumstances in which practices in multi-sided platforms may lead to foreclosure are precisely the same ones in which they may be welfare enhancing
- Competitive ambiguity derives from the existence of network externalities
- The takeaway: the problem competition law faces in these settings is similar to the one faced by multi-sided platforms when conducting business: striking a balance between the two sides, in this case the offensive/anticompetitive and the defensive/procompetitive

# On the double duality of business practices in multi-sided platforms (II)

## Multi-sided market features as a sword



- The doctrine and the application of the law in the face of network effects have tended to focus on their anticompetitive potential (paradoxical for a positive externality) (e.g. Guidance Paper, 17, 20; Guidelines horiz. mergers, 72; Guidelines non-horiz mergers, 62 and 101)
- Network effects are a most effective basis for legal arguments challenging allegedly anticompetitive conduct:
  - **Prices too high** (e.g. MIFs- card payment systems)
  - **Prices too low** (e.g. Google Maps --Bottin case- and Android complaint)
  - **Prices too stiff** (MFNs in online distribution)
  - **Exclusivity** (Google AdWords)
  - **Tying/Bundling** (Microsoft WMP and IE)
  - **“Competitive Bottlenecks”/”Gatekeepers”** (Search engines, GDSs, ISPs, Credit Cards, Supermarkets, etc)
  - **Mergers:** (e.g. MCI/Worldcom, Worldspan/Travelport, Google/DoubleClick, ~~Microsoft/Skype~~)

# On the double duality of business practices in multi-sided platforms (III)

## Multi-sided market features as a shield

*"A Jedi only uses the force for defense and knowledge"*

Master Yoda



-Economic literature shows that demand-side efficiencies achieved by MSPs may turn typically condemned practices into welfare enhancing ones:

- In spite of conceivable defences, still most rare to see demand-side efficiencies being effectively acknowledged as a valid defense in real cases, due to:

- (i) Requirement of objective quantification of efficiencies + inexistence of tool to quantify demand-side efficiencies (e.g. MasterCard's MIFs)
- (ii) Interpretation of the rules does not favor cross-market efficiency assessments (e.g. Guidelines 81(3), para 43 and GC Mastercard (240-243) upheld by ECJ).
- (iii) Inability to trade off the pros and cons of having one large scaled platform and the circumstances in which one platform is preferable to having several (e.g. GC MasterCard (para. 22) and GC Microsoft (paras. 1152-1153)).

# Acknowledging a practical imbalance

“Aligning oneself fully with the left, as with the right, is only one of the numberless ways open to man of being an imbecile: both are forms of moral hemiplegia.”

José Ortega y Gasset

“Acknowledgment is the first step”

Alcoholics Anonymous and others

- **Takeaway: whereas business practices in multi-sided platforms are often pro-competitive, or at least ambiguous from a competitive standpoint, the practical application of the law reflects an imbalance in which offensive arguments are favored and conceivable defenses are often effectively ignored.**
- **Asymmetry in standard of proof**
- **Against this background, not only economic tools that need to be refined in the presence of MSPs. The law –or rather the application thereof- also needs to refine itself.**
- **No legal revolution but analytical vigilance at three levels:**
  - (i) **Interpretation of 101(3)**
  - (ii) **Burden of persuasion/proof**
  - (iii) **Limiting principles**

# Addressing a practical imbalance (I)

## The natural way: a reasonable interpretation of 101(3)

- From an orthodox perspective, welfare enhancing features pertain to a 101(3) analysis
- Restrictive (wrong?) interpretation of 101(3) at the root of many current problems in EU Competition law, also regarding MSPs
- Reasonable competition policy: less object, more effect, much more 101(3):
  - Traditional interpretation of 101(3) (pre-Guidelines) did not require “objective quantification”
  - Traditional interpretation of 101(3) (pre-Guidelines) did allow for cross-market assessments, also regarding distinct groups of customers (e.g. para 228 in GC’s Mastercard unsupported by previous case-law) (contra: ECJ in CMB or Publishers’ Association, para 29, among others)

# Addressing a practical imbalance (II)

Burden of proof- anticipating multi-sided considerations (the Court's recent approach?)



KEEP  
CALM  
BECAUSE

THIS MARKET  
IS TWO-SIDED

- Not leave multi-sided considerations play a role at the tail-end of the analysis- specific acknowledgment of economic and legal context and explicit discussion prior to the finding of the *prima facie* restriction (i.e. prior to shifting burden of proof).
- Two-sided nature as part of “economic and legal context” to be assessed.
- Seems to be the approach favored by the ECJ in *Cartes Bancaires* (paras 73-79) and *Mastercard* (paras 179-182 )

# Addressing a practical imbalance (III)

## Revisiting basic limiting principles



Need to set filters or bright lines capable of adding some predictability and consistency to the law:

1. Absence of rivalry does not equal infringement
2. Remedies and objective justifications follow the establishment of an infringement by the authority, not the other way around
3. Companies shall be free to choose their business model - competition law is agnostic and authorities are not omniscient
4. Competition law is about protecting the process of competition from undue restraints
5. Competition law should be applied consistently and there is no reason to favor one parameter of competition over others
6. In the face of doubt- don't chill competition (asymmetry should go the other way around)

# Conclusions (I)

- When there are various sides to one platform, there are often two sides for every story or theory of harm- **Everything has pros and cons**
- Economic lessons have served us well – Some problems are so complex that **you have to be very well informed just to be undecided about them**
- In spite of consensus on duality of MSP features, there is **an imbalance in the practical application of the law**
- **Need to be aware of that imbalance and to correct it at the level of the application of the law**
- **Analytical vigilance (abandon traditional reflexes), not policy revolution**
- With the help of some basic tenets of competition law, **account for complexity in practical enforcement**
- Convenience of including **express guidance in soft law instruments**

# Conclusions (II)

## A reminder of the fallibility of competition law

- In many ways, **the issues identified in this presentation apply to competition law in general**
- The main specificity of multi-sided markets is that **they pose the same issues, but with more intensity, thus exposing competition law's insecurities and inconsistencies**
- We are used to saying that traditional tools and proxies are not accurate for multi-sided platforms, but **the truth is that they are never accurate**
- **Useful reminder of the fallibility of competition law** and of the need for humility, caution and limiting principles beyond MSPs

**GARRIGUES**

**Alfonso Lamadrid de Pablo**

BRUSSELS

EU & Competition Law

[alfonso.lamadrid@garrigues.com](mailto:alfonso.lamadrid@garrigues.com)

+32 2545 37 00