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CROSS-MARKET IMPACT OF PLATFORMS' ACTIVITIES: A PROPOSAL TO INTRODUCE THE OBLIGATION TO DEFINE A *SECONDARY* RELEVANT MARKET

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As platform industries prosper, games are becoming more and more like a team competition rather than an individual sport. Literature on platform envelopment and ecosystems competition shed light on the increasing need to consider cross-market effects of platforms' activities in competition analysis. Some established legal principles, such as monopoly leveraging theory, consider cross-market effects of platforms activities. However, they apply under strict conditions and their application may not be easily extended to cover the wide variety of platforms' activities. Thus, this article proposes to introduce the obligation to define secondary relevant market in competition analysis. By introducing the obligation, we could ensure that courts and competition agencies shall consider pro- and anticompetitive factors which exist in a secondary relevant market that significantly affect competition in a primary market. It also enables us to fairly distribute the burden of proof among the parties. This manuscript illustrates the application of the concept of secondary relevant market in the contexts of platform market definition, nascent acquisition, platform envelopment and ecosystems competition. It concludes with an outlook on future research.

I. INTRODUCTION

The definition of relevant market helps us to discern the range of firms who are in competition with each other. By pushing weak substitutes, complements and unrelated products out of the boundary of a relevant market, we could focus on firms who put significant competitive pressure on each other. If firms face competitive pressure only from other firms at the same horizontal level, the traditional market definition is a highly effective tool for competition analysis. However, as platform industries thrive, games are becoming more and more like a team competition rather than an individual sport. A dominant platform in an upstream market may leverage its power to discriminate between target platforms and its own platform in a downstream market[1]; a core platform may help its own platform in another market by enveloping a target platform which produces weak substitutes, complements or unrelated products.[2] In those cases attacks come from anywhere, not only from within a relevant market, but also from the outside. Further, platforms' business strategies increasingly focus on ecosystems competition beyond one-on-one competition between individual firms. Thus, commentators call for the consideration of cross-market impact of platforms' activities in competition analysis.[3]

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[1] *See, e.g.,* Commission Decision of 27 June 2017 in Case AT.39740 – *Google Search (Shopping)* (*hereinafter* "*Google Search* decision").

[2] Thomas Eisenmann, Geoffrey Parker & Marshall Van Alstyne, *Platform Envelopment*, 32 Strat. Mgnt. J. 1270 (2011). *See also*, Daniele Condorelli & Jorge Padilla, *Harnessing Platform Envelopment in the Digital World*, 16 J. Competition L. & Econ. 143 (2020); Sebastian Hermes, Jonas Kaufmann-Ludwig, Maximilian Schreieck, Jörg Weking & Markus Böhm, *A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities* (2020). AMCIS 2020 Proceedings. 17. *available at* https://aisel.aisnet.org/amcis2020/strategic_uses_it/strategic_uses_it/17.

[3] Victoria H.S.E. Robertson, *Antitrust market definition for digital ecosystems*, Concurrences Nº2-2021, On Topic: Competition policy in the digital economy (2021); Magali Eben & Viktoria H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil*, Graz Law Working Paper No 01-2021, (2021), *available at*: https://ssrn.com/abstract=3762447; Nicholas Petit & David J. Teece, *Taking Ecosystems Competition Seriously in the Digital Economy: A (Preliminary) Dynamic Competition/Capabilities Perspective*, Hearing on Competition Economics of Digital Ecosystems (3 December 2020), DAF/COMP/WD(2020)90, *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)90/en/pdf; Amelia Fletcher, *Digital*

Although some established legal principles, such as monopoly leveraging theory, consider cross-market effects of platforms activities, they apply under strict conditions and their application may not be easily extended to cover the wide variety of platforms' activities. Thus, this article proposes to introduce the obligation to define a secondary relevant market in competition analysis. By introducing the obligation, we could ensure that courts and competition agencies shall consider pro- and anticompetitive factors which exist in a secondary relevant market that significantly affect competition in a primary market. It also enables us to fairly distribute the burden of proof among the parties. This manuscript illustrates the application of the concept of secondary relevant market in the contexts of platform market definition, nascent acquisition, platform envelopment and ecosystems competition. It concludes with an outlook on future research.

II. LEGAL PRINCIPLES THAT CONSIDER CROSS-MARKET EFFCTS

Some established legal principles require the consideration of cross-market effects in competition

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competition policy; Are ecosystems different? Hearing on Competition Economics of Digital Ecosystems (3 December 2020), DAF/COMP/WD(2020)96, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)96&docLanguage=En; Daniel A. Crane, *Ecosystems Competition*, Hearing on Competition Economics of Digital Ecosystems (3 December 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)67/en/pdf; Georgios Petropoulos, *Competition Economics of Digital Ecosystems*, Hearing on Competition Economics of Digital Ecosystems (3 December 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf; Marc Bourreau, *Some Economics of Digital Ecosystems*, Hearing on Competition Economics of Digital Ecosystems (3 December 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)89/en/pdf; Frédéric Marty & Thierry Warin, *Innovation in Digital Ecosystems: Challenges and Questions for Competition Policy*, 2020S-10 Cahier Scientifique, Cirano (2020); Rupprecht Podszun, Digital Ecosystems, *Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition* (March 19, 2019). *Available at* SSRN: https://ssrn.com/abstract=3420692 or http://dx.doi.org/10.2139/ssrn.3420692; James F. Moore, *Business Ecosystems and the View from the Firm*, 51 Antitrust Bull. 31 (2006).

analysis. Let us briefly survey those principles in the area of mergers and abuse of dominance/monopolization.

A. MERGERS

In reviewing vertical and conglomerate mergers, cross-market impact of mergers shall be the focus of the review. In case of vertical mergers, competition agencies shall consider whether a factor in an upstream/downstream market might affect competition in a downstream/upstream market, either by foreclosing rivals or by facilitating coordination. In case of conglomerate mergers, agencies shall consider whether one of the merging parties in one market is a potential competitor of another party in a separate and different market.

Even in case of horizontal mergers, competition agencies sometimes shall consider cross-market impact of mergers. The EU horizontal merger guidelines says that the Commission may analyze "to what extent a merged entity will increase its buyer power in upstream markets."[4] The US horizontal merger guidelines says that, in some cases, "the Agencies in their prosecutorial discretion will 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 the other market(s)."[5]

B. ABUSE OF DOMINANCE/MONOPOLIZATION

In a typical abuse of dominance/monopolization case, a firm has market power in a market and its activity affects competition in the same market. However, in some cases, a firm has market power in one market and its activity affects competition in another market. The established legal principles of the EU, the US and Korea recognize such cross-market impact of activities by dominant firms.

In the US, cross-market effect of a monopolist's conduct shall be examined in tying, exclusive dealing and monopoly leveraging cases. *First,* in case of tying arrangements, "a typical theory is that a firm has significant market power in a primary market and then uses tying to distort

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[4] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004/C 31/03), OJ [2004] C 31/5, para. 61.

[5] U.S. Department of Justice & the Federal Trade Commission, *Horizontal Merger Guidelines*, footnote 14 (2010).

competition in the second, or complementary market."[6] *Second,* in some exclusive dealing cases, "market power in some primary market (such as power generation) and the extent of exclusion in some secondary market (such as coal)" shall be examined.[7] *Third,* a more controversial topic is the "monopoly leveraging" theory. Since 1940s, courts have applied the theory to curb the extension of monopoly from one market to another. Its broadest version found a violation of Section 2 of the Sherman Act, when a monopolist uses its monopoly power to obtain competitive advantage in a second market, even without an attempt to monopolize that market.[8] However, in *Trinko*, the Supreme Court made it clear that a claim of monopoly leveraging requires a showing of (i) a "dangerous probability of success" in monopolizing the second market, and (ii) anticompetitive conduct.[9] Nevertheless, even after *Trinko*, some leveraging claims have survived, when a plaintiff fulfilled the requirements set out in *Trinko.*[10]

In the EU, *Google Search* decision declared in more general terms that a dominant undertaking's abusive conduct can be illegal when it affects competition in another market, citing several court precedents:

> "Article 102 of the Treaty and Article 54 of the EEA Agreement prohibit not only practices by an undertaking in a dominant position which tend to strengthen that position, but also the conduct of an undertaking with a dominant position in a given market that tends to extend that position to a neighbouring but separate market by distorting competition. Therefore, the fact that a dominant undertaking's abusive conduct has its adverse effects on a market distinct from the dominated one does not preclude the application of Article 102 of the Treaty or Article 54 of the EEA Agreement. It is not necessary that the dominance, the abuse and the effects of the abuse are all in the same market."[11]

The decision found Google's challenged conduct illegal on the ground that it is capable of having, or is likely to have, anti-competitive effects (i) in the national markets for general search services

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[6] Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics,* 101 Boston Univ. L. Rev. 489, 519 (2021).

[7] *Id.,* 524.

[8] *Berkey Photo v. Eastman Kodak Co.,* 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct 1061 (1980).

[9] *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 415 n. 4 (2004).

[10] ABA Section of Antitrust Law, *Antitrust Law Developments* 323-24 (8th ed. 2017).

[11] *Google Search* decision, para. 334.

where Google has a dominant position and (ii) in the national markets for comparison shopping services where Google does not have market power.[12]

In Korea, courts and the Korea Fair Trade Commission (KFTC) have considered cross-market effect of a dominant firm's conduct in refusals to deal, tying and price discrimination cases. *First,* the Supreme Court of Korea, in *POSCO*, reviewed whether the refusal to deal by a dominant firm in the hot rolled coil market affects competition in the cold rolled steel market.[13] Although the court reached a negative conclusion, it explicitly recognized that an abuse of dominance in one market might bring about anticompetitive effects in an upstream and downstream markets. *Second,* a lower court, in *Microsoft*, declared illegal the tying of Windows and Windows Messenger on the ground that it was used as an undesirable method of competition for the purpose of leveraging Microsoft's monopoly power in the PC operating systems market to exclude competition on the merits in the messengers market.[14] *Third,* the KFTC, in *Qualcomm I*, declared illegal a discriminatory royalty scheme, after defining one market where the market power was established, *i.e.,* the CDMA technology market, and another where the market power was exerted, *i.e.,* the CDMA modem chip market.[15] Also the KFTC's *Guidelines for Review of the Abuse of Market Dominant Position* (2015) presuppose that an exclusive trading contract by a dominant firm may affect competition in another market.[16]

III. A PROPOSAL TO INTRODUCE THE OBLIGATION TO DEFINE A *SECONDARY* RELEVANT MARKET

A. THE CONCEPT AND UTILITY OF SECONDARY RELEVANT MARKET

[12] *Id.,* paras. 589-590.

[13] Supreme Court of Korea, Decision of 22 November 2007, 2002du8626.

[14] Seoul Central District Court, Decision of 11 June 2009, 2007gahab90505.

[15] Korea Fair Trade Commission, Decision of 30 December 2009, No 2009-281.

[16] The guidelines are available in English at https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=2855&bbsId=BBSMSTR_000000003632&bbsTyCode=BBST11.

The above mentioned legal principles consider cross-market effects under strict conditions, and their application may not be easily extended to cover the wide variety of platforms' activities. Thus this article proposes to introduce the obligation to define a secondary relevant market in competition analysis, and thereby oblige courts and competition agencies to consider cross-market effect of factors in that market.

A secondary relevant market is a market which is separate and different from an original (primary) relevant market, but significantly affects competition in the latter. The purpose of defining the concept in rather general terms is to ensure its application to the variety of circumstances where the consideration of cross-market impact of platforms' activities should be warranted. There are diverse ways for a market to affect competition in another market. The following are the most outstanding examples.[17]

First, the competition on one side of a two sided platform could affect competition on the other side, when the price and/or demand on one side affect those on the other side, due to indirect network effect and feedback effect. If we define one of those sides as relevant market, the other side could be defined as secondary relevant market.

Second, when an incumbent, which is dominant in an existing market, acquires a nascent competitor in an adjacent market, the acquisition could affect competition in the former by eliminating nascent competition. If we define the market dominated by an incumbent as (primary) relevant market, the adjacent market where a nascent competitor operates shall be defined as secondary relevant market.

Third, a core platform market could affect competition in a target platform market, when a dominant firm in the former deploys so-called platform envelopment strategy against a rival firm in the latter. If we define the latter as (primary) relevant market, the former shall be defined as secondary relevant market.

Fourth, a digital ecosystems market could affect competition in individual services markets by locking users in a digital ecosystem. If we define an individual service market as (primary) relevant market, a digital ecosystems market shall be defined as secondary relevant market.

This article will look into these examples more closely later. But, before that, let us elaborate some more on the utility of an approach to define a secondary relevant market in competition analysis

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[17] Another important example shall be "market power parasites," a term which indicates other market players who abuse the market power of information intermediaries, *e.g.*, by black hat search engine optimization, click fraud, and fraudulent ratings and reviews. *See*, Noga Blickstein Shchory & Michal S. Gal, *Market Power Parasites: Abusing the Power of Digital Intermediaries to Harm Competition*, 35 Harv. J. L. & Tech. 1 (2021).

(*hereinafter* "secondary market approach").

By introducing the obligation to define a secondary relevant market, we could ensure that courts and competition agencies shall consider the factors, be it anticompetitive or procompetitive, that exist in a secondary relevant market. As "defining the relevant market is akin to establishing the space of allowable trade-offs"[18], courts and agencies shall be obliged only to consider the factors within a (primary) relevant market, unless established legal principles require otherwise. But if we could add another market to the dimension of relevant market, courts and agencies shall also be *obliged* to consider the factors within the additional (secondary) relevant market that affects competition in the original (primary) relevant market.

Another benefit of applying secondary market approach is that it enables us to fairly distribute the burden of proof among the parties. If a factor *X* that exists in a secondary relevant market promotes competition in a primary relevant market, then the defendant shall provide the evidence of *X*. But if a factor *Y* in a secondary market restrains competition in a primary one, then the plaintiff shall bear the burden of proof.

The following illustrations will demonstrate when and how the secondary market approach shall be applied to bring about abovementioned benefits in specific contexts.

B. Illustrations of Secondary Relevant Market

1. *Defining Markets in Multisided Platform Industries*

Two different approaches have been proposed concerning the definition of relevant market in platform industries; one is to define a single relevant market containing both sides (*i.e.,* customer groups) of a two-sided platform (*hereinafter "*single market approach"); and another is to define each side of a platform as separate relevant market (*hereinafter* "multiple markets approach").[19] The two approaches collide with each other in *Amex* litigation in the US, generating a whirlwind of

[18] Patrick R. Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. Chi. L. Rev. 2059, 2087 (2017).

[19] Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement,* 127 Yale L. J. 2142, 2144-2145 (2018).

discussions.[20] The Supreme Court was split in its 5-4 decision: the majority opinion took side of the single market approach, while the dissenting opinion supported the multiple markets approach. [21] Here this article will examine both approaches to demonstrate how they fail to fulfill the main functions of market definition in analyzing two-sided markets, and suggest a new approach which applies the concept of secondary relevant market proposed above.

a. Single Market Approach

The major rationale of single market approach is that it enables courts to better consider the interaction between the sides of a platform, reflecting indirect network effects. [22] Its proponents also criticize multiple markets approach that it "could result in tribunals wrongly exonerating behavior that is anticompetitive (because, *e.g.,* the harm to the other side is ignored) or wrongly condemning behavior that is not (because, *e.g.,* the benefit to the other side is ignored)."[23] Some proponents of single market approach have explored conditions under which it could be applied, based on the typology of platforms.

First, Filistrucchi *et al.* draws on the distinction between two-sided *transaction* markets and two-sided *non-transaction* markets in choosing between a single market approach and a multiple markets approach.[24] In case of the former, such as payment cards, an observable transaction is present between the customer groups on both sides. The transaction takes place using a firm's service on both sides, or it does not take place through the firm. That is, a firm "is either in the relevant market on both sides or on neither side."[25] Thus, they argue, only one market should be defined in case of two-sided transaction markets. Whereas, in case of two-sided *non-transaction* markets, such as most media markets, an observable transaction is absent between the customer groups on both sides, and a product might be in the relevant market on one side but not on the

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[20] *See, e.g.,* the list of amicus curiae briefs supporting each party *at* https://www.scotusblog.com/case-files/cases/ohio-v-american-express-co.

[21] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (*hereinafter "Amex"*).

[22] *Id.,* at 2285-2287.

[23] D. Evans, & R. Schmalensee, *Brief for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee in Support of Respondents in Ohio et al. v. American Express Company* at 5 (2018).

[24] Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt*, Market Definition in Two-Sided Markets: Theory and Practice,* 10 J. Competition L. & Econ. 292, 296-302 (2014).

[25] *Id.,* at 301.

other side. For example, TV could "be in the same relevant market as newspapers on the advertiser's side but not on the reader's side." [26] Thus, they suggest, two interrelated markets need to be defined in case of two-sided non-transaction markets.

Second, a working paper by the Federal Cartel Office (FCO) of Germany introduces and draws on a slightly different typology of platforms but takes a more flexible stance in choosing between a single market approach and a multiple markets approach, reflecting demand-side substitutability.[27] The FCO distinguishes between *matching* platforms and *audience providing/advertising* platforms. A matching platform enables intermediation between members of two or more user groups and direct interaction between users liaised by the platform. The interaction by users may involve not only a transaction in an economic sense, *e.g.,* in case of a real estate platform, but also another kind of interaction, *e.g.,* in case of a dating platform. Thus, a transaction platform is a subcategory of a matching platform. The FCO basically regards a single market approach suitable for matching platforms, "if user groups essentially have the same need for liaising with the respective other group."[28] However, the FCO indicates that it is still necessary to analyze substitutability of services from the perspective of both user groups, and that a multiple markets approach have to be taken, if user groups have different possibilities of substitution, so that essential competitors may not be overlooked. On the other hand, an audience providing platform or advertising platform enables one user group to attract the attention of another user group. The FCO regards a multiple markets approach suitable for audience providing platforms, as they are generally characterized by asymmetrical indirect network effects and "it is indeed possible that both user groups have different views of their respective possibilities for substitution."[29]

Among the above two approaches, the majority in *Amex* applied the less flexible one proposed by Filistrucchi *et al.*, and defined a single credit card market, including both merchants' side and cardholders' side of the platform, on the ground that credit-card networks are two-sided *transaction* platforms. It held, "Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better

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[26] *Id.*

[27] BKartA, B6-113/15, *Working Paper – Market Power of Platforms and Networks*, June 2016, at 16-39.

[28] *Id.,* at 28.

[29] *Id.,* at 30.

understood as 'suppl[ying] only one product' – transactions."[30] From this, the majority derived two controversial conclusions. *First,* only two-sided transaction platforms can compete with each other for transactions. [31] *Second,* the plaintiffs failed to carry their burden to prove anticompetitive effects in the relevant market, because, among other reasons, their argument about merchant fees, "wrongly focuses on only one side of the two-sided credit-card market."[32]

b. Multiple Markets Approach

The dissenting opinion in *Amex* and the proponents of multiple markets approach fiercely criticized the single market approach, which the majority in *Amex* applied to the credit card market, on the following grounds.

First, a relevant market includes substitutes, not complements, because substitutes "restrain a firm's ability to profitably raise prices,"[33] while "the complementary relationship between the products is irrelevant to the purposes of market definition."[34] However, the relationship between merchant-related card services and shopper-related services is more like that of complements, and definitely not that of substitutes.[35]

Second, competitive conditions on both sides of a transaction platform can be different from

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[30] *Amex*, at 2286 (2018).

[31] *Id.,* at 2287.

[32] *Id.* Justices and parties all agreed that the case is properly evaluated under the rule of reason using a three-step burden-shifting framework. *Id.* at 2284-2285, 2290-2291. Under the framework, (i) the plaintiff has the initial burden to prove the anticompetitive effect of the challenged restraint which harms consumers in the relevant market; (ii) if the plaintiff meets the initial burden, the defendant has to show a procompetitive rational for the restraint; and (iii) if the defendant successfully bears this burden, then the plaintiff has to show that the procompetitive efficiencies could be achieved in less restrictive ways. However, the Court was fiercely divided on whether the plaintiffs have satisfied the first step in the framework.

[33] *Id.,* at 2295.

[34] *Id.,* at 2298.

[35] *Id.,* at 2296.

each other, even if it faces the same competitors on both sides.[36] For example, the effect of product differentiation, vertical integration, user sophistication and multi-homing may manifest differently on each side.[37]

Third, competition agencies and courts have found a "transaction" platform in competition with a one-sided market. [38] If we regard two-sided platforms only in competition with other two-sided platforms, we might overestimate the market power of those "that sell in the same markets as traditional stores."[39]

Fourth, competition analysis should not require the plaintiffs to establish a net harm after balancing effects on both sides of a two-sided platform, because (i) "users on each side of a platform are entitled to the benefits of competition,"[40] and (ii) it can be difficult for the plaintiff to prove the precise effect on the net price or the quality level of services on each side.[41] Further, the majority in *Amex* required a showing of reduced output, even though the plaintiffs provided evidence that the increase in merchants' side price was not entirely spent on cardholder rewards.[42] However, "to require actual proof of reduced output is often to require the impossible."[43] If the plaintiff shows harm to the competitive process and the resulting harm to one or more user groups, the burden of proof should shift to the defendant to show a procompetitive rationale.[44]

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[36] Katz & Sallet, *supra* note 19, at 2158.

[37] *Id.*

[38] *See,* Vikas Kathuria, *Platform Competition and Market Definition in the US Amex Case: Lessons for Economics and Law,* 15 Eur. Competition J. 254, 263-264 (2019) (presenting cases at the competition authorities of India, the UK and Singapore); Hovenkamp, *supra* note 6, at 505 (quoting the Third Circuit's *Philadelphia Taxi Ass'n v. Uber Technologies, Inc.* decision that discussed Uber's share of ridership "in the context of all the competitors in the Philadelphia taxicab market").

[39] *Id.*

[40] Katz & Sallet, *supra* note 19, at 2173.

[41] *Id.,* at 2174.

[42] *Amex,* at 2288.

[43] *Id.,* at 2301-2302.

[44] Katz & Sallet*, supra* note 19, at 2174.

c. *Secondary Market* Approach

A traditional market definition helps courts and competition agencies a lot in competition analysis by (i) letting them focus on close substitutes, excluding weak substitutes and complements, (ii) requiring them to examine and consider all the factors in a relevant market that significantly affect competition, and (iii) fairly distributing the burden of proof among the parties, e.g., in the US, through a three-step burden shifting framework under the rule of reason. It has fulfilled these three basic functions nicely in analyzing traditional one-sided markets, as factors outside of a relevant market rarely affect competition in that market, and those rare cases could be covered by established legal principles.

However, in analyzing two-sided markets, the traditional method of focusing on close substitutes may ignore important factors that affect competition from outside of a relevant market, as the price and the demand on one side of a platform may affect those on the other side due to indirect network externalities and feedback effect. That's the main argument for single market approach. One of its proponents says,

> "Because rule-of-reason analysis allows courts to trade off pro- and anticompetitive effects within the relevant market, defining the relevant market is akin to establishing the space of allowable trade-offs. This is why market definition is frequently outcome determinative. Predictably, courts have differed on how to navigate these waters. In particular, defining the relevant market to include all sides of the platform creates a broader space of allowable pro- and anticompetitive trade-offs during rule-of-reason analysis."[45]

Here the keyword is "allow." Courts are not exactly prohibited from considering factors outside of a relevant market. However, as the US precedents on monopoly leveraging theory illustrate, courts can be quite cautious in considering out-of-market factors, unless it is supported by established legal principles. Thus, another proponent of single market approach maintains that, if a single side of a platform shall be defined as relevant market in merger review, "that will tend to lead the court to view market power and anticompetitive conduct within the four corners of that market."[46]

Some proponents of multiple markets approach assert that it is possible to consider the

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[45] Ward, *supra* note 18, at 2087.

[46] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets,* 20 Yale J. Reg. 325, 358 (2003).

interaction between the sides of a platform, without applying single market approach.[47] However, courts could be quite hesitant to go for the consideration of out-of-market factors, if there is no established legal principle to rely on. In order to warrant the consideration of out-of-market factors, we need an additional measure to *oblige* courts to do that. Single market approach could be an answer for that matter, because, by defining a single market containing all the sides of a platform, courts shall be obliged to consider the interaction between those sides.

However, single market approach represents some serious problems in fulfilling the three main functions of market definition, mentioned above.

First, single market approach may shake the foundation of market definition which focuses on close substitutes. A traditional market definition has focused on close substitutes, because only close substitutes can provide meaningful competitive pressure upon each other. If we band together disparate products in a single relevant market, it could make it harder for courts and competition agencies to focus on the impact of challenged conduct upon the competitive relationship between close substitutes.

Second, even if we presume a single product that is sold in a market containing all the sides of a platform, as the majority in *Amex* did, it could lead courts to ignore competitive pressure from traditional one-sided markets, e.g., competitive pressure from traditional taxi companies upon Uber. In other words, single market approach may ignore different competitive conditions on each side of a platform.

Third, single market approach may put heavy burden of proof upon the plaintiffs by requiring them to establish a net harm after balancing effects on both sides of a two-sided platform. This, again, can keep plaintiffs and competition agencies from focusing on the impact of challenged conduct upon competitive conditions between close substitutes.

Here, by introducing the obligation to define a secondary relevant market, we could fulfill the three main functions of market definition in analyzing two-sided markets. *First*, by defining one side of a platform, which was affected by the challenged conduct, as primary (original) relevant market, we could focus on competition between close substitutes on that side. *Second*, by defining the other side of a platform, which significantly affects competition in the primary market, as *secondary* relevant market, we could reflect the interaction between the two sides of a credit card platform. *Third*, by fairly distributing the burden of proof, courts could effectively examine procompetitive and anticompetitive factors in the secondary market, without laying a heavy burden on the plaintiffs. The plaintiff needs only to prove anticompetitive factors that exist in the secondary market, while

[47] *See, e.g.,* Katz & Sallet, *supra* note 19, at 2170.

the defendant needs only to prove procompetitive factors that exist in the secondary market.

Let me take a credit card network as an example. If we define a (primary) relevant market including only the merchant side of a credit card platform, its cardholder side shall be a market which is separate and different from the merchant side market. As factors on the cardholder side significantly affect competition on the merchant side, we could define the former as *secondary* relevant market. The plaintiff shall bear the initial burden to prove anticompetitive effects only in a primary relevant market, *i.e.* the merchant side of the platform. However, courts shall be obliged to consider all the factors in the secondary market, *i.e.,* the cardholder side, which significantly affects competition in the primary market. If any factor in the secondary market brings about procompetitive effect to the primary market, the defendants shall bear the burden to prove it. Likewise, the plaintiffs shall bear the burden to prove any factor in the secondary market which may significantly restrain competition in the primary market.

The secondary market approach proposed here aims at promoting competition on *each* side of a platform. If a platform is allowed to restrain competition on one of its sides on the ground that the restraint could bring about procompetitive benefit on the other side, it could open the door for the platform to restrain competition on one of its sides first and then the other. Even if a platform wants to dominate multiple markets, it has to conquer those markets one by one by defeating close substitutes in *each* market. In other words, a platform's attack has to focus on *each* market, even if its overall strategy aims at dominating multiple markets. Thus, competition policy also has to focus on promoting competition in *each* market, even when it deals with a platform operating in multiple markets.

The secondary market approach could also be applied in merger reviews. For instance, let us take a look at Facebook's acquisition of WhatsApp in 2014. In reviewing the deal, the European Commission defined each side of a social networking services (SNS) platform and a consumer communications services (CCS) platform as separate relevant markets. In other words, applying multiple markets approach, the Commission defined three relevant product markets: the market for consumer communications service (the users' side of CCS platforms), the market for social networking services (the users' side of SNS platforms), and the market for online advertising (the advertisers' side of CCS and SNS platforms).[48] Although the Commission did not put much stress upon the interaction between the sides of CCS and SNS platforms, it examined whether the deal might affect competition in the online advertising market, by enabling Facebook to improve its

[48] Case No COMP/M.7217, *Facebook/WhatsApp*, Commission decision of October 3, 2014 (*hereinafter* "*Facebook/WhatsApp* decision"), paras. 13-34.

targeted advertisement with the data collected through WhatsApp.[49] The Commission reached a negative conclusion on the ground that, among other reasons, the notifying party submitted that there are major technical obstacles for Facebook to match each user's WhatsApp profile with her/his Facebook profile.[50] But, later in 2016, it turned out that it was possible to automatically link accounts, and the Commission fined Facebook 110 million euro for providing misleading information.[51] The Commission did not withdraw permission for the merger on the ground that "the clearance decision was based on a number of elements going beyond automated user matching,"[52] However, concern was raised about "whether there could have been anti-competitive aspect to the merger which may be harming consumers, and which are not being tackled by imposing a penalty on Facebook."[53]

If the secondary market approach had been applied in reviewing Facebook/WhatsApp merger, more thorough examination could have been warranted into the pro- and anticompetitive factors outside of the online advertising market. Here is how it works. When the Commission examines the merger's effect on competition in the online advertising market, the CSS market and the SNS market shall be defined as secondary relevant markets, as factors in those markets could significantly affect competition in the relevant market, *i.e.,* the online advertising market, due to the indirect network effect between the sides of a platform. Then the Commission shall bear the burden to prove anticompetitive factors within those secondary markets that significantly affect competition in the primary market, including the possibility of user matching. The Commission may not rely on the notifying party's submission, when "certain respondents [to the market investigation] argued that such matching would be easily achievable."[54] Once a secondary market is defined, it is the responsibility of a competition agency to prove anticompetitive factors in that market, especially when the notifying party and some respondents oppose with each other on those factors.[55] Under

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[49] *Id.,* paras. 180-189.

[50] *Id.,* para. 185.

[51] European Commission, *Press release - Mergers: Commission fines Facebook € 110 million for providing misleading information about WhatsApp takeover*, Brussels, 18 May 2017 (IP/17/1369).

[52] *Id.*

[53] *EU fines Facebook for misleading over WhatsApp*, GCR (18 May 2017), available at https://globalcompetitionreview.com/eu-finesfacebook-misleading-over-whatsapp (quoting a comment by Nelson Jung at Clifford Chance in London).

[54] *Facebook/WhatsApp* decision, para. 185.

[55] When only a (primary) relevant market is not defined, the possibility of user match is just a factor outside of the relevant market. However, once a secondary relevant market is defined, the

the secondary market approach, the Commission should have probed into whether the submission of the notifying party reflects the truth, as the possibility of user match might have been a key to a deeper investigation into the anticompetitive aspects of the deal. A further application of secondary market approach could have revealed more anticompetitive implications of user match as follows.

In competition assessment of the SNS market, the Commission examined the concern regarding potential integration between Facebook and WhatsApp after the transaction, and reached a negative conclusion. However, the Commission did not probe into the possibility that the merger might enable Facebook to improve its social networking services with the data collected through WhatsApp. As a commentator indicated, "By the acquisition of WhatsApp, Facebook would have access to the data of 600 million customers of the former. The availability of great amounts of data can be useful to improve the social networks services but the European Commission disregarded the relevance of data in these markets."[56] As user data is a key asset for both CCS and SNS platforms, the integration of user data between Facebook and WhatsApp could significantly affects competition in both of those markets. In other words, after the merger, data in the CCS market could significantly affect competition in the SNS market, and *vice versa*. Thus, under the secondary market approach, the Commission should have defined the CCS market as secondary relevant market in competition assessment of the SNS market, and *vice versa.* Once a secondary relevant market was defined, the Commission should have been obliged to prove anticompetitive factors in that market that affect competition in the (primary) relevant market, including the possibility and the impact of data integration between the merging parties.

2. *Nascent Acquisition*

Defining a secondary relevant market is like adding another dimension to competitive assessment. A traditional competitive assessment mainly focuses on competitive relationship between close substitutes in the same market, even though some established legal principles require the examination of factors outside of the market. We could compare it to a two-dimensional assessment. But when we define a secondary relevant market, we should examine pro- and anticompetitive factors in that additional market. We could call it a three-dimensional assessment. It definitely

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Commission is officially obliged to prove anticompetitive factors in that market.

[56] Michele Giannino, *The Social Network: The European Commission' Decision on the Facebook/Whatsapp Merger Case*, 19 J. Internet L. 1, 19 (2016).

aggravates difficulty in competitive assessment, however, as illustrated above, we could mitigate the difficulty by fairly distributing the burden of proof among the parties. The next topic, nascent acquisition, requires us to add one more dimension to competitive assessment: *future*. Although merger reviews have already demanded us to assess future market conditions without a transaction, nascent acquisition cases require us to implement an additional assessment of future: the possibility of future competition from nascent competitors. We could call it a four-dimensional assessment. The immense difficulties in assessing dual future - *i.e.,* a "but-for world" without a transaction and the possibility of future competition - have prevented competition agencies from effectively blocking the deals that might eliminate future competition from nascent competitors. Here, again, the secondary market approach could provide a partial solution: we could alleviate the difficulties in a four-dimensional assessment of nascent acquisitions, by defining a secondary relevant market and fairly distributing the burden of proof among the parties. Let us first return to the Facebook/WhatsApp merger to see what has caused the problem.

a. An Invisible Wall Between Markets

When Facebook announced its plan to acquire WhatsApp for 19 billion dollar, analysts were mixed in their assessment of the figures, as WhatsApp's turnover in Europe was less than 100 million dollar a year.[57] A plausible explanation was that WhatsApp was a nascent competitor of Facebook in the SNS market, and it was worth the money for Facebook to eliminate future competition from WhatsApp. As a commentator indicated, "WhatsApp posed a nascent competitive threat. In 2014, it was not a fully fledged social network. The competitive concern was that WhatsApp might 'morph into Facebook' over time."[58] However, in reviewing Facebook's acquisition of WhatsApp, the Commission did not examine the future possibility of competition from WhatsApp. Instead, the Commission focused on current market conditions. Based on "the considerable differences between the functionalities and focus of WhatsApp and Facebook," the Commission concluded that "these providers are not close competitors in the potential market for social networking services."[59]

The Facebook/WhatsApp decision is sharply contrasted with the Commission's decision on the

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[57] On a negative evaluation of profitability after the transaction, *see, e.g.,* Marketline, *Facebook: The Whatsapp acquisition, Marketline Case Study* (Reference code: ML00017-002), March 2014.

[58] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879, 1885-86 (2020).

[59] *Facebook/WhatsApp* decision, paras. 153-158.

Medtronic/Covidien merger just a month later.[60] In the latter, the Commission concluded that "the Transaction will have as an effect an elimination of a serious future competitor as a result of which DCB patients will be deprived of an innovative and potentially a very effective device." What shall be the difference between those two cases that made the Commission to take totally different stances on future competition? "The market" is this article's answer.

In Medtronic/Covidien, Covidien's innovation pipelines aimed at Medtronic's markets from the outset. The Commission needed only to focus on those relevant markets. In other words, the Commission's task was basically a two-dimensional assessment, mentioned above. In such a situation, it was relatively easy for the Commission to go for an additional task of assessing future competition. However, in Facebook/WhatsApp, the SNS market and the CCS market were separate and different markets from each other. When examining the SNS market, what was happening, or what was going to happen, in WhatsApp was just a factor outside of a relevant market. Thus, it might have been quite difficult for the Commission to take on an unpromising task of assessing future development of factors in another market. It is like there is an invisible glass wall between a relevant market and other markets that prevent competition agencies from examining anticompetitive factors across markets.

By applying secondary market approach, we could remove the wall. The secondary market approach could not only oblige competition agencies, but also *empower* them to go for cross-market examination, beyond the boundaries of a relevant market. For example, earlier we saw that the Commission should have defined the CCS market as secondary relevant market in competitive assessment of the SNS market, due to the impact of possible data integration. In that case, the Commission should also have been obliged/authorized to examine other anticompetitive factors in that market, including the possibility of nascent competitive threat from WhatsApp.

b. Burden of Proof

A nascent competitor is a firm which provides a future threat to an incumbent due to its potential for market success based on innovation. A competition agency faces triple uncertainties in reviewing an acquisition of a nascent competitor by a dominant platform: uncertainties concerning *future*, *market potential* and *innovation*. Although the assessment of future is a common element of merger reviews, it might get quite speculative to predict whether a nascent competitor could achieve technological innovation or develop a new business model and finally succeed in a complex and fast-moving sector. Thus, agencies are having immense difficulties in proving the anticompetitive

[60] Case No COMP/M.7326 – *Medtronic/Covidien*, Commission decision of November 28, 2014.

harm of nascent acquisitions. That is the reason why some commentators[61] and legislators, such as Sen. Amy Klobuchar of the US,[62] are urging merger reform to shift the burden of proof to parties seeking a merger.[63] However, others say that those proposals lack "a sufficient level of evidence and/or economic consensus that a particular type of conduct almost always results in negative market outcome."[64]

Here, by applying secondary market approach, we could ensure that the burden of proof shall be distributed reasonably between the plaintiffs/agencies and the defendants/merging parties. Although the secondary relevant market approach might not eliminate the intrinsic uncertainties in reviewing nascent acquisitions, it could at least warrant an opportunity for both competition agencies and merging parties to explore their cross-market effects, by fairly distributing the burden of proof.

As discussed earlier, once a secondary relevant market is defined, the plaintiffs/agencies need only to prove anticompetitive factors that exist in the secondary market, while the

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[61] Mark A. Lemley & Andrew McCreary, *Exit Strategy* at 85-86 (December 19, 2019). Stanford Law and Economics Olin Working Paper #542*, Available at* SSRN: https://ssrn.com/abstract=3506919; Stigler Committee on Digital Platforms, *Final Report* at 111, September 2019, *available at* https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.

[62] *Klobuchar to Unveil a Sweeping Antitrust Reform Bill*, CPI, February 4, 2021, *available at* https://www.competitionpolicyinternational.com/klobuchar-to-unveil-a-sweeping-antitrust-reform-bill/.

[63] More recently Sen. Josh Hawley of the US unveiled legislation which bans all mergers and acquisitions by companies with a market capitalization of over US$100 billion, and empowers the FTC to prohibit 'digital dominant firms' from buying out potential competitors. *Republican Senator Proposes Growth Ban On Big Tech*, CPI, April 13, 2021, *available at* https://www.competitionpolicyinternational.com/republican-senator-proposes-growth-ban-on-big-tech/.

[64] *E.g.,* John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust,* at 17 (September 22, 2020). Marquette Law Review, Forthcoming, George Mason Law & Economics Research Paper No. 20-26, *Available at* SSRN: https://ssrn.com/abstract=3698210. *See also,* Curtis Eichelberger & Khushita Vasant, *Klobuchar bill calling for some mergers to be presumed anticompetitive called an 'invitation to error,' 'aspirational', in* MLex Antitrust Special Report: 69th ABA Antitrust Law Spring Meeting – Look Before You Leap at 39 (2021).

defendants/merging parties have only to prove procompetitive factors that exist in the secondary market. For example, the defendants/merging parties shall bear the burden to prove that there are several other firms who are implementing similar research and development with similar goals and capabilities as those of the acquired firm, and that the acquisition shall neither restrain innovation competition, nor strengthen the dominant position of the acquirer. [65] Whereas, the plaintiffs/agencies shall bear the burden to prove that the acquired firm's assets are so unique, and its product is so different from other nascent competitors, that the acquisition is likely to remove a promising competitor.[66]

Again, the secondary market approach does not eliminate the difficulties in proving nascent competitive threat. However, it could at least facilitate the review of nascent acquisitions by removing the wall between markets and fairly distributing the burden of proof. As we shall have more and more such cases, courts and agencies shall have more and more opportunities to find clues to proving nascent threat.

3. *Platform Envelopment*

In 2011 Eisenmann *et al.* published a ground-breaking paper which explored an alternative entry path for platform providers to enter another platform market without relying on Schumpeterian innovation: platform envelopment.[67] They wrote:

> "Platform providers that serve different markets sometimes have overlapping user bases and employ similar components. Envelopment entails entry by one platform provider into another's market by bundling its own platform's functionality with that of the target's so as to leverage

[65] On the importance of recombining heterogeneous set of prior knowledge in assessing the value of an invention and its economic impact, *see*, Wonchang Hur & Junbyoung Oh, *A man is known by the company he keeps?: A structural relationship between backward citation and forward citation of patents*, Research Policy, Volume 50, Issue 1, 2021, 104117 (providing empirical evidence which supports the view that "A patent founded on a cohesive set of prior knowledge may produce redundant information and, therefore, lacks novelty with a high risk of replacement by many similar alternatives and will have only limited impact on subsequent patents.").

[66] Yun, *supra* note 64, at 49.

[67] Eisenmann *et al., supra* note 2.

shared user relationships and common components."[68]

They further offered a typology of envelopment attacks and likely conditions for their success.[69] *First,* envelopment of *complements* is most likely to succeed when the platforms' users overlap significantly. *Second,* envelopment of *weak substitutes* is most likely to succeed when bundling offers significant economies of scope. *Third*, envelopment of *unrelated platforms* is most likely to succeed when the platforms' users overlap significantly and when economies of scope are high.

Drawing on Eisenman *et al.*'s typology, Condorelli & Padilla considered an additional way in which enveloping of unrelated platforms can be profitable: privacy policy tying, *i.e.,* a strategy whereby the enveloper requests for users' consent to combining their data in origin and target markets.[70] They reveal that the strategy "may allow the enveloper to fund the services offered to all sides of the target market by monetizing data in the origin market, monopolize the target market, and entrench its dominant position in the origin market."[71]

Hermes *et al.* extended the original conceptualization of Eisenmann *et al.,* by investigating 20 cases and developing a comprehensive taxonomy of platform envelopment.[72] They derived three platform envelopment patterns as follows.[73] *First*, horizontal envelopment of platform competitors refers to platform competition between the new platform and the target platform. As there is no specific relationship between core and target platforms, this type of envelopment does not entail self-preference or bundling practices. *Second*, vertical envelopment of platform competitors also refers to platform competition between the new platform and the target platform. However, in this case, the target platform uses the core platform to reach users. Thus this type of envelopment may entail self-preferencing practices (e.g., higher ranking) and interference mechanisms (e.g., demoting rivals). *Third*, vertical envelopment of platform complementors refers to platform competition in a *coopetitive* setting. The target platform complements the core platform, and, at the same time, it competes with the new platform. This type of envelopment may, in some cases, entail self-preferencing, bundling and interference tactics. Hermes *et al.* warned that, by leveraging vertical envelopment, platforms are converging towards platform conglomeration: as platform

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[68] *Id.*, at 1270-71.

[69] *Id.*, at 1279-82.

[70] Condorelli & Padilla, *supra* note 2, at 19-32.

[71] *Id.*, at 1, 31-32.

[72] Hermes *et al., supra* note 2.

[73] *Id.*, at 6.

conglomerates may profit from self-reinforcing data feedback loops, platform owners can sustain market dominance in core platform markets and easily establish new dominant platforms.[74]

The insight from literature on platform envelopment provides a fertile ground for the application of secondary market approach. As platform envelopment strategies are deployed across markets, the assessment of their anticompetitive effect calls for the examination of factors outside of a relevant market. For example, if a core platform engages in a self-preferencing practice to attack a target platform, the core platform market should be defined as secondary relevant market, while the target platform market should be defined as (primary) relevant market.

However, it should also be noted here that, in platform envelopment cases, secondary market approach may work in both ways. As discussed above, platform envelopment strategies deployed by core platforms may affect competition not only in target markets, but also back in core markets, due to platform conglomerate advantages. In that case, we should first define the core market as secondary relevant market for competitive assessment of the target market, and then define the target market as secondary relevant market for competitive assessment of the core market.

In any case, once a secondary relevant market is defined, the plaintiffs/competition agencies shall bear the burden to prove any anticompetitive factor in that market, while the defendant/merging parties shall have to prove any procompetitive factor in it. I say "merging parties," because the insight from platform envelopment literature could also be applied to examine cross-market effects of mergers, with the help of secondary market approach. For instance, in reviewing *Google/Fitbit* deal, we could define the data-driven health services sector as a primary relevant market, and the advertising technology market as a secondary relevant market, and *vice versa*,[75] so that courts and agencies shall be obliged to consider cross-market effects of the deal. The plaintiffs/competition agencies shall have to provide evidence of anticompetitive factors in the secondary relevant market which might significantly constrain competition in the primary one. Likewise, the defendants/merging parties shall bear the burden to prove any procompetitive factors in the secondary market that promotes competition in the primary one.

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[74] *Id.*, at 7.

[75] Although the European Commission cleared the deal on conditions, the ACCC and the US DoJ are still investigating it over concerns whether "it could allow Google to dominate the nascent data-driven health services sector or entrench its dominance in the advertising technology market." *Google pushes through Fitbit deal without approval in Australia and US,* GCR, 15 January 2021, *available at* https://globalcompetitionreview.com/big-data/google-closes-fitbit-deal-without-approval-in-australia-and-us.

4. *Ecosystems Competition*

The multimarket presence of a large digital conglomerate allows it to offer a product ecosystem, *i.e.*, "a line of products and services with a technological linkage increasing the complementarity between them."[76] There are multiple factors which facilitate such extension of businesses across markets even without any anticompetitive intention, such as economies of scope, data synergies, enhanced interoperability, barriers to multi-homing and gateway role across markets.[77] However, platforms may exhibit potentially anticompetitive behaviors, using strategic leverage across markets, which include: (i) "degrading third party interoperability to favour their own interoperable products"; (ii) "sharing data across their own divisions, but not making it available to third parties"; and (iii) "using a gateway position to give prominence to their own products over those of third parties."[78]

Further, as firms in platform industries compete to draw consumers into comprehensive ecosystems, they may "steer demand through nudges, biased rankings, use of default settings, etc."[79] Also, Innovation efforts in a digital ecosystem might serve the purpose of "making the platform stickier, keeping users from multi-homing and locking them into the digital ecosystem."[80] Thus, when the lock-in strategies of firms in a digital ecosystem succeeds, we might have to define ecosystem-specific aftermarkets, along with a market for ecosystems.[81] Eben and Robertson suggested an innovative idea on defining multiple layers of markets concerning digital ecosystems, drawing on the experience in cluster market/integration cases and aftermarket cases.[82] Robertson further developed an idea on multilayered market delineation as follows:

> "Using an analogy to aftermarket delineation, we can inquire whether individual markets (e.g.,

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[76] Bourreau, *supra* note 3, at 2-3.

[77] Fletcher, *supra* note 3, at 5-7.

[78] *Id.*, at 8.

[79] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the digital era* 47 (2019).

[80] Robertson, *supra* note 3, at 7.

[81] Crémer *et al., supra* note 79, at 48.

[82] Eben & Robertson, *supra* note 3, at 25-29.

online search or email clients) can be regarded as secondary markets that are derived from a primary market, i.e., the comprehensive digital ecosystem. Depending on the competitive constraints on the individual markets, we can then delineate multiple markets or a comprehensive (system) market—or both. What could make the aftermarket analogy particularly fitting for digital ecosystems is that the digital ecosystem, just like a primary market, provides the ecosystem owner with an additional layer of power over the various markets by the simple fact of providing an integrated solution for services that could also be supplied separately."[83]

We could notice here that the relationship between a market for individual service and a market for digital ecosystem is almost exactly the same as that between a (primary) relevant market and a secondary relevant market. Factors in the latter may significantly affect competition in the former. The only difference is that, in Robertson's passage, a 'secondary' relevant market is called a 'primary' market, and *vice versa*. However, we don't even have to switch places of 'primary' and 'secondary' markets here, because secondary market approach may work in both ways. Factors in an individual services market may also affect competition in a digital ecosystems market. For example, a risk of envelopment attack from nearby platform markets may drive platforms to proactively deploy an envelopment strategy to monopolize an adjacent market, which may enable them not only to defend a core market, but also to create a monopolistic ecosystem.[84]

The combination of multilayered market delineation and secondary market approach could generate a powerful synergy in competition analysis of digital ecosystems. *First,* by defining a comprehensive market for digital ecosystems, we could avoid the overwhelming task of simultaneously juggling numerous combinations of primary and secondary markets in digital ecosystems. *Second*, the secondary market approach could open the door for the examination of interaction between an individual services market and a digital ecosystems market. Once a digital ecosystems market or an individual services market is defined as secondary relevant market, courts and competition agencies shall be obliged to examine pro- and anticompetitive factors in that market which significantly affect competition in a (primary) relevant market, and the burden of proof shall be fairly distributed among the parties, just like in previous illustrations of secondary relevant market..

[83] Robertson, *supra* note 3, at 8.

[84] *See,* Fletcher, *supra* note 3, at 9.

IV. CONCLUSION

This article proposes to introduce a secondary market approach whereby a secondary relevant market is defined to ensure that courts and agencies shall be obliged to consider pro- and anticompetitive factors in that market which significantly affect competition in an original (primary) relevant market. By applying the approach, we could address the increasing need to consider cross-market effect of platforms' activities, without interrupting the keynote of traditional market definition which focuses on close substitutes.

The secondary market approach could facilitate the examination of cross-market impact of platforms' activities at courts and competition agencies, by not only obliging but also authorizing them to go for cross-market examination of pro- and anticompetitive factors. It also helps us to fairly distribute the burden of proof among the parties: plaintiffs/competition agencies need only to prove anticompetitive factors in a secondary relevant market, while defendants/merging parties have only to prove procompetitive factors in it. Thus, while it does not eliminate all the difficulties of competitive assessment of platform industries, it could open the door to enhanced opportunity for courts and agencies to investigate into platforms' cross-market interactions.

This paper defines the concept of secondary relevant market in rather general terms to ensure its application to the variety of circumstances where the consideration of cross-market impact should be warranted. It also presents some prominent examples of secondary relevant market to illustrate how and when the secondary market approach shall be applied in specific contexts, which include: defining multi-sided platform markets, nascent acquisitions, platform envelopment and ecosystems competition.

While this manuscript focuses on the application of secondary market approach in *ex post* competition enforcement, the approach also exhibits some potential for *ex ante* regulation of platform industries. By providing a methodological framework for the assessment of competitive harm across markets, it could help legislators to pursue better targeted regulatory intervention. Future research could provide more refined and detailed guidelines on when and how the approach shall be applied, so that it could fill the gap between *ex post* enforcement of competition law and *ex ante* regulation of platform industries.