Summary of Discussion Points
Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee

“Two-sided Markets”
June 10, 2009

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee.

2. “Two-sided markets” or more precisely “two-sided platforms” have been identified as a concept by economists in the relatively recent past. Professors Jean-Charles Rochet and Jean Tirole\(^1\) are often quoted as its “inventors” although some of the markets considered have been operating for many years and there is earlier literature on some key issues specific to these markets.\(^2\) Since then many articles have been published, commenting on earlier and new case law on both sides of the Atlantic, specific sections on the subject have appeared in academic textbooks and a few major cases have made the concept more conspicuous.

3. It is not BIAC’s role to add to this already well developed literature. The only purpose of this deliberately very short paper is to state that the business community is in favour of a consistent approach by the antitrust authorities to this concept, which brings the necessary flexibility and pragmatism to antitrust analysis to such cases.

4. Even though there is no single unified and general definition, two sided markets typically involve two distinct types of users, interacting over a common platform.\(^3\) Most commentators\(^4\) agree on the following characteristics of two-sided markets:

   - two sides of demand brought together by an intermediary;

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there are “network externalities” i.e. benefits that the agents on each side cannot regulate themselves (e.g. price increases on one side which reduce the demand on that side will also affect the demand on the other side);

the intermediary (“platform”) can affect the volume of transactions through pricing decisions, design decisions, regulatory decisions.

5. Indeed there are specific industries with these characteristics, and their impact on the global economy is significant enough to merit that appropriate attention be given to the issues they generate e.g.:

- exchanges, in the broadest sense of the word, including brokers, agents, auction houses, global distribution systems (i.e. computerized reservation systems for travel agents), etc.
- advertising-supported media,
- transaction or payment systems (traveller’s checks, gift checks, etc. and in particular credit cards systems),
- software platforms, providing services for application developers serving personal computer, mobile phone, video game users, etc.\(^5\)

These markets are all growing in importance, especially those involving the use of software platforms.

6. In our view, in assessing businesses and industries that operate using two-sided markets, antitrust enforcement agencies reviewing mergers or business practices should be mindful of the impact of such practices on both sides of the platform. Focusing solely or primarily on one set of users (and ignoring the two-sided nature of the business) runs a real risk of not understanding the underlying business model or rationale behind a particular practice. “antitrust analysis that focuses on one side of the business in isolation from the other side is incorrect as a matter of economics, and can lead to the wrong answer when indirect network effects are significant and are relevant for assessing the practice at issue”.\(^6\) More generally, the manner in which such businesses contribute to the attainment of goals and objectives of competition law, such as the attainment of consumer welfare, efficiencies and incentives to innovate may be misunderstood if a “one-sided” market approach is used. In this regard, some authors have strongly cautioned against such a myopic analysis.\(^7\)

7. At the same time, is has been recognized that the concept of two-sided markets does not represent a major shift in antitrust policy: “Two-sided platforms may be a passing concept

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\(^5\) Other more basic examples of two-sided markets include auctions, flea markets and shopping malls.

\(^6\) Evans, *supra* note 4.

\(^7\) Wright, *supra* note 3.
which calls for analytical vigilance but does not require a policy revolution.”

In any case, it is generally admitted that the two-sided nature of a market can be a matter of degree. There are cases where the two-sided nature of a market is not the predominant feature of that market. There are also cases where the competitive concerns and analysis tools used in “one-sided” markets apply to two-sided markets. In other words, being two-sided does not shelter a market from anti-competitive issues, nor does it imply that it is affected only by specific anti-competitive issues.

8. Clearly however, consideration of two-sided markets may affect market definition and market power assessment. For instance, the traditional tools used to measure price elasticity or marginal cost for the purposes of reviewing the effect of a practice or a transaction or for the analysis of entry barriers cannot be applied in the same way if two markets rather than one are concerned. A high price-cost margin on one side may not be indicative of market power, when both sides of the platform are considered; similarly, a price below marginal cost on one side of a market may not be indicative of predatory conduct when its relation to the overall platform is considered.

9. Whilst this mainly concerns merger regulation, to which most of existing relevant decisions relate, the review of coordinated or unilateral practices is similarly affected in the case of two-sided platforms. For instance, coordination organized between the participants on one side of the platform may result in economic efficiencies in the market on the other side, or tying practices that impact one side can benefit consumers on the other side.

10. However, a review of case law in various jurisdictions shows that the specificities of two-sided platforms are not systematically considered. Indeed there have been decisions based on an analysis of the indirect network effects over many years, and more often recently, in most disciplines of antitrust law and with respects to various types of two-sided markets. Among many other examples: NaBanCo/Visa applying the rule of reason to concerted practices as early as 1986 in the field of credit cards, U.S. v. Microsoft analyzing the network effects to assess the barriers at entry when reviewing unilateral practices in 2001, or the Commission considering the indirect network effects for content providers of including the Windows Media Player in Microsoft’s standard software platform. A number of mergers have been cleared, based at least partly on the specificities of two-sided platforms, for instance stock exchanges by the U.K. Competition Commission in 2004, French press and cinema advertising in 2003,

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9 National Bancard Corp. V. Visa U.S.A., Inc., 779 F.2d 592, 602 (11th Cir. 1986).
12 LSE/Euronext and Deutsche Börse (aborted for business reasons) - London Stock Exchange Ltd, Competition Commission Enquiry, 29.03.05 - 01.11.05.
2005 and 2006 by the Conseil de la Concurrence,\textsuperscript{13} global distribution systems\textsuperscript{14} and an online advertising technology supplier with a leading Internet search engine by the European Commission in 2008,\textsuperscript{15} or the Dutch Yellow Pages by NMa in 2008.\textsuperscript{16}

11. Conversely, there seem to be a number of cases where these specificities have been ignored although the markets in question had the features of two-sided platforms. Again to quote only a few examples: in Europe, the Magill case (1995)\textsuperscript{17} in the field of advertising-supported media, or in the U.S. the XM-Sirius radio satellite merger (2008).\textsuperscript{18} In other cases, the specificities seem to have been considered, but not used as a basis for the decision, as in the First Data Corp/Concord case relating to a PIN debit card network (2003).\textsuperscript{19}

12. Two-sided markets are explicitly recognized by certain authorities in their guidelines, for instance the merger guidelines published in 2007 by the French Ministry of Economy (before the reform transferring most of its prerogatives to the new independent authority)\textsuperscript{20} and the Merger Assessment Guidelines jointly published by the UK Competition Commission and the Office of Fair Trading as a consultation document in April 2009. But they are not specifically mentioned by most, including the U.S. Department of Justice’s and FTC’s Horizontal Merger Guidelines and the European Commission’s two sets of Guidelines on the assessment of horizontal and non-horizontal mergers.

13. BIAC submits that more consistency in this field is desirable and necessary to promote both legal certainty and an international level playing field. This consistency should tend towards the recognition of the concept of two-level platforms as a valid consideration in antitrust decisions. Again, being two-sided does not shelter a market from anti-competitive issues, nor does it imply that it is affected only by specific anti-competitive issues. Accordingly, not all decisions recorded so far that were based partly or wholly on the analysis of indirect network effects applied to two-sided markets have been favourable to the applicants. Nor are they systematically free of criticism, for instance with respect to the remedies imposed for merger


\textsuperscript{14} Case COMP/M4523, Travelport/Worldspan.

\textsuperscript{15} Case COMP/M.4731, Google/DoubleClick.

\textsuperscript{16} NMa, Gouden Gids/De Telefoon Gids, 28 Aug 2008; see P. D. Camesasca et al., The Dutch Yellow Pages Merger Case, 2-1 will go ! E.C.L.R. 2009, 30(1), 4-13.

\textsuperscript{17} ECJ 6 April 1995. - Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities. Joined cases C-241/91 P and C-242/91 P.


\textsuperscript{19} US v. First Data Corp/Concord 03 Civ.7076 (S.D.N.Y. 1998).

\textsuperscript{20} DGCCRF, Lignes directrices relatives au contrôle des concentrations, §3.2.5, 427-442; new Guidelines are currently being drafted by the new Competition Authority but there is no reason to believe the section relating to two-sided markets will not be kept.
clearance. But in sum, BIAC supports the use of a concept which makes economic sense, and brings more flexibility and pragmatism to antitrust analysis.