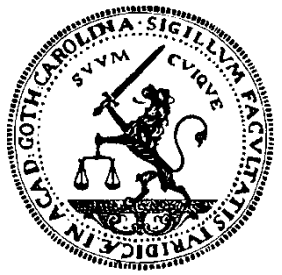

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"Virtual Competition: Challenges in Competition Law Regarding Online Platforms"

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Contents

Summary

The first part of this paper will focus on finding a definition of online platforms which stand at the centre of this paper. Different approaches will be taken into account and included, and a working definition will be established.

In a second part this paper will identify the potential issues that competition law can face in regard to online platforms by pointing out the differences between online platforms and more traditional forms of businesses.

After having identified the main potential issue, the need for intervention will be assessed in the light of different competitive theories, Chicago school and Ordoliberalism. The conclusion will be reached that it is in fact necessary to intervene in online markets even though they are arguably more dynamic and ever-changing.

In the main part that will follow that section, the specific application of Art 101 and 102 TFEU to issues regarding online platforms will be discussed in detail. This will be achieved by going through each step of application and identifying the issues therein. Additionally, possible solutions to said issues will be discussed.

In the last section of this thesis a case study of *Amazon Marketplace* will be conducted in light of two prior decisions by the Commission and the GCA. This case study highlights the discussed issues and provides possible solutions. It will thereby give an outlook into a possible future approach that EU competition authorities, be it the Commission or NCAs, take towards online platforms.

Abbreviations

AVC	Average variable cost
ATC	Average total cost
BGB	Bürgerliches Gesetzbuch (German Civil Code)
EU	European Union
FCA	French Competition Authority (Autorité de la Concurrence)
GCA	German Competition Authority (Bundeskartellamt)
NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union

1 Introduction

When speaking of a 'market' the associations are plentiful. Perhaps the most prominent is that of a traditional farmer's market as the origin of customers being able to compare prices and make informed choices within said market. Another association would be that of a 'bazaar' in mid-eastern cultures which entails the same concept, admittedly in a more colourful version than the mentioned farmer's market.

But what about marketplaces in modern day economies? In the new economy, modern is often synonymous for online as innovation in the online sector has been rapidly increasing for the past decades. Even though most modern-day consumers are familiar with and use the internet for their everyday purchases, the parallel to markets like the farmer's market or the bazaar does not immediately arise. While the abstract concept of the internet in of itself might be the primary reason for this, the unawareness of consumers of their participation in a particular market is another part that is not to be underestimated. The shift of consumers' attention to online markets has come with a shift in their awareness of participation in a larger market and, in extension, in a larger context. Comparing prices, conditions, opportunities, quality, and much more, has never been as available to consumers as today.[1] This is not only due to the large availability of information on the internet as a whole, but also due to vertically integrated platforms that are emerging more and more and form an important part of online competition.[2] The attention of competition authorities has already been triggered as can be seen by the statement of GCA president Andreas Mundt who spoke of vertically integrated platforms as "hybrid platforms with a potential to distort competition"[3].

However, during the process of comparison the consumer is now isolated from the source of information and will most likely not have direct interaction with the merchant that goes beyond communication via e-mail or telephone. It is in this environment that online platforms such as Google, Facebook and Amazon have been able to emerge, benefit and grow. These platforms are the 'Tech Giants' this paper will take as case studies to accentuate the identified issues that online platforms can pose to competition law. With the EU being one of the largest e-commerce markets in the world,

[1] European Commission, *Commission Staff working Document Accompanying document to the Report from the Commission to the Council and the European Parliament 2017 Final Report on the E-commerce Sector Inquiry COM(2017) 229 final* (SWD(2017)154 final 10 May 2017) 4.

[2] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 11.

[3] GCA president Andreas Mundt in an interview with FAZ: https://www.faz.net/aktuell/wirtschaft/andreas-mundt-endspiel-um-die-telekommunikation-15725311.html accessed 5 May 2019.

according to a report by the Commission,[4] it will be the focus of this paper to identify, discuss, and gain an understanding of online platforms in EU competition law.

The first part of this paper will focus on finding a definition of online platforms which stand at the centre of this paper. Different approaches will be taken into account and included, and a working definition will be established.

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1.1 Research questions and aim

The question this paper will address is whether the current legal framework in EU competition law is sufficient to address the emerging challenges regarding online platforms and competition law. The legal framework does mainly consist of Art 101 TFEU and Art 102 TFEU, meaning that the analysis will be conducted in regard to these Treaty articles. Any secondary legislation is, for the purposes of this paper, seen as an expression of the policies that are being pursued in EU competition law and is therefore not at the centre of this paper.

The aim is to identify which challenges online platforms pose to competition law in the EU in comparison to traditional brick and mortar businesses. This paper will further seek to provide possible

[4] European Commission, *Commission Staff working Document Accompanying document to the Report from the Commission to the Council and the European Parliament 2017 Final Report on the E-commerce Sector Inquiry COM(2017) 229 final* (SWD(2017)154 final 10 May 2017) 3.

solutions to address such challenges either through changes in competition policies or, if necessary, through further reaching legislative action.

1.2 Delimitations

This thesis will concentrate on an assessment of online platforms under Articles 101 and 102 TFEU and possible justifications to relevant conduct under these provisions. It will, however, not analyse online platforms in the context of mergers in detail. The mention of mergers will be limited to where relevant case law is of use in the assessment of overall developments in policies regarding online platforms. Such relevant context is especially to be found where data and the use and abuse thereof is concerned.

1.3 Methodology and sources

Theories that determine the understanding of competition law are discussed in order to establish whether there is a need for intervention regarding possible anti-competitive conduct of online platforms. At the forefront of this discussion are Chicago school and Ordoliberalism which are used to determine the possible effects on competition that intervention by competition authorities, national or on an EU level, could have.

By reviewing academic literature and case law, the author seeks to provide an insight to traditional methods of competition law and competition policy. In order to then monitor the issues and identify possible ways to address these issues the focus is then shifted to the analysis of articles rather than published books, as this form of published writing can capture the momentum and current developments more accurately.

2 Online platforms – in search of a definition

When it comes to the subject of this thesis, online platforms, the definition seems to be somewhat unclear. The term is being used freely to describe existing businesses[5] with the only defining factor seemingly being the online environment these businesses are operating in. While this is the lowest common denominator in finding a definition, it is nowhere near sufficient in order to address issues that are inherent to these forms of businesses. A question that arises in this regard is whether online platforms can, in fact, be subject to regulation and enforcement of competition law if there is no precise definition.[6] Keeping in mind that the application of the law does rely heavily on definitions regarding the subjects and objects thereof, this question must be answered in the negative. There can be no regulation of a non-defined area within the law, as this can only lead to legal uncertainty within the competitive process. It is for this reason that one needs to first establish a working definition of online platforms. The most common approach to finding a definition leans on the multi sided business model[7] and incorporates the data accumulation and processing practices, which will both in turn be analyzed below.

2.1 Multi sided market model

Online platforms are most commonly identified by their business model of acting in multi sided markets. The approach chosen to find a definition is therefore incorporating economics rather than staying strictly legal. Platforms operating under this model are active on multiple sides of a market,[8] and facilitate interaction between multiple parties for a fee.[9] Despite the common agreement on there being multiple parties interacting through the platform, the criteria chosen to define multi sided markets besides that are numerous.

One approach to defining multi sided markets is to focus on the parties interacting on the platform and the value they gain through this interaction. Multi sided markets are hence defined by the value obtained by one group of customers increasing through the number of customers on the other side of

[5] David Evans, ‚Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms' (2016) Coase-Sandor Working Paper Series in Law and Economics No. 753, p 2.

[6] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[7] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 10.

[8] European Commission, *Commission Staff Working Document Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market COM(2016) 288 final* (SWD(2016) 172 final), pp 1-9; Bundeskartellamt, *Working Paper – The Market Power of Platforms and Networks Executive Summary*, June 2016 (B6-113/15), pp 1-2; Lapo Filistrucchi, Damien Geradin, Eric van Damme and Pauline Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) Journal of Competition Law & Economics Vol.10(2), 293, p 9.

[9] Pieter Ballon and Eric Van Heesvelde, 'ICT platforms and regulatory concerns in Europe' (2010) TPRC 2010, p 8.

the market.[10] The platform functions and is necessary as an intermediary to internalize this increase in value.[11]

Another proposed definition is focusing on the costs of transactions for each side and is therefore to be categorized as a more economic approach. According to this definition, a market is multi sided if the platform is in control of the volume of transactions through its pricing structure.[12] This means that it can charge more to one side of the market while simultaneously reducing the price for the other side.[13] Transaction costs must, however, be reduced in total for both sides since the value of a platform would otherwise be obsolete.

The definition proposed by Evans and Schmalensee captures both the consumer oriented and the economic approach. A multi sided market is defined by the existence of two or more groups of customers who need each other in some way but cannot capture the value of this mutual need on their own, hence depending on the platform to facilitate interactions and value that would not exist without it.[14] The value is created by coordinating the multiple sides of the market and ensuring that there is enough demand to match the supply and vice versa.[15]

In the proposed definitions, one can identify common features and can thus form the base for a working definition of online platforms.

First, there are two sorts of network effects, or network externalities, associated with multi sided markets: usage externalities, meaning that both sides benefit from the usage, and membership externalities, meaning that the platform is more valuable the more customers it attracts on each side.[16] Second, the platform must facilitate valuable interactions between two distinct groups of customers, reducing the transaction costs for both. And last, the pricing structure of a platform must allow it to enact an asymmetric pricing system for different sides of the market in order to capture the value from the network externalities.[17]

Network effects or externalities as a key aspect of multi sided markets, and consequently of online platforms,[18] can be divided into indirect and direct network effects. Indirect network effects are present when the value or utility of a good or service offered on a market for one group of customers

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[10] Organisation for Economic Co-Operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, *Two-Sided Markets* (DAF/COMP (2009)20), p 11.

[11] Organisation for Economic Co-Operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, *Two-Sided Markets* (DAF/COMP (2009)20), p 11.

[12] Jiang Hao, Zhan Shilin and Shu Zhengang, 'Two-Sided Market Pricing in Operations Management: Review of Current Literature and Research Directions' (2017) CSCanada Management Science and Engineering Vol. 11(4), p 31.

[13] Ibid, p 31.

[14] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol. 1, p 7, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373> accessed on 12 May 2019.

[15] Ibid, p 2.

[16] Ibid, p 6.

[17] Ibid, p 7.

[18] Jean-Charles Rochet and Jean Tirole, 'Two-sided markets: An Overview' (2004), pp 5-6 <https://web.mit.edu/14.271/www/rochet_tirole.pdf> accessed on 28 May 2019.

is dependent on the consumption of said good or service by a different group of customers. [19] Direct network effects exist where the value of a good or service is dependent on the consumption of the good or service by members of the same group of customers. [20] Both direct and indirect network effects are very common in online platforms[21] and must thus be included in a working definition.

The intensity of indirect network effects will have an influence on the pricing structure of the market.[22] Intense indirect network effects result in one side of the market being willing to pay a certain price to access the other side. This will in turn result in the afore mentioned asymmetric pricing scheme, where one side of the market can pay little to nothing while the other side will pay significantly more,[23] overall still reducing the transaction cost for both sides.

A last aspect of multi sided markets is that of multi- and single homing, which describes the consumer's behavior in an environment where several platforms are operating simultaneously.[24] Depending on whether customers of a platform are using multiple platforms, meaning multi-homing, or just one, thus are single-homing, the pricing structures of multi sided markets will be influenced accordingly:[25] if one side of the market is only offering its product or service on a single platform, the other side of the market, which might be multi-homing, has no choice but to make use of that specific platform, creating a 'competitive bottleneck'.[26] This then allows the platform to charge the multi-homing side higher prices. The effects of single-and multi-homing are visible in the case of online platforms.[27] Social networks are just one of many examples where different sides of the market, in this case users and advertisers, are charged with very different prices. A goal of online platforms is thus the optimization of a business model and pricing scheme in order to achieve the minimal threshold of profitability,[28] the critical mass.

[19] Ibid, pp.5-6.
[20] Ibid, pp.5-6.
[21] Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) World Competition: Law and Economics Review Vol. 38 No. 4, 473, p 476.
[22] Marc Rysman, ‚The Economics of Two-Sided Markets' (2009) Journal of Economic Perspectives Vol. 23 No. 3, 125, pp 129-131.
[23] Ibid, p 129.
[24] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.
[25] David Evans, ‚Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms' (2016) Coase-Sandor Working Paper Series in Law and Economics No. 753, pp 8-9.
[26] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, pp 15-16, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373> accessed on 12 May 2019.
[27] European Commission, *Commission Staff Working Document Online Platforms Accompanying the Document Communication on Online Platforms and the Digital Single Market COM (2016) 288 final* (SWD(2016) 172 final), pp 32-43.
[28] David Evans and Richard Schmalensee, 'Failure to Launch: Critical Mass in Platform Businesses' (2010) Review of Network Economics Vol.9(4), 1, pp 3-4.

2.2 Data processing practices and accumulation

While data processing practices and accumulation in connection with online platforms are strongly connected to the multi sided market model, the Commission accentuates their importance in saying that it may give rise to privacy and competition law concerns.[29] When trying to define online platforms, one therefore needs to acknowledge that there is a difference between the access to data in an online context in comparison to traditional businesses. Online platforms are working with a greater mass of data than traditional businesses would ever be confronted with and rely heavily on it, which makes the volume of data a key aspect. While data collection is not confined to online platforms, the volume thereof and the non-transparency of online platforms in that regard are not to be dismissed in a definition of online platforms.

2.3 Conclusion

The foregoing analysis of different attempts at defining multi sided markets and online platforms reveals that there are several similar characteristics that need to be included, as each may be relevant in the legal analysis. Indirect and direct network effects, the pricing structure, consumption patterns of consumers, as well as data practices of a platform need to be included in a working definition. As the Court has stated in *Alianz Hungaria*: "An adequate assessment requires acknowledging the entire legal and economic context of each case".[30] For the purposes of this thesis, an online platform therefore requires the existence of two or more groups of customers who want to interact but cannot capture the value of this interaction without the platform in question facilitating the interaction in the first place. It further requires the existence of network effects, direct or indirect, and a data accumulation and processing practice that exceeds the capability of traditional businesses.

[29] Bertin Martens, ‚An Economic Policy Perspective on Online Platforms' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05 JRC101501, p 12.
[30] Case C-32/11 *Alianz Hungaria Biztosito Zrt and Others v Gazdasagi Versnyhivatal*, ECLI:EU:C:2013:160, para 36.

3 Potential issues – Why are online platforms different?

Online platforms are at the centre of competition law debates in the modern-day economy which means that one has to identify the potential issues this relatively new form of businesses can pose to the application of competition law.

This section will first discuss the difficulties in finding a market definition in the online context and establishing market power in such a market. It will then turn to data related issues by examining the grey zone between competition law and data protection and, finally, the assessment of the competitive value data might have.

3.1 Market definition and market power in an online context

The first challenge in an online context is that of finding a market definition. The traditional approach to finding a market definition relies heavily on economic factors[31] with the methods that are being used reflecting this economic focus. Identifying potential substitutes for a good or service in order to define the market is achieved through cross-price elasticities[32] and the SSNIP test[33], which are both quantitative methods in need of certain prices being set. In the context of online platforms, competition law's trusted methods face the difficulty that goods and services are often offered for free.[34] Such free products cannot be subject to quantitative methods of market definition, as there are no prices that could be cross-referenced.[35] SSNIP test and cross-price-elasticity therefore simply fail in regard to the pricing schemes of many online platforms, where the use of services is free for at least one side of the market.

However, a monetary compensation is not an indispensable factor in finding a market definition as can be seen from cases such as *Microsoft*[36] and *Cisco Systems*[37]. In the cases *Hoffmann-La Roche*[38] and *France Télécom*[39] the Commission has relied on qualitative methods rather than quantitative ones as a basis of a market definition, and does in fact favor them where qualitative methods fail to capture

[31] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 291.
[32] Ibid, p 5.
[33] Small but Significant Non-Transitory Increase in Price (Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 61).
[34] By referring to goods and services being offered for free the author is excluding any non-monetary compensation that might still be charged for the product in question.
[35] Rupprecht Podszun and Stephan Kreifels, 'Digital Platforms and Competition Law' (2016) Journal of European Consumer and Market Law Vol. 5(1), 33, p 35.
[36] Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289, paras 966-970.
[37] Case T-79/12 *Cisco Systems and Messagenet v Commission* ECLI:EU:T:2013:635, paras 65-74.
[38] Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, para 28.
[39] Case T-340/03 *France Télécom v Commission* ECLI:EU:T:2007:22, paras 79-82.

the specificities of a market.[40] This is indicative of the flexibility of competition law in this regard and can prove useful in finding a market definition where online platforms are concerned.

This leads to the second issue of defining a market in an online context: the multi sidedness of online platforms. As online platforms are defined as being active in multi sided markets, one has to turn to the methods adopted for this business model. A common method of defining a market in a multi sided context is to specify which side of the market the conduct in question is taking place in, hence splitting up the platform into multiple smaller markets rather than taking all sides into account.[41] An economic evaluation would, however, not be carried out by splitting up a multi sided market into its multiple sides as separate markets, but rather see it as one single market.[42] This approach would have the risk of not capturing conduct that might have a negative impact on one side of the market while simultaneously having a positive impact on another side, since such conduct would then be neutral in sum.[43]

Another issue in defining the market when it comes to online platforms is their heavy reliance on network effects. Such effects must be taken into account when trying to define the relevant market, as they are indicators for a larger relevant market with multiple sides. While it is still possible that there are multiple markets combined in one platform, network effects pose the issue that no side of the market can be assessed without taking the other side into account.[44]

Finally, the established SSNIP test in a zero-priced market would pose the problem of how to measure an increase in price when it comes to data.[45] A market definition should instead rely on the substitutability of the product or service in question in qualitative rather than quantitative terms.

When the issue of defining a relevant market is overcome, the challenge of measuring market power and the assessment of the relevant market as a whole arises.

Traditionally, the position of a specific actor in the relevant market is derived from the relative size of revenue on said market,[46] and other factors such as p.e. the number of customers,[47] which are then

[40] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 14.

[41] Thomas Höppner and Jan Felix Grabenschröer, 'Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche' (2015) Neue Zeitschrift für Kartellrecht Vol. 4, 162, p 162.

[42] David Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) Yale Journal on Regulation Vol. 20(2), 325, p 340.

[43] Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen Endbericht*, Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi), Projekt Nr. 66/17, pp 95-96.

[44] Rupprecht Podszun and Stephan Kreifels, 'Digital Platforms and Competition Law' (2016) Journal of European Consumer and Market Law Vol. 5(1), 33, p 35.

[45] Dirk Auer and Nicolas Petit, 'Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy' (2015) The Antitrust Bulletin Vol. 60(4), 426, p 443.

[46] Marios Iacovides and Jakob Jeanrond, 'Overcoming Methodological Challenges in the Application of Competition Law to Digital Platforms – a Swedish perspective' (2018) Journal of Antitrust Enforcement Vol. 6(3), 437, p 453.

[47] Eugen Langen and Hermann-Josef Bunte (eds.), *Kartellrecht Kommentar*, 13th edt, Art 102 AEUV, para 49.

used to calculate market shares as an indicator of the overall market power.[48] In an online environment, however, the relative strength of a competitor is hard to measure through this revenue method as the competitive environment can rapidly change. This, in turn, means that market shares become a less relevant indicator of market power than it would be in traditional markets. Alternative measures of market power that have been suggested are the number of daily, weekly or monthly users, the number of platform referrals to sellers, and the market share of products that are offered by a platform.[49]

Another relevant factor in the assessment of market power is that of existing barriers to market entry.[50] What complicates this factor in the online context is the possibility for users to multi-home and the low threshold for simply switching from one platform to another. The constant possibility of users to switch platforms means that current market power can be lost rapidly and makes it difficult to paint an accurate picture of the market power of an online platform.

In order to be able to assess market power correctly, competition authorities need to factor in as many metrics as possible[51] and should always take into account the intense competition and the ever-changing positions of online platforms within the relevant markets.[52]

3.2 Between data protection and competition law

While many online platforms may not ask for monetary reimbursement from at least one side of the market they are acting on, the services they offer are nonetheless paid for in a different currency: personal data.[53] The use of this currency falls into a grey zone between competition law on one side and data protection and privacy laws on the other side. This raises the question whether data related abuses can be addresses under competition law or should exclusively be a matter of consumer protection[54]

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[48] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 14.

[49] Marios Iacovides and Jakob Jeanrond, 'Overcoming Methodological Challenges in the Application of Competition Law to Digital Platforms – a Swedish perspective' (2018) Journal of Antitrust Enforcement Vol. 6(3), 437, p 454.

[50] Organisation for Economic Co-Operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, *Barriers to Entry* (DAF/COMP(2005)42) 6 March 2006, p 9.

[51] Ibid, p 454.

[52] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[53] Viktoria Robertson, 'The Theory of Harm in the Bundeskartellamt's Facebook Decision' (2019) Competition Policy International, p 2 https://www.competitionpolicyinternational.com/wp-content/uploads/2019/03/EU-News-Column-March-2019-Full-1.pdf accessed 2 April 2019; European Data Protection Supervisor, *Preliminary Opinion of the European Data Protection Supervisor, Privacy and Competitiveness in the Age of Big Data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, March 2014, p 10.

[54] European Commission, *Commission Staff Working Document Online Platforms Accompanying the Document Communication on Online Platforms and the Digital Single Market COM (2016) 288 final* (SWD(2016) 172 final), pp 20-21.

Consumers are often unaware of the amount of data they are disclosing and how this data is then being used in order to adjust and develop the service or good, may it be to their advantage or disadvantage.[55] As a result the average consumers might have difficulties in protecting their privacy[56] as they are being targeted for their data specifically and in an often non-transparent manner. This non-transparency also shows in the willingness of consumers to disclose personal data in order to access services that are perceived as free on the surface, which proves to be problematic in terms of privacy laws. This is especially true when taking into account a possible lack of options to switch from one platform to another due to strong network and lock in effects,[57] even though another platform might be more suitable to the consumer's privacy requirements and would meet them more accurately.[58]

While the privacy concerns are apparent when it comes to the disclosure of personal data, the competition concerns are less obvious at first glance. However, when assessing how accumulation and use of data can benefit the online platforms, it becomes clear that effects such as being able to assess risks in the market more accurately or personalizing the offered good or service are valuable assets in the competitive process. Abuse of data is therefore as relevant on the competition side of the law as on the privacy side.

The Commission has, however, made it clear, that there is in fact a distinction to be made between competition law and data protection with regard to privacy, as it has not addressed privacy-related concerns in previous decisions.[59] This distinction is not easy to make and the line between competition law and privacy laws is not a clear one. In fact, data protection laws and competition law are often targeting the same behaviour when it comes to use of data, the only difference being the purpose as to why they are targeting it. The interface between these two areas of the law becomes even more apparent when considering the option of classifying failures regarding consumer privacy as market failures and as such assess them under competition law as harming consumer welfare.[60] Possible forms of market failure in that context could include excessive collection of data and insufficient choices regarding the different needs for privacy consumer might have.[61]

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[55] Aleecia McDonald and Lorrie Faith Cranor, 'Beliefs and Behaviors: Internet Users' Understanding of Behavioral Advertising', Proceedings of the 2010 Research Conference on Communication, Information and Internet Policy 2010, p 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989092> accessed on 29 May 2019.

[56] Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 639, p 641.

[57] Ibid, p 642.

[58] Ibid, p 643.

[59] Case COMP/M.217 - *Facebook/WhatsApp*, Commission Decision of 3rd October 2014, para 164.

[60] Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 639, p 641; German Monopolies Commission (Monopolkommission), Competition policy: The challenge of digital markets, Special Report No. 68, 2015, paras 306-311.

[61] Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 639, p 641.

A possible solution to this unclear distinction could be found in the idea of data portability.[62] This could create an incentive for online platforms to strengthen their privacy policies in order to keep the consumer on the platform while simultaneously keeping the competitive advantage of possessing the consumer's data vis-à-vis the competitors. It seems like privacy and competition concerns could potentially reinforce positive effects on both ends mutually by creating incentives to improvement through competition policy on the one hand and privacy laws on the other.[63] Just like the idea of data portability, stronger privacy laws or policies could lead to more competition between online platforms as strong levels of data protection could be viewed as a desirable factor in choosing a platform for the consumer as well as other participants on the platform.

Having seen the impact that the use of data can have on competition and privacy to an equal extent, the question of addressing data related abuses under competition law must be answered in a differentiated manner. The Commission's stand on not addressing privacy related concerns in its investigations must remain intact in order to not blur the lines of competencies any more than need be. However, data cannot be disregarded in its entirety, as it is a growing factor of competition, which will be shown in more detail below. Data must therefore be addressed under competition law when the purpose of targeting certain practices is not put on protecting the privacy of consumers but rather on the impact a certain policy of an online platform can have on the market structure and the competitive process.

3.3 Competitive value of data

Data is a new resource in the competitive process which is being collected extensively by online platforms and often stands at the core of the online economy.[64] However, the mere accumulation of data in and of itself does not add value to an online platform's market power and it must therefore be analyzed how data can serve as a competitive advantage that goes beyond the mere accumulation and possession thereof.

This holds especially true against the backdrop of former European Data Protection Supervisor Peter Hustinx's stand which he took already back in 2014 that collection and control of data are a source of market power.[65] Market power and data couldn't be separated any longer in 2014, and must not be separated in today's economy either as data is the driving factor behind e-commerce markets as online platforms as well as the decisive factor when it comes to business decisions within the online sector.

[62] Ibid, p 643.
[63] Ibid, p 644.
[64] Ibid, p 639.
[65] European Data Protection Supervisor, *Press Release: Privacy and Competitiveness in the Age of Big Data* (EDPS/2014/06) (Brussels, 26 March 2014).

Analyzing the data that is gathered through various sources proves useful in providing insight into the preferences of consumers or the ventures of competitors. Valuable information which can then be used to adjust the business strategy online platforms are following and make the platforms more relevant to the needs and demands of the market or markets they are operating on.

Another factor of data collection and possession is the creation of indirect network effects through the adjustments that take place based on this data. When platforms are personalizing the consumer's experience and increase the use by one side of the market, a greater involvement of users on the other side of the market is inherent, as the multi sided market model is built on the creation of possibility for interaction.[66] The targeted use of data functions like a catalyst for attracting users to the platform, thereby boosting the demand side of the multi sided market and increasing the economic value market participants can realize from the platform. Marketing techniques can be adjusted to the individual that is targeted which can in turn draw in more consumers through network or lock in effects.

Besides the increased attractivity data can add to a platform, it can also keep potential competitors from entering the market as the accumulated mass of data and the positive impact it can have on the evolving platform model can simply not be replicated. Even if the amassing of the same amounts of data was possible in the long run, this would not prove equally effective as it would often take too long to enable competitors to make an impact based on their own data analysis.

Finally, the pricing structure of a platform can be influenced heavily by the amassed data it possesses and is willing to use. Different consumers can be charged different prices through algorithmic adjustments to the pricing structure. A platform can determine how much an individual consumer is willing to pay by relying on the collected data,[67] which in turn allows for personalized pricing and an optimal payout for the platform as well as consumers that might benefit from lower prices.

While the afore mentioned uses of data are descriptive of the value it can hold, there is an abstract measure of the role Big Data[68] can play in the competitive process: the 4 V criteria, variety, velocity, volume, and value of data.[69] Each criterion holds its own value to it as can be seen in the Commission's *Apple/Shazam* merger decision and must be considered when establishing the overall worth and value of data that is being collected and used by an online platform.

The value of data is not only increasing with the developments in the online environment, it also brings with it a shift in the assessment of market power, which is now inevitably linked to the mass

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[66] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, p 7, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373> accessed on 12 May 2019.

[67] Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, 639, p 641.

[68] While there are multiple definitions of the term 'Big Data' it shall be defined as 'data sets of a very large size' for the purposes of this paper in line with p.e. Caryn Devins, Teppo Felin, Stuart Kauffman and Roger Koppl, 'The Law and Big Data' (2017) Cornell Journal of Law and Public Policy Vol. 27(357), 357, fn 21.

[69] Case M.8788 - *Apple/Shazam* M.8788, Commission Decision of 6 September 2018, paras 318-324.

of data a platform is able to collect and analyze. So-called zero-price markets are not to be mistaken for such any longer, as the competitive value of data is considerable and must be acknowledged in any decision regarding abusive conduct related to data in a competition law context.

4 Need for intervention under Competition Law

Having established potential issues that competition authorities could face in enforcing competition rules regarding the conduct of online platforms, the question remains, whether such an enforcement and intervention is necessary in the first place. This question can only be answered in light of and with the focus on the goals of competition law, as an intervention should be serving the purpose of reaching those goals. There are multiple such goals which have been established for EU competition law and different schools of competition which can be considered in order to reach these goals. This section will therefore first give a broad overview of the goals of competition law and describe the possible approaches under Chicago school and Ordoliberalism as the most prominent schools of competition policy. It will then discuss the possible effects of intervention and non-intervention and will conclude that intervention regarding the conduct of online platforms is indeed necessary and thereby take a stand in line with the ordoliberal point of view.

4.1 Goals and Purposes of Competition Law

This section will give a brief overview as to what the goals and purposes of competition law in the EU are and have been. There are many different views regarding the objectives of competition law in the EU. As a result the importance that is attached to enforcement methods and possibilities is ever changing, as well as the possibility that is given to each actor on the market to defend a certain conduct. The priorities of enforcing competition law in a specific case are to a large extent determined by the goals of competition policy,[70] making it an interdependent play between policy and objectives, each relying on the development of the other.

In the EU's history there has been a shift in the objectives of competition law, as the focus was on market integration in the early years of the Union while today's focus is predominantly on consumer welfare.[71]

The position of market integration as the historically most relevant goal in EU competition law can be seen from the evolution of the Treaties. An integrated internal market is clearly marked as an essential goal of the Union and competition law is described as a means to achieve this.[72] As the internal market is a key parameter of the EU these days and the integration is mostly accomplished,

[70] Laura Parret, 'Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy' (2010) European Competition Journal Vol. 6(2), 339, p 370.
[71] Ibid, p 347.
[72] Ibid, p 346.

market integration has decreased in importance with each development in market integration and is no longer the main focus of competition policy.

Another goal of competition law is to be seen in economic freedom, meaning the ability to act free on a certain chosen market without restraints through unfair or distorted competition. This goal is mainly to be associated with the concept of Ordoliberalism, which tries to protect the market from concentrated power in a single actor and thereby protects the competitive process. By protecting the competitive process, the EU protects the freedom of self-responsible individuals to act and function in a market of their own choosing without restraints.[73] In cases such as *Bayer v Commission* and *United Brands* the Court has acknowledged the importance of safeguarding economic freedom, especially in the context of abusive conduct under Art 102 TFEU.[74] This could potentially be seen as a confirmation of the European focus being set predominantly on protecting the competitor rather than competition itself.[75] While this development could be seen as problematic, it is not a proven method or policy in EU competition law and shall therefore not be further discussed in this context.

A third goal of competition law is economic efficiency, which could be viewed as the overall end-goal of competition policy, when looking at competition from a mostly economic point of view.[76] Economic efficiency is defined as optimum factor allocation, which consists of allocative efficiency and productive efficiency.[77] While allocative efficiency describes the ensuring of efficient allocation of all resources,[78] productive efficiency is defined as the efficiency of a particular firm or industry in ensuring that it exploits all economies of scale and technology in order to cut unnecessary costs.[79] In sum, economic efficiency is therefore the perfect allocation of money, resources, demand, and supply, which is the prerequisite for perfect competition. In naming economic efficiency as a goal, one therefore describes perfect competition as a goal of competition law to some extent. While this might seem circular, perfect competition can be regarded as an umbrella goal, entailing all other goals of competition law, as it concentrates on creating the perfect balance between wants and needs.

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[73] Okeoghene Odudu, *The Boundaries of EU Competition Law: The scope of Article 81*, (2006) Oxford, Oxford University Press, p 14.
[74] Case T-41/96 *Bayer v Commission* ECLI:EU:T:2000:242, para 180 with reference to Case 26/76 *United Brands* ECLI:EU:C:1978:22, paras 182-191.
[75] Eleanor Fox, '"We Protect Competition, You Protect Competitors"' (2003) World Competition Law and Economics Review Vol.26(2), 149, p 149.
[76] Laura Parret, 'Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy' (2010) European Competition Journal Vol. 6(2), 339, p 349.
[77] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, pp 4-6.
[78] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 8.
[79] Ibid, p 14.

This aspect finally leads to the currently most prominent goal of competition law: consumer welfare. While EU and US competition policies are largely different, this goal is common to both,[80] which goes to show that consumer welfare is one of, if not the most important objective for competition authorities in enforcing competition rules. Consumer welfare describes the notion that every benefit of a certain operation carried out by an actor on the market needs to be passed on to the consumer in order to guarantee the best possible outcome for the consumer.[81] The need for protection of the individual consumer vis-à-vis the mostly larger and more powerful competitive forces on the market has been defined as a goal or primary concern of competition by the Court in *GlaxoSmithKline*.[82]
While each of the described objectives is admirable in of itself, it is the interplay between these goals that is the driving force behind competition policies, meaning they all need to be taken into consideration when deciding on the need for intervention in a specific context or a specific case.
Chicago school and Ordoliberalism have taken into account most of the goals that are mentioned in this section and have reached different conclusions as to which approach should be taken in regard to intervening in the competitive process. These different approaches shall be described briefly below in order to gain perspective of the possible outcomes an assessment of the need for intervention could have.

4.2 Chicago School

The Chicago School approach, which was developed by economists at the University of Chicago in the 1970s and 1980s, assumes that rational economic actors seek to maximize their profits by combining the factors available to their evaluation in the most efficient manner.[83] Besides the focus on the manner in which economic actors are expected to act on the market, the market's behavior is included in the Chicago school in assuming that a failure to act in a rational manner will be punished by the competitors.[84] The Chicago school thereby assumes a self-regulation of the market through action and reaction of the actors. This self-regulation of a market is regarded as the ideal that competition law should strive for, posing a heavy emphasis on pricing practices and theories for the markets to function.

[80] RH Bork, Legislative Intent of the Sherman Act, (2006) Competition Policy International 233, originally published in (1966) Journal of Law and Economics 7.
[81] Hans Vedder, 'Competition Law and Consumer Protection: How Competition Law can be Used to protect Consumers even better – or Not' (2006) European Business Law Review Vol. 17, 83, p 83.
[82] Joined Cases C-501/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plx v Commission* ECLI:EU:C:2009:610, para 6.
[83] Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change*, (1991) The University of North Carolina Press, p 107.
[84] Richard Posner, 'The Chicago School of Antitrust Analysis' (1979) University of Pennsylvania Law Review Vol. 127(925), 925, 928.

It is, however, questionable whether this ideal can be achieved in the economy that online platforms are operating in. The ever-changing conditions for competition on these markets seem to make a self-regulating competitive process extremely difficult. First mover advantages are even more pronounced in technological markets than in traditional ones and the establishment of 'champions' in certain fields such as *Amazon*, *Facebook*, *Google*, or *Apple* has considerably shaped the competitive landscape. Not only is self-regulation therefore questionable, it might also lose sight of goals of competition that should be on the forefront in the competitive process such as consumer welfare, as the online market is less transparent and understandable for consumers than ever before.

Whether achievable or not, the Chicago school approach would clearly call for a non-interventionist approach in regard to emerging quasi-monopolistic structures in the competition of online platforms, trusting in the self-regulating power of the competitive process.

4.3 Ordoliberalism

As a contrast to the very liberal and laissez-faire approach to competition of the Chicago school, Ordoliberalism emerged in post-World-War II Germany. It was a reaction to the previous concentration of market power in Nazi Germany as well as the concentrated power under Soviet influence and, as a result thereof, political power in few players on the market.[85] This approach views competition as a necessary component for the economic freedom of individuals, which needs to be protected by controlling private economic and political power.[86] At the core of Ordoliberalism lies a fundamental distrust in both private power and power at a state level, which it seeks to avoid through regulating the market in a way that protects competition.[87]

The freedom to act autonomously on the market[88] is the main goal of the ordoliberal school and is very much in line with the afore mentioned goal of economic freedom. In comparison to the Chicago School approach, the ordoliberal school is therefore much more considerate of social aspects of competition, rather than purely regarding the economic side of it which is trusted to encompass all other goals.[89] It is this consideration of social aspects that can be found in the EU's competition

[85] Ignacio Herrera Anchustegui, 'Competition Law Through An Ordoliberal Lens' (2015) Oslo Law Review Issue 2, 139, p 142.
[86] Ibid, p 142.
[87] Laura Parret, 'Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy' (2010) European Competition Journal Vol. 6(2), 339, p 348.
[88] Rupprecht Podszun and Stephan Kreifels, 'Digital Platforms and Competition Law' (2016) Journal of European Consumer and Market Law Vol. 5(1), 33, p 34.
[89] Ignacio Herrera Anchustegui, 'Competition Law Through An Ordoliberal Lens' (2015) Oslo Law Review Issue 2, 139, p 148.

policies as well, which can be seen from the focus on consumer welfare rather than pure economic motives to promote competition.

When looking at online platforms through an ordoliberal lense, the need for intervention and enforcement of the EU competition rules becomes a necessity considering the growing concentration of power with a few actors in the online market.

4.4 Possible effects of intervention and non-intervention

An analysis of the need for intervention cannot be carried out without considering the possible effects of intervention and non-intervention, thereby establishing the risks of assuming a false-negative or a false-positive[90].

Online markets such as those online platforms are operating on are prone to tipping[91] as the end-goal of these types of businesses is the accumulation of a critical mass of users and building a quasi-monopoly.[92] This is sought to be achieved through the creation of network effects which will in turn lock in users and consumers.

If left without regulation, the process of monopolization of online markets would not be subject to any control. A tipped market would merely cater to one competitor, the monopolist, which might not be harmful in of its own. However, a monopolistic structure of markets is not the desired outcome in regards of efficiency and consumer welfare. These goals are supposed to be protected by the competitive process, as was established before. This protection would neither be guaranteed nor enforced if online platforms were left to operate in an unregulated space, and the achievement of these goals would thereby be left to chance or deep trust in the self-regulating process, much in line with the Chicago School approach.

One aspect that needs to be taken into account when contemplating the need for intervention is that the online platform competition environment is one that can easily change from one day to another. The modalities of the online world make it easy for consumers to switch from one platform to another, mostly without having to endure any additional costs or negative effects. Many actors that have long played a major role in their respective markets are now largely irrelevant[93] which leads to the

[90] False-negative: assumption of negative effects for competition when there are none in reality; False-positive: assumption of positive effects or at least non-negative effects for competition, when there are negative effects (see p.e. Alan Devlin, Michael Jacobs, 'Antitrust Error' (2010) William & Mary Law Review Vol. 52(1), 75, p 79.

[91] Defined as a point in time where network effects may cause the market to 'tip' to a monopoly (see p.e. Howard Shelanski, 'Information, Innovation, and Competition Policy for the Internet' (2013) University of Pennsylvania Law Review Vol. 161(1663), 1663, p 1682.

[92] Rupprecht Podszun and Stephan Kreifels, 'Digital Platforms and Competition Law' (2016) Journal of European Consumer and Market Law Vol. 5(1), 33, p 38.

[93] MySpace, Microsoft Messenger, etc.

assumption that online markets are performance based and might concur to the self-regulatory process of competition without intervention. Further, the innovative progress might be negatively affected by intervention by creating insecurity regarding the barriers of what is allowed in an online context. Last, it is not per se negative to have one dominant platform, comparable to a natural monopoly, if this is what stands at the end of the competitive process as the most efficient solution,[94] an approach that would, however, go against the findings of ordoliberal theories.

4.5 Conclusion

The appropriate and needed degree of intervention into the competitive process has been subject to many theoretical discussions and developments over the years, from Harvard to Chicago School over Ordoliberalism and the likes. While there are many possible ways to address the issues connected to online platforms, competition policy in the EU has not deemed the emerging monopolistic structures among online platforms as per se negative since the multi sided market model is one that allows for procompetitive effects that have the potential to outweigh the negative effects of an emerging monopolization or at the very least neutralize them.[95]

However, an aspect that is not considered under the laissez-faire approach of the Chicago school is the significant first mover advantage through the accumulation and analysis of Big Data. The market might simply not be able to self-regulate in this hyper-evolving environment as network effects, direct and indirect, make it increasingly difficult for potential competitors to enter the market and emerge in a regular way. In short, the Chicago school approach is simply not equipped or developed with the risk of possible failure of the self-regulatory process in mind.

The ordoliberal approach, which traditionally has been a source of EU competition policy, [96] allows for intervention where necessary and can grasp the social aspects connected to the consumer-oriented platform model.

It is therefore the author's view that regulating the conduct of online platforms is necessary in order to protect not only competition as a goal in itself, but many subsequent or intermediary goals related thereto such as those discussed in this section.

[94] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 198.
[95] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 12.
[96] Ignacio Herrera Anchustegui, 'Competition Law Through An Ordoliberal Lens' (2015) Oslo Law Review Issue 2, 139, p 174.

5 Article 101 TFEU in an online context

Having discussed the complex nature of online platforms and the possible issues one could face when intervening in related competition, the application of EU competition rules needs to be established. While not the pre-dominant concern in the context of online platforms, coordinated behaviour among competitors is systematically the first step of consideration in the treaties and shall therefore be the first regulative norm to be analysed.

Art 101 TFEU entails the prohibition of restrictions of competition through coordinated behaviour between competitors and applies both to vertical and horizontal relations.[97] As previously mentioned, online platforms act in multi sided markets and are often vertically integrated, making the threshold of applicability an important step of the assessment.

Further, Art 101 TFEU is applicable to relations with parties that are not active on the same market the prohibited conduct takes place in as long as these relations contribute to the infringement.[98] This becomes especially relevant when platforms are harbouring relations with multiple sides of a market which can be seen as one market or separate markets, depending on the approach taken to market definition.

The conduct in question is then to be qualified as a restriction of competition by object or effect, leading to a difference in treatment regarding the possibility of justification under Art 101(3) TFEU.[99] An infringement of Art 101 TFEU is therefore established through a three-fold application: the jurisdictional threshold must be met, the practice in question qualified as a restriction by object or effect, and a possible justification must be considered. The jurisdictional threshold is met when a coordination in form of an agreement, a decision, or a concerted practice exists.[100] The subsequent classification of this coordination as having the object or effect to restrict competition then has a direct influence on the possibility of justification, as restrictions by object are less likely to be justified under Art 101(3) TFEU,[101] which makes this classification a decisive one.

[97] Joint Cases 56/64 and 58/64 *Consten Grundig* ECLI:EU:C:1966:41, p 342.
[98] Case C-194/14 P *AC-Treuhand AG v Commission* ECLI:EU:C:2015:717, para 35.
[99] European Parliament, *Fact Sheet on Competition Policy,* p 2, <http://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> accessed on 3 May 2019.
[100] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 114.
[101] European Commission, *Commission Notice Guideline on Vertical Restraints* (SEC(2010) 411 final) 10 May 2010, para 47.

5.1 Establishing collusion

The first step of any investigation of a possible infringement of Art 101 TFEU is to establish whether collusion has taken place. Such collusion has taken place in case of an agreement between parties, meaning that there must be a concurrence of wills between at least two parties, the manifestation of which is irrelevant so long as it represents the faithful expression of the parties' intentions.[102]

In the assessment of conduct of online platforms, one can distinguish between two common forms of agreement that can take place: agreements between two online platforms and agreements within the administration of online platforms.

Agreements between online platforms could p.e. take place as interoperability agreements or in the adjustment of a platform's terms of use in order to accommodate the participation on another platform.[103] While the agreements are not anticompetitive per se, they can prove problematic where they include price parity clauses,[104] or require a specific pricing scheme for the cooperation to take place,[105] thereby reducing the economic freedom of both parties.

Agreements regarding the administration of an online platform on the other hand could consist of the exchange of information between administrators and participants of the platform or the participants tolerating the monitoring by the administrator.[106]

While online platforms are differing from traditional businesses in many aspects, it is unlikely that the conceptual meaning of the requirements for establishing collusion need to be altered in this regard.[107] One has to keep in mind, however, that coordination through agreements and decisions of associations can only take place where a form of human decision-making is involved, [108] which might be difficult to prove in the online environment.

Concerted practices, as an alternative to the agreement or decision threshold, have a lower threshold as they require a lower intensity of the collusion that has taken place and are therefore a less demanding way to establish collusion under Art 101 TFEU.[109] But even proving concerted practices

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[102] Case T-41/96 *Bayer AG v Commission of the European Communities* ECLI:EU:T:2000:242, para 69.

[103] An example of participation of a platform on another platform can be seen in the Facebook interfaces such as 'Like' or 'Share' buttons on multiple other platforms and websites such as p.e. Twitter.

[104] Simonetta Vezzoso, ‚Online Platforms, Rate Parity and Free Riding Defense' (2016) in: Paul Nihoul and Pieter van Cleynenbreugel (eds.), *The Roles of Innovation in Competition Law Analysis* (2018) Edward Elgar Publishing, 341, p 341.

[105] Elai Katz, ‚Uber-algorithm alleged to constitute price fixing' (2016) New York Law Journal Vol.225 No.124.

[106] Joachim Lücking, ‚B2B E-Marketplaces: A New Challenge to Existing Competition Law Rules?', (2001) Paper presented at the Conference "Competition Law and the New Economy" at the University of Leicester, 12th-13th July 2001, pp 5 and 8.

[107] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[108] Ariel Ezrachi and Maurice Stucke, 'Artificial intelligence & Collusion: When Computers Inhibit Competition' (2015) University of Illinois Law Review Vol. 2017, 1775, pp 1781-1782.

[109] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 153.

might become more and more difficult through emerging technological developments.[110] Concerted practices are defined as a form of coordination that does not reach the stage of a proper agreement[111] but still requires a form of contact and a common form of conduct as a result of that contact.[112] Contact and common conduct are therefore in a cause and effect relation which is assumed when the parties are aware of the existence of contact[113] and proven if the communication is received by the other party[114]. Once the contact or even communication has been established, there is a rebuttable presumption that coordinated market conduct will follow or has already taken place.[115] Establishing contact and, even further, awareness of such contact is practically challenging in an online environment,[116] given the anonymity that actors can hide behind and the numerous technological options of distorting trails of contact or even the existence thereof.

This gives rise to the question whether it is a workable concept to have the burden of proof lie with the competition authorities in regard to the existence of awareness of contact in online markets or if the burden of proof should be with the undertakings concerned.[117] In the context of digital communication, the procedural rules regarding the burden of proof require an adjustment, as the possibility to produce direct or indirect evidence becomes increasingly difficult.[118] The non-existence of awareness will most likely be easier to proof, especially when undertakings are made aware of the burden of proof being with them, requiring them to keep records of their contacts and digital trails. While such a procedural rule reversing the burden of proof would certainly benefit the effectiveness of EU competition law, one must not lose sight of the presumption of innocence, which is inherent in all areas of the law. It is therefore necessary to find a balanced and proportionate way that is workable in both regards.[119]

A related, yet distinct issue presents itself in the form of automatic pricing and monitoring software which does not require any involvement of the parties beyond the point of installing the software. The results, however, can be the same as they would be through active conduct by a cartel, without

[110] Andreas Heinemann and Aleksandra Gebicka, ‚Can Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age' (2016) Journal of European Competition Law & Practice Vol. 7(7), 431, pp 2-3 <https://www.zora.uzh.ch/id/eprint/129311/1/Heinemann_Computer_Cartels.pdf> accessed on 31 June 2019.

[111] Case 48/69 *Imperial Chemical Industries Ltd. v Commission* ECLI:EU:C:1972:70, para 64.

[112] Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343, para 33.

[113] Joined Cases T-25/95 and others, *Cimenteries CBR v Commission*, ECLI:EU:T:2000:77, para 1849; Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford, Oxford University Press, p 153.

[114] Joined Cases T-25/95 and others, *Cimenteries CBR v Commission*, ECLI:EU:T:2000:77.

[115] Case C-199/92 P *Huls v Commission* ECLI:EU:C:1999:358, paras 161 and 162.

[116] Case C-74/14 *Eturas and others* ECLU:EU:C:2016:42.

[117] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[118] Case C-74/14 *Eturas and others* ECLU:EU:C:2016:42, paras 36-38.

[119] Case C-74/14 *Eturas and others* ECLU:EU:C:2016:42, paras 38-40.

taking the form of an agreement or a decision and therefore not meeting the threshold of application of Art 101 TFEU.[120]

One possibility to address this issue, which has been acknowledged by the Commission in its e-commerce sector inquiry,[121] could be the broadening of our understanding of the term 'concerted practices' as including such practices.[122] Such a broadening would allow for the application of Art 101 TFEU where 'cartel software' is concerned, but it would not come without issues of its own. Competition policy makers would have to give clear guidelines as to whether interactions between software programs could be considered a form of contact, which would then in turn open up the discussion whether awareness of the undertakings using the software is still required or even possible. The possibility of awareness in a scenario of software programs interacting with each other is highly questionable as such programs often make multiple unilateral decisions as a result of their monitoring of the market.[123] Parallel behavior is not sufficient to conclude the existence of concerted practices,[124] and the determination of such practices is made significantly harder when it cannot even act as an indicator any longer.

Where concerted practice and unilateral decisions taken by software have the same effect on competition, it is unsatisfactory to simply accept that such conduct cannot be caught under Art 101 TFEU because the threshold does not cover unilateral decisions.[125] A possible way to address this undesirable outcome would be to focus on whether undertakings are aware of the use of such software and how predictable its impact on price competition is for the undertakings.[126]

While evidence of parallel or common market conduct is largely irrelevant where monitoring software is used, it remains indicative of concerted practices where such conduct cannot be the result of a software's programming. This holds true for aspects of competition that fall outside of pricing parameters, such as privacy or terms and conditions, and have been recognized by the Commission.[127] Non-pricing factors can be summarized as making up the quality aspect of a service provided in a

[120] Ariel Ezrachi and Maurice Stucke, 'Artificial intelligence & Collusion: When Computers Inhibit Competition' (2015) University of Illinois Law Review Vol. 2017, 1775, pp 1808 and 1809; Salil K. Mehra, 'US v Topkins: Can price fixing be based on algorithms?', (2016) Journal of European Competition Law and Practice Vol.7(7), 470, p 473.

[121] European Commission, *Commission Staff Working document – Preliminary Report on the E-Commerce Sector Inquiry* (SWD(2016) 312 final), pp 174-176.

[122] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[123] Ibid, p 10.

[124] Case 48/69 *Imperial Chemical Industries Ltd v Commission*, ECLI:EU:C:1972:70, paras 64-66; Case C-89/85 *A.Ahlström Osakeyhtiö and others v Commission* ECLI:EU:C:1993:120, paras 70-72.

[125] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[126] Ibid, p 11.

[127] Case M.7217 – *Facebook/WhatsApp* Commission Decision of 3 October 2014, paras 87, 102; Case M.8124 – *Microsoft/LinkedIn* Commission Decision of 6 December 2016, paras 349-352.

zero-price market,[128] which allows the assumption that regular methods of establishing concerted practices can be held up in regard to monitoring qualitative aspects of online platforms, but not quantitative aspects.

5.2 Restrictions by object or effect

When collusion has been established in the first step, the next step is to establish whether the coordination restricts competition by object or effect.[129]

Restrictions by object are given when the practices have, by their very nature, the potential to restrict competition.[130] When a conduct is found to be a by-object restriction it is no longer necessary to prove that it has, in fact, anti-competitive effects, meaning that the burden of proof lies with the undertakings to proof the non-existence of anti-competitive effects.[131] The chances of success of such a justification under Art 101(3) TFEU are, however, reduced in case of a by-object restriction.[132] Obvious object restrictions that are classified as highly undesirable to the competitive process include price fixing, output limitation, and market sharing, and have a very slim chance of being found justified.[133]

The Court has taken multiple approaches to assess whether a conduct amounts to a by-object or effect restriction,[134] one of them being the so-called 'quick look'[135]. This test will have to become more elaborate going forward when it is being applied to online platforms,[136] as direct and indirect network effects require a more complex analysis given that each side of a multi sided market has an influence on the other[137].

In *Allianz Hungaria* the Court took the approach that the object of a practice must be observed with regard to all sides of a platform and take into account network effects existing between those sides.[138] This approach would effectively abandon the possibility of carrying out a 'quick test' as the theories

[128] Case M.7217 – *Facebook/WhatsApp* Commission Decision of 3 October 2014, paras 87, 102; Case M.8124 – *Microsoft/LinkedIn* Commission Decision of 6 December 2016, paras 349-352.
[129] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 373.
[130] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Cargimore) Meats Ltd* ECLI:EU:C:2008:643, para 16.
[131] Case C-56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* ECLI:EU:C:1966:38, paras 235, 249.
[132] European Commission, *Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) (OJ C 101/97), para 46.
[133] European Commission, *Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) (OJ C 101/97), para 21.
[134] Case C-32/11 *Allianz Hungaria Biztoito Zrt and Others v Gazdasagi Versnyhivatal* ECLI:EU:C:2013:160, paras 36-38; Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204, paras 49-52 with reference to further case law.
[135] Meaning that if there is a restriction by object it is unnecessary to look at the effects.
[136] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 133.
[137] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol. 1, p 28, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373> accessed on 12 May 2019.
[138] See by analogy Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, para 42.

of harm in multi sided markets have not been developed sufficiently, so that a by-object qualification cannot be carried out without going into some form of effect analysis.[139]

In its *Cartes Bancaires* judgment, the Court carried out an assessment which took into account the intentions of the undertakings concerned to improve the balance between the sides of the platform in light of existing network effects. This approach would make a similar finding of object restrictions impossible for comparable practices, as an effects analysis is inherent to the test, unless the findings would be limited to that specific case.[140]

In light of these two decisions it becomes apparent that conduct on multi sided markets cannot be understood and evaluated without taking into account its effects. It might therefore be necessary to concentrate on by-effect findings in the online platform environment, as an accurate assessment requires a quasi-effects analysis.[141]

Meanwhile, it is not possible to mix or abandon the classification of by object and by effect restrictions, as Art 101 TFEU systematically dictates this distinction, making them alternative in nature.

5.3 Justification

As a last step of the three-step assessment stands the possibility of a justification of the conduct in question under Art 101(3) TFEU, which lies down justification grounds for practices irrespective of their qualification as by object or by effect restrictions.[142] Practices must fulfill all four cumulative criteria under Art 101(3) TFEU[143] and the burden of proof lies with the undertakings concerned, however, it shifts once convincing evidence of compliance with those criteria has been produced by the undertakings.[144]

Under Art 101(3) TFEU the practice must be a contribution to improving the production or distribution of goods or to promoting technical or economic progress and allow consumers a fair share of the resulting benefit. It must further not impose restrictions which are not indispensable to the

[139] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[140] Javier Ruiz Calzado and Andreas Scordamaglia-Tousis, 'Groupement des Cartes Bancaires v Commission: Shedding Light on What is not a 'by object' Restriction of Competition' (2015) Journal of European Competition Law & Practice Vol. 6(7), 495, p 498.

[141] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[142] Case T-168/01 *GlaxoSmithKline Services Unlimited* ECLI:EU:T:2006:265, para 233.

[143] Case C-68/12 *Protimonopolny úrad Slovenskej republiky v Slovenská sporitel´na a.s* ECLI:EU:C:2012:71, para 31.

[144] Case T-168/01 *GlaxoSmithKline Services Unlimited* ECLI:EU:T:2006:265, para 82.

attainment of these objectives, and not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market.

In the case of online platforms as multi sided markets, the first two criteria are practically impossible to fulfill, as the efficiencies must be achieved in the same relevant market as the one the restrictive practice takes place in.[145] This is especially difficult given that the different sides of the market consist of different groups of customers, making it nearly impossible for the same group benefitting of the restrictive practice taking place on the market.[146]

In *Mastercard*[147] the Court seems to have relaxed this requirement in the case of multi sided markets in declaring that evidence of consumer advantage is not necessarily limited to the relevant market but can be considered in combination with advantages in related markets. It was, however, made clear that efficiencies on the relevant market remain a necessary prerequisite and cannot be surpassed by consumer advantage on a neighboring market.

With these difficulties in justifications under Art 101(3) TFEU, the definition of the relevant market becomes even more relevant than before, as far as the burden of proof of efficiencies on that market is concerned.[148] Depending on whether the relevant market is defined as including all sides of the market or considers them as interconnected but separate markets,[149] the possibility of justifying a practice under Art 101(3) TFEU becomes more or less probable.

A way to address this issue without requiring legislative action can be found in line with the Court's approach in *Cartes Bancaires* in balancing out all efficiencies and anti-competitive effects that might occur on all sides of the markets.[150] In order to remain in compliance with Art 101(3) TFEU, the emphasis in such a balancing exercise must be put on efficiencies on the consumer side.

Finally, the fourth condition of Art 101(3) TFEU requires that the proven restrictive practice must not provide the undertakings concerned with the possibility to eliminate competition in a substantial part of the relevant market.[151] In case of online platforms such an assessment might prove to be more

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[145] European Commission, *Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) (OJ C 101/97), para 43.

[146] Gönenç Gürkaynak, Öznur Inanilir, Sinan Diniz and Ayse Gizem Yasar, 'Multisided markets and the Challenge of Incorporating Multisided Considerations into Competition Law Analysis' (2017) Journal of Antitrust Enforcement Vol. 5(1), 100, p 125; Alfonso Lamadrid de Pablo, 'The Double Duality of Two-sided Markets' (2015) 64 Comp Law 5, 6, pp.9-15, <https://antitrustlair.files.wordpress.com/2015/05/the-double-duality-of-two-sided-markets_clj_lamadrid.pdf> accessed on 14 June 2019.

[147] Case C-382/12 P *Mastercard Inc and Others v Commission* ECLI:EU:C:2014:2201, paras 236-240.

[148] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[149] Ibid, p 17.

[150] Ibid, p 18.

[151] European Commission, *Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) (OJ C 101/97), para 105.

complex than in traditional markets as they are inherently prone to tipping. As a result, the assessment of possible elimination needs to include the intensity of network effects, scale economies, congestion limits, differentiation and multi-homing possibilities to get a full picture.[152] At the other side of the spectrum are dynamics that are characterized by intense competition that will possibly prevent tipping and therefore render monopolization unlikely.[153] The system established through these two extremes can be viewed as a steady process within a rotating system where one platform replaces the other. [154] It is therefore not easy to prove that a platform's conduct has or hasn't eliminated competition in a substantial part of the relevant market, making it yet another uncertain factor in the possibility of justification under Art 101(3) TFEU.

[152] Michael Katz and Carl Shapiro, 'Systems Competition and Network Effects' (1994) Journal of Economic Perspectives Vol. 8(2), 93, pp 112-113; David Evans and Richard Schmalensee, 'The Industrial Organization of Markets Based on Two-Sided Platforms' (2007) Competition Policy International Vol. 3(1), 151, pp 164-165.
[153] David Evans and Richard Schmalensee, 'The Industrial Organization of Markets Based on Two-Sided Platforms' (2007) Competition Policy International Vol. 3(1), 151, pp 164-165.
[154] Leslie Daigle, ‚On the Nature of the Internet' (2015) Global Commission on Internet Governance Paper Series no.7, pp 8-9, < https://www.cigionline.org/sites/default/files/gcig_paper_no7.pdf> accessed on 23 May 2019; Case M.7217 *Facebook/WhatsApp* Commission decision of 3 October 2014, paras 118, 125 and 132.

6 Article 102 TFEU in an online context

The more relevant norm in the context of online platforms is that of Art 102 TFEU, the reason being the often-mentioned tendency of online platform markets to tipping and monopolization. The developments of recent years have shown an emerging of 'tech giants' with considerable influence in their respective fields such as *Amazon* or *Facebook*. It is this influence that brings them to the center of attention of competition authorities, and especially sets focus on possible infringements of Art 102 TFEU.

Art 102 TFEU targets restrictions of competition that result from unilateral conduct of undertakings with a dominant market position. Comparable to Art 101 TFEU, the application of Art 102 TFEU also has three stages: the applicability threshold, qualification of the contested conduct and possible justification. In order for Art 102 TFEU to be applicable, an undertaking must hold a dominant position in the relevant market.[155] The conduct is then assessed in a second step and qualified as either exclusionary or exploitative abuse of the dominant position, with the focus of enforcement currently being on exclusionary abuses as they are deemed to be more damaging[156]. Regarding the possibility of justification there is no specific provision comparable to Art 101(3) TFEU. Undertakings can, however, produce evidence of their conduct being objectively justified and put forward efficiency arguments.[157]

6.1 Establishing dominance

The first step in applying Art 102 TFEU is to establish dominance of an undertaking in the relevant market. This is a two-stage process of first defining the relevant market and subsequently assessing the market power of the concerned undertaking on this market.[158]

Factors that need to be considered and might prove problematic when establishing dominance of online platforms are the multi sided market characteristics, the dynamics of the market, and the possibility of changing between online platforms and offline markets.[159] Especially the difference

[155] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford University Press, p 257.
[156] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45, pp 7-20, paras 6-7.
[157] Ibid, paras 28-31.
[158] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford University Press, p 260.
[159] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

between online and offline markets needs to be kept in mind in the assessment of market power in the second stage of establishing dominance. The traditional methods might no longer be adequate or fully suitable in that regard and thus might need to be adjusted to avoid errors in the assessment.[160]

6.1.1 Market definition

As was already addressed, the definition of the relevant market in the online environment and especially regarding online platforms entails many unclarities.

The established working definition of an online platform relies heavily on the multi sided business model which raises the question: Should the market definition include all sides of the platform or concentrate on each side separately?[161] There are multiple approaches to this question which either require a classification of the platform's possible markets as transaction and non-transaction markets,[162] or approach the platform as one market with a specific matching platform, meaning that each side of the platform participates with the aim of interacting with another side[163].

In order to find a working system, one must consider if it is possible to make a general classification of a platform without losing sight of the intricacies of the multi-facetted business models most platforms pursue or if it would be preferable to split the platform into its multiple sides.

Traditional concepts of market definition rely on demand and supply-side substitution, which remains relevant in online platform context where the substitutability can be determined through the functionality of the platform.[164]

If choosing to operate with a single market definition, competition authorities have to evaluate all sides of the online platform's business model in regard to functionality and provide a definition covering all those sides.[165] This, however, would create a large relevant market where dominance of an undertaking would be almost impossible to establish, as a platform model putting equal emphasis on all markets it is operating on is not sustainable yet in the long run. It is more likely that a platform builds a strong market position in one market and later uses that position on vertically integrated markets, which, however, does not amount to the same market position on all markets.

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[160] Julian Wright, ‚One-Sided Logic in Two-Sided Markets' (2004), Review of Network Economics Vol. 3(1), 44, p 61.
[161] Lapo Filistrucchi, Damien Geradin, Eric van Damme and Pauline Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) Journal of Competition Law & Economics Vol.10(2), 293, p 9, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850> accessed on 30 May 2019.
[162] Ibid, p 5.
[163] Bundeskartellamt, *Working Paper – The Market Power of Platforms and Networks Executive Summary*, June 2016 (B6-113/15), pp 5-6.
[164] See analysis of competition in Case M.7217 *Facebook/WhatsApp* Commission Decision of 3 October 2014 and Case M.8124 *Microsoft/LinkedIn* Commission Decision of 6 December 2016.
[165] Bundeskartellamt, *Working Paper – The Market Power of Platforms and Networks Executive Summary*, June 2016 (B6-113/15), pp 5-6.

The second possible approach, splitting up the platform into its multiple markets, requires an individual consideration of functionality for each market and each side thereof.[166] This approach would dissect the business model of online platforms; however, it would allow for a more accurate evaluation of substitutability between different platforms.

When assessing the interchangeability between different markets, a question to be considered is whether such interchangeability should include offline brick and mortar alternatives.[167] It is the authors view that online and offline markets are inherently different with the main difference being the ability of online platforms of reaching by far larger numbers of consumers. This is simply due to the fact of online platforms not being bound to a geographical area and therefore able to operate on a larger scale. While the markets may therefore be interchangeable functionally, the comparability fails in considering the geographical component. Additionally, it is unlikely for customers to consistently rely on so-called 'free-riding' methods[168], as they are more time consuming than simply remaining within one market, online or offline.

Traditionally, interchangeability will rely on quantitative methods like the SSNIP test. However, as was established before in this context, this test faces many difficulties regarding online platforms. Online platforms often operate in zero-price markets, at least for one side of the market, which eliminates the possibility of applying the SSNIP test for that side. A way to circumvent this issue could be to apply the SSNIP test to the entire pricing structure of the platform, which would then be in line with the single market approach, or simply following the multi market method and applying the test to each individual side.[169] If competition authorities see the need to apply the SSNIP test to online platforms, it will need adjustments in light of the pricing structure and the multi sided business model these platforms operate in.[170] As was, however, established before, there are qualitative methods available in order to assess substitutability and interchangeability[171] which should make the SSNIP test mostly obsolete in the online context.

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[166] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[167] Ibid, p 21.

[168] P.e. taking advantage of customer services and treatments that are confined to either the brick and mortar market or online market and then switching to the alternative market.

[169] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, pp 21-23, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373> accessed on 12 May 2019 ; Lapo Filistrucchi, Damien Geradin, Eric van Damme and Pauline Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) Journal of Competition Law & Economics Vol.10(2), 293, pp 34-38, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850> accessed on 30 May 2019.

[170] Sebastian Wismer, Christian Bongard and Arno Rasek, 'Multi-Sided Market Economics in Competition Law Enforcement' (2017) Journal of European Competition Law & Practice Vol.8(4), 257, pp 4-5, <https://doi.org/10.1093/jeclap/lpw082> accessed on 2 May 2019.

[171] See section 3.1.

A final question that was addressed by the German and French competition authorities is that of the role of data in finding a market definition for online platforms.[172] Data is mostly used to improve and expand the range of services online platforms provide in order to gain competitive advantages on a market. While the collection and use of data is therefore a relevant factor concerning competition, it is not to be placed in the context of market definition[173] but rather in the assessment of market power. A remaining possibility to capture abusive conduct in regard to data might be to define a separate relevant market solely for the data side of a platform,[174] this would, however, pose additional burden beside the competitive process to undertakings and treat them less favorable than traditional businesses. Defining a separate market for data is therefore not to be regarded as a proportionate measure and does not provide for an efficient solution in regard to data related abuses.

To conclude on the topic of defining a relevant market for online platforms, it can be said that while there surely need to be adjustments to traditional methods, these can be addressed through policy changes. In sum the challenges of the multi sided business models require a more thorough analysis of the relevant factors but at the same time make platforms more distinguished than traditional businesses. This means that while it might seem like there are several profound difficulties to defining online platform markets, a thorough analysis and research on the economics of multi sided platforms can provide clarity.

6.1.2 Market power

Market power on the predefined relevant market is the key component of Art 102 TFEU and part of the threshold of applicability. In order for Art 102 TFEU to cover a certain conduct, it is necessary for the concerned undertaking, more specifically in this context the concerned online platform, to have a dominant position on the market.

The market power of an undertaking is made up of three pillars that need to be included in the evaluation: actual competition, future competition, and countervailing buyer power.[175] Market shares act as a first indicator of market structures and can form the basis of a presumption of dominance, they are, however, not on themselves sufficient to establish whether an undertaking is dominant.[176]

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[172] Bundeskartellamt and Autorité de la concurrence, *Competition law and data* (10th of May 2016), pp 11-25, < https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed on 25th May 2019.

[173] (unless the provided service is that of collecting and assessing data).

[174] Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) World Competition: Law and Economics Review Vol. 38 No. 4, 473, p 492.

[175] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, paras 28-31.

[176] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 192.

The calculation of market shares of online platforms faces the difficulty that these platforms are operating on several different markets with likely differing market shares.[177] This does, however, not mean that an online platform with low market shares on one market isn't still able to exercise power that it gained through high market shares on another side of the platform in form of asymmetric competition.[178] It is therefore likely that the relevance of market shares as an indicator of market power will be diminished since the dynamics of online markets have shown that market shares can change drastically within short periods of time.[179]

Possible alternatives to market shares as indicators could be to measure the number of unique users that competing online platforms receive,[180] or to measure acquisition patterns[181] in order to gain insight into the changes that are taking place in the market structure.

The focus in the current practice of assessing market power is put on evaluating the barriers of entry for potential competitors, and therefore the possibility of future competition.[182] In line with this approach the GCA has proposed direct and indirect network effects, economies of scale, multi-homing and differentiation, access to data, and innovation potential of digital markets as criteria for assessing market power.[183] The value of Big Data and the access thereto as a criterion of market power are a critically viewed factor in competition,[184] as it was already established that it often falls within the field of data protection laws. What contributes to the uncertainty regarding this criterion is the fact that Big Data can provide a great competitive advantage, but its value can also decrease rapidly without the effective use and incorporation into the business strategy.[185] It is therefore preferable to include the use of Big Data, rather than the mere access, in the evaluation process.

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[177] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, pp 20-21, < http://ssrn.com/abstract=2185373> accessed on 4 April 2019; Jonathan Faull and Ali Nikpay (eds): *The EU Law of Competition* (2014) Oxford University Press, pp 367-368.

[178] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, pp 16-17, < http://ssrn.com/abstract=2185373> accessed on 4 April 2019.

[179] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[180] Bundeskartellamt, *Working Paper – The Market Power of Platforms and Networks Executive Summary*, June 2016 (B6-113/15), pp 9-10;

[181] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[182] Inge Graef, ‚Stretching EU Competition Law Tools for Search Engines and Social Networks' (2015) Internet Policy Review Vol.4(3), p 7.

[183] Bundeskartellamt, *Working Paper – The Market Power of Platforms and Networks Executive Summary*, June 2016 (B6-113/15), pp 9-17.

[184] Andres Lerner, ‚The Role of 'Big Data' in Online Platform Competition' (2014) p 3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780> accessed 27 May 2019; Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) World Competition: Law and Economics Review Vol. 38 No. 4, 473, p 496.

[185] Justus Haucap and Ulrich Heimeshoff, ‚Google, Facebook, Amazon, eBay: is the internet driving competition or market monopolization?' (2014) International Economics and Economic Policy Vol.11(1), 49, p 53.

A common theme among the proposed criteria is their potential to foreclose competition by creating high barriers to entry. This hints toward a shift in the assessment of market power away from focusing on current competition towards future competition.

The third pillar of assessment, countervailing buying power, is also likely to diminish in relevance. Online platforms are facilitating interactions between their users, meaning that there is no one powerful buyer but rather many buyers that make the concept of the online platform workable.[186] The existence of countervailing buyer power would act as a counterpart to high market power of an undertaking, thereby limiting its ability to act in a manner that is independent from the market.[187] This is, however, unlikely in the case of online platforms, as network effects are creating high incentives for the customers to stick with a certain platform and not switching between them.

An issue in establishing market power that has been mentioned in the context of market definition, is the likelihood of over- or underregulating a market, depending on how the market is defined. If the single market approach is taken, a market side with lower market power would be subject to scrutiny under Art 102 TFEU earlier than a traditional one-sided business would be under the same conditions. On the other side the threshold would be too high if dominance would be required on all sides of the market, as this is highly unlikely, even for widely vertically integrated platforms.[188] As established in regard to finding a market definition, the approach taken to this phenomenon of multi sided businesses requires a thorough analysis of the market structures and a degree of flexibility in evaluating the power a platform is really able to exercise. In practice, this might require a shift away from theoretical approaches and a focus on the practicalities of exercising market power.

6.2 Establishing abuse of dominance

The concept of abuse does not have a clear definition in the wording of Art 102 TFEU, but is nonetheless broadly divided into exclusionary an exploitative abuse.[189] Beyond this broad division the concept of abuse has been developed in the case law of the Court through numerous judgments. In *Michelin I* it was established that dominant undertakings have a special responsibility to not allow their conduct to impair genuine undistorted competition,[190]while in *Hoffmann-La Roche* the Court

[186] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.
[187] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, para 18.
[188] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.
[189] Jonathan Faull and Ali Nikpay (eds): *The EU Law of Competition* (2014) Oxford University Press, p 387.
[190] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* ECLI:EU:C:1983:313, para 57.

stated that conduct that hinders competition through recourse to methods different than those of competition on the merits is classified as abuse.[191] Another notable development and clarification has been made in *Post Danmark* in establishing that Article 102 TFEU applies in particular to the conduct of a dominant undertaking that hinders competition to the detriment of consumers.[192] This last judgment specifically involved the aspect of consumer welfare in the classification of certain conduct as abuse and thereby made the definition more diverse than the mere concentration on hindering competition.

Multiple tests were developed in order to find abuse such as the equally efficient competitor test and the no economic sense test.[193]

In *TeliaSonera*[194] and *Post Danmark*[195] the Court recognized the equally efficient competitor test, which classifies conduct as exclusionary abuse if it is "capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking"[196]. While indicative of the abusive nature of the conduct, the equally-efficient, or as-efficient, competitor test is not a necessary condition to establish such conduct.[197]

The no economic sense test is somewhat self-explanatory in its name, as it classifies conduct as abusive when there is no economic sense behind it other than excluding a competitor.[198] This test could be suitable to assess the conduct of online platforms as they are prone to operate in zero price markets on at least one side of the platform, which could be evaluated in regard to economic sense.

These tests rely heavily on the economic side of businesses, meaning that they have to be adapted to the concept of online platforms as multi sided business models given that the economics of such platforms differ remarkably from regular businesses.

The success of online platforms shows in their ability to amass and maintain critical mass, meaning that online platforms have to attract a certain number of users on all sides of the market in order to make the business profitable.[199] Exclusionary abuse therefore occurs where dominant platforms

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[191] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* ECLI:EU:C:1979:36, para 91.
[192] Case C-209/10 *Post Danmark v Konkurrenceråd*et ECLI:EU:C:2012:172, para 24.
[193] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2013) Hart Publishing, pp 227-231.
[194] Case C-52/09 *Konkurrenseverket TeliaSonera Sverige AB* ECLI:EU:C:2011:83.
[195] Case C-209/10 *Post Danmark v Konkurrenceråd*et ECLI:EU:C:2012:172.
[196] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, para 23.
[197] Elisabeth De Ghellinck, 'The As-Efficient-Competitor Test: Necessary or Sufficient to Establish an Abuse of Dominant Position?', (2016) Journal of European Competition Law & Practice Vol.7(8), 544, p 544.
[198] Thibault Schrepel, 'The "Enhanced No Economic Sense" Test: Experimenting With Predatory Innovation' (2018) New York University Journal of Intellectual Property and Entertainment Law Vol. 7(2), 30, p 36.
[199] David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2014) The Oxford Handbook of International Antitrust Economics Vol.1, pp 29-30, http://ssrn.com/abstract=2185373 accessed on 4 April 2019.

prevent other online platforms from achieving critical mass, thereby preventing their participation in the relevant market. [200] A distinction has to be made between conduct that is, in fact, inherent to the business model of the platforms and as such critical to maintaining critical mass, and conduct that is to be considered exclusionary abuse.[201][202]

In the following sections, different established theories of abuse will be explained and their relevance in the context of online platforms will be assessed. The distinction between theories of abuse is often not a clear one, which shows in the largely overlapping classification of the same conduct as different forms of abuse in literature as well as in the later discussion of cases in this paper. The distinctions that are made here are merely one possibility and are not meant to exclude other possible distinctions, which remain equally relevant. The possible forms of abuse are divided into leveraging and self-preferencing, tying and bundling, predatory pricing, and data related abuses.

6.2.1 Leveraging and self-preferencing

Like most forms of abuse, leveraging and self-preferencing are linked to the market power of a dominant undertaking on at least one side of the multi sided platform. Leveraging refers to the transfer of market power from one market to another, neighbouring market, by using the dominant market position on the other market as a lever to promote the own product or service.[203] Self-preferencing describes the placement or promotion of a platform's own products or services on the platform in a manner that gives preference to it in comparison to competitors' products or services.[204]
Leveraging and self-preferencing can be regarded as inherent within each other as self-preferencing can only be relevant in the competitive process when market power from another market is used and leveraging therefore included. Self-preferencing is therefore a form of leveraging that is not expressly mentioned in Art 102 TFEU. It is not an obvious abuse in the online context as it does not explicitly fit any of the cases in Art 102 TFEU, however, the Commission made clear in its *Google Shopping* decision that the concept of abuse is not tied to the examples given in Art 102 TFEU[205].

[200] Ibid, pp 29-30.
[201] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 26 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.
[202] As can be seen from the concentration on exclusionary abuse, it is this form that the author classifies as the most relevant form of abuse in the online platform context. Exploitative abuse will, however, be discussed later on in regard to data.
[203] David Bailey and Laura Elizabeth John (eds.), *Bellamy & Child - European Union Law of Competition* (2018) Oxford University Press, p 902.
[204] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 730.
[205] Case AT.39740 *Google Search (Shopping)*, para 335 and references therein.

A form of leveraging that could be especially relevant for online platforms is the use of data that is gathered on one side of the platform. Such data can then be used on another side of the platform in order to elevate the market power. This can either be done by giving preferred treatment to the own product, self-preferencing, or using the data in order to gain further information which can significantly reduce the risks connected to entering another side of the platform. It needs to be kept in mind that this form of leveraging is, again, depending on the approach that is taken to market definition. Leveraging can only be described as such if market power is transferred from one market to another. When taking the 'one market' approach to an online platform, leveraging within the platform cannot be addressed under the current competition laws. It is therefore, in line with the prior assessments, advisable to divide the platform into separate but linked markets. Only this approach would make it possible to capture leveraging abuses within the platform.

It is, however, questionable whether self-preferencing as a form of leveraging can be classified as abuse per se. It would also be possible to simply regard it as an advantageous business strategy given the positive effects for business.

Going even further, it is questionable whether self-preferencing can be classified as abuse, if there is no duty for the online platform to deal to begin with. Duty to deal is, however, only present when the platform constitutes an essential facility, which is assessed through a three-step test laid down by the Court in *IMS*[206]*:* the refusal is preventing the emergence of a new product for which there is a potential consumer demand, it is unjustified under objective considerations, and it will exclude any competition in the market or eliminate competition in a secondary market.[207] It is unlikely that an online platform will satisfy all three criteria, as the exclusion of any competition is impossible to achieve with the rapid developments in the online environment, seeing the emergence of new competitors at all times. Given that online platforms do not fulfil the *IMS* criteria, they can therefore not be considered essential facilities and are under no obligation to deal.

Under these circumstances one could consider that self-preferencing would be preferable to the complete refusal to deal, as the dominant undertaking is not under the obligation to deal and can therefore not be forced to further strengthen its direct competitors on the downstream market.[208] This argument does, however, not hold up when taking into account the special responsibility of dominant undertakings[209]. This special responsibility is only elevated upon entering into business relations with competitors on a related downstream market. When refusal to deal is therefore out of the picture this

[206] Case C-18/01 *IMS Health* ECLI:EU:C:2004:257.
[207] Ibid, paras 38 and 52.
[208] Bo Vesterdorf, ‚Theories of Self-Preferencing and Duty to Deal -Two Sides of the Same Coin?' (2015) Competition Law & Policy Debate, 4, p 6.
[209] Case 322/81 *Michelin NV v Commission* ECLI:EU:C:1983:313, para 57.

does not mean that self preferencing can be seen as a less intrusive alternative. It has to be seen for what it is: a harmful manipulation of the competitive process.

6.2.2 Tying and bundling

Tying and bundling are subject to scrutiny under Art 102(d) TFEU and as such are directly derived from the wording of the Treaty. Tying occurs where one product, the tying product, is sold under the condition that the purchase is combined with the purchase of a second, the tied, product, with the tied product being the only one that can be purchased separately.[210] Bundling is the offer of two separate products in a package or, as the name would suggest, a bundle, therefore constituting a single sale.[211] The General Court laid down a legal test in *Microsoft*[212] in order to establish the existence of tying as a form of abuse. Under this test, the concerned undertaking must have a dominant position in the tying market, it must be tying two distinct products, the consumer is coerced into purchasing both the tying and the tied products, the tie has an anti-competitive effect, and there is no objective justification for the tying.[213] The same test is used for bundling with the difference that the criterion of consumer coercion is not required for bundling.[214]

The Commission considers two products to be distinct when there is proof that in the absence of the tie the consumers would buy the tying product without the tied product from the same supplier, or when there is evidence of many competitors that offer the same products or service on an individual basis.[215]

Being in an online environment, there are numerous difficulties regarding the assessment of the existence of tying or bundling. Especially in zero price markets, one can have difficulties in following the *Microsoft*[216] test, given that consumers are prone to accept free products or services in a tying or bundling situation, even when presented with an alternative by a different supplier. The objective justification can therefore easily be made under consumer welfare considerations, as the consumer gets more products or services, which is objectively beneficial.

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[210] Aleksander Maziarz, 'Tying and Bundling: Applying EU Competition Rules for Best Practices' (2013) International Journal of Public Law and Policy Vol. 3(3), 263, p 1, <https://www.researchgate.net/publication/264822114_Tying_and_bundling_Applying_EU_competition_rules_for_best_practices> accessed on 20 May 2019.
[211] Ibid, p
[212] Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289.
[213] Ibid.
[214] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2013) Hart Publishing, p 616.
[215] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, para 51.
[216] Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289.

Another difficulty lies in defining which is the tying and which the tied product, as this distinction could make the difference between abusive conduct and legitimate business practice, depending on the platform being dominant or not.

In this context a policy change needs to be considered, as it would be easier and more practicable to recourse to proof of bundling rather than tying in online platforms. This would then circumvent the problem whether the assessment of a tying situation is possible in a clear and precise manner or if it is, to the contrary, not possible at all.

It can be seen from the foregoing, that the concept of bundling is prone to become more relevant in the context of online platforms, while tying is likely to diminish in importance when it comes to zero price markets.

6.2.3 Predatory pricing

Predatory pricing is defined as an undertaking's strategy of deliberately concurring losses or foregoing profits in the short-term in order to drive one or multiple existing or potential competitors out of the market, thereby strengthening its market position and causing consumer harm.[217]

In *AKZO v Commission*[218] the Court introduced a legal test for establishing the existence of predatory pricing. According to the Court's judgment an undertaking is presumed to abuse its dominant position when it is charging under AVC or when it is charging above AVC but under ATC[219].[220]

When assessing the prices that are charged by an online platform, the entire pricing structure has to be taken into account, which in effect requires a new approach to the establishment of predatory pricing.[221] As it is common for online platforms that one side of the market is receiving services free of charge while the costs are retrieved from the other side, it is not easy to separate predatory pricing from legitimate pricing structures.[222]

One has to take into consideration all sides of the market as only focusing on the side that receives services free of cost will automatically result in an assumption of predatory pricing under the *AKZO* test since zero price access is inevitably below AVC.[223] In the circumstances present in most online

[217] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009/C45/02), OJ C 45 pp 7-20, para 63.
[218] Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286.
[219] AVC meaning 'average variable cost' and ATC meaning 'average total cost' (Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 734).
[220] Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286, paras 70-72
[221] David Bailey and Laura Elizabeth John (eds.), *Bellamy & Child - European Union Law of Competition* (2018) Oxford University Press, 10.072.
[222] See European Commission, *Commission Staff Working Document Online Platforms Accompanying the Document Communication on Online Platforms and the Digital Single Market COM (2016) 288 final* (SWD(2016) 172 final), p 5.
[223] Amelia Fletcher, ‚Predatory Pricing in Two-Sided Markets: a Brief Comment', (2007) Competition Policy International Vol 3 No. 1, 221, p 223.

platforms, below AVC predatory pricing can therefore only be assumed if the sum of the compensation from all sides of the market is not sufficient to cover the costs incurred.

In *Post Danmark* the Court stated that, in absence of evidence of below AVC pricing, intent of exclusionary behavior can be assumed if the pricing scheme is likely to exclude an equally efficient competitor.[224] This development is especially important for competition on and between online platforms, given the zero price business strategies. In these zero price markets, the non-pricing aspect can be regarded as a new form of predatory pricing[225] that is no longer measurable through the traditional methods of the *AKZO* test, but needs to be addressed, nonetheless.

But how to address predatory pricing where there is no pricing to begin with? Approaches to predatory pricing on online platforms need to account for the multi sided aspect as well as the zero-price aspect equally in order to guarantee an accurate evaluation.

One possibility would be to adapt the equally efficient competitor test in such a way as to see whether competitors could sustain the same pricing strategy. Given the multi sidedness of online platforms, the difficulty arises whether to apply the test to each side of the platforms separately or take into account the whole pricing structure with regard to possible adaptations if the zero-price side of the platform cannot sustain itself any longer. The latter approach is the only one taking into account that multi sided platforms can support another vertically integrated side by adapting the pricing structure. Therefore, it is not only the preferable approach to assess the pricing structure of the whole platform when applying the equally efficient competitor test, but necessary to reach conclusive results.

The Commission has taken the approach of assessing whether a platform deliberately incurs short-term losses as a strategy to obtain or maintain dominance on the market and to foreclose it in the long term.[226] While this strategy is much in line with the very core of what is defined as predatory pricing, it will often be difficult to prove whether a business strategy is implemented for said reasons or merely a means of competition on the merits. Another issue in following this approach is the difficulty in proving the predatory pricing schemes online platforms may implement. The use of complex software makes it possible in theory to adjust prices to each customer and side of the platform,[227] meaning that certain customers could be facing the predatory prices while others will not due to different calculations of the software. In order to avoid a lack of enforcement of predatory pricing schemes in this regard, the approach needs to acknowledge the ever-changing technological possibilities. While it might not be possible to hold the platform accountable for the actual implementation of differing

[224] Case C-23/14 *Post Danmark* ECLI:EU:C:2015:651, para 66.
[225] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2013) Hart Publishing, p 645.
[226] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, para 63.
[227] Ariel Ezrachi, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (2016) Harvard University Press, pp 89-90.

predatory prices, the installation of the software doing so can be traced back to human decision-making processes. It must therefore be held in mind that each new development requires an adjustment of enforcement strategies.
Predatory pricing remains as relevant as ever, if not more relevant in regard to online platforms, given the common business strategy of keeping one side of the market in the zero-price segment, thereby opening up new possibilities of predation.

6.2.4 Exploitative and/or exclusionary use of data

Possibly the most intriguing issue of virtual competition is that of Big Data and more specifically the abuse thereof. The e-commerce Sector Inquiry has taken on this issue and established that the mass of data that a dominant platform is able to gather can be sensitive in a competitive context when paired with abusive conduct. [228] There are two possible forms in which abusive conduct related to data can take place: exploitative and exclusionary.

Exclusionary conduct is often assumed in so-called refusal to supply cases when platforms refuse to give access to personal data they have accumulated through their users. While this might seem as an obvious example of exclusionary conduct, it does not come without critique. The assessment of such refusals as abusive conduct is based on the essential facilities case law,[229] classifying data as an essential facility for competition on or between online platforms. However, data does not fulfill the criteria to be considered an essential facility.[230] To the contrary, data is described as being non-rivalrous and non-exclusive in nature, meaning that everyone can potentially access data, its importance merely secondary in the development of goods and services, and its value as fast diminishing.[231]
The essential facilities test in *IMS*[232] is therefore not only important in the context of leveraging and self-preferencing, it plays an equally important role in data related abuses. Refusal to supply is thereby only abusive when it concerns input that is indispensable for carrying out business on a related market, excludes any effective competition, prevents the emergence of new products for which there is potential consumer demand, and is not objectively justified.[233]

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[228] European Commission, *Commission Staff working document, Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry* (SWD(2017)154 final), paras 648.
[229] Inge Graef, Yuli Wahyuningtyas and Peggy Valcke, ‚Assessing Data Access Issues in Online Platforms', (2015) Telecommunications Policy Vol. 39(5), 375, p 9, <http://ssrn.com/abstract=2647309> accessed on 15 June 2019.
[230] Andres Lerner, ‚The Role of 'Big Data' in Online Platform Competition' (2014) pp 4-5, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780> accessed 27 May 2019.
[231] Ibid, p 21.
[232] C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* ECLI:EU:C:2004:257, para 38.
[233] Ibid.

As was shown by the joint report of the GCA and FCA, the main issue in case of online platforms is that of indispensability as it needs to be shown that the refused data is unique and cannot be obtained from other sources.[234] The assessment of indispensability therefore requires a decision on whether the data could be reproduced by other means or potentially replaced by a different data set.[235] The non-existence of a potential or actual substitute has been established in *Bronner*[236] in order to describe the indispensability criterion. This would not be met if the reproduction of the data sets or the accumulation of the information therein would require several years, as there would be no value left in the possession of such a data set. It would also be highly unlikely, assumed data can in fact be considered an essential facility, for an online platform to still be competing after several years without such data.

Given the importance that online platforms give to the accumulation of data, one cannot simply dismiss the approach to data as an essential facility. However, the criteria established in the traditional context must be re-interpreted in order to fit the online context.[237] The absolute terms in which the essential facilities test is formulated can, in the author's opinion, not be upheld for online platforms, as the online environment is simply too complex and dynamic. It can therefore be beneficial to introduce a marginal approach to the criteria, meaning that there can be made an assumption of the refused data as an essential facility if it is within certain margins, that yet need to be developed by the Competition Authorities and the courts.

Exploitative abuse as the second form of abusive conduct related to data is captured under Art 102(a) TFEU as the imposition of unfair pricing or unfair trading conditions. It can thus be described as a dominant undertaking imposing unfair or excessive prices on its customers, whichever side on the market they may be on, in order to make profits that it would not be able to make under normal market conditions and in the absence of market power.[238]

A problem that has been encountered in nearly all theories of abuse is also prevalent in this context: the operation of online platforms in zero-priced markets. However, zero-price in monetary terms does

[234] Bundeskartellamt and Autorité de la concurrence, *Competition law and data* (10th of May 2016), p 18, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed on 25th May 2019.

[235] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[236] Case C-7/97 *Oscar Bronner* ECLI:EU:C:1998:569, paras 41-47.

[237] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

[238] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 208.

not mean zero-price in all terms. To the contrary, data is being used as a currency by online platforms and as such is also at risk of being priced excessively, thereby amounting to exploitative abuse.[239]

In *United Brands v Commission* the Court stated that prices are excessive when they have no reasonable relation to the economic value of the product supplied.[240] The test to define whether a price is excessive established in *United Brands*[241] is two-fold: it needs to be assessed whether the price is excessive in comparison to the production costs, and if so whether the price is also excessive in comparison with competing products.

While there generally is an issue in defining the economic value of a product or service,[242] this issue is only enhanced in the online context. In *Scandlines* it was made clear that economic value goes beyond production costs and also entails demand for the product or service in question.[243] Keeping this in mind, in the ever-changing nature of online platform markets demand becomes a non-consistent variable in determining the value of a product or service, given that demand can rapidly change. In addition, demand is a factor on multiple sides of the market, which means that the value of an online platform is measured through the value that each side attaches to gaining access to the other side.[244] This form of value assessment is, however, only possible through retrospective analysis of the platform and may not correctly picture the current state of the platform's value. It is therefore necessary to establish a policy for value assessment of online platforms, which takes the possibility of rapid changes into account. Unless such policy changes take place, there won't be a possibility to establish exploitative abuse in regard to data.

The terms of the law as well as the *United Brands* and *Scandlines* judgments are, however, open enough to the concept of non-monetary compensation and data as currency. This opens up the possibility to adjust the methods of value assessment to the nature of online platforms without requiring a change in established case law or, more importantly, the wording of the treaties.

6.3 Objective Justifications

Unlike Art 101 TFEU, there is no codification of possible defenses or justifications of certain conduct of a dominant undertaking under Art 102 TFEU. The possibility of an objective justification does, however, exist and can include efficiencies arguments, objective necessity and the protection of

[239] John Newman, ‚Antitrust in Zero-Price Markets: Foundations' (2014) University of Pennsylvania Law Review Vol.164, 172, pp 173-174.
[240] Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para 250.
[241] Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para 252.
[242] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, p 762.
[243] Case COMP/A.36.568/D3 *Scandlines Sverige AB v Port of Helsingborg* Commission Decision of 23 July 2004, para 232.
[244] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead' (2017) European Competition Law Review 38(8), 353, p 32 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed on 2 May 2019.

commercial interests.[245] The burden of proof in showing the existence of an objective justification for abusive conduct lies with the concerned dominant undertaking.[246]

An objective justification that needs to be mentioned but is not to be classified as a defense in the stricter sense is that of legitimate business behavior. Competition on the merits is always compatible with the objectives of competition law,[247] meaning that legitimate business behavior will not meet the threshold of abuse and as such is not a justification for per se abusive behavior.

There are, however, other objective factors that can legitimize abusive behavior, even though it does in theory meet the threshold of abuse, one of them being objective necessity. This means that dominant undertakings can be limited in their business choices due to external factors such as general public interest and exceptional business circumstances.[248] General public interest may entail health or consumer safety concerns,[249] leaving the undertaking concerned with little to no choice but acting in a manner that would otherwise be considered abusive. In the online environment objective necessity can primarily be given in the context of protection of consumer privacy and the prevention of intellectual property rights violations.[250] While it might be in the interest of the competitive process for the dominant undertaking to grant access to collected data, this might not be possible due to these privacy concerns. The essential facilities approach could therefore face massive backlash besides the already mentioned difficulties.

Another possibility of objective justification is to resort to the efficiencies argument.[251] The Commission has formulated a test in order to establish whether the efficiencies argument holds up,[252] which was adapted by the Court in *Post Danmark*[253]. According to this four-step test the efficiencies have to, or must be likely to result from the conduct in question which must be indispensable to the realization of such efficiencies, the efficiencies must outweigh any negative impact on competition and consumer welfare in the affected markets, and the conduct must not eliminate effective competition by removing all or most existing sources of actual or potential competition.[254]

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[245] Case T-30/89 *Hilti AG v Commission* ECLI:EU:T:1991:70; Joint Cases C-468/06 to C-478/06 *Sot- Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton*, *formerly Glaxowellcome AEVE* ECLI:EU:C:2008:504; Case C-95/04 P *British Airways v Commission* ECLI:EU:C:2007:166.

[246] Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289, paras 688 and 1144.

[247] Case C-209/10 *Post Danmark v Konkurrenceradet* ECLI:EU:C:2012:172, paras 20-22.

[248] Case 77/77 *BP v Commission* ECLI:EU:C:1978:141, paras 19,26-36.

[249] Case T-30/89 *Hilti AG v Commission* ECLI:EU:T:1991:70, paras 33, 108, 109.

[250] European Commission, *Commission Staff Working Document Online Platforms Accompanying the Document Communication on Online Platforms and the Digital Single Market COM (2016) 288 final* (SWD(2016) 172 final), p 7.

[251] Case T-228/97 *Irish Sugar v Commission* ECLI:EU:T:1999:246, para 189; Case C-95/04 P *British Airways v Commission* ECLI:EU:C:2007:166, para 86.

[252] European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C45/02), OJ C 45 pp 7-20, para 30.

[253] Case C-209/10 *Post Danmark v Konkurrenceradet* ECLI:EU:C:2012:172, para 42.

[254] Ibid, para 42.

The efficiency defense is highly relevant in the online context given that the main purpose of online platforms is to create efficiency for each side of the platform.[255] It is, therefore, likely that the efficiency defense will be brought up when facing an investigation under Art 102 TFEU.

In *MasterCard* the Court stated that the evidence of efficiency is primarily required in the relevant market where the anti-competitive effects of the conduct in question are present.[256] While this is logical for traditional business concepts, online platforms do not operate under such concepts. The implementation of that requirement to online platforms faces the same difficulties regarding the market definition that were already discussed in regard to Art 101(3) TFEU. A way to address these difficulties under Art 102 TFEU would be to put the focus on consumer welfare by assessing whether efficiencies are passed on to the consumer.[257] This would open up the possibility to justify conduct regardless of the market it is taking place in and thereby circumnavigating the pre-dominant issue of online platforms: defining the right relevant market.

It is this approach that gives the right impulses for navigating online platforms in the author's view: finding methods that do not require a strict division between the multiple sides of the platform into different and distinct markets. By shifting away from the strict division and towards a more lenient and flexible approach, the positive aspects of strong players amongst online platforms can be yielded while still allowing for intervention where deemed necessary.

[255] European Commission, *Commission Staff Working Document Online Platforms Accompanying the Document Communication on Online Platforms and the Digital Single Market COM (2016) 288 final* (SWD(2016) 172 final), pp 12-15.

[256] Case C-382/12 P *MasterCard Inc and Others v Commission* ECLI:EU:C:2014:2201, paras 236-243.

[257] European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (December 2005) p 27, <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed on 14 June 2019.

7 Case Study - Amazon Marketplace

The different issues and approaches that have been discussed in the previous sections have been subject to intense debate and scrutiny by national competition authorities and the Commission, as well as the Court. In order to see the practical approach that is being taken towards online platforms, a case study of *Amazon* Marketplace will be conducted in this section. The study of *Amazon Marketplace* is conducted in order to provide an outlook on the possibilities of approaching online platforms in competition law, especially platforms that have a wide global reach beyond the European Union.

7.1 Background

In order to first provide background information for this case study, the Commission's and GCA's practices will in turn be outlined by having a look at the cases *Google Search (Shopping)*[258] and *Facebook Germany*[259].

7.1.1 Google Search (Shopping)

In the *Google Search (Shopping)* case it was held that *Google* abused its dominant market position as a search engine by illegally giving advantage to its own product, the Google Shopping service.[260] The Commission imposed a fine of € 2.4 billion for this abuse.

The Google search engine provides search results to consumers who pay for these results with their personal data.[261] Depending on this personal data it shows advertisements to customers,[262] which is a source of income for *Google* as well as a service to both the advertising party and the customer. By making use of the search engine frequently, the customer gets highly personalized advertisements.

Google entered a separate market for comparison shopping with a product initially called *Froogle* in 2004, which was renamed to "Google Product Search" in 2008 and "Google Shopping" in 2013.[263] The Google search engine is a very well working product on its respective market and as such it was used to give the less successful product "Google Shopping" a significantly better treatment than competitors. This was achieved by providing it a prominent placement in search results while rival products ended up with a lower generic ranking.[264] Such a decrease in generic ranking lead to results

[258] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017.
[259] Bundeskartellamt Decision (B6-22/16), 6 February 2019.
[260] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017.
[261] European Commission, *Statement by Commissioner Vestager on Commission decision to fine Google € 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (STATEMENT/17/1806), p 1.
[262] Ibid, p 1.
[263] Ibid, p 1.
[264] Ibid, p 1.

regarding competitor's products not showing up until page four of the Google search results, while Google Shopping was displayed at the top of the page, above even the most highly ranked results, in a separate box, making it even more visible. The decrease of visibility for competitor's products resulted in a decrease of traffic on the respective sites and an increase in Google Shopping's market power.[265]

This business strategy and conduct was at the centre of the Commission's investigation. The Commission found *Google* to be dominant in general internet search markets in all Member States of the European Union with market shares over 90% in most since at least 2008. It also found that high barriers to entry existed due to indirect network effects created by the high numbers of consumers.[266] This dominant position comes with special responsibilities that dominant undertakings have to bear,[267] which the Commission found to be violated as it concluded that *Google*'s conduct was in fact abusive within the meaning of Art 102 TFEU as it harmed competition in the neighbouring market of comparison shopping.[268] Additionally, the Commission rejected a defence on grounds of efficiency and consumer welfare and concluded that users of *Google* services have been deprived of the benefits of competition, namely genuine choice and innovation.[269] It has been held that *Google* has to give equal treatment to rival products and its own product on a neighbouring market to the one that it is dominant on.

In light of the previously discussed challenges that online platforms can pose for competition law, this case has shown how the difficulties of finding a market definition in a zero-price market for the consumer can play out in an online context. The market assessment that was carried out focused on qualitative methods rather than quantitative ones by evaluating market observations, information provided by *Google* itself, historical development of competitors on the market and questionnaires.[270] Market shares on that market were then calculated based on the number of customers accessing the site and existing network effects which were making market entry immensely difficult for potential competitors wanting to enter the market for general internet search.[271] What could be criticized in this

[265] Ibid, p 2.
[266] European Commission, *Press Release – Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (IP/17/1784), 27 June 2017, p 2.
[267] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* ECLI:EU:C:1983:313, para 57.
[268] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017, paras 27-54.
[269] European Commission, *Statement by Commissioner Vestager on Commission decision to fine Google € 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (STATEMENT/17/1806), p 2.
[270] European Commission, *Press Release – Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (IP/17/1784), 27 June 2017, p 3.
[271] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017, para 453.

market definition is the focus on merely one side of a multi sided platform.[272] As discussed earlier in this paper, however, the tendency in online platform assessments is to split up the platform and concentrate on one side in order to avoid a false positive interpretation of a platform's conduct. This approach is also the one providing the most accurate assessment of the competitive criteria in the Google case since it is not relevant to assess how the advertisers are affected by Google's self-preferencing practice, but rather how it affects the direct competitors on the comparison-shopping market.

To quote Commissioner Vestager: "[this] decision is a precedent which can be used as a framework to analyse the legality of such conduct".[273] This holds especially true given the importance that was attached to the role of Data in the competitive process as well as the clear position that was taken on the market definition issue which is pre-dominant in online platforms.

7.1.2 Facebook Germany[274]

In the case of *Facebook Germany,* the GCA imposed far reaching restrictions on the processing of user data on *Facebook* as it found that its terms and conditions for the collecting and use of data amounted to exploitative abuse of a dominant market position under Art 102 TFEU.[275]

The decision specifically targets the extensive amount of data *Facebook* is collecting and linking to existing accounts, the consent to which is a precondition to use the platform in the first place. At the center of the decision was so-called 'third-party' data from websites that either have an embedded *Facebook* interface (p.e. 'like' or 'share' buttons) or use the *Facebook Analytics* tool.

The relevant market was defined as 'social networks' in Germany, and *Facebook* was found to be dominant with a market share of 95% regarding daily, and 80% regarding monthly active users.[276] In order to define the relevant market, focus was put on the substitutability of *Facebook* and other social networks. While there are multiple other networks that would broadly match the category of 'social networks' on the German market, such as *Snapchat*, *LinkedIn*, *YouTube,* or *Twitter*, none of these

[272] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 15.

[273] European Commission, *Statement by Commissioner Vestager on Commission decision to fine Google € 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (STATEMENT/17/1806), p 3.

[274] Bundeskartellamt Decision (B6-22/16), 6 February 2019.

[275] Bundeskartellamt, *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources* (7 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html> accessed on 14 April 2019.

[276] Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources - Background Information on the Bundeskartellamt's Facebook Proceeding* (7 February 2019) p 4, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6> accessed on 14 April 2019.

offer a sufficient comparability as only parts of *Facebook* compete with these networks, excluding them from the relevant market.[277] *Facebook*'s market position was determined by taking into account direct and indirect network effects, the high barrier to market entry, as well as the position of social networks as 'data-driven' products.[278]

The GCA held that a social network's attractivity is subject to the number of other users that an individual user is able to communicate with, hence creating a so-called 'identity-based' direct network effect.[279]

Additionally, the high number of users and the amount of data collected by *Facebook* has an indirect network effect as *Facebook* is able to supply highly personalized and advertisement opportunities for advertisers.[280]

A result of these network effects, both direct and indirect, is the existence of high barriers to entry on the 'social network' market in Germany.[281]

These findings are traced back to the quality of social networks as data-driven products, with the president of the GCA, Andreas Mundt, stating that "*Facebook* was able to build a unique database for each individual and thus to gain market power."[282] This quote should, however, not be misunderstood as equating access to data with market power. It is merely highlighting the value that data possesses in creating network effects, lock-in effects and high barriers to entry into the market, therefore making it a "crucial factor for economic dominance"[283].

The abuse of a dominant position is seen in the extent to which *Facebook* collects, merges and uses 'third-party' data in user accounts. Emphasis is put on the fact that *Facebook* has a special responsibility as a dominant company[284] and has to take into account that users can practically not switch to other networks. The all-or-nothing approach when it comes to consent to these terms of use is viewed as exploitative abuse, meaning the "earning of monopoly profits at the expense of the customer"[285].

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[277] Ibid, p 4.
[278] Ibid, pp 4 and 5.
[279] Ibid, p 4.
[280] Ibid p 4.
[281] Bundeskartellamt, *Case Summary – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing* (B6-22/16) (15 February 2019), p 7, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3> accessed on 26 April 2019.
[282] Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources - Background Information on the Bundeskartellamt's Facebook Proceeding* (7 February 2019) pp 4 and 5, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6> accessed on 14 April 2019.
[283] Ibid, pp 4 and 5.
[284] Alison Jones and Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials* (2016) Oxford University Press, p 349.
[285] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford University Press, p 208.

This assessment is based on the case law of the Federal Court of Justice (BGH) stating that inappropriate contractual terms may be abusive within the meaning of competition law when they are in violation of a legal principle.[286] While this is expressly stated for principles of the German Civil Code (BGB), the GCA states that the same must be held for violations of data protection principles. *Facebook* is assumed to violate principles of data protection which in this case pursue the same goal as competition law in trying to prevent exploitation by the opposite side of the market.[287] It is on these grounds that the GCA found *Facebook* to be exploitatively abusing its dominant position on the 'social networks' market in Germany.

While there is no comparable concept to the violation of legal principles under German Law in EU law, the GCA decision is nonetheless immensely relevant when it comes to the approach that is taken toward data as a competitive factor. Identity based network effects were directly linked to the collected data as well as the possession of large amounts of such data. The value of data is therefore not only seen in the mere possession thereof but rather in the high barriers to market entry that can be created through the accumulation of data. Going forward it is important that such findings are transferred to an EU level even if the legal basis cannot be the same as in the GCA's decision.
While the assessment of abuse that has taken place in the German decision cannot directly be transferred, it is still possible to capture comparable conduct under EU law. By transferring the relevant case law regarding the concept of imposing unfair conditions[288] to cases of exploitative abuse of data, it can be seen that it would in fact be possible to come to the same finding as the GCA under Art 102 TFEU, even though the reasoning may be a different one. The concept of unfairness has been developed over the years and is somewhat open for interpretation and adjustment through the EU courts, making it possible to address challenges of the digital market under the existing legal framework.

[286]Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources - Background Information on the Bundeskartellamt's Facebook Proceeding* (7 February 2019) p 6, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6> accessed on 14 April 2019.
[287] Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook case for the EU and the U.S.' (2018) Stanford Law School and the University of Vienna School of Law TTLF Working Paper No. 31/2018, p 13.
[288] Case C-27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para 190; Case 127/73 *BRT v SABAM* ECLI:EU:C:1974:25, para 15; Case COMP/34.493 *Duales System Deutschland* (2001) (2001/837/EC) (OJ L 319/1), Commission Decision of 17 September 2001, para 112 (Upheld on appeal in Case T-151/01 *Duales System Deutschland* ECLI:EU:T:2007:154 and Case C-385/07 P *Duales System Deutschland* ECLI:EU:C:2009:456); Case IV/31.043 *Tetra Pak II* (1992) (92/163/EC) (OJ L 72/1), Commission Decision of 24 July 1991, paras 105-108; Case COMP/E-2/36.041/PO *Michelin* (*Michelin II*) (2002) (2002/405/EC) (OJ L 143/1), Commission Decision of 20 June 2001, paras 220-221 and 223- 224.

7.2 Amazon Marketplace – An Outlook

An investigation which is yet to be concluded is that into Amazon as a vertically integrated platform[289], which both provides a marketplace and acts as a merchant on said marketplace itself. The importance of this case can be seen by the fact that there is not only an investigation by the Commission under way, but an additional investigation was carried out by the GCA regarding the German leg of the company, *Amazon Germany*.[290] While the previously discussed decisions have shown a tendency towards wanting to regulate the conduct of online platforms, it remains unclear how much of a precedent is really being set, despite Commissioner Vestager's assessment, and how far the antitrust laws of the EU can reach. This section will first give an overview of *Amazon*'s function and business strategies, as far as possible, and then concentrate on defining possible theories of harm with regard to the previous assessment of Art 101 and 102 TFEU in a digital context.

7.2.1 Function and Strategy

There have been multiple analyses of *Amazon*'s business strategy that allow for an accurate assessment thereof. It is, for example, undeniable that Amazon has developed into a company standing at the center of e-commerce with many other businesses depending on the platform.[291] The fact that *Amazon* still does not generate profits that would reflect this position can be linked to the strategy of pricing its products and services below-price while expanding widely instead.[292]

In the early years *Amazon* invested aggressively leading to a rise in stock prices even though the company made losses. With the vertical integration of multiple business lines came a growing public awareness of *Amazon*'s position in e-commerce, and the possible downsides that such dominance could bring along.

The strategy that *Amazon* pursues is heavily characterized by two elements: the willingness to sustain losses in order to be able to invest at the expense of profits, and as a result of this willingness the possibility to integrate across multiple business lines. Notably, this strategy goes against the Chicago School's assumption that market actors will act rationally and seek to make profit above all else, which would in turn lead to effective competition.[293]

[289] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 13.
[290] Bundeskartellamt Decision (B2 – 88/18), 17 July 2019.
[291] Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal Vol. 126(3), 564, p 803.
[292] Ibid, p 786.
[293] Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change*, (1991) The University of North Carolina Press, p 107.

Amazon has established its market position through a first-mover advantage in the field of e-commerce, which it then further exploited by expanding into multiple business lines and establishing structural dominance.

The expansion into other business lines has mostly taken place through the acquisition of already existing firms,[294] which would otherwise be competitors of *Amazon*. By acquiring such firms, *Amazon* was able to eliminate a competitor while simultaneously broadening its portfolio of services and products, making it even more attractive for potential customers.

This vertical integration made it possible for *Amazon* to become a central infrastructure for e-commerce, making it immensely difficult for potential competitors to find an equally efficient way of competing on such a big scale. Through its function as a central infrastructure, *Amazon* made competitors on different markets dependent on the platform that it's competing on itself. The conflict of interest that may arise is obvious: *Amazon* receives information as a service provider, the marketplace operator, that might be used in order to gain competitive advantage when competing on that marketplace as a merchant.

While the markets that Amazon is operating on are plentiful, it is the view of the author that it is not necessary to strictly define and divide these markets, in line with the approach taken in regard to the efficiency defence under Art 102 TFEU. As such it could be sufficient to establish a flexible market definition, given that there are multiple indicators that *Amazon* is a strong and even dominant player on at least one of the possible markets.

The rapid success in sectors *Amazon* has just entered is one of such indicators of market power along with the vertical integration that is taking place. While the vertical integration in of itself does not speak for particular market power, it does in fact indicate market competition. The possibility for *Amazon* to react to such competition by vertically integrating said competition is then indicative of a dominant structural role.

Lastly, *Amazon* has a significant first-mover advantage in the field of e-commerce infrastructure providers and has established high barriers to entry due to data collection and network effects.[295] All these indicate a strong, and possibly also dominant position, in at least one of the markets *Amazon* is operating on. The approach to defining a relevant market should therefore be flexible in order to capture the extraordinary circumstances that *Amazon* is operating under as a huge beneficiary of the first-mover advantage in the online era. More importantly, *Amazon*'s dominance could be locked in for years to come through the first-mover advantage and the creation of barriers to entry, which needs to be kept in mind in all steps of the assessment.

[294] Lina Khan, 'Amazon's Antitrust Paradox' (2017) The Yale Law Journal Vol. 126(3), 564, p 754 (fn 229).
[295] Ibid, p 772 with further references in fn 316.

7.2.2 Complementary investigations

There are currently two investigations under way into different branches of *Amazon* on a national level in Germany and on an EU level. The investigations by the GCA and the Commission are being treated as complementary investigations, as they concentrate on different aspects of *Amazon*'s business strategy and conduct, while also taking place in differing geographical markets.[296]

The GCA is focusing on conduct that might be abusive vis-à-vis the merchants that use the platform *Amazon Marketplace Germany*.[297] As such the investigation considers the role and power of *Amazon* with regard to its hybrid function, given that *Amazon* is active both as a marketplace and a merchant on this marketplace.[298] Merchants are considered to be dependent on the platform provided by *Amazon* due its widely spread user base. Not using the platform could therefore pose a significant disadvantage while using the platform could still mean a less advantageous treatment of the merchant in relation to *Amazon* itself in its function as a merchant. Another consequence of *Amazon*'s conduct could be a squeeze out due to unfavourable conditions that are made a pre-condition to access the platform in the first place. With these possibilities, the terms of business as well as practices towards sellers are in the focus of the investigation.[299]

The possible relevant market definition could be 'marketplace services for online sales to consumers' according to a press release of the GCA.[300] This relatively wide market definition could work in *Amazon*'s favour, given that it is easier to establish dominance in more narrowly defined markets and vice versa. The investigation was triggered by numerous complaints by sellers. This makes the finding of collusion very unlikely, meaning that the focus of the investigations would be on abuse of a dominant position.

The Commission on the other hand is focussing on the accumulation and use of data by *Amazon*. This is considered problematic under the aspect that Amazon is a widely vertically integrated platform and therefore has access to multiple sides of the market and the data connected thereto.[301] Unlike the German investigations there is no preliminary market definition yet, which might be due to the

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[296] Bundeskartellamt, *Press Release – Bundeskartellamt / E-Commerce Bundeskartellamt initiates abuse proceedings against Amazon* (29 November 2018), p 2, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.pdf?__blob=publicationFile&v=2> accessed on 5 May 2019.

[297] Ibid, p 1.

[298] Ibid, p 1.

[299] Ibid, p 1.

[300] Ibid, p 1.

[301] European Commission, *Press Release: Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (IP/19/4291), 17 July 2019, p 1, <https://europa.eu/rapid/press-release_IP-19-4291_en.htm> accessed on 18 July 2019.

previously mentioned problems in finding such a market definition in the context of online platforms. However, it is likely that the Commission will take an approach comparable to the German approach in *Facebook* and *Amazon*, meaning that that there will be a seemingly broad definition. The main concern in the Commission's investigation is likely to be *Amazon*'s market power and thereby possible misconduct under Art 102 TFEU. While Art 101 TFEU concerns are not completely unthinkable, they are not as likely as abusive conduct under Art 102 TFEU given that a collaboration to the detriment of third parties between *Amazon* and merchants on the platform is unlikely.

While the specificities of the respective investigations are yet to be seen,[302] the next sections will explore potential theories of harm and take into account the identified issues in the previous sections as well as the findings in *Google*[303] and *Facebook*[304].

7.2.3 Potential theories of harm

The theories of harm that will be discussed in this section will, in contrast to the investigations by the GCA, merely take into account Art 101 and 102 TFEU and not consider German legislation. It must be noted, however, that the findings of the GCA in its *Facebook* decision remain relevant in this context and will be considered when establishing possible theories of harm.

7.2.3.1 Art 101 TFEU

The first potential theory of harm is that of restriction of competition through coordinated behaviour between competitors,[305] in this case the exchange of information and coordination between merchants on the platform. The merchants in question include *Amazon* and the investigation would therefore need to establish an agreement between *Amazon* and the other merchants. The main issue lies in the difficulty of establishing *Amazon*'s practice as an 'agreement between undertakings' or a 'concerted practice' with the object or effect of restricting competition between *Amazon* and the merchants using *Amazon Marketplace.*

[302] The NCA has concluded its proceedings in the meantime with the result that *Amazon* will adjust its terms of business for sellers active on its Marketplace. These adjustments are not limited to *Amazon Marketplace Germany* and include updated liability provisions, limitations on blocking and termination of accounts and further updated terms of business, see:<https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html;jsessionid=3FA24E906F055630261D46840A52D193.1_cid378?nn=3591568> accessed on 22 July 2019.
[303] Case AT.39740 *Google Search (Shopping)*, (C (2017) 4444 final), Commission Decision of 27 June 2017.
[304] Bundeskartellamt Decision (B6-22/16), 6 February 2019.
[305] European Commission, *Press Release: Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (IP/19/4291), 17 July 2019, p 1, <https://europa.eu/rapid/press-release_IP-19-4291_en.htm> accessed on 18 July 2019.

It is unlikely that such a classification would hold up given that this would require the knowledge of said anti-competitive effects. By entering into an agreement with *Amazon* the merchants are actively entering the platform's market and are thereby seeking to take part in a competitive process. The terms of this agreement are unlikely to have the object of reducing any kind of competition to the detriment of third parties and are also unlikely to have that effect.
In conclusion neither a restriction by object nor by effect seem likely in this context.

7.2.3.2 Art 102 TFEU

The more relevant and also more likely theory of harm is that of abuse of dominant position. In order to find such an abuse, it is first necessary to establish *Amazon* as a dominant undertaking on the relevant market. The main difficulty in this context is, once again, the definition of the relevant market. The methods of market definition used in the *Google* and *Facebook* cases can be seen as leading the way forward in this investigation with qualitative methods being the decisive factor. A main difference between the mentioned cases and this one is that *Amazon* does not operate on a zero-price market in the same sense that *Google* and *Facebook* do.[306] It may, therefore, not be necessary to completely cut out the SSNIP test in this assessment as was the case in *Google* and *Facebook*, especially when concentrating on one side of the platform[307] in order to establish dominance which could then be abused on another side of the platform.
Such an establishing of dominance could take place by using market shares as an indicator, as is the traditional method, in combination with other factors such as consumer behaviour. Such a factor could be whether a decrease in quality results in a loss of customers. If that is not the case due to the customers not being able or it not being practical to switch to another platform this could be an additional indicator of market power and dominance. The criterion of consumer behaviour is especially relevant for platforms that do not allow for multi-homing to be a practical or needed alternative to single-homing on the platform itself.[308] This is the case with *Amazon* as can be deducted from the high degree of vertical integration.

Provided the market definition and assessment of market conditions leads to a finding of dominance, there are several possibilities to qualify *Amazon*'s conduct as abusive that have been discussed in previous sections on an abstract level.

[306] While services are generally offered for free to customers, *Amazon* has resorted to the 'Prime' model which is offere for monetary compensation; the relations to merchants which are in the center of investigations are not taking place in a zero-price environment themselves.
[307] Raoul Hoffer and Leo Alexander Lehr, 'Onlineplattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle *Amazon*, *Google* und *Facebook*' (2019) Neue Zeitschrift für Kartellrecht Vol. 1, 10, p 15.
[308] Ibid, p 15.

In the first place, and in line with the decision on *Google,* stand the self-preferencing mechanisms[309] *Amazon* is allegedly using. Just like *Google* the allegations are that *Amazon* is offering preferred treatment to its own products. There are, in fact, not a lot of differences between the two cases given that the placement of *Amazon*'s own copycat products under the brand *Amazon Basics* is often very prominent in comparison to competitors' products. In its *Google Shopping* decision, the Commission found that this conduct could not be regarded as competition on the merits which could very well be the case for *Amazon* as well. Such conduct could have similar effects to that of *Google* in that it could block the market entry for competitors and make innovation and consumer welfare a non-necessary part of the competitive process at the same time.[310] The main concern in this regard is that customers of the *Amazon Marketplace* platform cannot directly spot the self-preferencing methods and are therefore often not aware that their behaviour is to some extent being manipulated. In the case of *Google* this form of manipulation was found to be a distortion of competition, [311] indicating that the same finding can be reached in similar cases such as the one at hand.

Second, *Amazon*'s conduct could be found to constitute predatory pricing, meaning a practice of pricing goods below cost and incurring losses in order to reduce or eliminate competition[312]. *Amazon* has its own copycat products that are sold under its own brand *Amazon Basics* for noticeably low prices. This theory would be in line with the previously mentioned strategy of *Amazon*'s growth, which included the incurrence of losses in order to invest in other business lines. However, it is not easy to prove predatory pricing on an online platform since there are variables and algorithms to *Amazon*'s pricing policies that could make a finding of predatory pricing invalid under the aspect of non-existent human decision-making processes. However, even the most complex algorithms are installed and provided by human decision-making, meaning that this issue could easily be prevented by requiring awareness of such a process rather than a specific decision in every step of the chain leading to predatory prices.

Possibly the most relevant theory of harm is that of exploitative use of data, which is also the focus of the Commission's investigation. It is suspected that *Amazon* makes impermissible use of merchant data by using it in order to accordingly adjust its business strategy. This means that information on product launches, market demands and supplies, and other competitively relevant information is

[309] Bo Vesterdorf, ‚Theories of Self-Preferencing and Duty to Deal -Two Sides of the Same Coin?' (2015) Competition Law & Policy Debate, 4, p 5 ; Petit, 'Theories of Self-preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) pp 2-6, < https://ssrn.com/abstract=2592253> accessed on 1 June 2019.
[310] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017, paras 592-593.
[311] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017, para 598.
[312] Richard Whish and David Bailey, *Competition Law*, (2018) Oxford, Oxford University Press, pp 756 and 757.

allegedly being collected in the role of a platform provider and used to increase the success as a merchant on said same platform. The risk of commercial failure with such extensive amounts of information is close to zero, which would in turn give *Amazon* an unfair competitive advantage through the impermissible use of merchant data.

Given that the GCA's *Facebook* decision focused on the use of data as well, the two cases are to some extent comparable. However, there are differences in the pricing structure of these platforms as *Facebook* is merely charging users in data whereas *Amazon* requires monetary payment besides the data from its users, namely the merchants, making the cases less comparable. It is debatable whether the merchants using *Amazon*'s marketplace can expect their data to be collected and used in the same way that *Facebook'*s users can, with data being the only form of payment on the social network. The use of data must be regarded as being less relevant for the functioning of *Amazon*'s marketplace in general and especially for *Amazon* in its capacity as a merchant on its own marketplace. Such use would merely present itself as an unfair advantage to other merchants and cannot be seen as a decisive competitive factor in regard to other merchant platforms.

Possibly even more comparable is the Commission's *Google Shopping* investigation[313] which dealt with similar issues. *Google* used data from its platform provider activities in order to promote its own commercial activities in the search results on its own platform, where it acted as a merchant as well.[314] In both cases the benefit stems from the use of third-party data even though the third party is technically the same company, either *Google*, or in this case *Amazon*, in different functions. Taking the *Google Shopping* decision as an indicator, it is likely that *Amazon* will be found to exploitatively abuse in regard to data. In the long run it is therefore necessary to think about the possibility of dividing entities within a company into own organisational units with zero access to the data of other organisational units. This could prevent data related abuses in this form and would make for an easier chain of proof for both the competition authorities and the companies.

The abuse of data can also be classified as a form of leveraging, meaning "an infringement of Article 102 TFEU committed by an undertaking active in several markets and dominant in one of them, which uses its position on the dominated market to distort competition on the […] related market"[315]. The possibly dominant market position would be that of market provision services in *Amazon*'s position as a platform provider with the related market being the retail market with *Amazon* acting as a merchant.

[313] Case AT.39740 *Google Search (Shopping)*, (C(2017) 4444 final), Commission Decision of 27 June 2017.
[314] Ibid.
[315] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2013) Hart Publishing, p 250.

8 Possible Defences

In order to defend its practice, *Amazon* could recourse to the previously discussed options of defence in the context of Articles 101 and 102 TFEU.
In regard to Art 101 TFEU, a possible justification in the stricter sense of Art 101(3) TFEU could be brought forward in the unlikely case that an abuse under Art 101 TFEU should be found to exist. The efficiencies required by Art 101(3) TFEU cannot be denied in the case of *Amazon*, given that its whole business concept is built on optimizing the distribution of goods to the customer and offering the consumer the best possible price in the process. However, it is unlikely that all of *Amazon*'s practices are absolutely necessary in order to attain these efficiencies. Especially given the discrepancy in power that exists between *Amazon* and the merchants using *Amazon Marketplace*, it is likely that restrictions are in place and have to be endured by the merchants when entering into an agreement, which are not absolutely necessary to attain the efficiencies. These restrictions could in turn be likely to eliminate competition in a substantial part of the market the merchants, including *Amazon*, are operating on. In any case, the existence of a justification in the sense of Art 101(3) TFEU would have to be proven by *Amazon* with the burden of proof being on the undertakings concerned.

In regard to Art 102 TFEU, the first possible objective justification that is likely to be brought forward by *Amazon* is that of legitimate business behaviour, given that it is debatable whether self-preferencing in the way that *Amazon* might be practicing can be regarded as an abuse sui generis or is simply a logical business strategy. The latter could be the case given that *Amazon* is offering similar or even the same products on *Amazon Marketplace* that its competitors are offering. It is thus worth trying to defend the practice by claiming legitimate business behaviour. It is further likely for *Amazon* to claim consumer welfare benefits in the form of efficiencies by bringing forward the direct comparability between products and thereby the high price transparency for customers.
While there are several possibilities to try and justify *Amazon*'s alleged misconduct, it is unlikely that those would hold up given the outcome in comparable cases like the discussed *Google Shopping* and *Facebook Germany*. The tendency seems to be towards a stricter approach once abuse is found to exist and thereby towards setting precedence for online platforms in general.

9 Conclusion

Throughout the analysis of factors that make online platforms a new and complex area in competition law, it has become clear that legal criteria now, more than ever, have to be defined in a more flexible way, allowing for a marginal approach. Economics therefore need to be integrated more in the application of such legal criteria and have to form the central part of the legal assessment. This holds especially true in the light of fast-shifting developments in the online environment, often leaving legal criteria rather unspecific if not filled with more precise economic terms and assessments.

However, this incorporation has challenges of its own, which in turn have proven to complicate the legal assessment.

The level of competition between traditional businesses and online platforms is one of those difficulties, since brick and mortar businesses are often themselves customers of their online competitors in order to keep up with the diversifying demand.[316] Such constellations can barely be measured in strict economic terms and call for a deeper analysis that incorporates both online and offline markets, making the flexibility of legal terms in regard to online platforms an absolute necessity.

Another difficulty that needs to be met with flexible application and interpretation of the legal terms is the connection between market power and turnover. While some online platforms may not, on paper, generate high revenue, their economic value does not reflect this.[317] It is, therefore, necessary to adjust the established metrics for measuring market power, shifting away from revenue-based assumptions and towards more flexible terms, which have been illustrated p.e. in the GCA's *Facebook* case.

Finally, the foregoing analysis has shown that the dynamics of online markets do require an adjustment of the enforcement of competition law. While a laissez-faire approach is, in the author's opinion, not in the interest or to the benefit of competition, a regulation within the findings for offline markets is only possible in a limited number of cases. The enforcement therefore has to be carried out in a much faster and much more dynamic environment, again making the case for the flexibility of competition law enforcement. Strategies and business models that are not profitable for traditional markets have emerged in online platforms and need to be met with new and adjusted enforcement strategies as the current price centric approach has the potential to blur the lines between Art 101 and

[316] Marios Iacovides and Jakob Jeanrond, 'Overcoming Methodological Challenges in the Application of Competition Law to Digital Platforms – a Swedish perspective' (2018) Journal of Antitrust Enforcement Vol. 6(3), 437, p 451.
[317] European Commission, *Press Release – Mergers: Commission seeks feedback on certain aspects of EU merger control* (IP/16/3337) (7 October 2016), p 1.

102 TFEU as well as the distinction between object and effect restriction.[318] Such blurred lines for the sake of keeping up long standing established enforcement strategies need to be eliminated through a shift in competition policies towards a more diverse and modern approach.

While the discussion regarding the incorporation of different parameters in the definition of legal terms has been evolving, as can be seen by the recent and current case law that has been discussed, the legal framework EU competition law is based on has not changed with it. However, this is not necessary in the long run given that the applicability of Art 101 TFEU and Art 102 TFEU is not restricted to the traditional forms of business. To the contrary, these norms have proven to be highly adaptable and flexible in their application. As was seen in the various interpretations by EU Courts as well as the Commission, the Treaties leave room for a progressive understanding and adaptation to the specificities of the digital era.

One adjustment that goes beyond the mere interpretation and adaptation of terms to the new circumstances is the P2B regulation as a new regulatory action.[319] It is intended to strengthen transparency of online platform's terms vis-à-vis their business partners using the platform in order to be able to detect and prosecute forms of abuse more easily. The regulation entails that terms must be clear and transparent regarding all parameters of interaction between the platform and its partners and the treatment of offered products and services.[320] It must further be clear how a ranking system, if in place, is calculating said ranking[321] and a description of access to personal or other data must be given[322]. This regulation, while not a direct amendment of competition rules, addresses the most pressing issues in digital competition, namely the missing transparency and the abuse of data. As such it shows that adjustments in enforcement policy as well as regulation of conduct in online markets can help strengthen competition without over-regulating the competition itself.

Is further regulation, therefore, necessary? When having a look at the most desirable outcome, perfect competition, further regulation would only lead to confusion as the online environment is fast evolving. The more competition is regulated the less effective the competitive process would become itself. Self-regulation by imposing the afore-mentioned transparency requirements seems to be the most effective way going forward as it leaves the choice of interaction to the actors on the market by providing them with the necessary information.

Given the open formulation of EU competition rules, they allow for flexibility and adjustments of the legal definitions where needed. Any insufficiencies arising due to a lack of regulation can be

[318] Julian Nowag, 'When sharing platforms fix sellers' prices', (2018) Journal of Antitrust Enforcement Vol. 6(3), 382, p 402.
[319] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186/57).
[320] Ibid, para 30.
[321] Ibid, para 24.
[322] Ibid, Article 9(2).

addressed through policy changes, which are more flexible than any type of legislation could be at the rapid rate of online innovation and evolution. By making transparency one of the core parameters in interactions with online platforms, a level playing field for competitors and platform providers can be guaranteed to a greater extent than it is being guaranteed now. In conclusion it can be said that the current framework is sufficient to address challenges emerging in regard to online platforms.

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