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# The “Gatekeepers” of heaven A legal analysis of multi-sided platforms

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# TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 BACKGROUND	4
1.2 PURPOSE AND RESEARCH QUESTIONS	5
1.3 DELIMITATIONS	6
1.4 METHOD AND MATERIAL	7
1.5 OUTLINE	8
<b>2 THE RISE OF THE DIGITAL ECONOMY</b>	<b>10</b>
2.1 INTRODUCTION	10
2.2 BIG TECH	10
2.3 SOME OF THE SPECIAL CHARACTERISTICS OF ONLINE PLATFORMS	12
2.3.1 <i>The Defintion of a Platform</i>	12
2.3.2 <i>Multi-Sided Platforms</i>	14
2.3.3 <i>Economies of Scale</i>	16
2.3.4 <i>Network Effects</i>	16
2.3.5 <i>The Role of Data</i>	18
2.4 COMPETITION CHALLENGES CREATED BY ONLINE PLATFORMS	20
2.5 CONCLUSION	22
<b>3 EU COMPETITION LAW AND ONLINE PLATFORMS</b>	<b>23</b>
3.2 INTRODUCTION	23
3.3 THE GOALS OF EU COMPETITION LAW	23
3.3.1 <i>Consumer Welfare</i>	25
3.3.2 <i>Fairness</i>	26
3.4 ARTICLE 102 TFEU	27
3.4.1 <i>Establishing Dominance</i>	28
3.4.2 <i>Market Definition</i>	29
3.4.2.1 Market Definition Issues of Multi-Sided Platforms	31
3.4.3 <i>Market Power</i>	33
3.4.4 <i>Barriers to Entry</i>	34
3.5 CONCLUSION	36
<b>4 THE DIGITAL MARKETS ACT (DMA)</b>	<b>37</b>
4.2 INTRODUCTION	37
4.3 BACKGROUND	37
4.4 DESIGNATED GATEKEEPERS	38
4.5 THE RELATIONSHIP BETWEEN ARTICLE 102 TFEU AND THE DMA	39
4.6 CONCLUSION	40
<b>5 CONCLUSION</b>	<b>41</b>
<b>BIBLIOGRAPHY</b>	<b>43</b>

# List of abbreviations

<b>CJEU</b>	Court of Justice of the European Union (covering the actual composition and pre-Lisbon composition known as the European Court of Justice – ECJ)
<b>DMA</b>	REGULATION (EU) 2022/... OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)
<b>EC</b>	European Commission
<b>EU</b>	European Union
<b>GDPR</b>	Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/59
<b>SME</b>	Small and Medium-sized Enterprises
<b>TEU</b>	The Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union (Consolidated version 2016) OJ C 202/47

# 1 Introduction

## 1.1 Background

It has never been easier to shop, access information, connect with people, or purchase services online than it is today. All thanks to the internet and digital technologies, which have revolutionized both consumers' lives and business models. The COVID-19 pandemic demonstrates the importance of digitalization in the lives of consumers and businesses. Many businesses were able to survive the pandemic because of the online ecosystem, and consumers were able to meet their needs in the same way.

If the internet revolutionized our world, then data, also known as “the new oil” or “the new currency”, is the primary driver in the digital economy of the twenty-first century.<sup>1</sup> From a competition point of view, some may argue that the internet has brought us closer to the notion of perfect competition, “with lower prices, greater choice, lower transaction cost and better-informed market participants”.<sup>2</sup> But with the use of data and the internet as infrastructure, the online type of platforms were born. New challenges were brought up to light that the legislature may not have anticipated. New methods of distorting competition emerged, posing a challenge to competition policymakers.

Many of the first leading online platforms on the digital market have become bigger and more powerful. So much so that they will act as regulators, establishing the rules for accessing their ecosystem and creating

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<sup>1</sup> Graef, Inge, Market Definition and Market Power in Data: The Case of Online Platforms, *World Competition*, Vol. 38, Issue 4, December 2015, p. 474.

<sup>2</sup> Ariel Ezrachi, Maurice E. Stucke, “eDistortions: How Data-Opolies are dissipating the Internet’s potential”, in Guy Rolnik (ed.) *Digital Platforms and Concentration*, Stigler Center, University of Chicago Booth School of Business (2018), 5, <[Digital-Platforms-and-Concentration.pdf \(promarket.org\)](#)> (accessed 13.03.2022).

barriers for new market entrants.<sup>3</sup> Although size and power are not in and of themselves problematic, the possible anti-competitive behaviour would be. Especially since such conduct will undermine some of the benefits the online environment is expected to deliver, such as increased consumer choice and lower prices. Therefore, as digital markets grow competition law plays an increasingly important role in ensuring dynamic competition, especially in preventing anti-competitive behaviour.<sup>4</sup>

Article 102 of the Treaty on the Functioning of the European Union (TFEU) has previously been used to tackle all kind of anti-competitive behaviour posed by dominant undertakings. As a result, the framework has been sufficient in addressing the most pressing competition issues. The framework's application, on the other hand, is *ex-post* and will apply after an abuse has occurred. Online platforms operate in highly dynamic and innovation-driven markets, challenging the *ex-post* application of the framework. A legal tool with an *ex-ante* application may thus be a suitable solution, allowing authorities to intervene before large online platforms violate Article 102 TFEU. That, I believe, is where the recently proposed and agreed-upon Digital Markets Act (DMA)<sup>5</sup> will play a vital role in this regard.

## 1.2 Purpose and Research Questions

The purpose of this thesis is to investigate what tools European Union (EU) competition law has to address competition issues posed by online platforms, as well as what complementary role the DMA can have in light of Article 102 TFEU. In order to achieve this purpose, the following research questions will be used as guidelines:

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<sup>3</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 9.

<sup>4</sup> OCED Report, “*Handbook on competition policy in the digital age*”, 2022, p. 19.

<sup>5</sup> (“Regulation of the European Parliament and of the council on constable and fair markets in the digital sector (Digital Market Act)”).

- (i) What makes multi-sided platforms so powerful and problematic from a competition perspective?
- (ii) Is Article 102 TFEU sufficient the way it is today to address the competition issues posed by multi-sided platforms?
- (iii) Is the new DMA an appropriate solution to the exposed problems and does it fill the gaps left by Article 102 TFEU?

## 1.3 Delimitations

As previously mentioned, this thesis attempts to investigate what tools EU competition law holds to tackle issues posed by online platforms. Despite the fact that there are various types of platforms, this thesis mainly focuses on competition issues that arise from multi-sided platforms. Thus, when referring to online platforms what is meant is multi-sided platforms.

Multi-sided platforms are distinguished by specific economic characteristics, which have implications for an antitrust analysis. Therefore, while the thesis has a legal perspective, a significant portion of it is devoted to explaining the most important and distinguishing economic characteristics they possess. Furthermore, local, and international competition authorities have identified challenges to effective competition posed by online platforms; for the purposes of this thesis, the choice has fallen on highlighting challenges identified by the Nordic competition authorities in their *"Digital platforms and the potential changes to competition law at the European level"* report from September 2020. The main reason for the selection is that the Nordic competition authorities are made up of five countries and play an important role in shaping competition policy, although it falls within the EU's exclusive competence.

EU competition law is underpinned by many objectives, but consumer welfare has been the primary goal in recent years. With the introduction of the DMA, one could conclude that fairness as an objective is becoming

more central. The thesis will therefore mainly focus on these two objectives in respect to multi-sided platforms.

Article 102 TFEU requires the fulfilment of five criteria. There must be an *undertaking* that has *abused* its *dominant* position in the *internal market* or a *substantial part* of it, and the anticompetitive conduct may *affect* trade between Member States. To address abusive behaviour posed by dominant multi-sided platforms, all criteria must be met. The first step in an Article 102 TFEU investigation is to determine whether the undertaking concerned is dominant. The analysis in this thesis is therefore limited to the establishment of an undertakings dominant position. Although some comments will be made about abusive behaviour, the main issue is how the economic characteristics influence the dominant criteria. Failure to conduct a proper analysis of an undertakings dominant position renders the article inapplicable, since abusive behaviour may not be considered problematic if the undertaking in question is not deemed dominant.

## 1.4 Method and Material

As previously stated, the main purpose of this thesis is to investigate what tools EU competition law has to address competition issues posed by online platforms. The legal dogmatic method is best suited to achieve this goal. Legislation, case law, preparatory works, and legal dogmatic literature serve as the foundation for the traditional legal dogmatic method.<sup>6</sup> All of which have been used in this thesis. The method is best suited since the thesis will examine the current legislation to assess whether the EU competition law framework is adequate the way it is today.

EU legal sources will be used throughout this thesis. These are divided into primary and secondary legal norms. The treaties, as well as their annexes and protocols, are the primary norms. All EU institutions and Member

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<sup>6</sup> Nils Jareborg, Rättsdogmatik som vetenskap, SvJT 2004 p. 1-10, p. 8.

States are bound by these primary legal norms, which take precedence over all other sources of law. The secondary norms consist of directives, regulations, decisions, opinions and recommendations.

Case law from both the General Court and the European Court of Justice (CJEU) has been referred to. Case law is in principle binding and has a strong legal basis value. The practice of the EU courts takes precedence over that of the member states legislation.

Other form of materials, such as doctrine, articles and websites has also been used throughout the thesis.

## **1.5 Outline**

Following the introductory chapter, the reader will be introduced to the second chapter, “The Rise of the Digital Economy”, which provides for a contextual background on the functioning and economical characteristics of online platforms. Understanding the economical characteristics of online platform is crucial for conducting an antitrust analysis that will reflect the business realities created by their business model. Moreover, the chapter highlights some of the challenges posed by online platforms.

The third chapter, “EU Competition Law and Online Platforms”, introduces the reader to the objectives of EU competition law and the functioning of Article 102 TFEU. It is critical to understand what the EU hopes to achieve by regulating anti-competitive behaviour of businesses in order to understand what interests in society and the internal market it is supposed to safeguard. A more in-depth analysis and discussion regarding the role of market definition is provided for as well. Market definition is an important tool in determining the dominant position of an undertaking. Failing to take into consideration the economical characteristics of online platforms could result in a too wide or too narrow definition of the relevant market. This, in turn, will influence whether an undertaking is deemed dominant.



The fourth chapter, “The Digital Markets Act (DMA)”, will examine the objectives of the DMA as well as how the term “gatekeeper” is defined in the regulation. There will also be a brief discussion of the relationship between the DMA and Article 102 TFEU .

The fifth chapter, “Conclusion”, includes my final findings and the answers to my research questions.

# 2 The rise of the digital economy

## 2.1 Introduction

Competition is considered the favoured model for ensuring that the economy serves the needs of the citizens and society.<sup>7</sup> In order to be able to tackle competition issues taking place in the digital economy one has to understand and differentiate the economical key features of online platforms. Online platforms are fundamentally business models, but the effect of their characteristics combined, created challenges for competition policy. They consist of many complicated factors and concepts. This chapter serves as an explanatory chapter, providing details on the economic background to add value to the legal discussion of digital platforms and to understand the source of the problems they create for competition.

## 2.2 Big Tech

Before providing the reader with a more in-depth understanding of the dynamics in the digital ecosystem, one must first mention giant tech companies. The acronym GAFAM refers to Google, Apple, Facebook, Amazon, and Microsoft.<sup>8</sup> With a combined revenue of \$ 1.379 trillion in 2021<sup>9</sup>, these five tech companies could be said to rule the digital world as we know it today.

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<sup>7</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, p 15.

<sup>8</sup> Petit, N., 2020. *Big Tech and the Digital Economy: The Mologopoly Scenario*, Oxford, United Kingdom: Oxford University Press, p. 5.

<sup>9</sup> Chaim Gartenberg, 'Big tech's 2021 earnings were off the chart 2021 had big challenges, but bigger revenues' (*The Verge*, 11 February 2022) <<https://www.theverge.com/2022/2/11/22925859/big-tech-companies-2021-earnings-record-revenue-apple-amazon-alphabet-meta>> accessed 3.04.2022

These five tech companies are at the heart of the digital economy's rise. Especially since hyperconnectivity is considered the backbone of the digital economy.<sup>10</sup> What is special about them is that they use cutting-edge technology to improve what we were already doing, and they have continued to evolve until they made it almost impossible to function without them. They dominate global markets in digital search, advertising, cloud infrastructure, social media, and other areas. They have dominated the global market for so long that they have developed the ability to recognize potential rivals and acquire them through so-called “killer acquisitions” to avert genuine competition.<sup>11</sup>

The term "killer acquisitions" refers to when a company acquires a competitor only to terminate the target's innovation projects in order to prevent future competition from emerging.<sup>12</sup> Amazon's acquisition of rival Quidsi Inc. in 2010 is an example of such conduct. A Quidsi Inc. subsidiary named Diapers.com sold baby products and was a profitable company that competed with Amazon specifically in the diapers market. The company had figured out how to turn diapers into a profitable business. Amazon thus presented Quidsi Inc with the opportunity to sell its company to Amazon, but they turned it down. As a result, Amazon launched an aggressive price cut in the diaper market, which caused them to lose money and prevented Diapers.com from matching their rates. They were ultimately compelled to sell the business to Amazon, who eventually shut down Diapers.com.<sup>13</sup>

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<sup>10</sup> Damian Heath and Ludwig Micallef, 'What is digital economy? Unicorns, transformation, and the internet of things' (*Deloitte*) <<https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html>> accessed 3 April 2022

<sup>11</sup> Moore, M., Tambini, D. & Brogi, E., 2022. *Regulating big tech: Policy responses to digital dominance*, New York, NY: Oxford University Press, p. 1.

<sup>12</sup> OECD website <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm>

<sup>13</sup> Petit, N., 2020. *Big Tech and the Digital Economy: The Moligopoly Scenario*, Oxford, United Kingdom: Oxford University Press, pp. 14-15, and BLEE Timothy, 'Emails detail Amazon's plan to crush a startup rival with price cuts' (*Arstechnica*, 7/30/2020) <<https://arstechnica.com/tech-policy/2020/07/emails-detail-amazons-plan-to-crush-a-startup-rival-with-price-cuts/>> accessed 1.04.2022

In recent years, big tech has also entered new markets such as entertainment, banking, or healthcare, raising the concern of EU antitrust agencies and market regulators.<sup>14</sup> I believe the concern about their expansion into new markets stems from the risk of high concentrations, and new innovative companies, despite having more innovative ideas, not having the same opportunity to enter these markets. That is one of the many reasons as to why the European lawmakers are seeking to limit their ability to acquire start-ups and mandate data sharing with competitors.<sup>15</sup>

## 2.3 Some of the Special Characteristics of Online Platforms

### 2.3.1 The Definition of a Platform

What exactly is an ‘online platform’? The online side of the phrase is obvious, but the platform element is not. When referring to platforms, one may use the term to describe marketplaces such as Amazon and eBay, or an appstore like Apple Appstore, social networks like Facebook and LinkedIn or search engines like Google search.<sup>16</sup> However, aside from its use as a descriptor, it appears that there is no commonly accepted definition of a platform.<sup>17</sup>

Furthermore, there is no legal definition of digital platforms or multi-sided platforms under Article 102 TFEU, and the term generally lacks precision.<sup>18</sup> One might wonder why terminology or definitions are necessary. From a

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<sup>14</sup> Petit, N., 2020. *Big Tech and the Digital Economy: The Mologopoly Scenario*, Oxford, United Kingdom: Oxford University Press, p. 1 (Abstract and Keywords).

<sup>15</sup> Ibid.

<sup>16</sup> Néstor Duch-Brown; The Competitive Landscape of Online Platforms; JRC Digital Economy Working Paper 2017-04, p. 9.

<sup>17</sup> Statement from the Vice President of the European Commission Ansip, Q 150 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/oral/25770.html>, accessed 05.05.2022.

<sup>18</sup> O’Donoghue, R., & Padilla, J. (2020). Abuses in Digital Platform Markets. In *The Law and Economics of Article 102 TFEU* (pp. 1046–1047). Oxford: Bloomsbury Publishing Plc. Retrieved March 28, 2022, from <http://dx.doi.org.ludwig.lub.lu.se/10.5040/9781509942985.ch-017>

legal standpoint, it is important because a lack of precision may render the substance of the principles enshrined in Article 102 TFEU meaningless if they are applied by label.<sup>19</sup> Moreover, it is important to know what features to include in an antitrust analysis that begins with a market definition in order to determine an undertaking's dominant position. If a platform is considered to have two or more non-competing user sides, it can have a significant bearing on market definition.<sup>20</sup>

The European Commission (EC) suggested a definition of online platforms as *'an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users as to generate value for at least one of the groups. Certain platforms also qualify as intermediary service providers'*.<sup>21</sup> However, instead of a definition, the EC referred to some important and specific characteristics of online platforms when the European Communication on Online Platforms was released in 2016. Although they vary in size and shape, they all share some important characteristics, such as the ability to benefit from network effects, data accumulation, economies of scale and scope, and so on.<sup>22</sup>

There are two types of online platforms: two-sided or multi-sided platforms, and single-sided or technological platforms such as PayPal or American

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<sup>19</sup> O'Donoghue, R., & Padilla, J. (2020). Abuses in Digital Platform Markets. In *The Law and Economics of Article 102 TFEU* (pp. 1046–1047). Oxford: Bloomsbury Publishing Plc. Retrieved March 28, 2022, from <http://dx.doi.org.ludwig.lub.lu.se/10.5040/9781509942985.ch-017>

<sup>20</sup> Ibid 1049.

<sup>21</sup> European Commission, 'Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy' (24 September 2015), [https://europeanbooksellers.eu/system/files/2020-02/European Commission's consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy – EIBF Contribution 2020-02-19.pdf](https://europeanbooksellers.eu/system/files/2020-02/European%20Commission's%20consultation%20on%20the%20regulatory%20environment%20for%20platforms,%20online%20intermediaries,%20data%20and%20cloud%20computing%20and%20the%20collaborative%20economy%20%E2%80%93%20EIBF%20Contribution%202020-02-19.pdf)

<sup>22</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, "Online Platforms and the Digital Single Market Opportunities and Challenges for Europe," COM/2016/0288 Final, pp. 2-3.

Express.<sup>23</sup> The primary goal of a technological platform is not to put sellers and buyers in direct contact with one another. Rather, their goal is to create a mend to a need by providing a technical interface. Both PayPal and American Express made it possible for users to conduct an online transaction without having to withdraw money from an ATM or make a bank transfer. As users, we were likely to engage in a transaction; however, digitalization made that transaction easier to complete.<sup>24</sup>

### 2.3.2 Multi-Sided Platforms

As previously mentioned, there are two-sided platforms and multi-sided platforms. Both are business models that have been present for centuries, but they have gained more attention due to their success, which has been enabled and accelerated by the internet and digitalization.<sup>25</sup> The platforms have also gained a lot of attention from several antitrust authorities, both in the US and EU.<sup>26</sup>

Businesses such as Airbnb, which has owners and renters, and Uber, which has drivers and passengers, are examples of two-sided platforms; each side of the platform is either a supply or demand side.<sup>27</sup> The GAFAM are active in a variety of fields, they do however have one thing in common: they are considered multi-sided platforms. Unlike two-sided platforms, multi-sided platforms have more than two communities of users. Through their platforms, they allow sellers and buyers to interact (supply and demand) but will also add additional kind of users to the equation such as advertisers or

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<sup>23</sup> Tirole, Jean, translated by Steven Rendall. *Economics for the Common Good*. Princeton University Press, 2017, p. 382. <https://doi.org/10.2307/j.ctvc77hng>. Accessed 17 Apr. 2022.

<sup>24</sup> Ibid.

<sup>25</sup> Peirera Daniel , 'Multisided Platform Business Model' (*The Business Model Analyst*, 19/03/2022)<[https://businessmodelanalyst.com/multisided-platform-business-model/#What\\_is\\_the\\_Multisided\\_Platform\\_Business\\_Model](https://businessmodelanalyst.com/multisided-platform-business-model/#What_is_the_Multisided_Platform_Business_Model)> accessed 1.04.2022

<sup>26</sup> David Evans and Richard Schmalensee, The Antitrust Analysis of Multisided Platform Businesses. Roger d blair and d daniel sokol (ed), The Oxford Handbook of International Antitrust Economics, Volume 1 (2014), pp. 2 <http://www.nber.org/papers/w18783>

<sup>27</sup> Peirera Daniel , 'Multisided Platform Business Model' (*The Business Model Analyst*, 19/03/2022)<[https://businessmodelanalyst.com/multisided-platform-business-model/#What\\_is\\_the\\_Multisided\\_Platform\\_Business\\_Model](https://businessmodelanalyst.com/multisided-platform-business-model/#What_is_the_Multisided_Platform_Business_Model)> accessed 1.04.2022

content developers.<sup>28</sup> The users could be both individuals, e.g., private persons or business owners.

The key feature of multi-sided platforms is to enable different sides of the market to meet and interact by providing a technological interface.<sup>29</sup> They add value by bringing together enough users from each side of the market to make it worthwhile for users to stay on the platform and facilitate interaction between them.<sup>30</sup> No single side of users or customer of a multi-sided platform can generate economic value alone. The economic value grows in proportion to the number of connections and options available across the platform.<sup>31</sup> The different sides of a platform are linked by the existence of a network effect which is something that is important to keep in mind. Economists define network effect as the increase in the value or benefit of a good or service as more people use it<sup>32</sup>, and it will be discussed further in chapter 2.3.4.

The nature of the price structure and business model of multi-sided platforms differs from that of single-sided platforms because multi-sided platforms use the method of "asymmetric pricing," which means that platforms can treat one side of a platform as a profit centre and the other as a loss leader or financially neutral.<sup>33</sup> Google's business model serves as an example of asymmetric pricing. Google provides many free services to users, such as online search, email, and maps. These services are funded by advertising, so attracting as many users as possible is critical to making the

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<sup>28</sup> Tirole, Jean, translated by Steven Rendall. *Economics for the Common Good*. Princeton University Press, 2017, p. 379 <https://doi.org/10.2307/j.ctvc77hng>. Accessed 17 Apr. 2022, and [THE BUSINESS MODEL ANALYST](#), Accessed 5 May 2022.

<sup>29</sup> Ibid.

<sup>30</sup> David Evans and Richard Schmalensee, The Antitrust Analysis of Multisided Platform Businesses. Roger d blair and d daniel sokol (ed), The Oxford Handbook of International Antitrust Economics, Volume 1 (2014), pp. 1-2.

<sup>31</sup> Joshua White, Antoine Chapsal and Aaron Yeater, European Union – Two-Sided Markets, Platforms and Network Effects, E-COMMERCE COMPETITION ENFORCEMENT GUIDE, Law Business Research, 2019, p. 85.

<sup>32</sup> Ibid. p. 86.

<sup>33</sup> J-C Rochet and J Tirole, 'Platform competition in two-sided markets,' Journal of the European Economic Association, 1(4): 990–1029 (2003). pp. 990-991.

platform appealing to advertisers.<sup>34</sup> Thus, the nature of multi-sided platforms' business model of allow them to set a very low price on one side of the market and a very high price on the other. Under traditional competition law reasoning this would be considered a predatory act.<sup>35</sup>

### 2.3.3 Economies of Scale

A feature common in online platforms, especially multi-sided platforms, are strong economies of scale and scope. Economies of scale refer to when the average cost of producing a product decrease as the quantity produced increases. On the other hand, economies of scope refer to when it is cheaper to produce two different products jointly than each separately.<sup>36</sup>

When entering the digital economy and market, online platforms have a high fixed cost, but once they have launched their platform, they benefit from being able to add additional units at a zero marginal cost, resulting in economies of scale.<sup>37</sup> In other words, once a platform is created it will be able to reach many people or enter new markets at a very low cost.<sup>38</sup>

### 2.3.4 Network Effects

Another important characteristic of online platforms is their strong network effects, which can be direct or indirect. A direct network effect occurs when the value of a product or service increases as the number of users on the same side grows.<sup>39</sup> Social media platforms such as Facebook is an example

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<sup>34</sup> Joshua White, Antoine Chapsal and Aaron Yeater, European Union – Two-Sided Markets, Platforms and Network Effects, E-COMMERCE COMPETITION ENFORCEMENT GUIDE, Law Business Research, 2019, p. 87.

<sup>35</sup> Tirole, Jean, translated by Steven Rendall. *Economics for the Common Good*. Princeton University Press, 2017, p. 382. <https://doi.org/10.2307/j.ctvc77hng>. Accessed 17 Apr. 2022.

<sup>36</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 7.

<sup>37</sup> David S Evans and Richard Schmalensee 'The Industrial Organization of Markets with Two-Sided Platforms' (2007) 3(1) Competition Policy International 151, 165, and Graef, *EU Competition Law, Data Protection and Online Platforms*, (2016) pp 32-33.

<sup>38</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, p. 20.

<sup>39</sup> Graef, *EU Competition Law, Data Protection and Online Platforms*, (2016) pp 34.



of an online platform that benefits from the direct network effect. The platform's value grows as the numbers of users grows. The rapid impact positive direct network effect can have on the growth of an online platform is significant.<sup>40</sup> The principle is that *'the more users there are on one side, the more valuable the service becomes, which attracts even more users to that side'*.<sup>41</sup> Users, including myself, want to be on the same platforms as their friends.

Indirect network effect occurs when the number of users on one side of the market, through the platform's products or services, attracts more users available on the other side of that platform.<sup>42</sup> The presence of an indirect network effect indicates that a company is operating a two-sided or multi-sided platform. Similarly, the rapid growth of platforms due to indirect network effects is significant because the more users join one side, the more appealing the platform becomes to the other side.<sup>43</sup> The biggest challenge for a multi-sided platform is to get all sides of users on board and create value, but once the platform has capitalised on the indirect network effect, they will experience an explosive growth.<sup>44</sup>

A strong network effect is not always positive. Digital platforms can sometimes experience a negative network effect, resulting in a "death spiral". This will happen when users on one side decline, which can happen for a variety of reasons such as an increase in price or a drop in product quality or customer service. As a result, users on the other side will value

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<sup>40</sup> OECD (2019), *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, <https://doi.org/10.1787/53e5f593-en>, p. 22.

<sup>41</sup> Ibid.

<sup>42</sup> Graef, *EU Competition Law, Data Protection and Online Platforms*, (2016) pp 34.

<sup>43</sup> OECD (2019), *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, <https://doi.org/10.1787/53e5f593-en>, p. 22

<sup>44</sup> Evans, David S. and Schmalensee, Richard, *Debunking the 'Network Effects' Bogeyman* (December 2017). Regulation, Vol. 40, No. 4, Winter 2017-2018, Available at SSRN: <https://ssrn.com/abstract=3148121>

the platform less and decrease in number as well, resulting in a downward spiral of users on both sides and reducing the overall value of the platform.<sup>45</sup>

### 2.3.5 The Role of Data

Online platforms rely heavily on user data. Data, also known as the ‘new currency’ in digital markets is an essential component of online platforms, hence data collecting is a prevalent practice. Although, users can access and use the services provided by the online platforms for free, they are actually “paying” with their personal data.<sup>46</sup>

Personal data is defined in Article 4 (1) GDPR as ‘*any information relating to an identified or identifiable natural person*’. An identifiable natural person is defined as someone ‘*who can be identified, directly or indirectly by name, identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*’. As for non-personal data, it is defined as everything that does not fall within the definition of personal data in the GDPR.<sup>47</sup> ‘*Aggregated and anonymized data sets used for big data analytics*’ are an example of non-personal data.<sup>48</sup>

As it has been illustrated, the concept of data is quite broad. Individual data, regardless of whether it is personal or non-personal, linked to digital platforms can be obtained in three different ways:

- 1 volunteered, created, and explicitly shared by individuals, e.g., a shared post on social media,

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<sup>45</sup> Joshua White, Antoine Chapsal and Aaron Yeater, European Union – Two-Sided Markets, Platforms and Network Effects, E-COMMERCE COMPETITION ENFORCEMENT GUIDE, Law Business Research, 2019, p. 86.

<sup>46</sup> O’Donoghue, R., & Padilla, J. (2020). Abuses in Digital Platform Markets. In *The Law and Economics of Article 102 TFEU* (pp. 1046–1047). Oxford: Bloomsbury Publishing Plc. Retrieved March 28, 2022, from <http://dx.doi.org.ludwig.lub.lu.se/10.5040/9781509942985.ch-017>

<sup>47</sup> See the definition of “data” in article 3 (1) of the Regulation on the free flow of non-personal data EU 2018/1807.

<sup>48</sup> Recital 9 the Regulation on the free flow of non-personal data EU 2018/1807.

- 2 observed, such as recordings through observations of individuals' action, e.g., location data when using the smartphones, and
- 3 inferred, which is volunteered or observed individual data that have been obtained based on predictions by an algorithm, e.g., credit ratings.<sup>49</sup>

The comprehensive information collected about consumers help multi-sided platforms analyse, adapt, and tailor their services and products, making data collecting, processing, and utilization key to their functioning.<sup>50</sup> Thus, user data could indirectly provide multi-sided platforms with market power as well as opportunities to capitalize on that power. The more data a platform accumulates the more it will grow.<sup>51</sup>

In terms of data-related competition issues, it is worth noting Amazon's abuse of non-public data as an example. Amazon has a dual role on its platform. It provides a marketplace for independent sellers while also selling its own product as retailer on the same marketplace. This means that Amazon, as retailer, competes directly with the independent sellers. Amazon's platform collects data about activity on its platforms in real time, such as which products sell the best, transactions, and information about independent sellers. As a result, the EC launched an antitrust investigation into Amazon, and while no decision<sup>52</sup> has been made, the commission discovered in its preliminary fact-finding that Amazon is competitively

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<sup>49</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, pp. 24-25.

<sup>50</sup> O'Donoghue, R., & Padilla, J. (2020). Abuses in Digital Platform Markets. In *The Law and Economics of Article 102 TFEU* (pp. 1050–1052). Oxford: Bloomsbury Publishing Plc. Retrieved March 28, 2022, from <http://dx.doi.org.ludwig.lub.lu.se/10.5040/9781509942985.ch-017>

<sup>51</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, pp. 73-75.

<sup>52</sup> The commissions case is AT.40703. and still pending.

using this sensitive information to its own advantage. As a result, Amazon is having an unfair competitive advantage over these small business owners.<sup>53</sup>

## 2.4 Competition Challenges created by online platforms

It is clear from the economic characteristics of online platforms that the business model is successful. Small and medium-sized enterprises (SMEs) were able to gain visibility, access new markets, and gain new customers, as well as customer groups, through online platforms. Consumers benefit from online platforms because they have access to a wider range of goods and services, as well as lower search and transaction costs.<sup>54</sup>

While the economic characteristics of online platforms can lead to success and prosperity, they also pose a great challenge to competition. The economic characters themselves are not challenging, they are present in other sectors as well. However, their effects combined in the digital market are significant and may result in a 'winner takes it all' scenario<sup>55</sup> leading to a high level of concentration and dominance.

Four challenges to effective competition have been identified by the Nordic competition authorities as being posed by online platforms. These are the 'tipping' market, online platforms acting as 'gatekeepers', online platforms using their market power to integrate into upstream or downstream markets or enter new markets, and the rapid pace of their evolution.<sup>56</sup>

Tipping market scenarios occur when the market shifts in favour of a single platform, leaving no room for competition. Rather than competing *in* the

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<sup>53</sup> The Commissions press release, 10 November 2022, Brussels, [Antitrust: Amazon \(europa.eu\)](https://ec.europa.eu/antitrust-division/press-releases/2022/11/10)

<sup>54</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 7.

<sup>55</sup> Ibid, p. 8.

<sup>56</sup> Ibid, pp. 8-10.

market, the online platforms will compete *for* the market.<sup>57</sup> The competition *for* the market could be considered an efficient competition process because competitors will be forced to offer better products and lower prices until a market has tipped. A tipped market that doesn't offer consumer benefits, on the other hand, is considered problematic in terms of competition.<sup>58</sup> As a result of the economic characteristics of multi-sided platforms, a tipping scenario is very likely, especially given the presence of indirect network effects. When a market shifts in favour of an online platform, that company gains a dominant or monopolistic position.<sup>59</sup> Establishing a dominant or monopolistic position may result in higher prices and lower output, causing harm to the functioning of the market.

Large online platforms acting as 'gatekeepers' to the ecosystem is the reason the DMA was proposed. The term is newly introduced and will be explained further below in chapter 4.2. However, these gatekeepers grew powerful enough to act as private regulators, setting the rules for accessing their ecosystems unilaterally.<sup>60</sup>

As previously stated, big tech is expanding into new markets. They are doing so by leveraging their market power and expanding through acquisitions of small, innovative start-ups. In doing so they are not only acquiring new products or processes, but they are also getting access to new

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<sup>57</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 8, and, Evans, David S. and Schmalensee, Richard, *Debunking the 'Network Effects' Bogeyman* (December 2017). Regulation, Vol. 40, No. 4, Winter 2017-2018, Available at SSRN: <https://ssrn.com/abstract=3148121>, p. 36.

<sup>58</sup> See, Petit, N., 2020. *Big Tech and the Digital Economy: The Mologopoly Scenario*, Oxford, United Kingdom: Oxford University Press, pp. 172-73, 187-188, where he draws a distinction between tipping markets and tipped markets.

<sup>59</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 8, and, Evans, David S. and Schmalensee, Richard, *Debunking the 'Network Effects' Bogeyman* (December 2017). Regulation, Vol. 40, No. 4, Winter 2017-2018, Available at SSRN: <https://ssrn.com/abstract=3148121>, p. 36.

<sup>60</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 9.

data.<sup>61</sup> The combined database of the merged companies will increase the information they have about their users and will strengthen the platform's dominance because of the acquisition.<sup>62</sup>

It has always been a challenge for lawmakers to get the law to evolve in tandem with societal changes. The rapid pace at which digital markets evolve is no exception. Investigations concerning digital ecosystems are complex and they may affect the timeliness as well as the intervention from the authorities. In the meantime, several things may occur such as a market that has tipped, or irreparable damage to consumers.<sup>63</sup>

## 2.5 Conclusion

As previously demonstrated, big tech is at the heart of the online platform economy. They have been successful in building businesses and capitalizing on the economic characteristics of multisided platforms. They provided compelling products, gained users through network effects, collected data on those users, and grew even larger and more powerful as a result. However, as it been illustrated in Chapter 2.4 online platforms bring competition challenges to the table due to their economic features combined. If a company's online platform has grown to be the best alternative among others, then the goal of competition has been achieved. However, if their growth comes at the expense of other platforms' ability to enter and grow in the market, there is a competition issues. Issues relating to Article 102 TFEU could arise at any time, since the economic characteristics of multi-sided platforms may often lead to high level of dominance and concentration triggering the application of the article. Especially when dominance is combined with anti-competitive behaviours.

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<sup>61</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, pp. 9-10.

<sup>62</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, p. 11.

<sup>63</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 10.

# 3 EU Competition Law and Online Platforms

## 3.2 Introduction

The previous chapter clarified the unique characteristics of online platforms and how they can raise competition issues, triggering the application of the competition legal framework. In order to understand how to legally tackle competition issues caused by online platforms one has to understand the objectives of EU competition law. This chapter provides the reader with an introduction to the objectives of EU competition law and the application of Article 102 TFEU to multi-sided platforms. An in-depth analysis of market definition and challenges created due to the economics of multi-sided platform is further discussed. The reason for this is that market definition is a crucial element of an Article 102 TFEU analysis, and failure to conduct a proper analysis may render the article inapplicable.

## 3.3 The Goals of EU Competition Law

The treaties, including the competition provisions, do not explicitly state which objectives EU competition law should pursue. Therefore, it should come as no surprise that there is a whole debate about what goals competition law should seek to achieve.<sup>64</sup> The debate, however, is not the focus of this thesis. Nevertheless, it is important to highlight some of the objectives EU competition law seeks to achieve through competition policy.

The Union's aim is to establish an internal market and work for a highly competitive social market economy which includes a system ensuring that competition is not distorted, according to Article 3 (3) of the Treaty on the European Union (TEU) and Protocol 27. Therefore, competition law, which falls within the Union's exclusive competence under Article 3 (d) TEU, is

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<sup>64</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 26.

both necessary and essential for the Union. The Court of Justice (CJEU) confirmed in *TeliaSonera* that the EU competition rules are necessary for the functioning of the internal market and seek ‘*to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*’.<sup>65</sup>

The notion of *effective competition* is central in EU competition law. In *Continental Can* the CJEU stated that the goal of the competition provisions, Articles 101 and 102 TFEU, is the “maintenance of effective competition”.<sup>66</sup> In *GlaxoSmithKline* the General Court (GC) expressed that the meaning of effective competition is the “*degree of competition necessary to ensure the attainment of the objectives of the Treaty*”.<sup>67</sup> The core concept of effective competition is that it allows businesses in the EU to compete on equal market terms while pushing them to provide high-quality goods at the best possible price for consumers. This will lead to more innovation as well as long-term economic growth for companies and the EU.<sup>68</sup>

In 2009 the EC published the Commission’s Guidance Paper<sup>69</sup> stating that:

*“In applying Article 102 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality, and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly*

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<sup>65</sup> Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 22.

<sup>66</sup> Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR, para.225.

<sup>67</sup> Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 109.

<sup>68</sup> European Parliament, Fact Sheets on Competition Policy, 2021 [Competition policy | Fact Sheets on the European Union | European Parliament \(europa.eu\)](#)

<sup>69</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (hereinafter, the “Guidance Paper”), OJ 2009 C 45/2.



*and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.*<sup>70</sup>

With the Guidance Paper in mind, it is clear that the primary goal of EU competition policy is consumer welfare. Nevertheless, other objectives have also played an important role in the application of Article 102 TFEU. These include promoting fairness, economic freedom, and the process of competition, as well as competitor protection. It is important to remember that the goals of EU competition law have shifted in tandem with shifting political views and values.

### **3.3.1 Consumer Welfare**

As previously stated, EU competition law focuses on consumer welfare, which economists narrowly define as the difference between what consumers are willing to pay and what they actually pay for goods.<sup>71</sup> However, in its Guidance paper, the Commission elaborates on the role of consumer welfare in the context of Article 102 TFEU application, stating that its enforcement activity seeks to prevent “*an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice*”.<sup>72</sup> This means that, as the CJEU emphasized in T-Mobile, not only conduct affecting the ultimate price to consumers is unlawful, but also conduct affecting the market structure and competition as a whole.<sup>73</sup> Thus, when assessing exclusionary conduct, exploitation, and concentrations by dominant undertakings an effects-based approach of consumer welfare will be taking into account.<sup>74</sup>

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<sup>70</sup>Guidings Paper, para. 5.

<sup>71</sup> O'Donoghue, R., & Padilla, J. (2020). Introduction, Scope of Application, and Basic Framework. In *The Law and Economics of Article 102 TFEU* (p. 6). Oxford: Bloomsbury Publishing Plc. Retrieved May 23, 2022, from <http://dx.doi.org.ludwig.lub.lu.se/10.5040/9781509942985.ch-001>

<sup>72</sup> Guidings Paper, para. 19.

<sup>73</sup> Case C-8/08 T-Mobile EU:C:2009:343, para 38

<sup>74</sup> Ariel Ezrachi, Discussion Paper the Goals of Eu Competition Law and the Digital Economy, The European Consumer Organisation, 2018, p.6.

The Commission noted that *“the concept of ‘consumers’ encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers”*.<sup>75</sup> This implies that the concept of consumer welfare can be used to address welfare effects affecting various types of users on each side of a multi-sided platform. However, because many multi-sided platforms have an asymmetric price structure, a price-centric approach to measuring consumer welfare is not appropriate. This is where quality can play an important role in competition. A decline in service or product quality may result in a negative network effect, as previously stated, but it may also harm consumer welfare.<sup>76</sup>

### **3.3.2 Fairness**

Although fairness is not the main objective of EU competition law, it is one of its pillars. As stated in the TFEU's preamble, the removal of obstacles requires concerted action to ensure fair competition. However, the term is quite broad and vague, and it can mean different things depending on the context. Furthermore, neither the treaty nor Article 102 TFEU define the term. Though, in the context of Article 102 TFEU, examples of abusive conducts such as "unfair purchase or selling price or other unfair trading conditions" are mentioned in the article.

Commissioner Vestager said during an interview by The Guardian that competition authorities have “to make sure you have fair competition, and that democracy still serves consumers”.<sup>77</sup> When aiming for fairness, the idea is that large, well-resourced firms should not impede the activities of small

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<sup>75</sup> Guidings Paper, footnote 2 to para. 19.

<sup>76</sup> Ariel Ezrachi, Discussion Paper the Goals of Eu Competition Law and the Digital Economy, The European Consumer Organisation, 2018 pp. 6-7.

<sup>77</sup> The Guardian, 9 June 2018, available at [EU tech czar Margrethe Vestager: 'Social media could deactivate democracy' | Margrethe Vestager | The Guardian, accessed 3.6.2022.](#)

and medium-sized businesses.<sup>78</sup> This is also the underlying objective of the DMA, which explicitly states that the DMA's goal is to address unfair practices and weak contestability of online platforms.<sup>79</sup> According to the Commission unfair practices and lack of contestability will have a negative impact on the digital sector since it will lead to higher prices, lower quality, fewer choices and less innovation. Being able to deal with these issues is critical, as the digital economy was expected to account for 4.5 percent to 15.5 percent of global GDP in 2019.<sup>80</sup>

### 3.4 Article 102 TFEU

Five criteria must be met in order for Article 102 TFEU to apply. There must be an *undertaking* that has *abused* its *dominant* position in the *internal market* or a *substantial part* of it, and the anticompetitive conduct may *affect* trade between Member States.

Article 102 TFEU prohibits abusive or anti-competitive behaviour rather than an undertaking's dominant position. As a result, an antitrust investigation will always begin with determining whether the undertaking in question is dominant. If the analysis results in finding an undertaking holding a dominant position, an investigation will be conducted to determine whether the concerned conduct may amount to an abuse. Furthermore, a non-dominant undertaking may engage in abusive behaviour but will not violate Article 102 TFEU because it is not dominant. It is important to bear in mind that EU competition law applies to non-EU businesses operating in the internal market as well, as long as there are anticompetitive effects.<sup>81</sup>

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<sup>78</sup> O'Donoghue, R., & Padilla, J. (2020). Introduction, Scope of Application, and Basic Framework. In *The Law and Economics of Article 102 TFEU* (p. 6). Oxford: Bloomsbury Publishing Plc. Retrieved May 23, 2022, from

<sup>79</sup> Proposal for a Regulation of the European Parliament and of the Council on constestable and fair markets in the digital sector (Digital Market Act) [2020] COM(2020) 842 final, p. 1.

<sup>80</sup> Ibid.

<sup>81</sup> European Parliament, Fact Sheets on Competition Policy, 2021 [Competition policy | Fact Sheets on the European Union | European Parliament \(europa.eu\), eu](#), pp. 1-2.

### 3.4.1 Establishing Dominance

Although online platforms have a tendency to grow large and quickly, and may be referred to as dominant, their size is not in and of itself relevant. The size may suggest that many consumers consider them to be the best alternative on the market. To initiate an Article 102 TFEU case, dominance must be legally assessed on a case-by-case basis.

The European Court of Justice (CJ) defined a dominant position in *United Brands* as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers’.<sup>82</sup> In *Hoffmann-La Roche* the Court went on to say that a dominant position does not preclude competition, but rather allows a dominant undertaking to at least influence the competitive conditions on the market.<sup>83</sup>

The first step in determining an undertaking's dominant position under Article 102 TFEU is to define the relevant market because a dominant position can only exist on a particular market, and thereafter assess the extent of their market power in that market.<sup>84</sup> In *Europemballage Corpn and Continental Can Co Inc v Commission* the CJ have held that the definition of the relevant market is of essential significance for the appraisal of a dominant position.<sup>85</sup> An undertaking's market share, which indicates the current state of the market, is used as an indicator of dominance. The higher the market share an undertaking has had for a longer period of time, the more likely it is to be considered dominant. Other factors indicating

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<sup>82</sup> Court of Justice of the EU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR [1978] 207, para. 65.

<sup>83</sup> Court of Justice of the EU, case 85/76, *Hoffman-La Roche & Co AG v Commission* ECR [1979] 461, para 39.

<sup>84</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 284.

<sup>85</sup> Case 6/72 *Europemballage Corpn and Continental Can Co Inc v Commission* EU:C:1973:22, para 32.

dominance is if other companies are not able to enter the market and if there are any barriers to expansion and, the existence of countervailing buyer power.<sup>86</sup>

### 3.4.2 Market Definition

The EC published a Market Definition Notice in 1997, which is based on EU court case law and has been useful for many stakeholders in understanding how the Commission approaches market definition. Market definition, according to the Notice, which is acknowledged by the CJ in several cases<sup>87</sup>, is a “*tool to identify and define the boundaries of competition between firms*”.<sup>88</sup> The primary goal of market definition is to identify the competitive constraints that firms face in their markets. Two variables are thus measured within market definition: the relevant product and the geographical market.

The relevant product market comprises ‘*all those products and/services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use*’.<sup>89</sup> The relevant geographic market on the other hand is defined as ‘*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*’.<sup>90</sup>

The purpose of assessing the product and geographical market is to identify competitors to restricting undertakings and evaluate their behaviour,

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<sup>86</sup> European Commission Factsheet, Competition: Antitrust procedures in abuse of dominance Article 102 TFEU cases, July 2013, p. 1. Available at [Fines for breaking EU Competition Law \(europa.eu\)](#), accessed 10 May 2022.

<sup>87</sup> See for example, T-321/05 *AstraZeneca AB v Commission* EU:T:2010:266, para 86; Case T-427/08 *Confédération européenne des associations d’horlogers-réparateurs (CEAHR) v Commission* EU:T:2010:517, paras 68–70.

<sup>88</sup> Notice on Market Definition, para 2.

<sup>89</sup> Notice on Market Definition, para. 7.

<sup>90</sup> Notice on Market Definition, para. 8.

whether acting independently or under pressure.<sup>91</sup> Three competitive parameters can be used in the assessment: demand substitutability, supply substantiality and potential competition.<sup>92</sup> It is important to keep in mind that in a broadly defined product market one is less likely to find an undertaking in a dominant position, and vice versa.<sup>93</sup>

Demand substitutability determines which products consumers consider interchangeable. The hypothetical small but significant and non-transitory increase in price (SSNIP) test is used to determine this.<sup>94</sup> The products or services, as well as the geographic area in which they are provided, are selected based on the application of the test that form the relevant market. The question asked is whether consumers would switch from product A to product B if the price was raised permanently by 5% to 10%. If consumers switch products, making a price increase unprofitable, the product market selected is not considered the relevant one. Additional product substitutes will be introduced until firms are able to raise the prices and consumers unable to switch and find substitutes. This will indicate that the relevant product market is relevant and has thus been properly defined.<sup>95</sup>

Although demand substitutability is typically used to study the relevant product market from the perspective of consumers, supply substitutivity will be employed where the impacts of supply side substitutions are comparable to those of demand side in terms of efficacy and immediacy. The ability of suppliers to switch production in response to a small and long-term price change in the relevant product market, without significant additional costs or risks, will be measured.<sup>96</sup> However, supply-side substitutability will not be assessed in the context of market definition if it requires necessitates

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<sup>91</sup> Notice on Market Definition.

<sup>92</sup> Notice on Market Definition, para. 13.

<sup>93</sup> Craig and De Búrca, *EU Law Text, Cases, and Materials*, 7<sup>th</sup> edition, Oxford University Press, Oxford, 2020, p. 1088.

<sup>94</sup> Notice on Market Definition, para. 15.

<sup>95</sup> Notice on Market Definitions, paras 15-18.

<sup>96</sup> Notice on Market Definition, para. 20.

changes to existing tangible and intangible assets, investments, strategic decisions, or time delays before the product can be sold.<sup>97</sup>

Potential competition is a third way of measuring competitive constraints. It is, however, not taken into account during the market definition stage but, rather during the competitive assessment stage. Several other factors and circumstances related to entry must be considered in order to account for potential competition. As a result, the method is not used unless a relevant market has already been defined.<sup>98</sup>

The geographical market is assessed using rough estimates of the distribution of market shares among the parties and their competitors. A preliminary analysis of pricing and price differences at the national and Community or EEA levels is also carried out. However, these preliminary estimates will be used as a working hypothesis to figure out the precise geographic market definition.<sup>99</sup>

### **3.4.2.1 Market Definition Issues of Multi-Sided Platforms**

Defining the relevant market of for multi-sided platforms is not an easy task, especially since multi-sided platforms may be active on several interdependent markets.<sup>100</sup> As previously stated, the functioning of multi-sided platforms is to facilitate the interaction between two or more users of the platform. A firm may sell two or more distinct products on each side of the market and the demand between the users are linked by indirect network

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<sup>97</sup> Notice on Market Definition, para. 23.

<sup>98</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 291.

<sup>99</sup> Notice on Market Definition, para. 28.

<sup>100</sup> Olga Batura, Nicolai van Gorp, Prof. Pierre Larouche ONLINE PLATFORMS AND THE EU DIGITAL SINGLE MARKET (2015), p. 9.

[https://ec.europa.eu/information\\_society/newsroom/image/document/2016-7/nikolai\\_van\\_gorp\\_-\\_response\\_economics\\_to\\_the\\_uk\\_house\\_of\\_lords\\_call\\_for\\_evidence\\_14020.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf)

effects. The question is thus do the different sides of users form part of the same relevant product market or are they separate?

In the EC's decision against *Groupement des Cartes Bancaires* (CB) the Commission recognized the two-sided character of card payment services, and that the two sides of the platform are linked by network effects. However, they concluded that although there was an interdependence between the two sides (issuing and acquiring payment cards), they did not form one single market although they were related.<sup>101</sup> The CJEU did not elaborate further on the market definition assessment but did in fact highlight the importance of the two-sided character of the platform.

The price is the most important factor in the SSNIP test. Several issues may arise when applied to multi-sided platforms, rendering the test inapplicable or incorrect. First and foremost, the phenomenon of zero monetary price service or product is prevalent in digital markets. This means that multi-sided platforms often provide access to their services, or products for free to some or all users. Or if not for free, users “pay” with their own data which the platform is collecting.<sup>102</sup> This makes it impossible to apply the SSNIP test because it focuses on the effect of a price change on the volume and profitability of switching. For instance, a price increase of 5% of zero would still be zero. In Crémer et al (2019) it was highlighted that the *‘digital world market boundaries might not be as clear as in the ‘old economy’*. The authors continued arguing *‘that in digital markets ‘less emphasis should be put on the analysis of market definition and more emphasis on theories of harm and identification of anti-competitive strategies’*.<sup>103</sup> In order to correctly define the relevant market it is important to take into account the

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<sup>101</sup> Case C-67/13 P, *Groupement des Cartes Bancaires*, para 180.

<sup>102</sup> European Commission, COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, Brussels, 12.7.2021, p. 31.

<sup>103</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, p. 3.



price structure charged to each side of the platform and the interaction between the user sides of the multi-sided platform.

In July 2021, the Commission issued a staff working document evaluating the Market Definition Notice and determining whether it was still valid. The EC concluded that the Notice still serves its purpose by providing correct, comprehensive, and clear market definition guidance<sup>104</sup>. However, the notice would be revised to reflect recent developments in areas such as the use and purpose of SSNIP test in multi-sided markets, rapidly evolving markets driven by high level of innovation, and digital markets.<sup>105</sup>

### 3.4.3 Market Power

Once the market has been defined, the power of the undertaking within that market must be evaluated in order to determine if it has a dominant position.<sup>106</sup> Market power is defined as an undertakings ability to significantly raise prices above competitive levels.<sup>107</sup>

Market power is usually measured through the calculation of market share for single-sided platforms, which, according to the EC in its Notice, reflect the current state and structure of the market. The CJEU held in *Hoffmann-La Roche v Commission* that a substantial market share as evidence of the existence of a dominant position is not a constant factor.<sup>108</sup> Which means that market share on its own can't determine whether an undertaking is dominant. Moreover, Article 102 TFEU, does not state any market share threshold to determine dominance. However, if an undertaking has a very large market share and holds it for some time it will be considered in a

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<sup>104</sup> Crémer, Jacques, de Montjoye, Yves-Alexandre & Schweitzer, Heike, *Competition Policy for the digital era*, Final report, European Commission Directorate-General for Competition, 2019, p. 30.

<sup>105</sup> *Ibid.*, pp. 30-31.

<sup>106</sup> Jones A & Sufirin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 319.

<sup>107</sup> David Evans and Richard Schmalensee, The Antitrust Analysis of Multisided Platform Businesses. Roger d blair and d daniel sokol (ed), *The Oxford Handbook of International Antitrust Economics*, Volume 1 (2014), <http://www.nber.org/papers/w18783> p. 422.

<sup>108</sup> Case 85/76 EU:C:1979:36, para. 41.

position of strength unless there are exceptional circumstances.<sup>109</sup> The CJEU further explained in *AKZO* that dominance can be presumed if an undertaking has a market share of 50 per cent of the market.<sup>110</sup>

Market share is typically calculated by calculating the sales of identified suppliers' relevant products in the relevant area.<sup>111</sup> Sales figures may not be the most appropriate basis for calculation in some industries, such as multi-sided markets. Asymmetrical price structures on multi-sided platforms make calculating value-based market share difficult because the price does not reflect the value received by users.<sup>112</sup> Other indicators, such as capacity, number of subscribers, or units, can be used to calculate market share.<sup>113</sup> Another difficulty in calculating market power in multi-sided platforms is distinguishing between customers and competitors, because platform customers may also be competitors.<sup>114</sup> It is critical to remember that when assessing market power, the business structure, economic characteristics, and all sides of a multi-sided platform must all be taken into account.

### 3.4.4 Barriers to Entry

Barriers to entry and expansion must be considered when assessing dominance because firms must be able to enter the market in order to compete.<sup>115</sup> When analysing market definition and market power, entry barriers play an important role.<sup>116</sup> The relationship between market power and entry barriers stems from the fact that a company will be considered to

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<sup>109</sup> Case 85/76 EU:C:1979:36, para. 42.

<sup>110</sup> Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 60.

<sup>111</sup> See the Notice on Market Definition, para. 53.

<sup>112</sup> David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, p. 425.

<sup>113</sup> Notice on Market Definition, para 53-54, and Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 321.

<sup>114</sup> OECD, *Measuring market power in multi-sided markets - Note by Kate Collyer, Hugh Mullan and Natalie Timan DAF/COMP/WD(2017)35/FINAL* [https://one.oecd.org/document/DAF/COMP/WD\(2017\)35/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)35/FINAL/en/pdf), p. 7.

<sup>115</sup> OECD, *Policy Brief, Competition and Barriers to Entry*, 2007

<https://www.oecd.org/competition/mergers/37921908.pdf>

<sup>116</sup> *Ibid.*, and, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, p. 362.

have market power for an extended period of time only if entry barriers exist.<sup>117</sup>

When evaluating market definition, barriers to entry are relevant when considering whether other firms can enter the market and constrain incumbent firms' price increases. While it is used in market power to determine whether the presumed dominant firm can exclude competitors while maintaining prices that exceed competitive norms.<sup>118</sup>

The definition of the term “barriers to entry” is highly debated and has been for several years.<sup>119</sup> Some scholars argue that anything that makes it difficult for companies to enter the market should be considered a barrier, whereas others prefer a narrower definition of the term that focuses on the advantages that established firms have over new entrants.<sup>120</sup>

The barriers to entry in multi-sided platforms are higher than in single-sided platforms due to their economics. Network effects is considered the most formidable entry obstacle because it will limit new entrants' ability to gain a sufficient number of users, particularly if there is little differentiation between the platforms.<sup>121</sup> Because of the high entry cost of multi-sided platforms, economies of scale are also considered a barrier to entry.<sup>122</sup> Furthermore, multi-sided platforms with strong data-analytics capabilities

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<sup>117</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 79.

<sup>118</sup> David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, p. 362.

<sup>119</sup> OECD, Policy Brief, Competition and Barriers to Entry, 2007  
<https://www.oecd.org/competition/mergers/37921908.pdf>

<sup>120</sup> David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, p.362.

<sup>121</sup> OECD, Policy Brief, Competition and Barriers to Entry, 2007  
<https://www.oecd.org/competition/mergers/37921908.pdf>

Werden, Gregory J. “NETWORK EFFECTS AND CONDITIONS OF ENTRY: LESSONS FROM THE MICROSOFT CASE.” *Antitrust Law Journal* 69, no. 1 (2001): 87–111.  
<http://www.jstor.org/stable/40843512>.

<sup>122</sup> Jones A & Sufrin B, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 82, and OECD, Policy Brief, Competition and Barriers to Entry, 2007 <https://www.oecd.org/competition/mergers/37921908.pdf>

create a barrier to entry for new market entrants because they are unable to access the same set of data, limiting competition.<sup>123</sup>

### **3.5 Conclusion**

As has been described, there is a debate over the objectives of EU competition law. Despite the fact that consumer welfare is regarded as the primary objective, the introduction of the DMA has shifted the focus toward fairness. Nonetheless, both objectives can exist concurrently.

Market definition, market power, and entry barriers are the traditional tools for assessing dominance in an Article 102 TFEU application. All of which gets complicated or inapplicable when applied to multi-sided platforms, leading to the conclusion that the tools available under Article 102 TFEU are insufficient today to protect competition or, to put it another way, to address competition issues posed by multi-sided platforms. Failure to properly define the market and assess market power and barriers to entry has implication for the application of Article 102 TFEU.

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<sup>123</sup> Digital platforms and the potential changes to competition law at the European level, The view of the Nordic competition authorities, September 2020, p. 10.

# 4 The Digital Markets Act (DMA)

## 4.2 Introduction

Although most of the online platforms operating in Europe's digital economy are SME's, a small number of very large online platforms account for the majority of the total value generated.<sup>124</sup> This chapter is devoted to describing the background to the now approved DMA. The chapter further contains a general review of the act as well as how the term gatekeeper is defined in the regulation. The relationship between Article 102 TFEU and the DMA is also discussed.

## 4.3 Background

In 2019 Executive Vice-President Vestager was tasked by Commission President von der Leyen with the mission of making sure that “*competition policy and rules are fit for the modern economy*”, and to “*strengthening competition enforcement in all sectors*”.<sup>125</sup> As part of this task, the EC proposed the DMA in December 2020, and the EU Council approved and adopted it in July 2022. The DMA is part of a package that also includes the Digital Service Act (DSA), both of which aim to revise the rules in the 2000 E-Commerce Directive.

The digital sector has brought great challenges to the internal market and Member states were applying or considering applying national rules to address some of the challenges. This creates a regulatory fragmentation in the EU which is why action on EU level had to take place. Moreover, many online platforms have a cross-border element which is also why

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<sup>124</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act) [2020] COM(2020) 842 final, p. 1

<sup>125</sup> Mission Letter to Margrethe Vestager, 2019, Brussels  
[https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner\\_mission\\_letters/mission-letter-margrethe-vestager\\_2019\\_en.pdf](https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf)

harmonisation were found necessary.<sup>126</sup> Without harmonisation a widespread application regarding the digital sector would happen since some Member States address the unfairness and contestability in relation to gatekeepers while others don't.<sup>127</sup>

The DMA seeks to pursue three main objectives: “strengthening the contestability of the gatekeepers’ positions; promoting fair commercial practices between gatekeepers and businesses operating on their platforms; and strengthening the Single Market”.<sup>128</sup>

## 4.4 Designated Gatekeepers

The DMA places certain regulatory requirements on digital platforms that act as "gatekeepers." The term "gatekeeper" is central to the framework's application, and its concept has implications for both gatekeepers and those competing or doing business with gatekeepers.

The term gatekeeper is defined in Article 2(1) DMA as a provider of core platform services. According to Article 3(1) DMA a core platform services must meet three cumulative criteria in order to be designated as gatekeeper and brought within the scope of the DMA. These are as follows:

- (a) it has a significant impact on the internal market;
- (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
- (c) it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.

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<sup>126</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act) [2020] COM(2020) 842 final, p. 4

<sup>127</sup> Ibid.

<sup>128</sup> Andrea Renda, Can the EU Digital Markets Act Achieve its Goals? 14/06/2022 <https://www.ie.edu/cgc/news-and-events/news/new-policy-paper-eu-digital-markets-act-achieve-goals/>, accessed 08/08/2022.

Article 2(2) DMA specifies a list of core platform services which includes, online intermediation services, online search engines and online social network services, among others.

A gatekeeper's evaluation can be made in one of two ways. It is done either by a rebuttable presumption that a core platform service meets a certain quantitative threshold as stated in Article 3(2) DMA, or by a case-by-case qualitative assessment during a market investigation by the EC Article 3(6) DMA. The EC will consider factors such as the company's size, operations, and position, entry barriers derived from network effect and data driven advantages, and scale and scope effects in its qualitative assessment. When conducting a qualitative assessment in an investigation, the EC bears the burden of proof for the determination of a gatekeeper, whereas the company bears the burden of proof when applying the quantitative threshold.<sup>129</sup>

Unlike Article 102 TFEU the assessment of a gatekeeper in accordance with the DMA does not require a determination of dominance or an assessment of market power. Which is good news because market definition and market power pose difficulties in their application to multi-sided platforms. A gatekeeper is also not always regarded as a dominant player.<sup>130</sup> However, when delving deeper into the qualitative criteria in Article 3(3) DMA, they appear to be in line with how dominant multi-sided platforms are viewed under Article 102 TFEU.

## **4.5 The Relationship between Article 102 TFEU and the DMA**

The DMA is intended to supplement EU competition law enforcement at the EU and national levels. Article 102 TFEU aims to protect undistorted market competition, whereas the DMA's overall goal is to ensure a

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<sup>129</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act) [2020] COM(2020) 842 final, p. 19, para. 23.

<sup>130</sup> Ibid, p. 8.

contestable and fair market in which gatekeepers are present. It will do so regardless of the gatekeepers' "actual, potential, or presumed effects" on competition.<sup>131</sup> This means that the new regulation has no effect on the application of Article 102 TFEU as confirmed in Article 1(6) DMA. The question is whether both frameworks would apply concurrently to the same conduct because some of the DMA's obligations<sup>132</sup>, could amount to an abuse under Article 102 TFEU, and whether such parallel application would violate the *ne is in idem* principle even if the frameworks are pursuing different legal interests.

## 4.6 Conclusion

The objectives of the DMA differ from those of the EU competition law framework, and they pursue different legal interests. It is a legal tool with an ex-ante application that will allow authorities to intervene before large online platforms violate Article 102 TFEU. There is no doubt that by implementing the DMA, the EC would be able to achieve similar results as applying Article 102 TFEU, but more quickly, and thus keep up with the rapidly changing digital environment. By doing so, the DMA will serve as an excellent supplement to Article 102 TFEU, without the difficulties that the Article presents when applied to multi-sided platforms.

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<sup>131</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 11.

<sup>132</sup> See, for example, Article 6(1)(a), which requires gatekeepers to refrain from using data that is not publicly available in competition with business users, and compare it to the Amazon case, which I discussed in chapter 2.



## 5 Conclusion

As has been demonstrated the concept of a platform is not a new phenomenon however the new online kind of a platform differs from the old ones by their characteristics. They are online/digital, scalable, and can create and enforce rules. They also benefit from a strong network effect as well as data. The main source of concern is the loss of competition caused by high fees, entry barriers, a lack of innovation, and a lack of consumer choice.

The economic characteristics have a significant impact on antitrust analysis and failing to take them into account will result in significant errors. The combination of economic characteristics in multi-sided platforms is what makes them powerful, but it also creates competition challenges across the board, including in the application of EU competition law framework.

The assessment of an undertaking's dominant position is largely based on the CJEU's, the General Court's, and the Commission's decisions. The traditional parameters of market definition, market power (market share), and entry barriers are used to determine a dominant position. These traditional tools, in my opinion, are insufficient and obsolete for determining the dominant position of a multi-sided platform. It is also difficult to determine the proper method of assessment. A revised commission guideline on the application of market definition is greatly appreciated. In summary, Article 102 TFEU and its tools for assessing dominance are insufficient and lack predictability.

When reviewing the DMA, I believe the framework will undoubtedly fill some of the gaps left by Article 102 TFEU. I also believe it will address some of the issues raised by multi-sided platforms. The ex-ante application is greatly appreciated and will assist the Commission in intervening as quickly as possible. Unlike the assessment of dominant position, the

framework is very clear on what it takes to be considered a gatekeeper, and it provides predictability when it comes to the do's and don'ts for large platforms, as well as users and consumers.

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