Unveiling Dominance: Abusive Practices in Digital Markets

An Analysis of the Market Platforms' Dominant Position and the EU's Regulatory Countermeasures

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Abstract

In an era of rapid technological advancements, the digital economy has witnessed significant transformations, resulting in the emergence of dominant technology giants. The rising dominance of companies like Google and Amazon has raised concerns in the European Union ("EU") regarding fair competition and consumer welfare. This thesis comprehensively examines the impact of digital markets and online platforms on EU competition law by analysing abusive practices and the unique challenges posed by these markets. To achieve this objective, the research provides a comprehensive overview of the EU competition law framework, focusing on its objectives and regulatory developments in response to technology giants in the EU market. The study explores the distinct characteristics of EU digital markets and platforms and their impact on competition. Notable examples of alleged abusive practices by technology giants are investigated, shedding light on their detrimental effects on fair competition.

Furthermore, the research evaluates the adaptations made by EU competition law, specifically the Digital Markets Act ("DMA"), to address the emergence of technology giants. The effectiveness of EU competition law in adapting to these challenges is critically assessed. The research employs the legal doctrinal method and descriptive research to analyse the EU legal framework, incorporating reputable sources such as academic articles, books, official documents, and reports from EU regulatory bodies and international organizations.

This thesis contributes valuable insights into the regulatory challenges faced by policymakers and regulators in the context of dominant market platforms and their impact on EU competition law. The findings enhance understanding of the evolving digital economy and provide implications for future regulatory measures within the EU. The conclusion summarizes the key findings, addresses the research questions, and presents conclusive remarks on the subject matter.

Foreword

In embarking on this thesis journey, I am realizing a dream that took shape within me two years ago. Today, as I stand here, a graduate of Sweden's most esteemed university, I am filled with profound happiness and immense pride. This achievement would not have been possible without the invaluable guidance and wisdom bestowed upon me by an exceptional faculty.

Foremost, I express my heartfelt gratitude to Jörgen Hettne, who not only served as my supervisor but also led this program with unwavering dedication. His unwavering support and constructive feedback have consistently challenged me to push my boundaries and fostered a spirit of critical self-reflection. I extend my thanks to all the guest lecturers and academics who graced our lectures, enriching our academic journey with their profound insights and contributions.

On a personal note, I am indebted to my beloved parents, whose unwavering support and unwavering belief in my abilities have been a constant source of strength. I also extend my deepest appreciation to my fiancée, whose endless support and understanding have been the pillars upon which I have relied during this challenging but joyful process.

As I conclude this chapter of my academic voyage, I hold dear the friendships forged along the way, and I am resolved to cherish the memories created with a smile. May these bonds endure the test of time, serving as a reminder of the transformative experiences we shared.

Abbreviations

DMA	Digital Markets Act
EU	European Union
EC	European Commission
ECJ	European Court of Justice
FTC	Federal Trade Commission (United States of America)
ICN	International Competition Network
OECD	Organization for Economic Cooperation and Development
SSNIP	Small but Significant Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1. Introduction

1.1 Background

Change is inevitable and nowadays it is happening within the blink of our eyes. With technology, our lives and how we carry out simple daily tasks have changed substantially thus, it is becoming more essential each day. The commercial sphere has also changed and is shaped by this fact, and it is clear that brick-and-mortar commerce is fading, leaving the stage for digital platforms, services, and economies. As is the fact, change, and development are followed by the law to regulate what is new with lots of uncertainty approached by the efforts of policymakers and regulators trying to navigate and find the right balance facing many challenges.

The increasing dominance of technology giants in the digital economy and markets has become a major concern for the European Union's ("EU") competition law framework. These companies have amassed significant market power, with Google, for example, holding an estimated 92.24% share of the search engine market in the EU.[1] The umbrella company of Facebook, Meta has an almost complete monopoly in the social media space, while Amazon has a significant presence in the e-commerce market.[2]

The EU's competition law framework is designed to promote fair competition and to protect consumer welfare[3] by preventing anti-competitive practices, such as the abuse of a dominant market position. However, the unique challenges presented by the digital economy such as the network effects, access to a vast amount of

[1] Statcounter Globalstats, *Search Engine Market Share Europe April 2022- April 2023*, <https://gs.statcounter.com/search-engine-market-share/all/europe> (Accessed 15/04/2023).

[2] Daniel Shvartsman, *Facebook: The Leading Social Platform of Our Times* (Investing.com, 2023), <https://www.investing.com/academy/statistics/facebook-meta-facts/ > (Accessed 24/05/2023), and Mordor Intelligence, *Europe E-Commerce Market Size & Share Analysis Growth Trends Forecast (2023-2028)*, <https://www.mordorintelligence.com/industry-reports/europe-ecommerce-market> (Accessed 24/05/2023).

[3] European Parliament, Fact Sheets on the European Union, *Competition Policy*, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> (Accessed 15/04/2023).

data[4], striking the balance between innovation and regulation, and the lack of transparency of algorithms and the technologies behind a digital product or service, have made it challenging to apply traditional competition law principles effectively.[5] This issue has also been stressed by the EC ("European Commission") in its Impact Assessment Reports[6] preceding the Digital Market Act[7], where it is considered that the existing legal framework is falling short in addressing competition law problems within the digital markets.

Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") are of utmost importance in this sense, as they represent and provide the enforcement power to EC. Both articles still represent an important part of the EU competition law policy and framework but their efficiency in regulating digital markets and platforms that hold significant market power has decreased by certain characteristics and dynamics of these markets and platforms.[8] For instance, the enforceability of Article 101 TFEU in terms of concerted practices relies on the existence of an agreement, which cannot easily be detected when carried out by advanced software and programmes. Another example relates to Article 102 TFEU, where its enforceability relies on defining the relevant market and the existence of dominance. If dominance is non-existent or not properly assessed, which is very likely due to the peculiarities of digital markets and platforms, concerted practices and abuse of dominance may take place unnoticed.

[4] Bruno Lasserre and Andreas Mundt, 'Competition Law and Big Data: The Enforcers' View' (2017), p. 87, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Competition_Law_and_Big_Data_The_enforcers_view.pdf?__blob=publicationFile&v=2> (Accessed 15/04/2023).

[5] EU Commission Report, Jacques Crémer, Yves Alexandre de Montjoye and Heike Schwitzer, *Competition policy for the digital era* (2019), available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf > (herein after Commission Report of *Competition policy for the digital era* (Accessed 15/04/2023).

[6] European Commission Staff Working Document, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) Part ½ and Part 2 SWD(2020) 363 final (herein after DMA Impact Assessment Report) accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0363> (Accessed 15/04/2023).

[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265 (herein after Digital Markets Act or DMA).

[8] DMA Impact Assessment Report (n.6), p.32-33.

To address the inefficiencies that arise with the emergence of the digital economy followed by digital markets and platforms, EC proposed the DMA back in December 2020 and it was agreed by both the European Parliament and the Council in March 2022.[9] As of 2 May 2023, it applies to big tech companies that satisfy certain thresholds[10] considering them as "gatekeepers"[11] providing a "core platform service".[12]

1.2 Purpose and Research Questions

This thesis aims to examine the impact of digital markets and online platforms on competition law in the EU. It will do so by giving an overview of the EU competition law framework and its objectives by exploring the development of EU competition law in response to the emergence of technology giants in the EU market, by examining abusive practices and their effects in the market together with presenting the challenges posed by unique characteristics of digital markets and platforms.

The research questions which this thesis aims to answer are:

R.Q.1 What are the characteristics of digital markets and platforms in the EU market, and how do they affect competition?
R.Q.2 What are the typical examples of alleged abusive practices by technology giants in the EU market?
R.Q.3 How has EU competition law adapted to the emergence of technology giants, specifically concerning the Digital Markets Act?

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[9] European Commission, *Digital Markets Act: Ensuring fair and open digital markets* (2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en > (Accessed 15/04/2023).

[10] European Commission, Questions and Answers have described the threshold for being subject to DMA as follows: (I) Certain annual turnover in European Economic Area; (II) providing core platform service in at least three EU Member States, providing core platform services to more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU; (III) meeting the (II) criterion during the last three years. <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 > (Accessed 15/04/2023).

[11] Definition of 'gatekeeper', DMA Article 2(1).

[12] Definition of 'core platform service', DMA Article 2(2).

1.3 Delimitations

The study is limited to the regulatory framework within the EU and secondary sources of information regarding EU competition law therefore the study will not cover any other legal system but will solely stay within the boundaries of the EU legal system. Only relevant EU competition law frameworks, regulations, and policies will be analysed in the study. Another limitation derives from the peculiarities and technical aspects of digital markets and platforms considering the limited time for the study, only some of the directly related technical aspects are taken into consideration to be able to provide causal links and logical reasoning with regard to the research questions in a sufficient manner. The focus of the study is on the impact of digital markets and platforms on competition law in the EU. Thus, it will provide the relevant regulatory framework within the scope of relevant actors in the EU market and their characteristics to answer the research questions.

1.4 Materials and Method

The research aims to analyse the impact of tech giants that operate in digital markets on competition law in the European Union. To achieve this, the legal doctrinal method is employed throughout the study to analyse matters that relate to the legal sphere. I will therefore analyse the complex nature of legal issues from the inside of the legal framework, rather than from the outside.[13] However, there are also concepts and technical aspects to consider that fall outside the legal sphere to carry out this study which is the reason for employing descriptive research[14] along with the legal doctrinal method.

The research relies on the EU regulatory framework, starting with the Treaty on the Functioning of the European Union ("TFEU"), regulations, directives,

[13] Jan M. Smits, What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, (Cambridge University Press, 2017), p.5, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088 > (Accessed 23/04/2023).

[14] M. D Pradeep, Legal Research-Descriptive Analysis on Doctrinal Methodology 4(2), p. 99, *International Journal of Management, Technology, and Social Sciences* (IJMTS, 2019), available at <http://doi.org/10.5281/zenodo.3564954> (Accessed 23/04/2023).

proposals for regulation and case law of the European Court of Justice. Secondary sources such as academic articles, books, official documents, and reports published by European regulatory bodies and international organization such as the EU Commission and Organisation for Economic Co-Operation and Development ("OECD") has been used. I will therefore in combination with my legal doctrinal method and descriptive research rely on the hierarchy of norms and methods of interpretation developed by the EU Court of Justice which is usually called the EU legal method.[15]

1.5 Structure

The Introduction chapter will provide the background and context of the research, outline the purpose and research question, describe the delimitations of the study, present the materials and methods used, and provide an overview of the structure of the thesis.

The second chapter will provide an introduction to EU competition law and its objectives and present the regulatory framework including TFEU Articles 101 and 102 (cartels and abuse of a dominant position). This will provide the necessary legal background to examine the dominant tech giants and their abusive practices within the EU market.

The third chapter will provide a general definition of digital markets and platforms in the EU, discuss digital platforms' general characteristics and certain theories of harm will be explained.

Chapter four will provide an overview of abusive practices in EU competition law, with a focus on examples of abusive practices by digital platforms in the EU market. The chapter will examine how EU competition law has adapted to tackle its dominance with the Digital Markets Act and will provide an overview of the recent cases and the Commission's response to their practices. In this chapter, the author will make an analysis of these countermeasures adopted by the EU.

[15] *See* Koen Lenaerts and José A. Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, EUI AEL, 2013/09, *Distinguished Lectures of the Academy Retrieved from Cadmus, European University Institute Research Repository*, available at: <http://hdl.handle.net/1814/28339 > (Accessed 24/03/2023).

The final chapter will summarize the main findings of the thesis, answer the research questions, and provide the concluding remarks.

2. EU Competition Law Framework

2.1 Introduction to EU Competition Law and its Objectives

EU competition law is a set of rules and regulations established by the EU to prevent anti-competitive practices and to promote competition in the EU internal market.[16] The EU competition law aims to ensure a level playing field for all businesses operating in the EU, regardless of their size or origin.[17] The importance of promoting competition in the EU internal market lies in its ability to promote consumer welfare, economic efficiency, and innovation.[18]

The history of EU competition law dates back to the Treaty of Rome in 1957, which established the European Economic Community (EEC). Article 85 of the Treaty of Rome prohibited agreements that would restrict competition in the EU internal market.[19] This provision laid the foundation for EU competition law, which was initially focused on controlling monopolies and cartels that could hinder competition in the EU internal market. The first case that the European Commission dealt with was the Italian concrete case in 1966, which involved a price-fixing cartel.[20]

In the following years, EU competition law evolved and expanded to include not only the control of monopolies and cartels but also the regulation of the behaviour

[16] Damien Chalmers, Gareth Davies and Giorgio Monti, "EU Competition Law", European Union Law: Text and Materials (4th ed., Cambridge University Press 2019), p. 875.

[17] European Commission, Directorate-General for Competition, EU competition policy in action – COMP in action, Publications Office, (2018) <https://data.europa.eu/doi/10.2763/897035 > (Accessed 15/04/2023).

[18] European Parliament, Fact Sheets on the European Union, *Competition Policy* (n.3).

[19] EEC Treaty, Article 85 "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market…"

[20] ECJ, Case 32/65, *Italian Republic v Council of the European Economic Community and Commission of the European Economic Community* [1966] EU:C:1966:42.

of undertakings. The first merger regulation[21] was introduced in 1989, which enabled the European Commission to scrutinize and approve mergers that could potentially harm competition in the EU internal market. In addition, the introduction of the State Aid rules in 1957, which were further developed in 1999, aimed at preventing member states from providing subsidies or grants that could distort competition in the EU internal market.[22]

The EU competition law has also been developed through several landmark cases, such as the *Microsoft* case[23] in 2007, which dealt with the abuse of a dominant market position, and the *Google* case[24] in 2016, which involved anti-competitive behaviour related to online advertising. These cases have played a crucial role in shaping EU competition law and establishing a precedent for future cases.

Promoting competition in the EU internal market is of paramount importance for several reasons. Firstly, it allows consumers to benefit from lower prices, increased choice, and higher quality products and services.[25] Secondly, it promotes economic efficiency by encouraging businesses to operate efficiently and innovate to remain competitive.[26] Finally, it fosters innovation by providing a level playing field for businesses to compete, which in turn drives new ideas and advances in technology.[27]

In conclusion, EU competition law has evolved from a mere framework for the control of monopolies to a broader system aimed at regulating the behaviour of undertakings and preventing anti-competitive practices.[28] The history and

[21] Council Regulation (EEC) No 4064/89 of 21 December 1989 on control of concentrations between undertakings [1989] OJ L 395, this regulation is no longer in force.

[22] Catherine Barnard and Steve Peers, 'European Union Law' (3rd ed.). (Oxford University Press, 2020), p.579-580.

[23] Judgment of the Court of First Instance (Grand Chamber), Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2007] EU:T:2007:289.

[24] European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service", < https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> (Accessed 24/04/2023).

[25] Johan W. Van de Gronden and Catalin S.Rusu, "Article 102 TFEU, Dominant Position," *Competition law in the EU: Principles, Substance, Enforcement* (Edward Elgar Publishing 2021), p. 8-9.

[26] Ibid.

[27] Ibid.

[28] Valentine Korah, 'An Introductory Guide to EC Competition Law and Practice' (Hart Publishing, 2007), 9th ed.

development of EU competition law provide a clear framework for its importance in ensuring a level playing field for businesses and promoting competition in the EU internal market.

2.2 Regulatory Framework

2.2.1 TFEU Article 101: Restrictive Practices

Article 101 TFEU plays a crucial role in regulating competition for the undertakings that operate in the EU. This article prohibits any agreement between companies that may affect trade between EU member states and have as their object or effect the prevention, restriction, or distortion of competition within the EU internal market.[29]

According to the article, if an agreement restricts competition and if it is not exempted under paragraph (3), then the agreement is automatically void by paragraph (2). EU law prohibits agreements that are in breach of this Article.[30] Relying on the article, EC may require undertakings to end the infringing practice and may impose fines. The article applies to both horizontal agreements[31] and vertical agreements[32]. It encompasses all types of agreements and coordinated actions that have a negative impact on competition within the European common market, regardless of the specific market in which the parties are active.[33]

Within the scope of the article, an anticompetitive behaviour occurs between undertakings and the conduct prevents, restricts, or distorts competition either by its purpose or its effect.[34] Price-fixing and market sharing, and agreements between undertakings at different levels of the supply chain, such as resale price

[29] Article 101 TFEU.

[30] Regulation 1/2003 on the implementation of the rules laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1, Recital 4, Articles 1, 5 and 6.

[31] Horizontal Agreements are made between companies operating on the same market level.

[32] Vertical Agreement is made between companies operating on different levels of the supply chain.

[33] Gero Meeßen, 'Article 101 TFEU', in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019 online edn, Oxford Academic), p. 1009 <https://doi.org/10.1093/oso/9780198759393.003.196> (Accessed 24 May 2023).

[34] Moritz Lorenz, 'An Introduction to EU Competition Law' (Cambridge Press, 2013), p.63.

maintenance and exclusive dealing can be provided as examples of such prohibited practices.[35]

While in the digital economy, concerted practices may take various forms, including algorithms used by companies to coordinate prices or other business strategies. As digital platforms become more prevalent, concerns have arisen about the potential for such platforms to facilitate tacit collusion[36] among competitors. Algorithms are computer programmes that are instructed to analyse large data sets to provide an outcome regarding the market.

To provide an example: Amazon provides its third-party sellers with a feature that always matches the lowest price accessible on its platform.[37] In this specific case, it helps consumers benefit from cheaper prices. However, in some cases, it can be used as a tool for facilitating cartels. For instance, it was used as a tool to monitor whether parties (parties to the concerted practice) complied with the agreed price, therefore, setting a cartel agreement behind the scenes.[38] Another scenario is more complex in nature since it is the algorithm itself making decisions for maximising profit. In this case, a third party that supports the algorithm for the use of another company may be aware of such conduct of the algorithm but the users may be unaware of the risks that such conduct may produce a cartel-like effect.[39] It becomes extremely hard to detect such conduct and even if it is detected "it does not seem easily possible to base the IT service provider's liability under Article 101 TFEU on the fact that it was the contract for the provision of the respective

[35] ECJ, Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*. [1985] EU:C:1985:284, para.43 and Gero Meeßen, 'Article 101 TFEU' (n.33), p.1034.

[36] Tacit collusion arises when rival firms secretly come to an implicit understanding to jointly exercise authority over the market and establish elevated prices, thereby minimizing the chances of undermining each other. The examples of such practices are discussed in Moritz Lorenz, 'An Introduction to EU Competition Law' (n.34) pages 105-110.

[37] UK Competition and Markets Authority define a pricing algorithm in 'Economic working paper on the use of algorithms to facilitate collusion and personalised pricing', p.9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf > (Accessed 26/04/2023).

[38] UK Competition and Markets Authority, Decision of the CMA, Online sales of posters and frames Case 50223, <https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf > (Accessed 26/04/2023).

[39] Damien Chalmers, Gareth Davies and Giorgio Monti (n.14) "Chapter 21: Antitrust and Monopolies", p.934.

algorithm that produced the collusive market outcome and that this contract constitutes an agreement within the meaning of the provision."[40]

Oligopolistic firms' behaviour may also be in parallel without actually coming to any agreement or concerted practice considering the fact that digital markets are already oligopolistic and considering their collective market power.[41] Furthermore, data-driven businesses are characterized by digital markets; the emergence of algorithms can facilitate collusive behaviour, known as 'algorithmic collusion'.[42] Algorithms may perform tacit collusion with automatic tools. Furthermore, they can conclude a collusive agreement by bypassing direct communication.[43] In the case of tacit collusion (where enterprises do not interact with one another and do not engage in other actions), the EU enables them to enforce collusion, which is not prohibited by Article 101 TFEU.[44]

It is an undeniable fact that as with every legal system, EU competition law needs to evolve to be able to address new challenges that are posed by emerging tech giants because these companies are not growing without a reason, the way they serve the consumers, their approach in serving products and the way they interact with their users started a new era within the market.

In relation to this, EC is aware that a new approach is needed to address the problems of this new market therefore in the Impact Assessment Report preceding the Digital Markets Act it is stated that "The Commission considers that the current legal framework would not allow it to address the market failures."[45] An

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[40] Ibid, p.935 *cross-ref.* 'Biennial Report of the Monopolies Commission (Competition 2018) in accordance with Section 44 Paragraph 1 Sentence 1 of the German Act against Restraints of Competition' para.267.

[41] EC, Summary of the Contributions of the National Competition Authorities to the impact assessment of the new competition tool, p.4 -5. <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_contributions_NCAs_responses.pdf > (Accessed 26/04/2023).

[42] Massimo Motta and Martin Peitz, 'Intervention triggers and underlying theories of harm' (2020) European Commission, p.26 <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420575enn.pdf > (Accessed 26/04/2023).

[43] OECD, 'Executive Summary of the Roundtable on Algorithms and Collusion' (2017), p.3.,

<https://one.oecd.org/document/DAF/COMP/M(2017)1/ANN3/FINAL/en/pdf > (Accessed 26/04/2023).

[44] Massimo Motta and Martin Peitz, 'Intervention triggers and underlying theories of harm' (2020), p.24 (n.42).

[45] DMA Impact Assessment Report (n.6), para.118.

example that supports this statement, is the absence of some pre-conditions such as the existence of an anticompetitive agreement. In the event of anticompetitive behaviour combined with the absence of an agreement, Article 101 TFEU becomes inapplicable.[46] Also, it is important to take precautionary measures when regulating a market, so relying solely on Article 101 TFEU means that EC can only interfere after an anticompetitive incident takes place (*ex post*). When abusive conduct forecloses the market, the intervention comes too late since the rules of Article 101 TFEU operate *ex post*.[47] Therefore, existing competition tools are not sufficient to tackle the problems of the digital market.[48]

2.2.2 TFEU Article 102

While TFEU Article 101 covers agreements, decisions, and concerted practices, TFEU Article 102 is concerned with the unilateral abusive conduct of dominant firms.[49] Protection of consumer welfare and promotion of economic efficiency are the main objectives of the article.[50] By doing so, consumers will benefit from reduced prices, higher quality, and a wider selection of new and improved goods and services as a result of efficient competition among competitors.[51]

In accordance with the judgement of the European Court of Justice ("ECJ") in *Michelin I*[52] case the Court stated that in para 57: [53]

> A finding that an undertaking has a dominant position is not in itself recrimination but simply means that irrespective of the reasons for which it has

[46] Ibid, para. 119.

[47] Ibid.

[48] Ibid, para.123. The main concern is that the existing competition rules can answer anticompetitive conduct only after the conduct takes place. This insufficiency is caused by the structure of the digital markets rather than by any anticompetitive conduct.

[49] Damien Chalmers, Gareth Davies and Giorgio Monti (n.14) "Chapter 21: Antitrust and Monopolies", p.951.

[50] 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] OJ C 45, paras.5-6 (herein after 'The Guidance Paper').

[51] Ibid, para. 5.

[52] ECJ, C-322/81, *NV Nederlandsche Banden Industrie Michelin v European Commission* [1983] EU:C:1983:313 (herein after Case *Michelin I)*

[53] Ibid., para. 57 and *See* that in ECJ, Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, para. 23; ECJ, Case C-457/10 P *AstraZeneca v Commission* [2012] EU: C:2012:770, para. 134.

> such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

With this case, EC established that if a dominant undertaking is not abusing its dominant position, then there is no concern under the article. To establish an infringement, the EC must demonstrate that an undertaking is in a dominant position in a specific market, that it has taken advantage of its dominant position, that this conduct had affected trade between the Member States, and that there is no ground of any objective justification for the abuse.[54]

The concept of dominant position is not provided within the TFEU but rather left for ECJ to describe in its judgements such as in the early cases of *United Brands*[55] and *Hoffmann-La Roche*[56] as:

> A position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

Assessment of whether an undertaking is dominant requires a two-step analysis: first, the relevant market must be defined and second, after the relevant market is identified, indications of substantial market power need to be examined to determine whether the market dominance exists or not.[57] In the assessment of the market power, other factors are considered by EC, such as the position of the dominant undertaking and its competitors in the market, countervailing buyer power[58], and expansion and ease of entry into the market.[59]

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[54] Damien Chalmers, Gareth Davies and Giorgio Monti (n.14), p.951.

[55] ECJ, Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, para. 65.

[56] ECJ, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU: C:1979:36, para. 38.

[57] Johan W. Van de Gronden and Catalin S.Rusu, (n.25). p.109.

[58] Definition of countervailing buyer power: "…the ability to sufficiently neutralize opposing market power based on the buyer's bargaining strength in a commercial relationship…" https://www.concurrences.com/en/dictionary/buyer-

The Notice on Relevant Market[60] explains the in-practice application of how the market definition is carried out with geographic and product/service aspects. The relevant market is composed of products/services which are interchangeable or substitutable by consumers due to their characteristics, their uses, and prices.[61] Defining the market requires a comprehensive and complex analysis, as part of this process, findings must be challenged against the economic and business realities.[62]

One of the indicators when determining dominance is market share.[63] Therefore the existence of dominance can be presumed from a market share of 50%.[64] In majority of the cases, while a dominant company enjoys over 50% market share, its competitors are in substantially less favourable conditions. Additionally, there are also other factors to consider. If undertaking (x) has a 90% market share and if its competitors can immediately enter the market after a price increase by (x), then it can be said that (x) is not in a dominant position. In this respect, ECJ's view is whether other undertakings can enter the market to compete against the dominant undertaking in a relatively short period.[65] In the *Michelin I* case, the General Court (at the time the Court of First Instance) found that a dominant position might be secured through holding intellectual property rights, access to capital, considerable costs of entry or through a well-established distribution system and brand recognition.[66]

The question of determining the relevant market gains importance when it comes to the digital market and economy. The transition from traditional economies to digital economies gave rise to the emergence of new markets, namely digital

power#:~:text=Countervailing%20buyer%20power%2C%20or%20the,and%20abuse%20of%20dominance%20cases (Accessed 25/04/2023).

[59] The Guidance Paper, para 12.

[60] Commission Notice on the definition of relevant market for the purposes of Community competition law , OJ C 372, Introduction par. 4. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 > (Accessed 27/04/2023).

[61] Johan W. Van de Gronden and Catalin S.Rusu, (n.25). p.111.

[62] Ibid, p.112.

[63] ECJ, Case 85/76 *Hoffmann-La Roche,* par.39-41 and Paragraph 13 of The Guidance Paper.

[64] ECJ, Case 62/86 *AKZO Chemie* v *Commission* [1991] , EU:C:1991:286, para. 60.

[65] Damien Chalmers, Gareth Davies and Giorgio Monti (n.14), p. 953.

[66] ECJ, C-322/81 *Michelin v European Commission* [1983] EU: C:1983:313, para.58.

markets. The reason for the emergence of digital markets is technological advancement and innovation in the way the customers are served, communicated, and offered products. [67] This new type of market requires a different approach because traditional market definition tests have become insufficient to determine the new dynamics in the digital markets.

In this sense, the SSNIP ('Small but Significant Non-transitory Increase in Price') test, which is a speculative experiment that evaluates the reactions of customers to relative price changes becomes useless since in digital markets, products are offered in zero-pricing strategy.[68] At this moment, customer data substitutes the fee for the offered services/products. Monetization of customer data through personalised advertisements is the most common example of this exchange.

One of the core aims of the EU competition law is to preserve competition in the markets both for companies and for the benefit of consumers but in digital economies and markets this gains special importance since competitors in digital markets adopt winner takes all approach.[69]

Because of core changes in the market, now the boundaries of the market are not as clear as they used to be with traditional markets and therefore as stated in the EC 2019 Report on Competition Policy for the Digital Era[70] as follows:

> Less emphasis should be placed on the analysis of market definition in the digital sector, and more emphasis should be devoted to theories of harm and the identification of anti-competitive strategies.[71]

2.2.3 Abuse of Dominance

After establishing that an undertaking is dominant, the question is whether it abuses its dominant position and as a dominant undertaking it has the special responsibility of not allowing its conduct to impair genuine undistorted

[67] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p.115.

[68] Ibid.

[69] Ibid, p. 121.

[70] EU Commission Report of *Competition Policy for the digital era* (n.5.).

[71] Ibid, page 3.

competition on the common market.[72] Even if the concept of abuse of a dominant undertaking is not provided in TFEU Article 102, ECJ in its rather recent case law stated the concept of abuse as:

> An objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[73]

What we understand from this statement is that abuse is an objective concept. Furthermore, in the *Continental Can* case[74] ECJ ruled that abuse can be established regardless of any fault or subjective intention of a dominant undertaking.

The concept of abuse is also heavily influenced by the EC's economic approach as it was first applied in cartel and merger cases as a concept but concerning the article, effects of conduct and consumer welfare are on the focus.[75] Over the years, the approach is evolved towards exclusionary practices and intervention is limited to instances where "the allegedly competitive conduct is likely to lead to anticompetitive foreclosure."[76]

It is considered that there are two types of abuse which are exploitative and exclusionary.[77] Exploitative abuses are practices that impose unfair purchase or selling prices or unfair trading conditions such as the application of dissimilar conditions to equivalent transactions that are aimed to harm the customer of a

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[72] ECJ, C-322/81 *Michelin I v European Commission* [1983] EU: C:1983:313, para. 57.

[73] ECJ, C-52/09 *Konkurrensverket v Telia Sonera Sverige AB* [2011] EU:C:2011:83, para. 27 and ECJ, Case C-280/08 *P Deutsche Telekom v Commission* [2010] EU:C:2010:603 para.174.

[74] ECJ, Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities.* [1973] EU: C:1973:22, para. 29.

[75] Moritz Lorenz, 'An Introduction to EU Competition Law' (Cambridge Press, 2013), p. 214.

[76] Article 102, The Guidance Paper, para. 20.

[77] Damien Chalmers, Gareth Davies and Giorgio Monti (n.14), p. 955.

dominant undertaking.[78] One example of such conduct is charging excessive prices and in the *United Brands* case, ECJ provided that 'a price is excessive when it bears no reasonable relation to the economic value of the product that is in question.'[79] It can also be a certain behaviour that hinders the goal of achieving an integrated internal market.[80]

The second type of abuse is exclusionary abuse which finds its application as forcing to exit or limiting entry or expansion by competitors that eventually distorts the structure of the market.[81] This type of abuse is specifically directed towards rivals in the market that are aimed at securing the dominant position and further taking advantage of the dominant position enjoyed.[82] Therefore, it is no surprise that in the EC's Enforcement Priorities Guidelines[83], exclusionary abuses (foreclosure effects) are at centre of the attention regarding enforcement as it can also be derived from the title of the document.[84] The 5th and 6th paragraphs of the Guidelines state that the EC's concern is the conduct that is most harmful to consumers. In this sense, the enforcement is aimed at ensuring a well-functioning market through effective competition between undertakings so that consumers will benefit from efficiency and productivity.[85] Thus, EC should intervene in situations where the allegedly abusive conduct of a dominant undertaking is likely to harm consumers which may also cause a foreclosure effect.[86]

Effects analysis is a criterion that is important when establishing an abuse of a dominant position. It seeks whether there is a causal link between the conduct and the alleged foreclosure effect. Therefore, conduct may only be considered an

[78] Ibid.

[79] Ibid.

[80] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p.126.

[81] Ibid.

[82] Thomas Kattenmaker and Steven Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price' (Yale Law Journal, 1986) Vol.96. No.2., available at < https://doi.org/10.2307/796417 > (Accessed 26/04/2023).

[83] The Guidance Paper, para.22.

[84] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p.126-127.

[85] Ibid.

[86] Neelie Kroes, 'The European Commission's Enforcement Priorities as Regards Exclusionary Abuses of Dominance – Current Thinking' [2008] Competition Law International 4(3), 6.

abuse if it is capable of producing anticompetitive effects.[87] For instance, in the *TeliaSonera* case, ECJ stated that conduct must have an anticompetitive effect on the market to be established as abusive.[88] Additionally, there is no need for actual effect though it should be demonstrated that there is an anticompetitive effect that may potentially exclude competitors. For conducts such as exclusive dealing, or pricing below average variable cost is assumed that the only intention behind it is to limit competition and it is assumed to have the ability to cause restrictive effects. In such cases, there is no need to conduct an effects analysis. This is also mentioned in the Guidelines as a comprehensive evaluation may not always be necessary if the conduct only creates barriers to competition and does not generate any efficiencies, it can be assumed to have anticompetitive effects.

Different types of exclusionary abuses that are in the Guidance will be discussed below.

- **Refusal to Supply**

A dominant firm may abuse its position by refusing to supply a product or service to a customer without a valid reason.[89] This conduct may be considered an abuse of a dominant position if the refusal to supply has an anti-competitive effect and if the dominant firm has no valid justification for the refusal. In the case of *United Brands,* the ECJ held that a refusal to supply may amount to an abuse of a dominant position if the dominant firm is preventing its customers from competing effectively.[90]

- **Exclusive Dealing**

Exclusive dealing occurs when a dominant firm requires its customers to buy its products or services exclusively, or predominantly from it to the detriment of

[87] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p. 127.

[88] ECJ, C-52/09 *Konkurrensverket v Telia Sonera Sverige AB* [2011] EU:C:2011:83, para. 64. *See* that effect in those cases: ECJ Case C-23/14 *Post Danmark A/S v Konkurrencerådet (Post Denmark II)* [2015] EU:C:2015:651 para 29 and ECJ, C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* [2018] EU: C:2018:270, para 31.

[89] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p. 138.

[90] ECJ, Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, para. 220.

competition.[91] This conduct may be considered an abuse of a dominant position if the exclusive dealing has an anti-competitive effect and if the dominant firm has no valid justification for the practice.

- **Tying and Bundling**

Tying and bundling occur when a dominant firm requires its customers to purchase one product or service only if they also buy another product or service. This conduct may be considered an abuse of a dominant position if the tying or bundling has an anti-competitive effect and if the dominant firm has no valid justification for the practice. In the case of *Microsoft Corporation v Commission*[92], the ECJ held that tying and bundling may be an abuse of a dominant position if the dominant firm uses its market power to foreclose competition.

- **Predatory Pricing**

Predatory pricing occurs when dominant firm prices its products or services below cost to drive its competitors out of the market.[93] This conduct may be considered an abuse of a dominant position if the predatory pricing has an anti-competitive effect and if the dominant firm has no valid justification for the practice.[94] In the case of *AKZO Chemicals v Commission*[95], the ECJ held that predatory pricing may be an abuse of a dominant position if the dominant firm uses its market power to foreclose competition.

- **Margin Squeeze**

Margin squeeze occurs when a dominant firm charges its customers a price for a downstream product that is higher than the price it charges for the upstream product. This conduct may be considered an abuse of a dominant position if the margin squeeze has an anti-competitive effect and if the dominant firm has no

[91] The Guidance Paper, Article 32 defines 'Exclusive Dealing'.

[92] Judgment of the Court of First Instance (Grand Chamber), Case T-201/04 *Microsoft Corp. v Commission of the European Communities [2007]* EU:T:2007:289, para.305.

[93] Moritz Lorenz, (n.34), p. 230.

[94] Johan W. Van de Gronden and Catalin S.Rusu, (n.25), p. 135.

[95] ECJ, Case-62/86 *AKZO Chemie* para. 71-72.

valid justification for the practice. In the case of *TeliaSonera*, the ECJ held that margin squeeze may be an abuse of a dominant position if the dominant firm uses its market power to foreclose competition. [96]

- **Rebates**

Rebates occur when a dominant firm offers a discount to its customers based on the volume of purchases they make. This conduct may be considered an abuse of a dominant position if the rebates have an anti-competitive effect and if the dominant firm has no valid justification for the practice. Rebates can take different forms, such as loyalty rebates, target rebates, and retroactive rebates.

Loyalty rebates are offered to customers who exclusively purchase from the dominant firm. This practice may have the effect of foreclosing competitors from the market. In *Michelin I*[97], the ECJ held that a loyalty rebate scheme may be an abuse of a dominant position if it creates a fidelity-inducing effect that restricts competition.

Target rebates are offered to customers who meet a certain purchasing target. This practice may have the effect of foreclosing competitors from the market.

Retroactive rebates are offered to customers who reach a certain purchasing threshold after the fact. This practice may have the effect of foreclosing competitors from the market. In *British Airways v Commission*, the ECJ held that a retroactive rebate scheme may be an abuse of a dominant position if it has the effect of hindering competition. [98]

Rebates are subject to the ECJ's guidance under the "as efficient competitor" test, which requires assessing whether a dominant firm's rebate scheme is capable of excluding an as efficient competitor from the market. If the rebate scheme is

[96] ECJ, C-52/09 *Konkurrensverket v Telia Sonera Sverige AB,* para.91.

[97] ECJ, Case C-322/81 *Michelin I v European Commission*, para.73.

[98] ECJ, Case C-95/04 P, *British Airways plc v European Commission* [2007] EU: C:2007:166, para.58.

capable of excluding an as efficient competitor, it may be deemed an abuse of a dominant position.[99]

3. Digital Markets and Platforms

3.1 Introduction

Digital markets refer to markets that rely on digital technologies for offering products and services. Digital markets have become increasingly important in recent years as a result of their growth and influence together with the emergence of innovative technologies.[100] These markets have raised unique challenges for competition law and policy in the EU.

Digital markets are defined as markets in which goods and services are provided through digital technologies and therefore these markets are characterized by low marginal costs, network effects, and winner takes all dynamics.[101] The actors of these markets are called "core platform services" which encapsulate e-commerce platforms, online advertising, social media, and search engines, etc.[102]

The EU has recognised the importance of digital markets and has taken steps to promote their development, such as through the Digital Single Market strategy in 2015.[103] However, the dominance of certain companies in digital markets has

[99] EC, Case T-286/09, *Intel Corporation v European Commission*, [2022] EU: T:2022:19, para.158 "… it may be concluded that a system of exclusivity payments is capable of foreclosing market access for equally efficient competitors if the effective price is below Intel's AAC. In that situation, the AEC test has a negative result. If, by contrast, the effective price is above the AAC, an as-efficient competitor is deemed to be able to cover its costs and to therefore be in a position to enter the market. In that situation, the AEC test has a positive result."

[100] Digital Markets Act, Recital 1.

[101] Ibid, Recital 2.

[102] Ibid, Article 2(2).

[103] Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final.

raised concerns about the impact on competition and innovation. For example, companies such as Google and Meta (Facebook) have significant market power in the online advertising market.[104]

This chapter will try to define and analyse digital markets and online platforms in the EU. It will examine the new theories of harm that provide a competitive edge to these platforms including certain characteristics and the unique challenges of these platforms. In this chapter, the EU's approach and response to these challenges will be discussed, including the adoption of a more proactive approach to the enforcement of competition law in digital markets.

3.2 Online Platforms and Multi-sided Markets

Online platforms such as search engines, social network providers, and e-commerce platforms have unique characteristics compared to other businesses. They only operate on the internet, and they act as intermediaries for customers of different groups and sizes. OECD defines online platforms as:

> A digital service that facilitates interactions between two or more distinct but interdependent sets of users (firms or individuals) who interact through the service via the internet. [105]

These platforms' cost of production is low when it is compared to the number of its customers.[106] This is due to the extreme scalability of the platforms. Once, platforms reach a sufficient number of customers, one customer's activity undertakes the cost of services for other customers or users. This is where the network effects come into play when "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good."[107] This effect can be exemplified by what has been experienced in

[104] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.2. <https://one.oecd.org/document/DAF/COMP/WD(2022)56/en/pdf > (Accessed 24/05/2023).

[105] OECD, 'An Introduction to Online Platforms and Their Role in Digital Transformation' [2019] p.21 .< https://read.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_53e5f593-en#page1 > (Accessed 25.04.2023)

[106] Commission Report of *Competition policy for the digital era* (n.5), p.2.

[107] Michael L. Katz and Carl Shapiro, 'Network externalities, competition, and compatibility' (1985) 75(3) The American Economic 424.

Facebook, as more people joined the platform the value of the social media platform increased. As a result of this, digital markets can be said to be characterised by strong network effects that can lead to the emergence of dominant firms with significant market power.

Multi-sidedness of these online platforms is of great importance when determining abuse of a dominant position. These platforms act as intermediaries between two or more customer groups and by facilitating interaction in between, platforms satisfy the demands of each customer group. In this sense, what they do is 'matchmaking' between these groups.[108]

Probably the most important issue for regulators regarding the promotion of competition in digital markets and platforms is to maintain the possible new entry into markets and potential rivals to existing undertakings.[109] For this reason, one needs to understand the key characteristics of the digital economy to be able to understand how they are leveraged by dominant firms to maintain their position.

3.3 Key Characteristics of the Digital Economy

The digital economy is characterised by the use of digital technologies to transform existing means of production, distribution, and consumption of goods and services. The digital economy encompasses a wide range of industries, including e-commerce, online advertising, social media, and cloud computing. The key features of the digital economy will be analysed in this chapter.

3.3.1 Extreme Returns to Scale

Returns to scale can be explained as "the quantitative change in output of a firm or industry resulting from a proportionate increase in all inputs".[110] Digital products often come with significant fixed costs that relate to the development phase, but there are low or zero variable costs in terms of acquiring or adding an

[108] Pieter Ballon and Eric Van Heesvelde, 'ICT Platforms and Regulatory Concerns in Europe', 35(8) Telecomm. Pol'y 702–708 (2011), <https://doi.org/10.1016/j.telpol.2011.06.009> (Accessed 10/05/2023).

[109] Commission Report of *Competition policy for the digital era* (n.5), p. 5.

[110] Britannica Money, Glossary <https://www.britannica.com/money/returns-to-scale > (Accessed 10/05/2023).

additional user.[111] Despite having no zero costs for acquiring new customers, significant fixed costs constitute a barrier to new entry. It is a factor that affects the number of undertakings that operate in a market, but it does not provide market power.[112] One of the crucial aspects of evaluating market power goes through the probability of new competitors in the concerned market. Therefore, high fixed costs pose challenges for new entries in the market and eventually, provide a shield for the dominant firm.[113]

3.3.2 Multi-homing

"Multi-homing refers to a situation in which users tend to use several competing platform services in parallel."[114] It has also been recognised by competition authorities when assessing market power because lack of multi-homing when combined with substantial network effects and switching costs can result in absolute protection of a single firm from new entrants.[115]

Users may encounter various obstacles that prevent them from using multiple platforms or services simultaneously, such as cost, technical limitations, contractual obligations, and the absence of data portability. Additionally, even when these obstacles are absent, users may still choose to use a single platform due to the "free effect."[116]

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[111] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.12 <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf > (Accessed 10/05/2023).

[112] Ibid, p.12.

[113] Ibid and, as it has been stated in the *Google Search* (AdSense) Case AT.40411 [2003] C(2019) 2173 final, p.52 para.227 "Other important factors when assessing dominance are the existence of countervailing buyer power and barriers to entry or expansion, preventing potential competitors from having access to the market. … Such barriers may result from a number of factors, economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual costs of entry incurred in penetrating the market."

[114] European Commission, Directorate General for Communications Networks, Content and Technology, Barcevičius, E., Caturianas, D., Leming, A., et al., 'Multi-homing : Obstacles, Opportunities, Facilitating Factors : Analytical Paper 7', (Publications Office, 2021), p.8 <https://data.europa.eu/doi/10.2759/220253 > (Accessed 10/05/2023).

[115] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.12 <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf > (Accessed 10/05/2023).

[116] Ibid.

3.3.3 Network Effects

It can be said that there are network effects if the value of a product or service rises due to an increase in the number of people that use that product or service.[117] The Commission explained the network effect in its decision of *Microsoft/LinkedIn* Case M8124 as "Network effects occur when the value of a product or service for a customer increase when the number of other customers also using it increases".[118] Therefore, network effects have been considered many times by competition authorities in cases relating to digital markets.[119] It can contribute significantly to the market power of an undertaking by reducing substitution for customers and creating new barriers that make it even harder to penetrate the relevant market which ultimately limits competitiveness.[120]

3.3.4 Access to Data

The advancement of technology with innovations has opened a new era for companies. Through collection, storage, and usage of large sets of data companies power their online services, production processes, and logistics. As innovation is a key element for developing and further enhancing existing platforms and the ways customers are served, being able to access and use data to power innovation is very relevant in terms of acquiring market power. Today, the competitive advantage that data provides to companies is acknowledged by competition authorities since it creates barriers to entry when combined with network effects and economies of scale.[121] The possible leverage effect of data to acquire further market power is also considered by EC in its recent merger decisions.[122] As stated by the EC:

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[117] Concurrences, Antitrust Publications and Events Glossary, <https://www.concurrences.com/en/dictionary/Network-effect#:~:text=Author%20Definition-,Definition,same%20product%20or%20service%20increases. > (Accessed 10/05/2023).

[118] *Microsoft/LinkedIn* Case M.8124 [2016] C(2016) 8404 final p.75 para.341-342.

[119] European Commission's decision of: *Google Shopping* Case AT.39740 [2017] C(2017) 444 final, p.70 para.314, *Google/Fitbit* Case M.9660 [2004] C(2020) 9105 final para.452, *Google Search* (AdSense) Case AT.40411 [2003] C(2019) 2173 final, para.230.

[120] See that effect above case law and cited paragraphs.

[121] *Google Search* (AdSense) Case AT.40411 [2003] C(2019) 2173 final, para. 246.

[122] *Microsoft/LinkedIn* Case M.8124 [2016] C(2016) 8404 final and *Google/Fitbit* Case M.9660 [2004] C(2020) 9105 final.

> …none of Google's competitors in online advertising has access to a database or data collection capabilities equivalent to those of Fitbit and it is not likely that they would acquire such assets without incurring into significant costs and in timely manner."[123]

3.3.5 Switching Costs

The terms simply can be described as:

> The costs that a consumer incurs as a result of changing brands, suppliers, or products. Although most prevalent switching costs are monetary in nature, there are also psychological, effort-based, and time-based switching costs.[124]

Switching costs are an important factor to consider since they can contribute to market power.[125] Some forms of switching costs in digital markets are loss of data, the time need for setting up a new account, the need to repurchase specific content or premium features, and the additional time needed to learn a new system to completely benefit its functionalities.[126] For instance, a customer buying a new mobile device that uses a different operating system can cause the loss of already purchased products or subscription services in the old mobile device due to the change in operating systems.[127] By these effects of switching costs in digital markets, consumers are put in a disadvantaged position, new entry becomes difficult even for competitors with products or services at least as good as the other one.[128] Nevertheless, a certain threshold of innovation of a new entrant can

[123] *Google/Fitbit* Case M.9660 [2004] C(2020) 9105 final, para.457.

[124] Definition of switching costs, <https://www.investopedia.com/terms/s/switchingcosts.asp#:~:text=What%20Are%20Switching%20Costs%3F,and%20time%2Dbased%20switching%20costs > (Accessed 10/05/2023).

[125] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.7-8 <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf > (Accessed 10/05/2023).

[126] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.12 <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf > (Accessed 10/05/2023).

[127] Ibid.

[128] Emilio Calvano and Michele Polo, 'Market power, competition and innovation in digital markets: A survey, Information Economics and Policy, Vol. 54, <https://doi.org/10.1016/j.infoecopol.2020.100853 > (Accessed 11/05/2023)

still surmount switching costs such as in the transition from Myspace to Facebook.[129]

3.3.6 Effects of Brand and Consumer Behaviour

Brand loyalty is also important for consumers just as it is important for market power since the consumer's loyalty to the brand and habit of using a specific product is determinative for the distribution of market power. Furthermore, the ability to benefit a product at a zero price generally results in the inertia of consumers which can be explained as an unwillingness to try and evaluate new products. This kind of behaviour can also be identified as the "stickiness" of consumers to a certain brand or product which it's contributing effect to market power is considered by competition authorities.[130]

These features of the digital economy have the potential to affect the market and dominance in several ways. For instance, network effects and data accumulation may lead to the creation of dominant players in the market, while the presence of multi-sided platforms and the use of algorithms may pose challenges to traditional market analysis.[131] When all these features are combined in a single company, a dominating market power is formed. These peculiar features of the digital markets pose challenges for competition enforcement especially with regards to different types of conduct that are covered by existing and established theories of harm.

3.4 Theories of Harm in the Digital Era

The digital era has brought various challenges for competition law enforcement, particularly in relation to the theories of harm. The traditional theories of harm that were developed in the context of brick-and-mortar markets are often inadequate in the digital space. This is due to the unique characteristics of digital markets that were discussed above, such as network effects, data-driven business

[129] Catharine Tucker, 'Network Effects and Market Power: What Have we Learned in the Last Decade?', Antitrust Spring, <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effectsantitrust2018.pdf> (Accessed 11/05/2023)

[130] OECD, 'The Evolving Concept of Market Power in the Digital Economy' [2022], p.17 <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf > (Accessed 10/05/2023).

[131] Alison Jones, Brenda Sufrin and Niamh Dunne, 'Jones & Sufrin's EU competition law : text, cases, and materials' (7th edn, Oxford University Press, 2019), p.61.

models, extreme returns to scale, switching costs, and brand loyalty and consumer behaviour which can create significant barriers to entry and limit competition. It is crucial to be mindful of new types of misconduct in digital markets because they are driven by innovation and technological advancement, that bring new business models and strategies. Thus, trying to understand and analyse new types of misconduct rather than relying on existing patterns can be beneficial for consumers and to identify new forms of misconduct.[132] In addition to this, according to the survey[133] carried out by International Competition Network ("ICN"), the most common conducts that were investigated in digital markets was related to a refusal to deal, tying and exclusive dealing as the third most common conduct. Based on this awareness, the theories of harm of this new era will be explored in this section.

3.4.1 Refusal to Deal

An undertaking with a dominant position may be regarded as committing an act of abuse if it refuses to deal with customers or suppliers, thereby hindering or jeopardizing competitors' ability to enhance or maintain their market power.[134] If it can be demonstrated that an input or technology is crucial for competition and a dominant firm has complete ownership or control over it, and if it is possible to share that input (as evidenced by past supply agreements), then a theory harm related to refusal to deal may be applicable. Alternatively, if the dominant firm

[132] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 23, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[133] ICN Unilateral Conduct Working Group, 'Report on the Results of the ICN Survey on Dominance/Substantial Market Power in Digital Markets' (2020), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf > (Accessed 11/05/2023).

[134] Concurrences, Antitrust Publications and Events Glossary, <https://www.concurrences.com/en/dictionary/refusal-to-deal > (Accessed 11/05/2023) and OECD Glossary of Industrial Organisation Economics and Competition Law, p. 72-73 <https://www.concurrences.com/IMG/pdf/oecd_-_glossary_of_industrial_organisation_economics_and_competition_law.pdf?39924/61543ab059ef02f25a5b58d7b8b4636a8fe2232efa57c3b86700b24cdb1da9ca > (Accessed 11/05/2023).

has acquired the input through an exclusive supply agreement, a theory of harm related to exclusive dealing may apply.[135]

The concerns arise when a dominant firm has exclusive access to an important input, technology, or distribution network, which is essential[136] to compete in a market. Such a firm may foreclose competition by denying rivals access to the resource. Refusals to deal can be classified as unconditional, conditional, or constructive.[137]

When a refusal to deal forecloses competition, overbroad enforcement activity to remedy the situation may have risks, particularly when the obligation to share an important input with one's rivals may undermine the incentives of firms to develop such inputs.[138] This could discourage firms from developing innovations and making other investments that may involve risks and which are beneficial for consumers if they will not have an exclusive right to their results. Remedies that require firms to share these inputs may also undermine the incentives of any potential rivals seeking to develop substitutes for these inputs.[139]

Refusals to deal associated with technology involve a unique set of issues, particularly when a firm refuses to license a patent to its competitors. In many digital markets, certain technology standards encourage innovation and interoperability.[140] When a firm holds a patent that is necessary for that standard, the refusal to license the patent can be considered a refusal to deal. It is important

[135] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 26, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[136] Barak Orback and Grace Campbell Rebling, "Essential Facilities" described in 'The Antitrust Curse of Bigness', *Southern California Law Review*, Vol. 85, p.641, <https://southerncalifornialawreview.com/wp-content/uploads/2018/01/85_605.pdf > (Accessed 11/0/2023).

[137] OECD, 'Competition Policy Roundtables: Refusals to Deal', p.22 <http://www.oecd.org/daf/43644518.pdf.> (Accessed 12/05/2023).

[138] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 26, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[139] Ibid, p. 26.

[140] Ibid.

to address this type of refusal to deal as it could lead to the exclusion of competitors and have negative effects on innovation and consumer welfare.[141]

3.4.2 Predatory Pricing

As provided under section 2.2.3, predatory pricing is a strategy used by dominant companies to push their competitors out of the market by lowering prices to a level that it cannot sustain in the short term, with the intention of increasing prices to a higher level in the future to recover its losses.[142] One type of predatory pricing is below-cost predatory pricing which involves pricing products or services below a certain cost measure, which makes it impossible for as efficient competitors to stay in business.

Challenges of identifying predatory pricing in digital markets are coming from the fact that they involve low or zero prices and cross-subsidisation between different sides of a multi-sided platform.[143] Determining the appropriate measure of cost can be difficult due to low marginal costs and the blurring of boundaries between different markets. Furthermore, below-cost pricing on one side of a market may be a pro-competitive strategy to maximize network effects.[144] On the other hand, multi-sided markets can also result in predatory pricing when they deny rivals sufficient scale to operate.[145] In such cases, assessing the profitability of below-cost pricing can be a useful alternative approach to determine if predatory pricing has occurred.[146] Overall, the analysis of costs and prices alone may not be

[141] Concurrences, Antitrust Publications and Events Glossary, <https://www.concurrences.com/en/dictionary/refusal-to-deal > (Accessed 11/05/2023).

[142] Moritz Lorenz, (n.34), p. 230.

[143] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 32, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[144] OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms', p.108-109 <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sidedplatforms-2018.pdf.> (Accessed 11/05/2023).

[145] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 32, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[146] Ibid.

sufficient to establish predatory pricing in digital markets, and other factors such as network effects may need to be taken into consideration.[147]

3.4.3 Forced Free Riding

This harm theory emphasizes the distinctive function of platforms, particularly transaction or content platforms, where consumers sell their products or provide content to their customers. Forced free riding occurs when a platform seizes innovation from other firms that rely on the platform for reaching consumers.[148] Therefore, a dominant digital platform can leverage its position as an intermediary and access data on sellers and consumers to impede competition in markets related to the platform. Such a strategy can serve as an option for the platform to prevent access to the platform, as it could enable the platform to reap the rewards of the innovation of its downstream competitors.[149]

"Content scraping" is an example of such conduct. Google was accused of this conduct by the US Federal Trade Commission where it investigated whether Google's alleged use of content scraping was an "unfair method of competition".[150] The practice involved Google displaying content from certain downstream competitors such as restaurant review platforms in a specialised search results box, thus denying them web traffic from the search engine.[151] According to reports, Google threatened to remove their results if they contested this conduct. However, Google agreed to stop this practice, and FTC did not pursue it further.

Another example of such conduct can be seen in digital transaction platforms. These dominant firms that facilitate transactions on digital platforms can utilize data about both buyers and sellers to introduce their own products for sale on the

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[147] Ibid.

[148] Howard A. Shelanski, 'Information, Innovation, and Competition Policy for the Internet', University of Pennsylvania Law Review, (2013) Vol. 161, p. 1699. <https://scholarship.law.upenn.edu/penn_law_review/vol161/iss6/6/. > (Accessed 11/05/2023).

[149] Ibid, p. 1700.

[150] Statement of the Federal Trade Commission Regarding Google's Search Practices *In the Matter of Google Inc., FTC File Number 111-0613,* (2013), p.3, footnote2, <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf > (Accessed 11/05/2023)..

[151] Howard A.Shelanski, (n.147) p.1699.

platform. This can result in abuse of dominance if the position of the platform as transaction facilitator and holder of significant product data is exploited to exclude competitors. EC investigated Amazon for this specific type of conduct.[152] By involving in such conduct, Amazon benefits from the information that it gathers through the retailer's business data, therefore, eliminates risks and offers products that are in high demand by consumers.[153] In its preliminary conclusion, EC deemed that Amazon's conduct affected third-party sellers' ability to grow.[154] The EC made Amazon's commitments binding regarding the investigation which revolves around not benefiting from marketplace seller data for its own retail operations and granting non-discriminatory access to its Buy Box and Prime Programme thus ceasing preferential treatment.[155]

3.4.4 Abusive Leveraging or Self-preferencing

The term self-preferencing is used for undertakings that favour itself, its services, or its subsidiaries over competitors or customers.[156] Therefore, this new theory of harm examines whether it is using (leveraging) its dominant position in a market to favour its own products or services in a related market.[157] This is especially crucial in a vertically integrated market when the digital marketplace owner intermediates buyers or sellers meanwhile offering its own products or services in the same market, thus carrying the potential of abuse of a dominant position. For instance, EC's *Google Shopping* case[158] is an example of this conduct.

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[152] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 53 < https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[153] Statement of the Federal Trade Commission Regarding Google's Search Practices *In the Matter of Google Inc., FTC File Number 111-0613* (n.149), p.3 footnote 2.

[154] Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime, available at < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777 > (Accessed 11/05/2023).

[155] Ibid.

[156] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 54 < https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[157] Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles', p. 5. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654083 > (Accessed 11/05/2023).

[158] *Google Shopping* Case AT.39740 [2017] C(2017) 444 final, p.7. para 2 and pages 76-77 para.344.

Leveraging may be used to foreclose competitors in a discreet way resulting in a refusal to deal, taking advantage of behavioural biases of consumers such as the tendency to select offers that are more visible.[159] Abusive leveraging theories of harm share some similarities with tying and bundling theories of harm. Both involve the use of market power in one market to restrict competition in a related market. Tying and bundling can be considered as a form of self-preferencing, and abusive leveraging conduct can be seen as a variation of tying and bundling in certain situations, such as through platform design or the use of mixed bundling type discounts and incentives.[160]

Abusive leveraging also shares similarities with a type of abuse known as margin squeeze through discrimination. This occurs when a firm engaged in abusive leveraging discriminates against its competitors by providing access to inputs or compatibility with complementary products. Due to the complex nature of abusive leveraging, a case-by-case approach is necessary, especially considering that it can also generate efficiencies for consumers and incentivise innovation and competitive differentiation.[161]

3.4.5 Privacy Policy Tying

In this type of strategy known as privacy policy tying, a dominant firm imposes data collection terms on its consumers, allowing it to utilise consumer data in various contexts.[162] By collecting data in the market where it holds dominance, the firm can enter a new market with a similar user base, even if the products are unrelated in terms of usage. In the target market, the firm can aggressively compete, potentially offering a zero-price subsidized by its dominant position in the original market of dominance. Subsequently, the firm can leverage the data it collects in the new market to strengthen its position in the original market. This strategy is effective in terms of offering a protective shell from the competition,

[159] OECD, 'Abuse of Dominance in Digital Markets' [2020], p. 54 < https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf > (Accessed 11/05/2023).

[160] Ibid.

[161] Ibid.

[162] Ibid, p. 55.

particularly if potential competitors in the original market would have first established themselves in the new market, which this strategy prevents.[163]

According to Condorelli and Padilla[164], this behaviour can be addressed as either an exclusionary abuse of dominance or a combination of exclusionary and exploitative abuses, considering the imposition of broad data usage terms on consumers. They also suggest that data portability remedies could be a suitable approach, although they would be more effective in preventing anticompetitive outcomes before the implementation of a privacy policy-tying strategy rather than restoring competition afterwards.[165]

4. Regulatory Response

4.1 Introduction

Having explored the unique characteristics of digital markets and the transformative force of digital platforms in previous chapters, this chapter delves into the concept of platform dominance and its wide-ranging effects on the market. Having examined the specific characteristics and behaviours of dominant platforms, as well as the emerging theories of harm in the digital realm, the aim is to shed light on the general consequences that platform dominance can have on competition, innovation, and consumer welfare.

The increasing dominance of digital platforms has raised concerns about their market power and the potential for anti-competitive practices. Understanding the dynamics of platform dominance and its impact on the market is essential for policymakers, regulators, and market participants to effectively address challenges

[163] Daniele Condorell and Jorge Padilla, 'Harnessing Platform Envelopment Through Privacy Policy Tying' (2019), p.39-40, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504025 > (Accessed 12/05/2025).

[164] Ibid.

[165] Ibid.

and ensure fair competition, innovation, and consumer protection in digital markets. Throughout this chapter, the author will analyse the relevant case law of the ECJ and explore the implications of platform dominance in light of the new theories of harm that have emerged in the digital context including the evolving landscape of remedies and regulatory approaches to address these new challenges.

4.2 EU's Digital Competition Policy

As stated in the *Competition policy for the digital era*[166] report of the EC, the digital revolution does not require a fundamental rethinking of competition law. Competition policy enforcement remains effective in serving consumer and economic interests. While the core principles of EU competition rules still provide a solid basis for the digital era, adjustments are needed to address the unique characteristics of platforms, digital ecosystems, and the data economy. [167]

The inefficiency of the existing EU competition rules in regulating digital markets is explicitly acknowledged in the *Impact Assessment Report:*

> EU competition rules cannot conceptually deal with market failures resulting from the behaviour of gatekeepers in the absence of some preconditions, such as the existence of an anticompetitive agreement in the case of Article 101 TFEU or of a dominant position in the case of Article 102 TFEU.[168]

Another crucial point is that the enforcement of Articles 101 and 102 by the EC can only take place *ex post*, after an infringement takes place, thus ruling out any intervention which may be of critical importance and may cause irreparable effects considering the fast-paced nature of digital markets.

Even if the core principles of competition law remain relevant in addressing some of the new challenges that are posed by digital markets and platforms, they need to be adjusted for the new circumstances.

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[166] Commission Report of *Competition policy for the digital era* (n.5), p.3.

[167] Ibid, p. 3.

[168] DMA Impact Assessment Report (n.6), para 119.

For instance, the consumer welfare standard in the context of digital markets is diminished.[169] This is due to the inner dynamics of the digital world. The concept of consumer welfare extends to all users in the digital economy, including business users, thus making price-related analysis somewhat ineffective. Therefore, instead of focusing on to apply consumer welfare criteria, plausible theories of harm should be evaluated considering the peculiarities of the digital markets.[170]

Nowadays, there are contrasting views regarding the effectiveness of antitrust policy in curbing the growth of private power and the potential involvement of public power in market management.[171] Consequently, there are conflicting pressures to revise antitrust enforcement criteria.[172] On one side, there is a call for broader prohibitions and stricter enforcement of existing rules, while on the other side, there are requests to ease competition rules in pursuit of broader policy objectives.[173] It is extremely hard to maintain the right balance between pursuing broader policy goals and not sacrificing the effectiveness of competition which may arise from structural weaknesses.[174]

Besides, in the EU, both the EC and national competition authorities have increasingly utilised traditional competition measures, particularly the prohibition of abuse of dominance, in recent years. These entities have demonstrated a proactive approach by actively experimenting with new strategies and methods in their enforcement efforts.[175]

Competition law is inherently adaptable to respond to dynamic market conditions and address power imbalances that are not adequately corrected by competition

[169] Commission Report of *Competition policy for the digital era* (n.5), p. 40.

[170] Ibid, p.41 footnote 55: "Johannes Laitenberger, CRA conference, 5 December 2018, pleading for a more empirically driven approach."

[171] Oles Andriychuk, Ginevra Bruzzone, 'Chapter 8 - The Narrow Path to a Future-Proof Competition Policy', *Antitrust and the bounds of power: 25 Years on* (Hart Publishing 2023), p. 168-170.

[172] Ibid.

[173] Ibid.

[174] Ibid.

[175] European Competition Network, 'Joint Paper of the heads of the national competition authorities of the European Union – How national competition authorities can strengthen the DMA' (2021), < https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf > (Accessed 12/05/2023).

alone. Its strength lies in its flexibility, enabled by broad and general rules, which have enabled it to effectively tackle emerging challenges and power dynamics in the digital era. By considering the specificities of different markets, competition law has proven capable of addressing novel phenomena and positions of power that arise in the ever-changing landscape of the digital economy.[176]

However, competition law's case-specificity has its drawbacks, as determining relevant competitive forces in each case is time-consuming and costly.[177] The extensive nature of competition law, with its breadth and flexibility, results in a complex implementation process. Nonetheless, this process, along with academic discussions, contributes to a better understanding of the unique characteristics of the digital economy. These insights can guide the adjustment of general rules in consumer protection, unfair trading, and data protection laws to effectively address the challenges posed by the digital economy. Moreover, the knowledge gained from enforcing these rules informs the development of competition policy, potentially leading to modifications in the boundaries between different legal frameworks. In some cases, issues closely tied to market power may require the establishment of a new regulatory regime due to their frequent and systematic occurrence such as in the situation with digital markets and platforms.[178]

In this new era, the EU's approach is to deal with tech giants/digital platforms/gatekeepers through a tool that considers the peculiarities of these actors and the general characteristics of digital markets in which they operate or form collectively. While Articles 101 and 102 TFEU, deal with the cartels, dominant position and abuse, DMA targets a narrower and more specific key points which gatekeepers almost weaponised to maintain their market power and dominant position, which Articles 101 and 102 TFEU fail to address.

[176] Commission Report of *Competition policy for the digital era* (n.5),p. 52.

[177] Ibid.

[178] Ibid.

4.3 Platform's Dominance and General Effects on the Market

Platform dominance and its impact on the market are topics that raise important concerns. It's crucial to approach the examination of platform dominance with great care due to the potential risks and advantages involved. Dominant platforms, although they may enjoy benefits like economies of scale and network effects, also have the power to distort competition and disrupt the dynamics of the market.

One key aspect to consider when discussing platform dominance is the role of intermediaries. Dominant platforms often act as intermediaries, controlling access to a large user base and valuable data. This level of control gives them a significant advantage and allows them to influence the dynamics of the market. By leveraging their intermediary position, these platforms can shape the competitive landscape, potentially creating barriers that make it difficult for new players to enter the market. This, in turn, can lead to limited competition, reduced innovation, and fewer choices for consumers. For instance, in the *Furman Report*[179] engaging in the excessive collection of private data, thereby violating consumer privacy and surpassing the usual amount of ads found in competitive markets; implementing high charges for platform access, intermediation fees, or unfair contractual terms that impact both consumers and businesses relying on the platforms for accessing consumer; raising prices due to the additional burden of these higher fees or by excluding companies unable to afford them; utilizing control over search result rankings, reputation-based mechanisms, or similar tools to harm competitors; and eliminating potential competitors from the market through acquisitions or other exclusionary behaviours are stated as the potential harm that may be faced due to excessive market power in digital markets.[180]

Furthermore, the impact of platform dominance extends far beyond the boundaries of the platforms themselves. Dominant platforms have the ability to

[179] UK Report of the Digital Competition Expert Panel 'Unlocking Digital Competition' (2019), < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf > (Accessed 12/05/2023).

[180] Filippo Lancieri and Patricia Morita Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 Stanford Journal of Law, Bus & Fin 65, p.30 < https://www.econstor.eu/bitstream/10419/262705/1/wp303.pdf > (Accessed 12/05/2023).

expand into related markets, integrating a wide range of services within their own ecosystem.[181] This expansion further solidifies their dominance and makes it challenging for users to switch to alternative platforms.[182] As these dominant platforms integrate more services within their ecosystem, the network effect strengthens, solidifying their position and making it harder for competitors to succeed.[183] This lack of diversity and reduced competition can have negative consequences for the overall health of the market.[184]

Effectively addressing the concerns associated with platform dominance requires a thorough examination of the practices employed by dominant players. It needs to be carefully evaluated whether these practices have any detrimental effects on competition, consumer choice, and innovation. It is essential to adapt regulatory approaches to account for the unique characteristics of digital markets, which are heavily influenced by data and are prone to rapid shifts and disruptions.[185]

To develop effective competition policies in this digital era, it is crucial to have a deep understanding of the implications of platform dominance and its broader effects on the market. This involves closely examining the concentration of power, the role of data, and the potential distortions that may arise in the market. By gaining an insightful understanding of these factors, it is possible to craft strategies that encourage healthy competition, facilitate market entry for new players, and ensure the protection of consumer interests.[186]

Collaboration between regulatory bodies is also of utmost importance. Digital markets often intersect with various regulatory domains, such as data protection, privacy, and consumer rights.[187] By working together and coordinating efforts, the broader implications of platform dominance can effectively be addressed, and a

[181] Alain Strowel and Wouter Vergote, 'Digital Platforms: To regulate or not to regulate?' – European Commission, p. 8,. <https://ec.europa.eu/information_society/newsroom/image/document/2016-7/uclouvain_et_universit_saint_louis_14044.pdf > (Accessed 20 May 2023).

[182] Filippo Lancieri and Patricia Morita Sakowski (n.179), p. 89.

[183] Ibid. p. 75.

[184] Ibid.

[185] Ibid, p. 82.

[186] Alain Strowel and Wouter Vergote,(n.180), p.7.

[187] Ibid, p. 11

holistic regulatory approach can be ensured. This collaboration has the potential to enhance the understanding of the interplay between competition concerns and other societal interests, leading to more effective and comprehensive regulatory frameworks.

In conclusion, platform dominance has significant implications for competition and the dynamics of the market. By fostering a comprehensive understanding of platform dominance and its broader effects on the market, it is possible to develop tailored competition policies that foster fair competition, encourage innovation, and protect the well-being of consumers. Collaboration between regulatory bodies is crucial in addressing the multifaceted challenges posed by platform dominance in the digital age.

4.4 EU Regulatory Adaptations to Platform's Dominant Position on the Market

4.4.1 Digital Markets Act (DMA)

The DMA was approved by the Council of Europe on July 18, 2022, following the presentation of a proposal for regulations on fair and competitive digital markets on December 15, 2020.[188] The DMA aims to establish fairness and clear rules for large online platforms, or "gatekeepers", preventing their abuse of power and ensuring a level playing field.[189] Its objective is to foster the emergence of alternative platforms that offer innovative products and services at affordable prices, ultimately benefiting businesses and consumers.[190]

The DMA addresses the fragmentation of the Internal Market caused by national regulations and provides a unified framework for rights and obligations in the

[188] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265 (n.7).

[189] DMA, Recital 11.

[190] DMA, Recital 2.

platform economy.[191] Therefore, harmonization at the EU level is essential to prevent regulatory uncertainty and fragmentation.[192]

The DMA seeks to establish a fair and competitive environment that allows platforms to maximise their potential, benefiting both end users and business users in the digital economy.[193] In the Proposal it is highlighted that a few large online platforms have gained dominance, acting as gateways[194] or gatekeepers[195] between businesses and users. Therefore, their control over market access has resulted in a high level of dependency among businesses, leading to unfair practices. This dependence negatively impacts the competition of core platform services.[196] Moreover, digital platforms demonstrate a strong network effect where user growth on one side of the market attracts users to the other side.

The DMA addresses these issues as they lead to inefficiencies in the digital sector, resulting in higher prices, reduced quality, limited choices, and decreased innovation, which ultimately harms European consumers.[197]

According to the first article of the DMA, its purpose is to contribute to the proper functioning of the internal market by establishing harmonised rules that ensure contestable and fair markets in the digital sector across the EU, particularly where gatekeepers are present. The scope encapsulates "core platform services" provided or offered by gatekeepers to business users or end users in the EU, regardless of the gatekeepers' establishment or the applicable law.[198]

The definition of "core platform service" is provided in Article 2(2), and includes various online services such as online intermediation, search engines, social network platforms, video sharing platforms, communication services, operating systems, web browsers, virtual assistants, cloud computing services, and online

[191] DMA, Recital 7.

[192] DMA, Recital 5.

[193] Proposal for DMA, Explanatory Memorandum, 3.

[194] DMA, Recital 6.

[195] DMA, Recital 3.

[196] DMA, Recital 6.

[197] DMA, Recital 4.

[198] DMA, Article 1(2).

advertising services (including advertising networks, exchanges, and other intermediation services) offered by entities providing any of the aforementioned core platform services.

"Core platform services" refer to the most widely used services by both user types. These services are characterised by high concentration, where a few large online platforms typically dictate the commercial conditions independently of their competitors, customers, or consumers. They also involve dependence on a limited number of gatekeeper platforms that act as intermediaries between business users and their customers. Furthermore, core platform service providers often misuse their power through unfair practices against economically dependent business users and customers.[199]

As provided in previous chapters[200], Article 101 TFEU and specifically Article 102 TFEU is not efficient in regulating digital markets. The reason for this inefficiency lies within the approach of these articles, as they are designed to operate *ex post*.

However, the dynamics of digital markets and platforms that operate in these markets require *ex ante* regulation since Articles 101 and 102 lack swiftness to address any anticompetitive conduct. In this direction, EC sees the DMA as a tool to be used alongside the existing enforcement tools, as stated before the proposal of the DMA:

> The current proposal minimises the detrimental structural effects of unfair practices *ex ante*, without limiting the ability to intervene *ex post* under EU and national competition rules.[201]

This is also mentioned in the Recital of the DMA as, the application of Articles 101 and 102 TFEU is limited to certain instances of market power and

[199] DMA, Recital 4

[200] See, Sections 2.2.1 and 2.2.2.

[201] Proposal for DMA, Explanatory Memorandum, Section 3: Consistency with other Union policies, < https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN > (Accessed 12/05/2023).

anticompetitive behaviour concerning gatekeepers.[202] Enforcement of these provisions relies on *ex post* investigations that examine intricate details on a case-by-case basis.[203] Furthermore, the existing EU competition law does not effectively address the issues arising from the conduct of gatekeepers who may not meet the conventional criteria of dominance in competition law.[204]

The conditions and thresholds for the gatekeepers are provided under Article 3 of the DMA as: under paragraph 1 - (a) having a significant impact on the internal market; (b) providing a core platform service which is an important gateway for business users to reach end-users; and (c) enjoying an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future. Further, under paragraph 2, an undertaking will be presumed to satisfy the requirements in paragraph 1 if: (a) it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b) it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex, and (c) the thresholds in point (b) of this paragraph were met in each of the last three financial years.

The concept of gatekeeper is provided under the second chapter of the DMA. Accordingly, gatekeeper status can be established through quantitative metrics, which can be used as initial presumptions to determine whether certain undertakings qualify as gatekeepers.[205] Alternatively, it can be assessed qualitatively on a case-by-case basis through a market investigation.[206]

[202] DMA, Recital 5 and 10.

[203] Ibid.

[204] Ibid.

[205] DMA, Article 3.

[206] DMA, Article 3.

Upon designation of an undertaking as a gatekeeper, pertaining obligations are provided under Article 5 and Article 6 targeted at preventing practices that limit contestability or are unfair. These obligations automatically apply to gatekeepers, mandating their complete and effective compliance.[207] Some obligations within Article 5 and Article 6 aim to establish fairness in the interactions between gatekeepers, their business users, and competitors. Lastly, certain obligations in the DMA focus on promoting market contestability by encouraging practices such as multi homing, switching between platforms, reducing barriers to entry, and enhancing transparency.

The duty to supervise the fulfilment of the mentioned obligations and the measures related to implementation is given to the EC.[208] In satisfying its designated duties, the EC shall be assisted by a committee which is the Digital Markets Advisory Committee that is composed of the representatives of the Member States.[209]

As previously discussed in this section, ex-ante intervention is seen as advantageous compared to ex-post intervention under EU competition law.[210] It allows for addressing structural issues that existing competition law rules cannot effectively handle, particularly in markets with strong network effects and winner-takes-all tendencies.[211] Ensuring market contestability, including barriers to entry and multi-homing, is crucial for open and competitive markets. Ex-ante rules are better suited to address these market characteristics, focusing on the market's operation rather than specific behaviours of undertakings.[212]

However, ex-ante intervention, as applied in the DMA, comes with two recognized risks.[213] The potential ineffectiveness of rules due to legal

[207] DMA, Article 11.

[208] DMA, Chapter V.

[209] DMA, Article 50.

[210] OECD, 'Ex Ante Regulation in Digital Markets – Background Note', DAF/COMP(2021)15, p.13, <https://one.oecd.org/document/DAF/COMP(2021)15/en/pdf > (Accessed 13/05/2023).

[211] Proposal for DMA (n.200) Recital 3.

[212] OECD, 'Competition Enforcement and Regulatory Alternatives' (2021), p. 11. < https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf> (Accessed 13/05/2023).

[213] Proposal for DMA (n.200), Legislative Financial Statement, p. 64.

uncertainties regarding obligations, and the potential ineffectiveness of rules due to significant changes in market conditions.[214]

From the author's perspective, these are not the only concerns regarding the DMA. To be effective, DMA should include self-executing obligations that can be fulfilled without requiring recourse to regulators or third-party interests. Since some of the obligations that require commercial judgements or factual assessments can lead to extensive litigation and undermine the intended swiftness that is expected from *ex ante* regulation.[215] In this case, DMA becomes the narrower scoped version of existing competition law rules that operate *ex post*.

Another critical point is that under the DMA, all core platform services are treated the same, where they should be treated differently as each type of core platform service has its own distinct business models, technologies, and user bases which requires tailored obligations to ensure effectiveness and commercial sense.

4.4.2 Cases on Digital Markets

- ***Amazon Cases: Marketplace and Amazon Buy Box***[216]

  The decision of the EC concerns two investigations directed at Amazon. Both investigations concern the conduct of the undertaking regarding its marketplace platform. In case AT.40462 – *Amazon Marketplace*, EC founds Amazon's usage of third-party sellers' non-public data to favour its own retail business. As mentioned in section 3.3.4, access to data carries significant importance in terms of acquiring market power. Especially, considering that Amazon both offers a marketplace for retailers and also acts as a retailer itself, competing against third-party retailers on its platform which it governs.[217] Accordingly, EC found Amazon's conduct as an abuse of its dominant position for the reason of leveraging its access to seller's data and exploiting it

[214] Ibid.

[215] Richard A. Posner, 'Regulation (Agencies) versus Litigation (Courts): An Analytical Framework' in D.P. Kessler (ed) Regulation vs. Litigation: Perspectives from Economics and Law (University of Chicago Press, 2011), p. 20-23, < https://www.nber.org/system/files/chapters/c11956/c11956.pdf > (Accessed 13/05/202ex

[216] Cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, Summary of Commission Decision [2022] C(2022) 9442 final.

[217] Cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, Summary of Commission Decision [2022] C(2022) 9442 final, para. 12.

to gather insight to deploy its retail strategy accordingly.[218] In its wording, EC stated this conduct:

> …shields Amazon Retail from some of the normal risks and costs of retail competition on the merits, Amazon distorts competition with third-party sellers. This allows Amazon to leverage its dominant position in the markets for the provision of marketplace services into online retail markets.[219]

In case AT.40703 – *Amazon Buy Box*, the "Buy Box" feature on Amazon's European websites plays a significant role in driving sales, as it prominently showcases a single seller's offer and enables swift purchases.[220] Additionally, Amazon Prime, a premium membership program grants various benefits for both consumers and retailers on the platform. Accordingly, Amazon draws traffic through the "Buy Box" feature utilising a behavioural strategy by making offers more visible to consumers.[221] By the traffic drawn, it favours its retail operations[222], making sellers' offers that use Amazon's logistics and delivery services more visible to consumers which eventually distorts competition on the Amazon marketplace.[223]

- ***Google Search (AdSense)***[224]

  In this case, EC investigated the conduct of Google in the general search market considering its dominant position in the market.[225] In assessing the

[218] Cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, Summary of Commission Decision [2022] C(2022) 9442 final, para. 16.

[219] Ibid.

[220] Ibid, para. 13.

[221] Ibid, para 18.

[222] Retail operations of Amazon include offering Marketplace sellers' logistics and delivery services.

[223] Cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, Summary of Commission Decision [2022] C(2022) 9442 final, paras. 17, 18.

[224] Case AT.40411 – *Google Search (AdSense)*, Summary of Commission Decision [2019] C(2019) 2173.

[225] Ibid, para. 6.

relevant market EC applied substitutability criteria.[226] Then, in assessing its dominance, EC considered market shares, significant barriers to entry and expansion which emphasise the significance of fixed costs and network effects that are discussed in sections 3.3.1 and 3.3.3 respectively.[227] EC found that Google abused its dominant position by favouring its own comparison shopping service in its general search results over competing services through exclusivity clauses with its partners.[228] This conduct of Google, diverts traffic from competing services to Google's own service, potentially having anticompetitive effects. Google positioned and displayed its service more favourably compared to competing services, which ultimately led to increased traffic for Google and decreased visibility for competitors.[229] The potential impact of Google's conduct is stated as higher fees for merchants, higher prices for consumers, reduced access to relevant comparison shopping services, and less innovation in the relevant markets.[230]

- ***Google Android***[231]

  In the decision, it is stated that Google has held a dominant position in the worldwide market for licensing smart mobile operating systems, android app stores, and general search services in the EU.[232] In assessing its dominant position, EC considers market share, barriers to entry, lack of buyer power, and the absence of effective competition from non-licensable operating systems or app stores.[233] The abusive practices are identified as tying[234] the Google Search app with the Play Store and tying Google Chrome with the Play Store and the Google Search app. These conducts were found to restrict

[226] Ibid, paras. 4, 5.

[227] Ibid, para. 9.

[228] Ibid, paras. 11, 12, 13.

[229] Ibid, paras. 12, 16.

[230] Ibid, para. 25.

[231] Case AT.40099 — *Google Android*, Summary of Commission Decision [2018] C(2018) 4761.

[232] Ibid, para. 6.

[233] Ibid, para. 7.

[234] Tying is discussed under section 2.2.3.

competition, provide Google with a competitive advantage, and harm consumers and innovation.[235]

- ***Google Search (Shopping)***[236]

  The decision concerns the conducts of Google in the market for general search services and shopping comparison services in which it favoured its shopping comparison service by more visible positioning thereby taking advantage of consumer behaviour.[237] In establishing dominance, EC considered market shares, barriers to expansion and entry, lack of multi-homing, brand effects and the lack of countervailing buyer power.[238] While Google employs an algorithm in listing rival comparison shopping services in lower ranks in its general search results, its own shopping comparison is not subject to this algorithm, appearing on the top of the page with enhanced features which constitutes a self-preferencing behaviour as discussed under section 3.4.4.[239] Another consideration by the EC is the traffic flow from Google's service to rival shopping comparison services together with the consideration of the lack of sources that would effectively channel traffic to rivals and replace Google's traffic.[240] Further, EC listed potential anticompetitive outcomes as potential foreclosure of competing services, higher fees for merchants, higher prices for consumers and less innovation.[241]

[235] Case AT.40099 — *Google Android*, Summary of Commission Decision [2018] C(2018) 4761, para. 12.

[236] Case AT.39740 — *Google Search (Shopping)*, Summary of Commission Decision [2017] C(2017) 4444.

[237] Ibid, para. 1; consumer behaviour is discussed under section 3.3.6.

[238] Ibid, para. 8; countervailing buyer power (n.58).

[239] Ibid, para. 13.

[240] Ibid, para. 21.

[241] Ibid, para. 23.

5. Summary and Conclusions

Concerning the first research question: digital markets and platforms in the EU market possess unique attributes that have a profound impact on competition. These markets exhibit extreme returns to scale, meaning that as digital platforms expand their user base, their market power grows exponentially. This dominance creates barriers to entry for new competitors, thereby limiting competition. Additionally, multi-homing, where users engage with multiple platforms simultaneously, can inadvertently strengthen the market power of established platforms, as users become locked into their services due to network effects and switching costs. The utilization of data is a critical element in digital markets. Technology giants leverage extensive user data to personalize and enhance their services, thereby gaining a competitive advantage. However, concerns regarding data privacy and the potential for anticompetitive practices arise from the manipulation of data. Furthermore, the behaviour of digital consumers differs from that of traditional markets, as they prioritize convenience, user experience, and access to a wide array of products and services. These dynamics pose challenges to competition as digital platforms strive to meet these demands, potentially leading to exclusionary practices and inhibiting competition.

Overall, the characteristics of digital markets and platforms in the EU significantly impact competition, necessitating a nuanced regulatory approach due to challenges related to market entry, market concentration, and the evolving nature of digital commerce.

Regarding the second research question: technology giants in the EU market have faced allegations of engaging in various forms of abusive practices. One prevalent example is the abuse of dominance, wherein companies with significant market power engage in practices such as refusal to deal. This involves denying access to their platforms or services to competitors or imposing discriminatory terms and conditions, thereby impeding fair competition.

Predatory pricing is another alleged abusive practice. Technology giants may set prices below cost levels to drive competitors out of the market, capitalizing on their financial resources and long-term profitability to sustain such pricing strategies. In digital markets, forced free riding has emerged as a concerning abusive conduct. Technology giants may exploit the free access or usage of certain services or content while imposing hidden costs or limitations elsewhere, distorting competition and gaining unfair advantages. Furthermore, privacy policy tying has raised concerns. Technology giants may condition access to their platforms or services on users accepting privacy policies that enable extensive data collection and utilization. This practice potentially facilitates anticompetitive behaviour by leveraging the acquired data.

These examples illustrate some alleged abusive practices by technology giants in the EU market, highlighting the importance of robust enforcement of competition law to address such practices and ensure a fair and competitive marketplace.

Concerning the third research question: EU competition law has undergone adaptations to address the challenges posed by technology giants, with the introduction of the DMA serving as a significant regulatory response. The DMA specifically focuses on regulating digital markets and platforms to ensure fair competition and safeguard consumer interests. Articles 101 and 102 TFEU, encounters challenges in effectively addressing anticompetitive practices due to the unique dynamics and characteristics of the digital economy. The enforcement under Articles 101 and 102 TFEU operates ex post, meaning it addresses anticompetitive behaviour after it occurs, lacking the necessary tools to effectively tackle the specific challenges posed by technology giants in digital markets.

In response to the emergence of digital platforms and their substantial market power, the EU has adopted the DMA. This Act introduces ex ante rules, representing a shift in regulatory intervention from ex post to a preventative approach. By implementing proactive measures, authorities can address potential anticompetitive conduct in digital markets before it causes substantial harm or distorts competition. The DMA empowers regulators to designate certain technology giants as "gatekeepers" and imposes enhanced obligations and scrutiny

on these entities. Moreover, the DMA grants the EC the power to enforce the rules and impose fines on non-compliant gatekeepers, aiming to deter abusive practices and foster a more level playing field for competition. This proactive regulatory approach acknowledges the need to adapt competition law to the specific challenges posed by technology giants, allowing for more effective intervention and regulation in digital markets.

In conclusion, the EU's competition law framework, including the Digital Markets Act, has evolved to address the unique characteristics of digital markets and the alleged abusive practices of technology giants. Through the DMA's ex ante rules and enhanced regulatory measures, the EU strives to ensure fair competition, protect consumer welfare, and maintain a dynamic and innovative digital marketplace.

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