



FACULTY OF LAW

LUND UNIVERSITY

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The MDMS Regulation: is the EU missing the train to a multimodal Europe?

JAEM01 Master Thesis

European Business Law

15 higher education credits

Supervisor: Annegret Engel

Term of graduation: Spring 2024

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Summary

In a digital age where travellers are increasingly looking for the cheapest, fastest or most sustainable way to travel, comparing different modes of transport efficiently becomes a challenge. The internet offers a wide range of websites and travel providers, fragmenting information and forcing travellers to navigate inefficiently between different platforms and websites.

Multimodal Digital Mobility Services (MDMS) can facilitate this comparison process by bringing together different transport options, ticket prices and other travel arrangements on a single platform. This allows travellers to easily find the best travel options that match their preferences and needs. However, the potential success of these MDMS platforms is hampered by the anti-competitive behaviour of transport operators towards MDMS operators and vice-versa. Transport operators may choose not to share essential data with MDMS platforms, although this data is crucial for the latter to provide their services. On the other hand, MDMS platforms may engage in self-preferencing by using biased rankings or by simply denying access to their platform to certain transport providers.

Chapter 2 therefore examines the extent to which Article 102 TFEU can adequately tackle these competition concerns. However, it appears that this Article is not always effective in addressing the anti-competitive tactics. Chapter 3 will reveal that EU legislation also falls short in addressing differential treatment and refusal to provide data in MDMS. The Commission has recently acknowledged this legislative gap and, as a result, has initiated the drafting of an MDMS Regulation.

Chapter 4 consequently outlines some policy recommendations that can be incorporated into the MDMS Regulation to address these issues, including imposing a neutral display obligation on MDMS platforms, extending the CRS Code of Conduct to all 'CRS-like' players, making data sharing reciprocal and mandating access to real-time dynamic data for transport operators.

In summary, while the EU's recent efforts to draft an MDMS Regulation are encouraging, the path forward for this Regulation is still uncertain. Hopefully, the EU embraces this opportunity and moves forward steadily towards a more integrated European transport landscape.

Acknowledgements

With the completion of my thesis, my years as a student are also slowly coming to an end. Therefore, I would like to take a moment to acknowledge the people who have encouraged and supported me throughout my LL.M. at Lund University.

First of all, I would like to thank my thesis supervisor, Annegret Engel, for her inspiring and encouraging feedback during the writing process. I would also like to express my sincere thanks to Jan Bocken for suggesting this topic, which fascinated me from the beginning to the end of the thesis.

In addition, I would particularly like to express my appreciation for my parents' support in my dream of returning to Sweden. You have always encouraged me to pursue my passions and chase my goals, even if it meant leaving my comfort zone. Thank you for raising me with a broad view of the world, which led me to take on this challenge.

Moreover, a heartfelt thank you goes out to all the wonderful friends I have met during this LL.M. adventure. Although we have only known each other for a few months, we have formed an incredibly strong bond. Your friendship has made this experience unforgettable.

Finally, I would like to thank my boyfriend, whose unconditional support and commitment to our relationship have helped make my Swedish dream a reality.

Tack för allt.

List of abbreviations

AGCM	Autorità Garante della Concorrenza e del Mercato
CER	Community of European Railway and Infrastructure Companies
The Commission	The European Commission
CRS	Computerised Reservation Systems
CRS Code of Conduct	Council Regulation (EC) 80/2009
DB	Deutsche Bahn
DMA	Council Regulation (EU) 2022/1925
EMDS	European Mobility Data Space
IIA	Inception Impact Assessment
ITS Directive	Council Directive 2010/40/EU
MaaS	Mobility as a Service
MDMS	Multimodal Digital Mobility Service
MDMS Regulation	Multimodal Digital Mobility Services Regulation
MPMF	Multimodal Passenger Mobility Forum
MMTIS	Commission Delegated Regulation (EU) 2024/490
MMTIS 2017	Commission Delegated Regulation (EU) 2017/1926
Passenger Rights Regulation	EU Rail Passenger Rights Regulation (EU) 2021/782
P2B Regulation	Platform-to-Business Regulation (EU) 2019/1150
SSMS	Sustainable and Smart Mobility Strategy
T&Cs	Terms and conditions

1 Introduction

1.1 Background

Travellers are often looking for the cheapest, fastest or most sustainable way to travel, be it by air, road, rail or sea. However, the internet with its wide variety of websites and travel providers makes comparing the different modes of transport in an efficient way quite challenging nowadays. Often, the different modes of transport offer their services separately through their own distribution channels. As information is fragmented across different distribution channels, travellers have to navigate their way through multiple websites or platforms to compare prices, routes and other relevant information, causing travellers to face inefficiency in their search.¹ In addition, some travel options may be overlooked if they are not listed on a particular distribution channel, making it difficult for the traveller to get a complete picture of all available possibilities. The lack of transparency and comparability between transport modes can also affect sustainability considerations, as travellers may be tempted to choose the most convenient or the cheapest option if they cannot easily see how different options compare in terms of eco-friendliness.²

This problem can be tackled by focusing on Multimodal Digital Mobility Services (MDMS). MDMS are defined by the European Commission as “*systems providing information about, inter alia, the location of transport facilities, schedules, availability and fares, of more than one transport provider, with or without facilities to make reservations, payments or issue tickets.*”³ They consolidate diverse transportation options, prices, and travel details into a single platform, empowering travellers to conveniently compare and select their preferred mode of transport. However, the concrete elaboration of MDMS platforms is currently held back by anti-competitive behaviour of incumbent MDMS operators towards transport operators and vice versa.⁴

¹ Commission, ‘Public consultation on the initiative on Multimodal Digital Mobility Services (MDMS)’, Ref. Ares(2022)5368601, 26 July 2022, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 4.

² Commission, ‘Sustainable and Smart Mobility Strategy – putting European transport on track for the Future’, COM(2020) 789 final, 9 December 2020, para 28-29.

³ Section 2.1 will go more into detail on this matter.

⁴ Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 4 (further: MDMS Inception Impact Assessment).

Incumbent MDMS operators behave in an anti-competitive way towards transport operators by engaging in differentiated treatment, as they are often unwilling to integrate offers from other operators on their platform. Especially when MDMS platforms are owned by incumbent transportation operators, they are not likely to benefit directly from promoting their competitors on their own platforms. Therefore, they will be reluctant to cooperate, which can result in a refusal of access to the MDMS platform. Moreover, when MDMS platforms do integrate other travel operators' offers, they often manipulate their presentation and prioritize their own offers, leading to a non-neutral presentation, less transparency, reduced comparability and fewer choices for users. Self-preferencing by MDMS platforms is thus detrimental for both consumers and competing transport operators. When MDMS platforms prioritize their own services over those of competitors, it distorts the level playing field in the market. This can lead to reduced competition and innovation, as consumers may be steered towards options that may not necessarily be the best fit for them in terms of price, convenience, or sustainability. Moreover, this may limit consumers' access to a diverse range of transportation options, thereby reducing their ability to make informed decisions.

In contrast, the anti-competitive behaviour of transport operators towards MDMS operators manifests itself mainly in a refusal to supply data that the MDMS operator needs to offer its services. By withholding crucial information such as real-time data and travel details, transport operators impede MDMS platforms' ability to offer comprehensive and up-to-date transportation options to users. Consequently, transport operators tend to be reluctant to provide real-time data and other travel information to MDMS operators, as this enables them to weaken the latter's competitive position. This refusal not only limits the range of choices available to travellers but also undermines the overall efficiency and convenience of multimodal travel planning, as MDMS platforms cannot fulfil their core functionalities. Consequently, consumers are deprived of access to accurate and diverse transportation information, leading to potential inconveniences, inefficiencies, and missed opportunities for optimized travel experiences.

A present-day illustration of the aforementioned issues can be found with Ryanair, a low-cost airline known for its budget-friendly prices and extensive flight network across Europe.⁵ The Italian competition authority, the *Autorità Garante della Concorrenza e del Mercato* (AGCM),

⁵ Ryanair, 'Our Network' (*Ryanair*) <<https://corporate.ryanair.com/about-us/our-network/>> accessed 16 May 2024

opened an investigation in September 2023 into the airline’s possible abuse of dominant position. The AGCM accuses Ryanair of “*leveraging on its dominant position in several markets of air transport sector in order to extend its market power also into the offer of other tourist services (such as hotels and car rental)*”.⁶ Ryanair in fact refuses to sell its tickets through travel agents. This stems from the fact that, as a dominant transport operator, Ryanair is not likely to gain any advantage from being compared to its competitors, and therefore wants to lure customers directly to its website to avoid travellers discovering better alternatives.⁷ In addition, Ryanair complicates the sale of its tickets through Computerised Reservation Systems (CRS)⁸ by subjecting these tickets to “*considerably less favourable conditions in terms of pricing, range of available services, and post-sale management*”.⁹ These practices do not only affect travel agencies, but also consumers, as they will be hindered from finding the best travel option when booking their trip.

These anti-competitive tactics persist due to the absence of a comprehensive Union-wide regulatory framework specifically dedicated to governing MDMS, resulting in diverging legal frameworks between Member States on this issue.¹⁰ In 2021, however, the European Commission (the Commission) announced its initiative for a Multimodal Digital Mobility Services Regulation (MDMS Regulation). With this initiative, the Commission aims to address the aforementioned competition law issues in order to achieve the economic, social and environmental benefits of multimodality in a more efficient way. It furthermore aims to better integrate public transport and rail services to achieve seamless multimodal passenger transport, delivering on the EU Green Deal.¹¹ This Regulation could potentially mark the beginning of a new era centred around multimodal travel, but many uncertainties remain about its concrete implementation. Although the deadline for implementing a proposal was set for the first quarter

⁶ Autorità Garante della Concorrenza e del Mercato, ‘A568 - ICA: the AGCM investigates Ryanair for an alleged abuse of dominant position’ (Autorità Garante della Concorrenza e del Mercato 20 September 2023) <<https://en.agcm.it/en/media/press-releases/2023/9/A568>> accessed 4 April 2024.

⁷ Eu travel tech, ‘Ryanair gets called out for not letting passengers book tickets where they want. We need MDMS now!’ (*eu travel tech*, 22 September 2023) <<https://eutravelttech.eu/ryanair-gets-called-out-for-not-letting-passengers-book-tickets-where-they-want-we-need-mdms-now/>> accessed 4 April 2024.

⁸ A kind of collection point of tickets that acts as a bridge between airlines and travel agencies.

⁹ Autorità Garante della Concorrenza e del Mercato, ‘A568 - ICA: the AGCM investigates Ryanair for an alleged abuse of dominant position’ (Autorità Garante della Concorrenza e del Mercato 20 September 2023) <<https://en.agcm.it/en/media/press-releases/2023/9/A568>> accessed 4 April 2024.

¹⁰ Inception Impact Assessment (n 4) 1.

¹¹ Commission, ‘Public consultation on the initiative on Multimodal Digital Mobility Services (MDMS)’, Ref. Ares(2022)5368601, 26 July 2022, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 2.

of 2023, no proposal has been presented yet more than a year later,¹² and a draft impact assessment was rejected by the Regulatory Scrutiny Board in September 2023. It thus currently remains uncertain when and if a proposal for this Regulation will be adopted. Nevertheless, this thesis prematurely explores its potential impact on competition concerns in the MDMS sector.

1.2 Research question

The main question this thesis seeks to answer is: “What are the shortcomings of current EU legislation in addressing anti-competitive tactics within the Multimodal Digital Mobility Services sector, and to what extent is the planned MDMS Regulation capable of mitigating them?” The main research question builds on three sub-research questions.

Because of its increasing importance in the transportation industry, the concept of MDMS is explored in more detail. This way, a thorough understanding can be gained of the role MDMS play in modern transport and the regulatory challenges they may face. Concerns have arisen regarding anti-competitive practices among transport operators and MDMS. This thesis seeks to examine the various anti-competitive tactics currently employed within this sector that are hindering the realisation of seamless multimodal travel experiences in the EU. Consequently, the first sub-research question reads: “What are Multimodal Digital Mobility Services and how adequate is EU competition law in addressing the anti-competitive tactics that are currently used among transport operators and MDMS that counteract the accomplishment of multimodal travel in the EU?”

Next, the existing secondary regulation in this area and the level of protection it currently provides is analysed. Chapter 3 will examine whether the Regulation (EC) 80/2009 (CRS Code of Conduct)¹³, the Platform-to-Business Regulation (P2B Regulation)¹⁴, the Delegated Regulation 2017/1926 on EU-wide multimodal travel information services (MMTIS)¹⁵ and the

¹² This thesis was written in the second quarter of 2024.

¹³ Council Regulation (EC) 80/2009 of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 [2009] OJ L35/47 (further: CRS Code of Conduct).

¹⁴ Council Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57 (further: P2B Regulation).

¹⁵ Commission Delegated Regulation (EU) 2024/490 of 29 November 2023 amending Delegated Regulation (EU) 2017/1926 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services [2024] OJ L2024/490 (further: MMTIS).

EU Rail Passenger Rights Regulation (Rail Passenger Rights Regulation)¹⁶ are adequate to address the anti-competitive practices. The second sub-research question thus goes as follows: “To what extent does secondary EU legislation effectively address anti-competitive tactics within the MDMS sector?”

With its initiative to regulate MDMS, the Commission clearly indicates that it intends to address the challenges of sustainable digitalisation in the transport sector in order to adapt to the changing transport landscape. To tackle the current bottlenecks, the third sub-research question seeks to identify some safeguards that could be included in the future MDMS Regulation to mitigate anti-competitive tactics. The third and final research question thus concludes with some policy recommendations and goes as follows: “What additional safeguards can be incorporated into the future MDMS Regulation to mitigate these anti-competitive tactics?”

1.3 Methodology

This thesis has the objective of assessing whether the current EU legislation provides a sufficient protection against anti-competitive behaviour in the field of multimodal travel and if not, whether a new regulatory framework can adequately address these challenges. By adopting a legal dogmatic approach, the thesis seeks to evaluate the efficiency of the current EU legislative framework in addressing anti-competitive problems (*lex lata*) and to provide recommendations for possible changes to the regulatory framework in the future MDMS Regulation (*de lege ferenda*).¹⁷

The aim of this thesis is to analyse and evaluate the current legal framework and the possible measures that could be included in the future MDMS Regulation, despite its current status as an EU initiative. The assessment of the adequacy of competition law within the context of the MDMS sector will predominantly rely on Article 102 TFEU¹⁸ and on secondary sources. Furthermore, the evaluation of the EU framework will entail a thorough examination of pertinent EU legislation that bears significance to the thesis topic. As the Commission has yet

¹⁶ Council Regulation (EU) 2021/782 of 29 April 2021 on rail passengers’ rights and obligations (recast) [2021] OJ L172/1 (further: Passenger Rights Regulation).

¹⁷ Jan M. Smits, ‘What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research’, in Rob Van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds), *Rethinking Legal Scholarship* (Cambridge University Press 2017).

¹⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

to put forward a concrete proposal for the MDMS Regulation, regard must also be had to other relevant sources, such as the Commission’s Inception Impact Assessment (IIA)¹⁹, feedback from stakeholders, the Commission’s 2019 report on *Remaining challenges to EU-wide integrated ticketing and payment systems* and websites and blogs.²⁰

1.4 Delimitation

Before embarking on this thesis, the topic should be clearly defined. This is done using three brief constraints.

- (1) First, in the first public workshop impact assessment for the initiative on MDMS, 60% of the attendees indicated that they identified the lack of willingness to collaborate between MDMS and transport operators, alongside commercial and technical hurdles in establishing a robust MDMS as stumbling blocks hindering better use of MDMS.²¹ This indicates that most stakeholders identify problem driver 2²², and thus the existence of competition issues, as the biggest barriers to achieve a seamless integration of multimodal transport. Consequently, this thesis focuses on the anti-competitive tactics in MDMS.
- (2) Second, the purpose of this study is not to provide a comprehensive overview of the current state of affairs in competition law, nor to delve deeply into the academic discussions within this field. The transport sector often exhibits characteristics of natural monopolies due to high infrastructure costs and economies of scale, leading to market dominance by a few large operators. These conditions make it difficult for new transport operators to compete, resulting in frequent abuses of dominance. Although issues related to Article 101 TFEU can occur, they are less prevalent in this context. Therefore, this thesis concentrates on the most common abuses under Article 102 TFEU.
- (3) Lastly, it is important to note that this thesis does not aim to provide a comprehensive overview of all possible relevant legislation. Instead, a selection has been made of

¹⁹ MDMS Inception Impact Assessment (n 4).

²⁰ Commission, ‘Remaining challenges for EU-wide integrated ticketing and payment systems – Final report’, Ref. Ares(2019)5698356, 11 September 2019, <<https://op.europa.eu/en/publication-detail/-/publication/af05b3eb-df43-11e9-9c4e-01aa75ed71a1>>.

²¹ Directorate-General for Mobility and Transport, ‘1st public workshop impact assessment for the initiative on Multimodal Digital Mobility Services’ (*European Commission: Mobility and Transport*, 17 March 2022) <https://transport.ec.europa.eu/news-events/news/1st-public-workshop-impact-assessment-initiative-multimodal-digital-mobility-services-2022-03-17_en> accessed 7 April 2024.

²² Cf. page 37.

specific legislation of particular relevance to the treatment of the anti-competitive practices in MDMS.

2 Multimodal Digital Mobility Services

2.1 What are Multimodal Digital Mobility Services?

The Commission defines MDMS²³ as “*systems providing information about, inter alia, the location of transport facilities, schedules, availability and fares, of more than one transport provider, with or without facilities to make reservations, payments or issue tickets (e.g. route-planners, Mobility as a Service, online ticket vendors and ticket intermediaries).*”²⁴ In other words, MDMS streamline the process of comparing various transportation options, ticket prices and other travel arrangements at a glance.²⁵ This is facilitated by third-party websites or platforms that bring together all available modes of transportation – be it by air, road, rail, or sea – in one easily accessible place. This empowers travellers to effortlessly assess and compare their options, enabling them to make informed decisions based on their preferences and priorities. In the long run, these services will lead to improvements in sustainability, comfort and time management of the overall travel experience.²⁶

The concept of MDMS can be clarified with a simple example.²⁷ Say Milla wants to travel from Dresden to Krakow by 19:00.

- Without the MDMS Regulation, Milla will have to visit several websites to plan her trip. It is very likely that the first search results will prompt her to take the trip by plane. Unfortunately, this means that she may overlook better (such as cheaper and more sustainable) travel options, as trips that combine air and rail travel are rare. Her trip will result in a high cost, generate substantial emissions, and the journey will be time-consuming.

²³ Also often referred to as Mobility as a Service (MaaS).

²⁴ Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 1 (further: MDMS Inception Impact Assessment).

²⁵ Commission, ‘Public consultation on the initiative on Multimodal Digital Mobility Services (MDMS)’, Ref. Ares(2022)5368601, 26 July 2022, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 2 (further: MDMS Public consultation).

²⁶ MDMS Inception Impact Assessment (n 23) 2.

²⁷ Example provided by Eu travel tech, a European travel tech organisation that represents travel technology companies in Europe. This example can be consulted at: Eu travel tech, ‘Explainer – Multimodal Digital Mobility Services Regulation’ (*Eu travel tech*, 17 April 2023) <<https://eutraveltech.eu/explainer-multimodal-digital-mobility-services-regulation/>> accessed 4 April 2024.

- With the MDMS Regulation, however, this may change. A clear framework will enable third parties to integrate all modes of transportation in one place, where they can be easily compared. This allows Milla to travel more sustainable and save time and money.



An example of an existing MDMS platform can be found in Rome2Rio.²⁸ This platform allows travellers to compare and combine different modes and routes for their trip. The platform integrates information from different transport providers, such as airlines, train operators, bus companies and ridesharing services, and provides travellers with a convenient overview of available options.

²⁸ Rome to Rio, 'Discover how to get anywhere' (*Rome to Rio*) <<https://www.rome2rio.com/>> accessed 14 May 2024.

2.2 Possible competition law concerns

2.2.1 Anti-competitive tactics hinder the development of MDMS

While it is undeniable that MDMS can increase mobility and improve the travel experience, the digitisation of transport also brings challenges, especially in terms of ensuring fair competition within the market. For MDMS platforms that have gained dominance in the market, Article 102 TFEU will be applicable.²⁹ Article 102 applies to all modes of transport³⁰, and transport operators, mobility service providers and MDMS are also caught by these provisions.³¹ This Article prohibits companies from abusing their dominant position,³² as dominant firms have a special responsibility not to allow its conduct to impair undistorted competition on the internal market.³³ Article 102 TFEU covers different kinds of abuses, that can be split up in exclusionary abuses (such as predatory pricing, exclusive dealing, discounts and rebates, tying, and refusal to supply)³⁴ or exploitative abuses (such as charging unfair prices and imposing unfair terms and conditions)³⁵.

The IIA - as discussed in Section 4.2 - makes a distinction between two types of abuse: anti-competitive behaviour of incumbent MDMS operators towards transport operators and anti-competitive behaviour of transport operators towards MDMS operators.³⁶ Incumbent MDMS operators behave anticompetitively towards carriers when they engage in differential treatment. This can appear in several forms, ranging from pure self-preferencing to secondary-line differentiation. In contrast, the anti-competitive behaviour of transport operators towards MDMS operators manifests itself mainly in a refusal to supply the data that MDMS operators

²⁹ Björn Lundqvist and Erion Murati, 'Collaborative Platforms and Data Pools for Smart Urban Societies and Mobility as a Service (MaaS) from a Competition Law Perspective' in Michèle Finck, Matthias Lamping, Valentina Moscon and Heiko Richter (eds), *Smart Urban Mobility Law, Regulation, and Policy* (Springer 2020) 206.

³⁰ Vicenç Pedret Cuscó, 'EU Transport and EU Transport Policy' in Luis Ortiz Blanco and Ben Van Houtte (eds), *EU Regulation and Competition Law in the Transport Sector* (2nd Edition, Oxford Press 2017), para 1.27; Hubert de Broca, Marta Mielecka Riga and Anatoly Suboès, 'Special sectors: Transport' in Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (3rd Edition, Oxford University Press 2014), para 15.17.

³¹ as they are deemed to be undertakings defined as "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" (Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para 21).

³² The Court of Justice has defined a dominant position as "a position of economic strength, affording one or more undertakings to behave independently of its competitors" (Case 27/76 *United Brands Company and United Brands Continentaal BV v European Commission* [1978] ECLI:EU:C:1978:22, para 65).

³³ Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313, para 57.

³⁴ Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', C 45/7, 24 February 2009.

³⁵ Richard Whish and David Bailey, *Competition Law* (10th Edition, Oxford Press 2021) 315.

³⁶ MDMS Inception Impact Assessment (n 23) 4.

need to offer their services. These anti-competitive practices undermine the principles of fair competition, stifle innovation, limit consumer choice and can lead to higher prices for transport services.³⁷ This hinders the realisation of the benefits of improved multimodality and the use of the most sustainable modes of transport.³⁸ In what follows, these anti-competitive practices are discussed more in detail.

2.2.2 Behaviour of incumbent MDMS towards operators: differentiated treatment

2.2.2.1 Introduction

MDMS strive towards making the search for the journey that best suits the traveller's preferences more efficient by bringing all transport options together on one platform. To ensure that consumers trust and use their services, MDMS must guarantee that consumers can rely on their services being presented and ranked in a fair and transparent manner. It is therefore essential that the presentation of the possible transport options is done in a non-discriminatory manner. The Commission's IIA, however, reveals that MDMS often participate in anti-competitive practices when displaying options, more precisely by engaging in differentiated treatment.³⁹ Differentiated treatment is a form of discrimination that, in the context of MDMS, can be classified into two subcategories: pure self-preferencing and secondary line differentiation.⁴⁰ Pure self-preferencing occurs when a dominant firm gives preferential treatment to its own services in a market where it is active itself (the MDMS platform then acts as a vertically integrated platform operator), while secondary line differentiation occurs when a dominant firm discriminates in a market where it is not active itself (the MDMS platform then acts as an intermediary platform operator).⁴¹

³⁷ Richard Whish and David Bailey, *Competition Law* (10th Edition, Oxford Press 2021) 9; Brenda Sufrin, Niamh Dunne, and Alison Jones, *Jones & Sufrin's EU Competition Law* (8th Edition, Oxford Press 2023) 39.

³⁸ MDMS Inception Impact Assessment (n 23) 2.

³⁹ *Ibid* 3.

⁴⁰ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 278.

⁴¹ Pablo Ibáñez Colomo, 'Exclusionary discrimination under Article 102 TFEU' (2014) 51 *Common Market Law Review* 141, 145; Friso Bostoen and Daniel Mândrescu, 'Assessing abuse of dominance in the platform economy: a case study of app stores' (2020) 16 *European Competition Journal* 431, 447; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 *Yearbook of European Law* 448, 453.

The Commission in its IIA mainly focuses on MDMS providers who are at the same time transport operators (vertically integrated platform operators), indicating that secondary-line differentiation is not common in MDMS.⁴² Accordingly, the Court of Justice itself has in the past pointed out that an undertaking in a dominant position, in principle, has no interest in excluding one of its trade partners from the downstream market.⁴³ Because it is implausible to find secondary-line differentiation in MDMS today⁴⁴, it is beyond the scope of this thesis to analyse this form of abuse. The upcoming Section will examine the effectiveness of competition law in addressing the issues of self-preferencing within the context of digital mobility and transport services.

2.2.2.2 *Pure self-preferencing*

When MDMS are offered by an (incumbent) transport operator, it will likely tend, as a vertically integrated platform operator, to manipulate the ranking of results in order to favour its own transport services over others. When a platform treats more favourably, in ranking and related indexing and crawling, services and products offered by himself than similar services or products of a third party⁴⁵, it is engaging in self-preferencing.⁴⁶

Self-preferencing is a form of leveraging, an anti-competitive tactic in which “*an undertaking with a substantial degree of market power in one market is engaging in anticompetitive practices with the aim of extending its market power into another market.*”⁴⁷ The vertically integrated platform operator is capable of leveraging because it has a dual role: on the one hand, it acts as the provider of a marketplace where various transport operators can offer their tickets, and on the other hand, it sells its own tickets as a transport operator on this marketplace.⁴⁸ This

⁴² MDMS Inception Impact Assessment (n 23) 3.

⁴³ Case C-525/16, *MEO - Serviços de Comunicações e Multimédia SA* [2018] EU:C:2018:270, paras 35.

⁴⁴ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 182.

⁴⁵ Article 6, 5 DMA.

⁴⁶ Friso Bostoan and Daniel Mândrescu, ‘Assessing abuse of dominance in the platform economy: a case study of app stores’ (2020) 16 *European Competition Journal* 431, 447.

⁴⁷ Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763, para. 163; Pietro Crocioni, *Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework* (Oxford Press 2008) 449.

⁴⁸ Inge Graef, ‘Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence’ (2019) 38 *Yearbook of European Law* 448, 449.

unique position ensures that it has an incentive to exclude direct competitors in order to benefit from their downfall.⁴⁹

Vertically integrated platform can self-preference in various ways, such as influencing and biasing rankings, refusing to cooperate with other operators or imposing exorbitantly high commissions towards their competitors.⁵⁰ The following section will specifically address the biased ranking of transport routes and the refusal of access to MDMS platforms, as these aspects are crucial to understanding the impact of existing MDMS on the market and the potential distortion of competition, as highlighted in the IIA.⁵¹

2.2.2.2.1 Self-preferencing through biased ranking

As discussed earlier, a transport operator-owned MDMS platform has an interest in presenting its own services more attractively than those of competitors. A common method to achieve this is by, regardless of the specified criteria such as price, duration or sustainability, ranking its own transport services at the top of search results and those of competitors below. The idea behind this biased ranking is that travellers tend to choose the first few search results out of convenience, without bothering to go through all the available options. Considering that this is exactly the behaviour that Google was accused of by the Commission in the *Google Shopping* case⁵², where the General Court confirmed that self-preferencing can constitute an independent form of abuse of dominance, it is appropriate to apply this case by analogy to MDMS platforms.

For a long time, there was controversy about whether self-preferencing is a stand-alone abuse under Article 102 TFEU or whether it should be linked to one of the pre-existing categories of abuse.⁵³ The *Google Shopping* case, in which the Commission found Google guilty of abusing its dominant position in the search engine market by giving its own Google Shopping service priority in search results, is the leading case in this matter.⁵⁴ In upholding the Commission's decision, the General Court confirmed that self-preferencing by a dominant company is an

⁴⁹ Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 *World Competition* 417, 418.

⁵⁰ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023), 281.

⁵¹ MDMS Inception Impact Assessment (n 23) 4.

⁵² Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763, para 61.

⁵³ Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102' [2021] *European Papers*, 1345, 1348.

⁵⁴ Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763.

independent form of abuse of dominance.⁵⁵ The General Court, however, did not lay down a legal test clarifying which elements must be fulfilled for self-preferencing to qualify as abuse of dominance.⁵⁶

Because the General Court did not lay down a legal test, it is difficult to derive a clear theory of harm to distinguish legal self-preferencing by dominant companies from strategies that infringe Article 102 TFEU from this case with specific circumstances. However, while the General Court did not indicate in any way that these elements are binding on the Commission in determining unlawful self-preferencing in future cases, it did cite four circumstances in its decision that it considers relevant for the qualification of self-preferencing as abuse: i) the fact that Google leveraged its dominant position in general search services to promote its own comparison shopping service over competing services on its search results pages, often resulting in the demotion of competitors' results⁵⁷; (ii) the importance of traffic generated by Google's general search engine for comparison shopping services; (iii) the behaviour of users when searching online; and (iv) the fact that diverted traffic from Google's general results pages accounts for a large proportion of traffic to competing comparison shopping services and cannot be effectively replaced by other sources. Since these elements serve as indicators of a legal test, they are used to draw parallels between MDMS and the *Google Shopping* case.⁵⁸

A clear parallel can be drawn for conditions (i) and (ii): Just as Google used its dominant position in general search services to promote its own comparison shopping service over competing services on its search results pages, MDMS platforms may use their position to favour their own transport services at the expense of competitors, often resulting in the disadvantaging of competitors' results. In addition, smaller transport operators may depend on traffic flows generated by MDMS platforms, just as comparison shopping services depend on Google's traffic. These traffic flows can be a significant source of customers for various transport operators offering their services on the platform. However, applying this analogy is more difficult for condition (iii), as the Commission here based its argument largely on the behaviour of users. It concluded that users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining

⁵⁵ *Ibid* paras 150-197.

⁵⁶ This issue will be addressed *infra*.

⁵⁷ Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763, para 167.

⁵⁸ Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102' [2021] *European Papers*, 1345, 1352.

generic search results.⁵⁹ However, it is important to contextualise this conclusion and emphasise that the attention users pay to ranking results usually depends on the value and importance of the service purchased. This can be illustrated by the *Funda Real Estate* judgment from the Court of Appeal in Amsterdam, that ruled that the comparison with *Google Shopping* was not valid because it is not plausible that in case of a search for residential property sites, the buyer simply assumes that the highest posted offer best meets his demand.⁶⁰ Similar reasoning can be followed for choosing travel itineraries. Indeed, there are several parameters that travellers consider when booking their trips, such as the departure date and time of the trip, place of departure, length and price of the trip, etc. It is therefore highly plausible that travellers are willing to put in extra effort when checking their travel options to ensure that the trip meets their personal needs. The behaviour of users when searching for travel itineraries online is thus arguably not the same as in the *Google Shopping* case. Finally, it is difficult to draw a direct parallel for condition (iv). This is because this scenario does not seem to apply directly to MDMS platforms, as they typically do not have the same degree of dominance as Google in the search market. Rather, MDMS platforms operate in an ecosystem with multiple competitors and sources, which means that diverting traffic from their platform to competing services is less of an issue than in the case of Google, and may well be replaced by other sources. Consequently, it can be asserted that the parallel with the *Google Shopping* case is probably not applicable.

In the past, however, the Court of Justice has relied on Article 102, c TFEU⁶¹ as a legal basis for self-preferencing cases. In *Deutsche Bahn*, for example, the German national railway operator was found guilty of abuse of dominance under Article 102, c TFEU because it applied more favourable tariffs to its own downstream subsidiary than to others.⁶² While it is clear that imposing discriminatory conditions on equivalent transactions in the downstream market has previously been found to constitute abuse of dominance under Article 102, c TFEU, some authors have expressed reservations about using Article 102, c TFEU as a legal basis for cases of self-preferencing. They refer to the fact that this article talks about ‘other trading parties’, which according to them refers to competitive distortions between the customers of the dominant company, which are assumed not to cover the platform’s own downstream

⁵⁹ *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 [2018] OJ C 9/11 para 455.

⁶⁰ Gerechtshof Amsterdam 5 maart 2019, ECLI:NL:GHAMS:2019:772, para 3.12.1.

⁶¹ Article 102, c TFEU: “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.

⁶² Case T-229/94 *Deutsche Bahn v Commission* [1997] ECLI:EU:T:1997:155.

activities.⁶³ It is therefore suggested that this provision is not the most appropriate to address cases of self-preferencing⁶⁴, a view that the author of this thesis endorses. Given that dominant firms typically have no particular interest in favouring any of its trading parties, practices of pure secondary-line differentiation receive relatively little attention from competition authorities.⁶⁵ Consequently, such practices are unlikely to be found in MDMS platforms today⁶⁶ and therefore fall beyond the scope of this thesis.

2.2.2.2.2 *Self-preferencing through refusal of access to the MDMS platform*

The most extreme form of self-preferencing occurs when MDMS providers deny transport operators access to the MDMS platform in order to prevent competitors' offers from being displayed to travellers. The principle of freedom of contract plays a crucial role here. This is because all companies, including dominant ones, are in principle free to contract with whomever they want.⁶⁷ In some cases, however, refusal to deal may go so far that it constitutes a violation of competition law.⁶⁸ Therefore, a dominant company may, in specific cases, be forced under Article 102 TFEU to cooperate with third parties even if they would not have wanted to do business with them under normal circumstances.⁶⁹ Because of the significant infringement of contractual freedom, it is not surprising that this duty is highly controversial and only applied in exceptional circumstances.⁷⁰ Consequently, the Court of Justice has

⁶³ Robert O'Donoghue and Jorge Padilla, *Refusal to Deal. In The Law and Economics of Article 102 TFEU* (Bloomsbury Publishing Plc 2020) 957; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448, 474; Pinar Akman, 'The theory of abuse in Google Search: a positive and normative assessment under EU competition law' [2017] Journal of Law, Technology & Policy 301, 329.

⁶⁴ Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448, 474.

⁶⁵ The *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* focuses primarily on exclusionary conduct. The Commission indicates in para 7 that it "may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured." (Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', C 45/7, 24 February 2009).

⁶⁶ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 182.

⁶⁷ DG Competition, 'Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, IP/05/1626, 19 December 2005 <https://www.concurrences.com/IMG/pdf/m5496_20090622_20212_en-80.pdf?11277/daa83c8e6636c3336295ca785d1c4567d0565df5027e34a1489c951344465532>, para 207.

⁶⁸ *Ibid.*

⁶⁹ Robert O'Donoghue and Jorge Padilla, *Refusal to Deal. In The Law and Economics of Article 102 TFEU* (Bloomsbury Publishing Plc 2020) 603; Rossella Incardona, 'Modernisation of Article 82 EC and Refusal to Supply: Any Real Change in Sight?' (2006) 2 European Competition Journal, 337, 345.

⁷⁰ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 182; Robert O'Donoghue and Jorge Padilla, *Refusal to Deal. In The Law and Economics of Article 102*

developed the test for this abuse, the “essential facilities doctrine”, through a series of cases.⁷¹ Fulfilment of the conditions in this doctrine is difficult to achieve given that a refusal is only abusive when the refusal (i) concerns an input that is indispensable for carrying out business on a related market; (ii) eliminates any effective competition on that market; and (iii) is not objectively justified.⁷² The question now arises whether denying access to an MDMS platform is an essential facility for a transport operator to carry out its transport services.

With regard to condition (i), the Court of Justice has indicated that it understands indispensability as “*having no alternative products or services and replication of such a facility would be impossible due to technical, legal or economic reasons under current market conditions*”.⁷³ Such is not the case with MDMS platforms, as transport operators have several possible alternative channels available to offer their services and conduct their activity. Thus, the transport operator that is denied access to the platform still retains the ability to carry out its services, which means that access to the platform cannot be considered indispensable for the continuation of its business.⁷⁴ Since the transport operators can still compete through other channels, such as direct sales or other online platforms, there is also no elimination of effective competition (condition (ii)). To assess whether this restriction can be objectively justified (condition (iii)), a detailed analysis of the concrete circumstances is appropriate. The MDMS platform may base the refusal of access to the platform on legitimate reasons, such as maintaining the quality of its services. Whether these justifications are accepted will depend on the specific circumstances of the case. Because the indispensability test is accepted only in very limiting circumstances⁷⁵, and it is unlikely that the first two conditions will be fulfilled, it is not

TFEU (Bloomsbury Publishing Plc 2020) 603; Inge Graef, *EU competition law, data protection and online platforms data as essential facility* (Kluwer Competition Law 2016), 156.

⁷¹ Case C-6/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECLI:EU:C:1974:18, para 25; C-311/84 *Centre belge d'études de marché – Télémarketing v Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux* [1985] ECLI:EU:C:1985:394, paras 25-27; Case C-7/97 *Oscar Bronner* [1998] ECLI:EU:C:1998:569, paras 40-47.

⁷² Case C-7/97 *Oscar Bronner* [1998] ECLI:EU:C:1998:569, paras 40-47; Friso Bostoen and Daniel Mândrescu, ‘Assessing abuse of dominance in the platform economy: a case study of app stores’ (2020) 16 *European Competition Journal* 431, 459.

⁷³ *Ibid.*

⁷⁴ A few years ago, however, the outcome could be differently, which can be illustrated by the *London European v Sabena* case (*London European/Sabena* (Case IV/32.318) Commission Decision 88/589/EEC [1988] OJ L 317/47), in which Sabena refused London European access to the computerised reservation system (CSR) operated by Sabena, and was accused of using its dominant position on the reservation systems market to impose a certain air fare on London European. The Commission decided in this case that Sabena abused its dominant position, as this could result in the elimination of London European as a competitor on the relevant routes. However, this case can no longer be considered a useful analogy in today's era, given the changes in technology, the rise of the internet and the diversity of platforms now available for offering products or services.

⁷⁵ Friso Bostoen and Daniel Mândrescu, ‘Assessing abuse of dominance in the platform economy: a case study of app stores’ (2020) 16 *European Competition Journal* 431, 459.

essential to make a final judgment on whether the last condition will be fulfilled. While access to an MDMS platform may add a lot of value to a transport operator and provide it with a larger customer base, refusal of access to the platform may arguably not be categorised as an abuse of dominance, but rather as an expression of freedom of contract. Consequently, it will be difficult for transport operators that are denied access to MDMS platforms to rely on Article 102 TFEU to challenge such exclusions.

2.2.3 Behaviour of operators towards MDMS: refusal to supply data

2.2.3.1 Introduction

Another recurring form of abuse in the MDMS sector goes out from transport operators towards MDMS, as incumbent transportation operators may refuse to share their data with MDMS platforms. Indeed, transport operators can gain competitive advantages by not sharing their data with MDMS platforms, as this allows them to maintain their exclusive position and offer unique travel experiences to customers. According to the Commission, this limits the ability of MDMS to compete on an equal footing by providing equivalent and relevant real-time information to passengers before, during and after the journey.⁷⁶ In fact, the lack of access to data from transport operators is a serious impediment to MDMS as this data is essential for the effective functioning of the platforms and adding value to users' travel experience. Without data, MDMS operators cannot accurately plan travel routes, provide up-to-date information on schedules and availability, or compare fares between different transport providers. This hampers users' ability to make informed decisions and choose optimal travel routes that match their needs and preferences. As a result, MDMS cannot fulfil their core functionalities, which means they simply cannot exist as effective travel facilitation platforms. The question, however, is whether the refusal from a transport operator to share his data with a MDMS platform amounts to a violation of EU competition law. The essential facilities doctrine, as discussed in Section 2.2.2.2.2, also applies to the refusal to grant access to data. This means that for a refusal to supply to be abusive, the access to data must be an essential facility for the MDMS platform in order to carry out its transport services.

⁷⁶ MDMS Inception Impact Assessment (n 23) 3.

2.2.3.2 *Essential facilities doctrine*

Applied to the refusal to supply data by a transport operator vis-à-vis MDMS, the first condition requires that this data must be indispensable to enable the MDMS to operate in a secondary market.⁷⁷ The French and German national competition authorities⁷⁸ indicate that this condition is only satisfied “*if it is demonstrated that the data owned by the incumbent is truly unique and that there is no possibility for the competitor to obtain the data that it needs to perform its services.*”⁷⁹ Transport operators are often the main holders of data relevant to MDMS for several reasons. First, transport operators own the infrastructure needed to provide transport services, such as trains, buses and planes. As a result, they have direct access to data related to schedules, routes and availability. In addition, transport operators collect transaction data when passengers buy tickets or use their services. This data includes information on travel preferences, booking history and payment details, which are valuable for understanding consumer behaviour. Moreover, transport operators have access to real-time operational information, such as vehicle locations, cancellations or delays, service disruptions and maintenance schedules, which is essential for the smooth delivery of transport services and responding to unexpected events. Transport operators are thus the primary source of data essential for the delivery of transport services and can therefore be considered indispensable.⁸⁰ To fulfil the second condition, the transport operator must aim to reserve the market for itself by denying access to data and consequently eliminate all effective competition on that market.⁸¹ Whether lack of access to transport data hamper MDMS operators in their ability to provide accurate travel options, differs depending on the type of MDMS platform.

⁷⁷ Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 216; Thomas Tombal, *Imposing Data Sharing among Private Actors: A Tale of Evolving Balances* (Kluwer Law International 2022) 236.

⁷⁸ Autorité de la concurrence for France and Bundeskartellamt for Germany.

⁷⁹ Autorité de la concurrence and Bundeskartellamt, ‘Competition Law and Data’, 10 May 2016, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> 18.

⁸⁰ The argument sometimes raised by transport operators that “MDMS always have access to data from other providers”, ignores the fact that transport operators are often dominant and sometimes even the only players on certain routes or regions. As such, they have exclusive access to crucial information on those routes that is not available elsewhere, making them a vital player in the transport landscape. Consequently, without access to these transport operators’ data, MDMS would not be able to provide a complete overview of the available transportation services. Additionally, if every transport operator were to come up with a similar argument, this would significantly hinder the possibility of setting up any competing MDMS platform at all. Consequently, this is not a valid argument.

⁸¹ Giuseppe Colangelo and Mariateresa Maggiolino, ‘Big data as misleading facilities’ (2017) 13 *European Competition Journal* 249, 273.

2.2.3.2.1 *Vertically integrated platform operators*

Refusal to supply data seems to be a less prominent issue when it comes to vertically integrated platforms, as market dynamics naturally resolve it. Indeed, to establish an MDMS platform, it is not enough to offer only one's own services. An MDMS platform requires a wide range of transport options and routes to be attractive to users and to remain competitive in the market. If a transport operator chooses not to share its data with other platforms, this would mean that it would also be denied access to the data of other transport providers, and consequently can only offer its own tickets on the digital channel. Such a refusal to share data consequently results in an impasse where no MDMS platform can be launched. Smichowski examined this cooperation dilemma, and drew two main conclusions as to when transport operators decide to share their data and when not: (i) "The more complementary an operator's routes are with those of other operators considering joining/participating in a MDMS scheme, the higher the chances that it will decide to cooperate with them through data sharing will be. The inverse (when the operator's routes are competing) is true."; and (ii) "Because certain key operators hold data about essential means of transportation in a territory (typically public transportation), if they do not share their data no other operator will have incentives to do so."⁸² These findings highlight the reluctance of transport operators to cooperate when it comes to sharing data on competing routes. However, this is a missed opportunity because the more transport services and routes are available on an MDMS platform, the easier it is to compare different transport options and the more attractive these services become for travellers.⁸³ Transport operators could try to resolve this deadlock by entering into cooperation agreements with other transport operators, agreeing to share data with each other, but not with intermediate platform operators.⁸⁴ However, this could result in a cartel agreement, potentially falling under Article 101 TFEU. This possibility will not be discussed further.

⁸² Bruno Carballa Smichowski, 'Determinants of cooperation through data sharing in MaaS' [2018] 2, *Management & Data Science* <<https://management-datascience.org/articles/4160/>> accessed 6 May 2024.

⁸³ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 92.

⁸⁴ *Ibid* 187.

2.2.3.2.2 *Intermediary platform operator*

However, for an MDMS platform that acts as an intermediary platform and thus does not itself offer services in the transport market, denying access to data may lead to the elimination of all competition in that market. Indeed, these platforms depend on the willingness of transport operators to provide their information to establish an effective platform. The lack of relevant data will make it almost impossible for intermediary platforms to create attractive and competitive offers for travellers. This is because the whole concept of MDMS relies just on the fact that transport operators would share their data with MDMS. 60% of stakeholders therefore agree that the lack of data sharing hampers the deployment of MDMS between modes.⁸⁵ Consequently, the second condition of the essential facilities test may be met.

The final condition is that this refusal to provide data should not be objectively justifiable. A transport operator could argue that not sharing data is justified for various reasons, such as lack of trust, fear of losing the relationship with the customer or a lack of reciprocity of data sharing.⁸⁶ Assessing the justification of a specific ground requires a case-by-case assessment.

An example of a case in which the essential facilities doctrine was successfully invoked in the context of MDMS can be found in the investigation of the Bundeskartellamt regarding certain practices by Deutsche Bahn (DB), the national railway company.⁸⁷ The Bundeskartellamt initiated an abuse proceeding against DB in late 2019⁸⁸, and came to the conclusion in June 2023 that the company is in violation of competition law because it is abusing its market power in relation to mobility platforms. The Bundeskartellamt stressed in its decision that DB is the incumbent rail operator in Germany, and that intermediary (MDMS) platforms need DB's data to offer integrated itineraries to travellers.⁸⁹ By denying competing MDMS platforms real-time access to crucial data, such as information on delays and cancellations, "DB uses its key position

⁸⁵ MDMS Public Consultation (n 24) 9.

⁸⁶ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 85-100.

⁸⁷ Bundeskartellamt, 'Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition' (Bundeskartellamt 28 June 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html> accessed 6 May 2024.

⁸⁸ Bundeskartellamt, 'Fair competition for digital mobility services – Bundeskartellamt issues statement of objections against Deutsche Bahn due to possible hindrance of mobility platforms' (Bundeskartellamt 20 April 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/20_04_2022_Bahn.html> accessed 6 May 2024.

⁸⁹ In doing so, the Bundeskartellamt indicates that it considers access to this data indispensable.

on the transport and infrastructure markets to restrict competition from third-party mobility platforms”.⁹⁰ The Bundeskartellamt decided that DB must provide mobility platforms with continuous access to real-time data on train delays and cancellations in return for a reasonable fee equivalent to the costs incurred for providing data access. This decision was upheld by the Düsseldorf Higher Regional Court.⁹¹

⁹⁰ Bundeskartellamt, ‘Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition’ (Bundeskartellamt 28 June 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html> accessed 6 May 2024.

⁹¹ Bundeskartellamt, ‘Düsseldorf Higher Regional Court largely confirms enforceability of the Bundeskartellamt’s ruling on abusive practices against Deutsche Bahn’ (11 March 2024) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2024/11_03_2024_OLG_DB.html> accessed 6 May 2024.

3 The current legislative framework

3.1 No specific EU framework

In its IIA, the Commission mentions that “*MDMS are currently deployed in a fragmented manner, lacking proper legal and market frameworks to develop more successfully and to provide a full range of offers across the EU.*”⁹² There is thus currently no comprehensive legal framework promoting MDMS at EU level. On the one hand, a complex regulatory framework with multiple national and supra-national regulations may pose additional risks to the feasibility of multimodal travel and hinder the development of new services. On the other hand, however, stakeholders stress the need to avoid national fragmentation and to ensure a level playing field for all travel operators by introducing rules at the EU level.⁹³ After all, national measures are not best suited to address cross-border challenges, as their geographical scope is often limited to cities, regions or countries, and they rarely provide cross-border travel information.⁹⁴ Moreover, legal fragmentation can lead to overregulation and result in an inconsistent framework that can complicate the development of MDMS. In addition, there is the challenge of countering anti-competitive practices in the MDMS sector. Because competition law is an exclusive competence of the EU⁹⁵, it is best placed to provide specific regulation regarding multimodal travel that counteracts these problems.

It is clear that there is a need to develop common standards for multimodal travel. In its 2011 *White Paper Roadmap to a Single European Transport Area*, the Commission set the goal of establishing the framework for a European multimodal transport information, management and payment system by 2020.⁹⁶ The Commission furthermore has already indicated that “*the promotion of EU-wide multimodal travel information, planning and ticketing services, and better use and integration of transport modes and various mobility services, are interlinked*

⁹² Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en> 2 (further: MDMS Inception Impact Assessment).

⁹³ Feedback from the various stakeholders is discussed in the Annex.

⁹⁴ Commission, ‘Commission staff working document - Towards a roadmap for delivering EU-wide multimodal travel information, planning and ticketing services’, SWD(2014) 194 final, 15 January 2015, 6.

⁹⁵ Article 3 TFEU.

⁹⁶ Commission, ‘White paper on transport – Roadmap to a single European transport area – Towards a competitive and resource efficient transport system’, (White Paper) COM(2011) 144 final, 28 March 2011, 9.

objectives and require an integrated approach.”⁹⁷ In addition, the European Parliament pointed out that the Commission should create a clear framework regarding multimodal travel.⁹⁸ Following this, the Commission took several legislative initiatives, the most significant of which will be discussed *infra*. However, it has become apparent that none of these regulations can provide a comprehensive response to the challenges currently encountered by MDMS. The Commission’s specific EU legislative initiative for an MDMS Regulation is therefore most welcome.

3.2 Evaluation of the existing legal framework

3.2.1 Introduction

To clarify the legal challenges that the Commission is facing, it is appropriate to examine which existing EU legislation could provide possible solutions to the anti-competitive practices in MDMS. These practices, including differentiated treatment and refusal to supply data, undermine the benefits of digitisation in the transport sector and hinder the creation of a level playing field for the provision of digital mobility and transport services in the EU.⁹⁹ This chapter will examine whether existing regulations, including the CRS Code of Conduct, the P2B Regulation, the MMTIS and the Rail Passenger Rights Regulation are adequate in addressing the competition concerns.

3.2.2 The CRS Code of Conduct

In the airline industry, a significant proportion of airline reservations are made through Computerised Reservation Systems (CRS).¹⁰⁰ CRS can be defined as “*a computerised system containing information about, inter alia, schedules, availability and fares, of more than one air carrier, with or without facilities to make reservations or issue tickets, to the extent that some*

⁹⁷ Commission, ‘Commission staff working document - Towards a roadmap for delivering EU-wide multimodal travel information, planning and ticketing services’, SWD(2014) 194 final, 15 January 2015, 10.

⁹⁸ European Parliament, ‘Report on delivering multimodal integrated ticketing in Europe’, 2014/2244(INI), 12 June 2015, 5.

⁹⁹ European Commission, ‘Questions and Answers on the revision of the Delegated Regulation on multimodal travel information services and on the Communication on the creation of a common European mobility data space (EMDS)’ (2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6112> accessed 7 May 2024.

¹⁰⁰ Recital 2 Council Regulation (EC) 80/2009 of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 [2009] OJ L35/47 (further: CRS Code of Conduct).

*or all of these services are made available to subscribers”.*¹⁰¹ CRS act as a bridge that connects travel agents and airlines.¹⁰² However, airlines that own CRS have the tendency to misuse their CRS by displaying their own routes on the CRS first, regardless of the specified parameters (such as price, flight duration or connections), or by denying access to the CRS for some air carriers.¹⁰³

To meet the need for legal intervention for these anti-competitive practices¹⁰⁴, the CRS Code of Conduct was adopted, of which the revised version entered into force in 2009. This Regulation seeks to ensure fair competition and protection of consumer rights by introducing a Code of Conduct for the use of CRSs.¹⁰⁵ The regulation applies to air transport and can also apply to rail-transport products which are incorporated alongside air-transport products into the principal display of a CRS when offered for use or used in the Community.¹⁰⁶

With regard to the display of search results (ranking), Article 5 CRS Code of Conduct states: *“A system vendor shall provide a principal display [...] through its CRS and shall include therein the data provided by participating carriers in a **neutral** and comprehensive manner and **without discrimination or bias**. Criteria to be used for ranking shall **not be based on any factor directly or indirectly relating to carrier identity** and shall be applied on a **non-discriminatory basis** to all participating carriers. The principal display(s) shall not mislead the user, shall be easily accessible and shall respect the rules set out in Annex I.”*¹⁰⁷ In addition, Article 10 CRS Code of Conduct states that a parent carrier may not discriminate against a competing CRS by refusing to provide the same data as it provides to its own CRS or by refusing reservations from competing CRSs unless it is consistent with its fares and conditions.

Although the *Evaluation of the CRS Code of Conduct Regulation* shows that it has been effective in promoting transparency in travel options on CRS platforms¹⁰⁸, the Commission is

¹⁰¹ Article 2, 4 CRS Code of Conduct.

¹⁰² Carlos Mestre Zamarreño, ‘Air Transport: Liberalization and Regulation’ in Luis Ortiz Blanco and Ben Van Houtte (eds), *EU Regulation and Competition Law in the Transport Sector* (2nd Edition, Oxford Press 2017), para 15.85.

¹⁰³ *Ibid.*

¹⁰⁴ Recital 4 CRS Code of Conduct.

¹⁰⁵ Recital 4 CRS Code of Conduct.

¹⁰⁶ Article 1 CRS Code of Conduct.

¹⁰⁷ Emphasis added.

¹⁰⁸ Commission, ‘Commission staff working document – Executive summary of the Evaluation of Regulation 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems’, SWD(2020) 11 final, 23 January 2020, 4.

currently considering a review of the Regulation because of the strong evolution in the industry.¹⁰⁹ Because distribution of tickets is currently conducted largely through ticket sales channels outside the scope of the CRS Code of Conduct, the question arises whether its objectives are still relevant and whether it is still fit for purpose.¹¹⁰ The Commission recognises that there is a strong overlap in subject matter between the MDMS Regulation and the possible revision of the CRS Code of Conduct, and it therefore ensures a coherent approach between the two impact assessments and subsequent measures.¹¹¹ Recommendations on how this Regulation could best be adapted to meet the needs of MDMS will be provided in Section 4.4.

The need for adaptation of the CRS Code of Conduct can be illustrated by the AGCM's investigation into Ryanair's possible abuse of its dominant position, as discussed in Section 1.1.¹¹² Ryanair refuses to sell its tickets through travel agents, thus leaving travel agencies with no alternative but to sell Ryanair tickets exclusively through CRS.¹¹³ However, Ryanair complicates the sale of its tickets through CRS by subjecting these tickets to "*considerably less favourable conditions in terms of pricing, range of available services, and post-sale management*".¹¹⁴ One example given by the AGCM is a 45% price increase when compared to the Ryanair.com price. Thus, despite the requirements of the CRS Code of Conduct, Ryanair still manages to sell its tickets through CRS on less favourable terms than on its own website. Several stakeholders have also pointed out that the effectiveness of the CRS Code of Conduct is affected by the Commission's lack of enforcement of these anti-competitive practices.¹¹⁵ This highlights the need to amend the CRS Code of Conduct and take stronger measures to counter such forms of self-preferencing.

¹⁰⁹ Commission, 'Commission Inception Impact Assessment of 9 June 2020 on Possible revision of the Code of Conduct for computerised reservation systems (CRS)', Ref. Ares(2020)3635812, 9 June 2020, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12507-Air-travel-computerised-reservation-systems-updated-rules-_en>.

¹¹⁰ Commission, 'Commission staff working document – Executive summary of the evaluation of Regulation 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems', SWD(2020) 11 final, 23 January 2020, 1.

¹¹¹ MDMS Inception Impact Assessment (n 91) 2.

¹¹² Autorità Garante della Concorrenza e del Mercato, 'A568 - ICA: the AGCM investigates Ryanair for an alleged abuse of dominant position' (Autorità Garante della Concorrenza e del Mercato 20 September 2023) <<https://en.agcm.it/en/media/press-releases/2023/9/A568>> accessed 4 April 2024.

¹¹³ Eu travel tech, 'Ryanair gets called out for not letting passengers book tickets where they want. We need MDMS now!' (*eu travel tech*, 22 September 2023) <<https://eutraveltech.eu/ryanair-gets-called-out-for-not-letting-passengers-book-tickets-where-they-want-we-need-mdms-now/>> accessed 4 April 2024.

¹¹⁴ Autorità Garante della Concorrenza e del Mercato, 'A568 - ICA: the AGCM investigates Ryanair for an alleged abuse of dominant position' (Autorità Garante della Concorrenza e del Mercato 20 September 2023) <<https://en.agcm.it/en/media/press-releases/2023/9/A568>> accessed 4 April 2024.

¹¹⁵ Commission, 'Multimodal Passenger Mobility Forum - Report from the Expert Group', 2 February 2022, <<https://transport.ec.europa.eu/system/files/2023-02/mpmf-report-2023.pdf>>, 40.

3.2.3 Platform-to-Business Regulation

In July 2020, the P2B Regulation became effective. The P2B Regulation aims to create a fair, predictable, sustainable and trusted online business environment with regard to the relationships between online platforms and companies that use these platforms to offer their goods or services, with the aim of restoring the balance in these relationships.¹¹⁶ After all, to fully exploit the benefits of the online platform economy, it is important that undertakings can trust online intermediation services with which they enter into commercial relationships.¹¹⁷

The P2B Regulation therefore imposes specific obligations on online intermediation services¹¹⁸ towards their business users. With regard to ranking, Article 5 P2B Regulation stipulates that providers of online intermediation services must state in their terms and conditions (T&Cs) the main parameters that determine ranking and the reasons for the relative importance of those parameters compared to others.

More importantly, Article 7 P2B Regulation obliges online intermediation services to act in a transparent manner and to include in their T&C's a description of any differentiated treatment which they give, or might give, in relation to goods or services offered to consumers. This description shall refer to the main economic, commercial or legal considerations for such differentiated treatment. With this Article, the P2B Regulation thus explicitly addresses the self-preferencing problem.

However, despite these measures, the P2B Regulation does not adequately address the issue of differential treatment by platforms. In fact, an in-depth study found that only six out of 300 platforms surveyed contained detailed descriptions of differential treatment in their terms and conditions.¹¹⁹ While some platforms may not favour any business user and therefore do not include a description of differential treatment, the actual implementation of Article 7 is expected

¹¹⁶ Recitals 1-8 P2B Regulation.

¹¹⁷ Recital 2 P2B Regulation.

¹¹⁸ Article 2, 2 P2B Regulation. Both vertically integrated and intermediary MDMS platforms can be considered online intermediary services, as these platforms typically offer a range of travel-related services directly to consumers and thus can meet the conditions of Article 2, 2 P2B Regulation. The presence of the dominant firm's own services on the platform does not preclude it from being classified as an online intermediation service under the regulation, as long as it meets all the necessary criteria specified. Nevertheless, the classification of a platform as an online intermediary service will depend on its specific characteristics and activities.

¹¹⁹ Vaida Gineikytė-Kanclerė, Luka Klimavičiūtė, Barbora Kudzmanaitė and Lucie Lechardoy, 'Final Report of Study on Evaluation of the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the P2B Regulation)' (Publications Office of the European Union 2022), 73-81.

to remain low.¹²⁰ The fact that major platforms such as Amazon and the Apple AppStore, which are usual suspects of self-preferencing behaviour, have not included provisions on differential treatment in their general terms and conditions, also indicates a lack of compliance.¹²¹ Consequently, it would be desirable to implement an overall obligation for all platforms to explicitly state whether they apply differential treatment, even if they do not. Moreover, the P2B Regulation does not contain a general prohibition on differential treatment by platform operators. Self-preferencing is allowed, as long as it is made fully transparent to platform users. While mandating transparency may have a deterrent effect, it is uncertain whether this is sufficient to ensure that platforms do not continue to give preferential treatment to themselves. This leaves doubts about the effectiveness of this regulation to adequately address self-preference by platforms.¹²²

3.2.4 Digital Markets Act

An explicit ban on self-preferencing can, however, be found in the Digital Markets Act (DMA).¹²³ Nevertheless, because of the high financial turnover threshold that is required by this Regulation¹²⁴, it is implausible, at least at this moment, that an MDMS platform could qualify as a gatekeeper and thus fall under this prohibition.¹²⁵ Consequently, a discussion of the DMA is beyond the scope of this thesis.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Friso Bostoen and Daniel Mândrescu, 'Assessing abuse of dominance in the platform economy: a case study of app stores' (2020) 16 *European Competition Journal* 431, 487.

¹²³ Article 6, 5 Council Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (further: DMA).

¹²⁴ Article 3 DMA.

¹²⁵ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 306.

3.2.5 MMTIS

The MMTIS imposes a duty on data holders¹²⁶ to share digital, machine-readable data with data users¹²⁷ through national access points (NAPs)¹²⁸. The MMTIS supplements Directive 2010/40/EU (ITS Directive)¹²⁹, which aims to encourage the development of innovative transport technologies to create intelligent transport systems (ITS) by introducing common EU standards and specifications. MMTIS therefore aims to enable data users, including providers of multimodal travel information services, to provide accurate information to travellers.¹³⁰ By doing so, it strives to make the experience of multimodal travel smoother.¹³¹ MMTIS recently underwent a revision, with the new version entering into force in 2024.

Before the revision, MMTIS only required the sharing of static data¹³², while the sharing of dynamic, real-time data¹³³ was only recommended.¹³⁴ This limited framework proved to be detrimental to MDMS operators as the lack of obligation for real-time data sharing obstructed MDMS operators' ability to provide accurate information to travellers, affecting the user experience. Because travellers could not be informed of potential disruptions in their journey, journey planning and execution was hampered, limiting the overall effectiveness of multimodal travel information services. This put MDMS operators at risk of being less relevant to users, which could undermine their competitive position in the market.

¹²⁶ Article 2, 11 MMTIS: such as transport authorities, transport operators, infrastructure managers or transport on demand service providers.

¹²⁷ One of the data users mentioned in Article 2, 7 MMTIS is a travel information service provider. The definition of 'travel information service provider' in Article 2, 23 MMTIS is quite broad and includes both public and private providers that provide at least one form of travel and traffic information to data users and end users. Since MDMS operators provide information on various transport options, routes and schedules to users on the move, they can be considered to fall within this broad definition and thus be deemed as 'data users'.

¹²⁸ Article 2, 17 MMTIS.

¹²⁹ Council Directive 2010/40/EU of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport [2010] OJ L 207/1 (further: ITS Directive).

¹³⁰ European Commission, 'Questions and Answers on the revision of the Delegated Regulation on multimodal travel information services and on the Communication on the creation of a common European mobility data space (EMDS)' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6112> accessed 7 May 2024.

¹³¹ Recital 3 MMTIS.

¹³² Article 2, 4 MMTIS: "static travel and traffic data" means data relating to different transport modes that do not change often, or data on planned changes, as listed in the Annex. E.g.: location search (origin/destination) or trip plans: operational calendar, mapping day types to calendar dates.

¹³³ Article 2, 3 MMTIS: "dynamic travel and traffic data" means data relating to different transport modes that change often, or data on unexpected events or circumstances, as listed in the Annex. E.g.: disruptions, such as network closures and/or diversion, or real-time status information, such as estimated departure and arrival times of services, delays, cancellations, guaranteed connections monitoring.

¹³⁴ Articles 4 and 5 Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services [2017] OJ L 272/1 (further: MMTIS 2017).

The Commission found that “*Due to the current unsatisfactory accessibility of multimodal dynamic data, the accessibility of dynamic datasets is thus considered necessary to support the continued development of multimodal travel information services across the Union and should therefore be made mandatory.*”¹³⁵ To address this problem, the new Article 6 MMTIS now makes it mandatory for data holders to share dynamic information through the NAPs. This allows travellers to receive real-time updates on delays or cancellations through MDMS platforms.

The recent revision of MMTIS, with its requirement to share dynamic data, marks a welcome step forward. However, it is too early to draw definitive conclusions about its impact. It remains to be seen whether these changes will have the intended effects on improving the service of MDMS platforms. In addition, it is remarkable that access to dynamic fare data¹³⁶ is not included in the revised Regulation.¹³⁷ As a result, travellers can so far only use MDMS platforms as a search engine to consult timetables, delays, prices and other information, but are unable to book and pay for the multimodal journey in one go.¹³⁸ Nevertheless, the Commission indicated in its IIA that services facilitating payment and booking of mobility products are not in the current scope of this Delegated Regulation but will be covered by the MDMS Regulation initiative.¹³⁹

3.2.6 EU Rail Passenger Rights Regulation

Specifically for the railway sector, the Rail Passenger Rights Regulation sets out the rights and obligations of travellers regarding information, availability of tickets and compensation in case of delay, cancellation or accident.¹⁴⁰ This Regulation recently underwent an update as well, and the revised version came into force in June 2023. The Regulation explicitly recognises the importance of access to real-time travel information in making rail travel more accessible to new customers.¹⁴¹ Article 10, 2 Rail Passenger Rights Regulation therefore imposes a duty on railway undertakings to provide access to minimum travel information to other railway

¹³⁵ Recital 10 MMTIS.

¹³⁶ Dynamic fare data can be described as pricing information that is flexible and can change in response to various factors such as demand, time of day, day of the week, seasonality, available inventory, or other market conditions.

¹³⁷ Erion Murati, *Regulating Mobility as a Service (MaaS) in European Union: a legal analysis* (Springer Nature 2023) 174.

¹³⁸ For stakeholder feedback on this point, see Annex.

¹³⁹ MDMS Inception Impact Assessment (n 91), 1.

¹⁴⁰ Article 1 Rail Passenger Rights Regulation.

¹⁴¹ Recital 12 Rail Passenger Rights Regulation.

undertakings, ticket vendors and tour operators¹⁴² that sell their services. This minimum travel information includes pre-journey information (such as, *inter alia*, time schedules and conditions for the fastest trip and for all available fares, highlighting the lowest fares)¹⁴³ and information during the journey (being disruptions and delays (planned and in real time), main connecting services, on-board services and facilities, next station and security and safety issues)¹⁴⁴. Article 10, 3-4 Rail Passenger Rights Regulation stipulate that this data will be distributed in a non-discriminatory manner and that data holders may charge a fair, reasonable and proportionate financial compensation for the costs incurred in providing the access.

While it is to be welcomed that these data-sharing obligations are included in this Regulation, it does not cover all the necessary real-time data. Indeed, specific details such as real-time occupancy rates or seat availability, reasons for delays or cancellations, up-to-date information on platforms or platform changes or substitute transport services are not provided. In accordance with the opinion of the Multimodal Passenger Mobility Forum (MPMF), expanding the list to include the aforementioned elements is appropriate.¹⁴⁵

This can also be illustrated by the Bundeskartellamt's decision on DB's infringement of competition law, discussed in Section 2.2.3.2.2. Indeed, in its decision, the competition authority clearly indicated that it considered the Rail Passenger Rights Regulation to be insufficient to end the infringement of competition law, as it does not cover all necessary real-time data, nor does it regulate important commercial and technical aspects regarding the implementation of data access.¹⁴⁶

¹⁴² MDMS operators can be considered tour operators or ticket vendors because of their role in creating multimodal travel packages and selling tickets for different transport services through a single platform. They act as intermediaries between travellers and transportation operators, allowing them to fall under the definitions of tour operators or ticket vendors in Article 3, 4&5 Rail Passenger Rights Regulation.

¹⁴³ Annex II, Part I Rail Passenger Rights Regulation.

¹⁴⁴ Annex II, Part II Rail Passenger Rights Regulation.

¹⁴⁵ Commission, 'Multimodal Passenger Mobility Forum - Report from the Expert Group', 2 February 2022, <<https://transport.ec.europa.eu/system/files/2023-02/mpmf-report-2023.pdf>>, 18.

¹⁴⁶ Bundeskartellamt, 'Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition' (Bundeskartellamt 28 June 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html> accessed 6 May 2024.

3.2.7 European Mobility Data Space (EMDS)

Also worth mentioning, finally, is the recent creation of a Common European Mobility Data Space (EMDS). EMDS aim to facilitate the access, pooling and sharing of data from existing and future transport and mobility data sources.¹⁴⁷ One of the objectives of EMDS is to facilitate data access, sharing and reuse, where possible, through modal and cross-modal harmonisation of sharing conditions in a fair, transparent, proportionate and non-discriminatory manner.¹⁴⁸ The intention is not to create one vast centralised database or a single hardware infrastructure that will host all of the EU's mobility and transport data through this initiative, but to offer a framework for interlinking and federating many different transport-data ecosystems that are heterogeneous and often difficult to discover or access, in order to achieve free flow of data within the EU's single market.¹⁴⁹ Again, this initiative marks a step in the right direction.

¹⁴⁷ Commission, 'Creation of a common European mobility data space' (Communication) COM(2023) 751 final, 1 (further: EMDS Communication).

¹⁴⁸ *Ibid* 3.

¹⁴⁹ *Ibid* 3.

4 The MDMS Regulation

4.1 Initiative of the European Commission

As highlighted in Section 3.1, there is currently no comprehensive EU legal framework for multimodal travel that addresses all the possible competition concerns.¹⁵⁰ To mitigate these issues, the Commission initiated a new MDMS Regulation in 2021. This Regulation is intended to be a real “game-changer” and aims to facilitate multimodal transport by establishing a clear framework that will allow transport operators to work together to achieve better integration of the various transport systems.¹⁵¹ In doing so, it implements Action 37 of the Sustainable and Smart Mobility Strategy (SSMS)¹⁵² and fulfils the Green Deal goals of sustainable and affordable travel.¹⁵³ The legal basis for the Regulation is Article 91 TFEU (transport) and Article 100(2) TFEU (sea and air transport) and the responsible unit for this regulation is the Commission’s Directorate-General for Mobility and Transport (DG MOVE), as it is in charge of EU policy on mobility and transport.¹⁵⁴

The Commission’s choice to regulate this issue in a Regulation testifies to the importance it attaches to this matter. Unlike a Directive, which sets objectives for Member States to achieve and allows flexibility in implementation, a Regulation is automatically and uniformly applicable in all Member States and does not need to be implemented into national law.¹⁵⁵ By opting for a Regulation, the Commission indicates that MDMS requires uniform and immediate

¹⁵⁰ Commission, ‘Remaining challenges for EU-wide integrated ticketing and payment systems – Final report’, Ref. Ares(2019)5698356, 11 September 2019, <<https://op.europa.eu/en/publication-detail/-/publication/af05b3eb-df43-11e9-9c4e-01aa75ed71a1>>, 68

¹⁵¹ Commission, ‘Public consultation on the initiative on Multimodal Digital Mobility Services (MDMS)’, Ref. Ares(2022)5368601, 26 July 2022, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 2; Directorate-General for Mobility and Transport, ‘1st public workshop impact assessment for the initiative on Multimodal Digital Mobility Services’ (*European Commission: Mobility and Transport*, 17 March 2022) <https://transport.ec.europa.eu/news-events/news/1st-public-workshop-impact-assessment-initiative-multimodal-digital-mobility-services-2022-03-17_en> accessed 7 April 2024.

¹⁵² Commission, ‘Sustainable and Smart Mobility Strategy – putting European transport on track for the Future’, COM(2020) 789 final, 9 December 2020, para 37.

¹⁵³ Commission, ‘The European Green Deal’, COM(2019) 640 final, 11 December 2019, 10.

¹⁵⁴ European Commission, ‘Directorate-General Mobility and Transport’ (*European Commission*) <https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/mobility-and-transport_en> accessed 7 April 2024.

¹⁵⁵ Paul Craig and Gráinne de Búrca, *EU law* (7th edn, Oxford University Press 2020) 540; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union law: cases and materials* (2nd edn, Cambridge University Press 2010) 98; Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press 2009) 71; Margot Horspool and Matthew Humphreys, *European Union Law* (8th edn, Oxford University Press 2014) 95; Penelope Kent, *Law of the European Union* (4th edn, Person Longman 2008) 56.

enforcement in all Member States. This approach ensures that the measures will be effective immediately upon ratification and demonstrates the Commission's determination to address the challenges posed by MDMS in a uniform manner.¹⁵⁶

In its IIA, the Commission sets out 3 key problem drivers:¹⁵⁷

- (1) 'Opaque conditions for combining and re-selling mobility products in land based modes, waterborne and maritime transport',
- (2) 'Difficulty to ensure that incumbent MDMS do not adopt anti-competitive practices or that deployment of MDMS is not limited by anti-competitive practices' and
- (3) 'Difficulty to ensure that multimodal digital mobility services support transport sustainability objectives'.

In the first public workshop impact assessment for the initiative on MDMS, 60% of the attendees indicated that they identified the lack of willingness to collaborate between MDMS and transport operators, alongside commercial and technical hurdles in establishing a robust MDMS as stumbling blocks hindering better use of MDMS.¹⁵⁸ This indicates that most stakeholders identify problem driver 2 as the biggest barrier to achieve a seamless integration of multimodal transport. According to the Commission, the above three key problem drivers result in digital mobility services not being fully utilized to improve the overall operation of transportation systems through multimodality.¹⁵⁹ This is unfortunate as it results in travellers losing out on the many benefits that MDMS offer.

¹⁵⁶ Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer International Publishing 2018) 53.

¹⁵⁷ Commission, 'Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services', Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 3 (further: MDMS Inception Impact Assessment).

¹⁵⁸ Directorate-General for Mobility and Transport, '1st public workshop impact assessment for the initiative on Multimodal Digital Mobility Services' (*European Commission: Mobility and Transport*, 17 March 2022) <https://transport.ec.europa.eu/news-events/news/1st-public-workshop-impact-assessment-initiative-multimodal-digital-mobility-services-2022-03-17_en> accessed 7 April 2024.

¹⁵⁹ *Ibid.*

4.2 The Inception Impact Assessment

4.2.1 Specific Policy Objectives

In October 2021, the Commission released its *Inception Impact Assessment* (IIA). This document aims to inform citizens and stakeholders about the Commission’s plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities.¹⁶⁰ The Commission’s initiative aims to make it easier to use digital mobility services in a multimodal cross-border or internal situation.¹⁶¹ The initiative seeks to solve the previously identified problems that prevent travellers from benefiting of these types of travel options.¹⁶² This will allow travellers to use these services more frequently and efficiently, thereby enabling the entire transportation sector to move towards a more sustainable and digital world. As stakeholders identify problem driver 2 as the main obstacle to achieving multimodal transport integration, the following section will discuss this problem driver and the solutions proposed by the Commission to address them.¹⁶³

The Commission identifies the “*Difficulty to ensure that incumbent MDMS do not adopt anti-competitive practices or that deployment of MDMS is not limited by anti-competitive practices*” as Problem driver 2. As discussed in detail in Section 2.2, the IIA makes a distinction between two types of abuse: anti-competitive behaviour of incumbent MDMS operators towards transport operators and anti-competitive behaviour of transport operators towards MDMS operators.¹⁶⁴ Incumbent MDMS operators act in an anti-competitive manner when they engage in differentiated treatment. Especially when these MDMS are owned by incumbent transportation operators, they are not likely to benefit directly from promoting their competitors on their own platforms, and thus will be reluctant to cooperate, which can result in a refusal of access to the MDMS platform. Moreover, when MDMS do integrate other operators’ offers, they often manipulate the ranking and prioritize their own offers, leading to a non-neutral presentation, less transparency, less comparability and fewer choices for users. In contrast, the

¹⁶⁰ MDMS Inception Impact Assessment (n 91) 1.

¹⁶¹ *Ibid.*

¹⁶² MDMS Inception Impact Assessment (n 91) 3.

¹⁶³ Unless stated otherwise, the source used for the following section is: Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>.

¹⁶⁴ *Ibid* 4.

anti-competitive behaviour of transport operators towards MDMS operators manifests itself mainly in a refusal to supply data that the MDMS operator needs to offer its services. Operators will be reluctant to provide real-time data and other travel information to MDMS, weakening the latter's competitive position against operators. As a result, there is a lack of willingness for cooperation between MDMS and operators.¹⁶⁵

To address the competition law issues that arise in the context of multimodal travel, the Commission sets the goal to “*Prevent harmful market effects which may arise from discriminatory behaviour of MDMS against operators, and ensure that the deployment of MDMS is not hampered by discriminatory practices.*”¹⁶⁶ A division is made between two scenarios:

- (1) With respect to the behaviour of incumbent MDMS *vis-a-vis* operators, the Commission wants to incorporate measures that mandate fair and non-discriminatory cooperation, to ensure the integration of operators willing to be part of MDMS. Incumbent MDMS should not engage in self-preferencing, would not be allowed to exclude other operators from their platform, and should provide a neutral representation of the different travel options.
- (2) With respect to operators' behaviour *vis-a-vis* MDMS, special attention is given to measures mandating the sharing of real-time data and travel information. Accordingly, minimum requirements and conditions regarding transparency would apply. Furthermore, access to this information should follow the FRAND principle, meaning that the data should be shared on a Fair, Reasonable And Non-Discriminatory basis.¹⁶⁷

In this way, the Commission aims to ensure good cooperation and fair competition between incumbent MDMS and transport operators. How these policy objectives can be concretely implemented is discussed in Section 4.4.

¹⁶⁵ MDMS Inception Impact Assessment (n 91).

¹⁶⁶ *Ibid.*

¹⁶⁷ Commission, ‘Multimodal Passenger Mobility Forum - Report from the Expert Group’, 2 February 2022, <<https://transport.ec.europa.eu/system/files/2023-02/mpmf-report-2023.pdf>>, 23.

4.2.2 Anticipated benefits

With a sound and solid framework regulating MDMS, numerous benefits will emerge. The Commission divides the impact of this Regulation into three main categories.¹⁶⁸

ECONOMIC IMPACT: Implementing clear rights and obligations for MDMS will foster competition, consumer choice, and technological innovation.¹⁶⁹ Fairer and transparent operations will empower smaller players in the mobility sector, resulting in more competition that will ensure a more diverse range of services, better use of infrastructure and a better transportation network for travellers.¹⁷⁰ This will ultimately lead to lower prices, better quality and more choices for consumers.¹⁷¹

SOCIAL IMPACT: The MDMS Regulation will streamline travel planning by allowing travellers to access and compare prices across different transportation options easily. This will enable modal and geographical integration¹⁷², which offers travellers more flexibility and connectivity in their journeys and will enhance their travel experience.¹⁷³

ENVIRONMENTAL IMPACT: Finally, the MDMS Regulation aligns with the goals of the European Green Deal by promoting sustainable transportation alternatives.¹⁷⁴ By providing clear information on various transport options, MDMS will raise awareness among travellers about the environmental impact of their choices, encouraging them to opt for more sustainable modes of travel like rail or bus, particularly if these options are conveniently timed for seamless journeys.

¹⁶⁸ MDMS Inception Impact Assessment (n 91) 4.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Richard Whish and David Bailey, *Competition Law* (10th Edition, Oxford Press 2021) 9; Brenda Sufrin, Niamh Dunne, and Alison Jones, *Jones & Sufrin's EU Competition Law* (8th Edition, Oxford Press 2023) 39; European Commission, 'Why is competition policy important for consumers?' (*European Commission*) <https://competition-policy.ec.europa.eu/about/why-competition-policy-important-consumers_en> accessed 10 April 2024.

¹⁷² Directorate-General for Mobility and Transport, '1st public workshop impact assessment for the initiative on Multimodal Digital Mobility Services' (*European Commission: Mobility and Transport*, 17 March 2022) <https://transport.ec.europa.eu/news-events/news/1st-public-workshop-impact-assessment-initiative-multimodal-digital-mobility-services-2022-03-17_en> accessed 7 April 2024.

¹⁷³ MDMS Inception Impact Assessment (n 91) 4.

¹⁷⁴ In the SSMS, the Commission stresses that the "success of the European Green Deal depends on our ability to make the transport system as a whole sustainable." The SSMS highlights the need to make sustainable alternatives widely available in a multimodal transport system and indicates that digitalisation, and thus MDMS, plays an important role in the modernisation of the system (Commission, 'Sustainable and Smart Mobility Strategy – putting European transport on track for the Future', COM(2020) 789 final, 9 December 2020, para 3).

4.2.3 Stakeholder feedback

As a reaction to the IIA, multiple stakeholders have shared their feedback and concerns through position papers, the majority of which have been made available on the Commission's website.¹⁷⁵ Essentially, two main groups of stakeholders can be identified.

- (1) On the one side, the Friends of MDMS advocate for an ambitious MDMS Regulation that addresses the restrictions that are currently imposed by incumbent travel operators against mobility service operators.¹⁷⁶ These ten travel associations have united to jointly campaign for the adoption of the MDMS Regulation under the name 'Friends of MDMS'. This alliance includes a variety of associations, being AllRail, BEUC, BT4Europe, ECTAA, the European Passengers' Federation, Eu travel tech, Europe on Rail, GBTA, mofair, and Transport & Environment.¹⁷⁷ The Friends of MDMS represent a broad spectrum of stakeholders, going from consumers, passengers, environmental groups, independent rail operators and ticket intermediaries like Booking.com or Skyscanner.¹⁷⁸

- (2) On the other side, the incumbent transport operators, among whom the Community of European Railway and Infrastructure Companies (CER), cautiously support the initiative but emphasize the importance of maintaining a balanced approach. CER¹⁷⁹ represents the interests of European railroads in the EU policy process.¹⁸⁰ It aims to make rail travel the preferred transport mode of choice and improve its competitiveness against air transport.¹⁸¹ Although CER overall supports the goals of the MDMS

¹⁷⁵ 'Multimodal Digital Mobility Services – Feedback and Statistics: Inception Impact Assessment' (*European Commission*) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/feedback_en?p_id=26580602> accessed 19 April 2024.

¹⁷⁶ Friends of MDMS, '[Joint Statement] Multimodal Digital Mobility Services – Ambition needed to increase consumer choice and ease sustainable travel' (*eu travel tech*, 28 February 2023) <<https://eutraveltech.eu/mobility-stakeholders-call-for-an-ambitious-mdms-regulation/>> accessed 10 April 2024.

¹⁷⁷ Friends of MDMS, 'Open letter to EVP Timmermans: Multimodal Digital Mobility Services – Friends of MDMS call for ambition, halfway measures are unacceptable' (*eu travel tech*, 7 June 2023) <https://eutraveltech.eu/wp-content/uploads/2023/06/BEUC-L-2023-102-Open-Letter-to-EVP-Timmermans_Multimodal-Digital-Mobility-Services.pdf> accessed 10 April 2024.

¹⁷⁸ *Ibid.*

¹⁷⁹ The focus on CER as a stakeholder in this analysis stems from the availability of extensive documentation on their opinion, which allows a thorough assessment of their feedback within the topic. In addition, the MDMS regulation places a strong emphasis on sustainability, encouraging a shift from air to rail transport as a more sustainable option. Given CER's commitment to promoting this modal shift, it is relevant to examine CER's feedback.

¹⁸⁰ CER, 'Who we are' (*CER*) <<https://www.cer.be/about-us/who-we-are>> accessed 21 April 2024.

¹⁸¹ *Ibid.*

Regulation, it expresses clear doubts in its implementation, which is reflected in its recommendations.

It is no surprise that the Friends of MDMS and CER hold divergent views, given that their position papers are aimed at defending the interests of their members. The Friends of MDMS represent stakeholders who have a great interest in adopting an ambitious MDMS Regulation that addresses the restrictions currently imposed by incumbent travel operators on mobility service operators. The Friends of MDMS therefore indicate that they are generally very satisfied with most of the content of the IIA and feel that the initiative is moving in the right direction. Eu travel tech points out that the current lack of independent transport distributors offering multimodal travel in Europe is due to insufficient profitability in the market, and not out of a lack of willingness.¹⁸² By establishing fair, reasonable and non-discriminatory conditions, this problem can be addressed.¹⁸³ The Friends of MDMS are therefore convinced that “*This initiative will pave the way to the future of passenger transport in the EU and will play a significant part in achieving the sector’s ambitious climate goals.*”¹⁸⁴

CER’s position, on the other hand, as the “voice of European railroads,” reflects the interests and priorities of rail operators and infrastructure managers within the European rail sector. Fully in line with the Commission’s objectives, CER strongly supports efforts to increase the efficiency and sustainability of the transportation system. The association highlights the crucial role of railroads in achieving the European Green Deal and emphasizes the need for a modal shift from air to rail transportation.¹⁸⁵ Although it supports the goals of the MDMS Regulation, CER also expresses reservations about its concrete implementation as proposed in the IIA.¹⁸⁶ The association argues that the MDMS Regulation would favour digital platforms, which could adversely affect rail operators.¹⁸⁷ It stresses that optimizing travel convenience should not come

¹⁸² Eu travel tech, ‘Feedback from: eu travel tech’ (*European Commission*, 1 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2748893_en> accessed 19 April 2024, 2.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* 1.

¹⁸⁵ CER, ‘Position paper: Multimodal Digital Mobility Services Initiative’ (*CER*, 1 February 2023) <https://www.cer.be/images/publications/positions/230201_CER_Position_Paper_MDMS.pdf> accessed 21 April 2024, 2.

¹⁸⁶ *Ibid* 2.

¹⁸⁷ CER, ‘Position paper: Multi-modal Digital Mobility Services Regulation – roadmap feedback’ (*CER*, 2 November 2021) <https://www.cer.be/images/publications/positions/211102_CER_feedback_to_the_MMDMS_inception_IA.pdf> accessed 21 April 2024, 1.

at the expense of the interests of rail operators, pointing to the importance of a fair and open market.¹⁸⁸ While CER thus support initiatives that directly benefit the rail industry, such as improvements in ticketing technology and customer service, their focus on rail-specific solutions can create an obstacle to the broader implementation of the MDMS regulation. A comprehensive analysis of the feedback from both the Friends of MDMS and CER can be consulted in the Annex.

4.3 The future of the MDMS Regulation

It is clear from the above that finding a middle ground between the diverse perspectives represented will be a challenge for the Commission. Each stakeholder has their own specific interests and objectives that they want to see reflected in the proposed regulations. Lobbying on both sides of the debate can have a significant impact on the decision-making process¹⁸⁹: established travel operators like CER will seek to impose restrictions on mobility service operators that threaten their competitiveness, while other interest groups like Friends of MDMS will fight for a more open and inclusive system. This diversity of views makes finding a solution that satisfies all parties a complex task. With so many stakeholders lobbying the Commission, there is a real possibility that the Commission's originally ambitious plan will be significantly weakened. However, it is crucial for the Commission to carefully weigh these influences and strive for a balanced Regulation that serves the interests of all interested parties, without watering down the original ambitious goals to the point where the impact of the Regulation is diminished.

In September, the Commission proposed a draft impact assessment to the Regulatory Scrutiny Board, which gave a negative opinion.¹⁹⁰ The opinion pointed to a lack of evidence to substantiate sufficient market failure and a lack of a truly multimodal approach.¹⁹¹ DG MOVE is currently redrafting the IIA.¹⁹² A possible retabling of the initiative is to be expected after the new Transport Commissioner takes office, which will probably take place in early 2025.

¹⁸⁸ *Ibid.*

¹⁸⁹ David Coen, Alexander Katsaitis, and Matia Vannoni, *Business lobbying in the European Union* (Oxford University Press 2021) 146.

¹⁹⁰ Email from info@eutraveltech.eu to author (22 April 2024).

¹⁹¹ *Ibid.*

¹⁹² A positive or positive with reservations opinion is needed from the Board for an initiative accompanied by an impact assessment to be tabled for adoption by the Commission.

It is of crucial importance that the Commission persists with this initiative and strives to further develop the MDMS Regulation, as a clear European framework to encourage the development of MDMS and ensure fair competition is essential for the future of the European mobility sector. Therefore, the following section will focus on recommendations to shape this initiative and suggest possible solutions to the problems identified.

4.4 Recommendations for addressing anticompetitive practices in MDMS

The insufficiency of EU competition law and the lack of specific EU legislation to ensure multimodal mobility has been acknowledged by the Commission in its IIA. The question now raises as to how the Commission can best address these regulatory challenges. The Multimodal Passenger Mobility Forum (MPMF), which has as its purpose “*to assist the Commission in the preparation of policy initiatives in the field of sustainable multimodal mobility for passengers*”¹⁹³, published its Expert Group Report in 2023.¹⁹⁴ In the following section, policy recommendations will be discussed, using the MPMF Report as a guideline.

4.4.1 Neutral display obligation

The Commission states in its IIA that it wants to address the anti-competitive behaviour of incumbent MDMS towards operators by establishing provisions on fair and non-discriminatory multimodal digital travel services, to ensure the integration of operators willing to be part of a multimodal digital mobility service.¹⁹⁵ For the implementation of this duty, the Commission might want to take inspiration from the French Transport Code, where a similar obligation on MDMS platforms has been in place since 2019.¹⁹⁶

¹⁹³ Commission, ‘Commission Decision on setting up the Multimodal Passenger Mobility Forum’ (Decision) C(2021) 8688 final, 3 December 2021.

¹⁹⁴ Commission, ‘Multimodal Passenger Mobility Forum - Report from the Expert Group’, 2 February 2022, <<https://transport.ec.europa.eu/system/files/2023-02/mpmf-report-2023.pdf>>.

¹⁹⁵ Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en>, 4 (further: MDMS Inception Impact Assessment).

¹⁹⁶ Article L1115-10 Loi n° 2019-1428 (Fr) of 24 December 2019 d’orientation des mobilités, JO 26 December 2019, <www.legifrance.gouv.fr> accessed 13 May 2024.

The IIA also states that the Commission intends to limit self-preferencing and favours a neutral display. The MPMF Report discusses two options for regulating self-preferencing: implementing a neutral display obligation or imposing a complete ban on self-preferencing.¹⁹⁷ A ban on self-preferencing, as included in the DMA, is however not suitable for MDMS. This is because MDMS platforms have so far not achieved such dominance as the ‘gatekeepers’ in the DMA, and therefore a similar ban would be too restrictive for some market players as it would significantly limit their commercial freedom. Consequently, a carefully crafted neutral display system is the preferred solution to address the problem of self-preferencing.

A neutral display can be achieved by establishing general ranking criteria that all MDMS operators have to adopt. This will allow travellers to personalise and tailor their searches to specific parameters that are important to them when researching and comparing travel options. The MPMF Report notes that price, duration, sustainability, number of changes and accessibility should be considered when establishing a minimum list of ranking criteria.¹⁹⁸ However, it is likely that for all these parameters (other than sustainability), rail offers will fail to appear on the first page of search results, thus preferring air transport to rail and road. In addition, MDMS operators are concerned about the impact that a neutral display obligation will have on the competitive position of their platforms, as it is through ranking practices that they can differentiate themselves from other platforms.¹⁹⁹ Nevertheless, it remains in the traveller’s interest to have access to all relevant information on different modes of transport to enable them to customise their journey according to their personal preferences. Therefore, despite potential implementation problems, it is recommended that all MDMS platforms be required to offer filtering options based on the aforementioned parameters. However, it is important to stress that this is only a minimum list, and that MDMS operators have the freedom to offer additional criteria, such as user convenience or cost-quality considerations, to be able to stand out from other platforms.

¹⁹⁷ Commission, ‘Multimodal Passenger Mobility Forum - Report from the Expert Group’, 2 February 2022, <<https://transport.ec.europa.eu/system/files/2023-02/mpmf-report-2023.pdf>>, 37 (further: MPMF Report).

¹⁹⁸ *Ibid* 39

¹⁹⁹ *Ibid*.

4.4.2 Revision of the CRS Code of Conduct and P2B Regulation

A similar neutral display obligation already exists in the CRS Code of Conduct. In its IIA, the Commission indicated that it is considering a revision of this Regulation.²⁰⁰ In the *Public consultation on the Initiative on Computer Reservation Systems*, more than 50% of stakeholders indicated that they believe that there is a risk of uneven regulatory treatment between B2B air ticket intermediation services as a result of new air ticket distribution channels not being covered by the CRS Code of Conduct.²⁰¹ As today only a small proportion of all bookings are made through CRS, and are mostly being distributed through channels that are currently outside the scope of the CRS Code of Conduct²⁰², it is appropriate to extend the scope of neutral display of this Regulation to all ‘CRS-like’ players.²⁰³ Furthermore, it is also advisable to introduce a general requirement in the P2B Regulation for all platforms to explicitly state whether they apply differential treatment, even if they do not.²⁰⁴

4.4.3 FRAND principles

The Commission also recognizes that data sharing is a *conditio sine qua non* for MDMS to exist and realise its full potential.²⁰⁵ It therefore aspires to establish minimum requirements, conditions of transparency and non-discriminatory access for MDMS to operators’ real-time data and journey information. This data sharing could best be done through the FRAND (fair, reasonable, and non-discriminatory) principle. The MPMF advocates for the integration of FRAND as a core standard in the new MDMS regulation and considers the new Data Act²⁰⁶ an appropriate basis to explore how to implement this principle specifically in MDMS.²⁰⁷

²⁰⁰ MDMS Inception Impact Assessment (n 194) 2.

²⁰¹ Commission, ‘Public consultation on the initiative on Computer Reservation Systems’, Ref. Ares(2022)6464093, 19 September 2022, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12507-Air-travel-computerised-reservation-systems-updated-rules-/public-consultation_en>, 6.

²⁰² Commission, ‘Commission Inception Impact Assessment of 9 July 2020 on a possible revision of the Code of Conduct for computerised reservation systems (CRS)’, Ref. Ares(2020)3635812, 9 July 2020, 2.

²⁰³ Such as airlines or airline groups when selling tickets directly to consumers (via websites), other business which aggregate air ticket information and provide it to businesses, meta-search engines or travel comparison websites (MDMS could fall under this category).

²⁰⁴ As discussed in Section 3.2.3.

²⁰⁵ MDMS Inception Impact Assessment (n 194) 4.

²⁰⁶ Article 8 Council Regulation (EU) 2023/2854 of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) [2023] OJ L2023/2854 states that the FRAND principle applies when data holders make data available to data recipients.

²⁰⁷ MPMF Report (n 196) 23.

4.4.4 Reciprocal and dynamic data sharing

Furthermore, it is recommended to include more data-sharing obligations in either the MDMS Regulation, or in a revised version of MMTIS and the Rail Passenger Rights Regulation. More specifically, an obligation to share dynamic fare data, real-time occupancy rates or seat availability, reasons for delays or cancellations, up-to-date information on platforms or platform changes or substitute transport services would improve the travel experience and thus the overall success of MDMS platforms.²⁰⁸

In addition, it is desirable to make data sharing reciprocal, and thus to also subject MDMS platforms to a data-sharing obligation.²⁰⁹ To avoid a data asymmetry (data-poor transport operators and data-rich platforms)²¹⁰, transport operators should be given access to data on inquiries and usage received by the platforms, in order to have access to the data they helped generate.²¹¹

4.4.5 Integrated ticketing

Lastly, it is important that the Commission remains committed to achieving an integrated ticketing system, whereby the traveller can not only find their tickets in one place, but also buy them in one place, in a single purchase.²¹² Although the Commission initially had ambitious plans to make it possible to buy integrated tickets in a ‘one stop shop’²¹³, it appears that these plans have been toned down. There is word that the Commission’s focus is now primarily on re-linking from third-party websites to tickets offered on the websites of the ticket operators.²¹⁴ This is unfortunate, as establishing a ticketing system that enables travellers to make a single

²⁰⁸ *Ibid* 18.

²⁰⁹ *Ibid* 25.

²¹⁰ EMTA, POLIS and UITP, ‘Joint opinion on EU-wide integrated ticketing’ (*UITP*) <https://cms.uitp.org/wp/wp-content/uploads/2021/02/UITP_EMTA_POLIS_Joint-opinion-on-EU-wide-integrated-ticketing.pdf> accessed 13 May 2024, 7.

²¹¹ CER, ‘Position paper: Multimodal Digital Mobility Services Initiative’ (*CER*, 1 February 2023) <https://www.cer.be/images/publications/positions/230201_CER_Position_Paper_MDMS.pdf> accessed 13 May 2024, 5.

²¹² Commission, ‘Remaining challenges for EU-wide integrated ticketing and payment systems – Final report’, Ref. Ares(2019)5698356, 11 September 2019, <<https://op.europa.eu/en/publication-detail/-/publication/af05b3eb-df43-11e9-9c4e-01aa75ed71a1>>, 41.

²¹³ AllRail, ‘Feedback from: ALLRAIL asbl Alliance of Passenger Rail New Entrants in Europe’ (*European Commission*, 2 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2749034_en> accessed 19 April 2024, 2.

²¹⁴ Dave Keating, ‘Can a new EU law move people from planes to trains?’ (*Energy Monitor*, 17 August 2023), <<https://www.energymonitor.ai/sectors/transport/can-a-new-eu-law-move-people-from-planes-to-trains-multimodal-ticketing/?cf-view>> accessed 10 April 2024.

booking that covers all multimodal transport options is critical to achieve the goal of a more efficient use of digital mobility services.

The difficulties involved in working out this system should therefore not be seen as a barrier that cannot be overcome.²¹⁵ Instead of combining all modes of transportation into one ticket, the Commission could consider the option of offering separate tickets for each separate part of the journey.²¹⁶ As long as these tickets can be combined into one transaction and payment, the ultimate goal - promoting traveller convenience - will be achieved.²¹⁷

²¹⁵ Eu travel tech, 'Feedback from: eu travel tech' (*European Commission*, 1 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2748893_en> accessed 19 April 2024, 3.

²¹⁶ *Ibid.*

²¹⁷ For more information on integrated ticketing, see Annex.

5 Conclusion

Multimodal Digital Mobility Services (MDMS) streamline the process of comparing various transportation options, ticket prices and other travel arrangements at a glance. This allows travellers to easily find the best travel options to suit their preferences and needs. This not only saves time and effort, but also enables travellers to make informed decisions and plan an itinerary that best suits their individual needs and requirements. However, the concrete elaboration of MDMS platforms is currently held back by anti-competitive behaviour of incumbent MDMS operators towards transport operators and vice versa.

Chapter 2 therefore analysed the extent to which Article 102 TFEU can address competition law concerns in MDMS. First, it is important to bear in mind that Article 102 TFEU only applies to transport operators and MDMS that maintain a dominant position in the market, which raises the question of how many transport operators and MDMS actually hold a dominant position in the transport market. As for the self-preferencing tactics of MDMS platforms, it appears difficult to draw an analogy with the *Google Shopping* case, because MDMS platforms do not have the same degree of dominance as Google. Moreover, applying the essential facilities doctrine is problematic, as refusing access to one specific MDMS platform is unlikely to actually eliminate all competition. Furthermore, refusal to supply data to an intermediary platform operator could fall under the essential facilities doctrine, as these platforms depend on the willingness of transport operators to provide their information to establish an effective platform. However, the fact remains that this doctrine only applies in exceptional circumstances, with strict conditions evaluated on a case-by-case basis. This raises questions about how effective this tool can be in addressing abuses within digital mobility and transport services, especially given the importance of access to data for MDMS platforms not owned by transport operators. These findings suggest that competition law may not be sufficient to address market failures within MDMS.

The analysis of existing EU secondary legislation in Chapter 3 also highlighted gaps in addressing differential treatment and refusal to supply in MDMS. First of all, the current situation raises questions about the effectiveness of current regulations to address differential treatment. The CRS Code of Conduct has been pivotal in combating unfair competition in the airline industry, enhancing transparency and consumer protection. However, given the rapid evolution in the travel industry, it is clear that the CRS Code of Conduct is in need of an update

to better address current challenges, including differential treatment by platforms in broader contexts such as MDMS. Efforts to revise it are thus commendable. Moreover, although the P2B Regulation explicitly addresses self-preferencing by mandating transparency, a thorough study has shown that its actual implementation falls short. Additionally, the P2B Regulation lacks a general ban on differential treatment by platform operators, leaving platforms in a position that enables them to continue practising self-preference. Further, EU legislation also inadequately addresses refusal to supply data, despite positive steps like the MMTIS and EU Rail Passenger Rights Regulation revisions. The obligation to share dynamic data in the MMTIS and the provisions on minimum travel information in the Rail Passenger Rights Regulation are commendable developments. Nevertheless, gaps remain in the current legislative framework, such as the absence of certain real-time data and the insufficient regulation of commercial and technical aspects related to data access, ultimately affecting travellers' experiences and journey planning. The creation of the European Mobility Data Space (EMDS) however does testify to the EU's willingness to tackle the problem of inadequate data sharing.

Overall, the recent legislative developments and revisions show a positive trend towards a more coherent and integrated European framework for multimodal travel. However, to effectively address competition concerns and fully protect passengers' rights, further legislative improvements at the European level are necessary, as illustrated by the Bundeskartellamt's recent decision on DB and the AGCM's investigation into Ryanair. This is supported by the fact that 60% of the stakeholders indicate these abuses as a barrier to the development of MDMS platforms, and by the fact that the Commission explicitly recognises the need to take measures in its IIA.

It is thus clear that additional EU intervention is needed to effectively address the anti-competitive concerns in MDMS. Therefore, the Commission's initiative for a specific MDMS Regulation is to be commended and it is desirable that a concrete proposal is presented soon. To adequately tackle the anti-competitive issues in the MDMS Regulation, policy recommendations were put forward in Chapter 4. It was concluded that it is recommended that MDMS platforms be required to have a neutral display obligation, presenting different travel options in a fair and transparent manner. In addition, the CRS Code of Conduct should be extended to all 'CRS-like' players to ensure fair competition. It is also important that data exchange between different players in the mobility sector is reciprocal and follows the FRAND

(fair, reasonable, and non-discriminatory) principle. Furthermore, it is necessary to require transport operators to provide access to all real-time dynamic data, which is essential for the proper functioning of MDMS platforms. Finally, it is vital to strive for the development of an integrated ticketing system that allows travellers to buy their tickets in one place, in a single purchase.

It can be concluded that the initiative for an MDMS Regulation is a promising step towards a more streamlined and competitive digital mobility sector in the EU. Nevertheless, it remains to be seen how the Regulation will be further developed in the legislative process. Hopefully, the EU will seize this opportunity and not miss the train to a multimodal Europe.

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Annex: Feedback from stakeholders

5.1 About the Annex

This annex provides an overview of the perspectives of two key interest groups involved in the regulation of MDMS: Friends of MDMS and incumbent travel operators. Friends of MDMS represent digital mobility service providers and advocate for a regulatory framework that encourages innovation and ensures fair competition within the MDMS sector. On the other hand, incumbent travel operators represent the traditional actors in the transport sector, such as airlines, railway companies and bus companies. Discussed below are the key elements of three position papers from the Friends of MDMS²¹⁸, published on the Commission’s website in response to the IIA.²¹⁹ The position papers discussed are those from: AllRail, representing independent passenger rail companies, such as rail operators and ticket vendors in Europe²²⁰; BEUC, representing consumer organizations throughout Europe²²¹; and EU travel tech, representing the interests of travel technology companies.²²² It is interesting to note that although the Friends of MDMS have united in their pursuit of the adoption of the MDMS Regulation, the various position papers clearly highlight the interests of the stakeholders they represent. CER responded to the IIA in November 2021 with concise feedback, referring primarily to its Ticketing Roadmap Position Paper.²²³ In February 2023, CER released a more comprehensive position paper in response to the MDMS initiative, outlining its position on the issue more clearly.²²⁴

²¹⁸ Out of all ten Friends of MDMS, only three associations published their feedback on the Commissions website.

²¹⁹ Commission, ‘Commission Inception Impact Assessment of 5 October 2021 on Multimodal Digital Mobility Services’, Ref. Ares(2021)6062336, 5 October 2021, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en> (further: MDMS Inception Impact Assessment).

²²⁰ AllRail, ‘Who we are’ (*AllRail*) <<https://www.allrail.eu/about-page/>> accessed 19 April 2024.

²²¹ BEUC, ‘Who we are’ (*BEUC*) <<https://www.beuc.eu/about-beuc/who-we-are>> accessed 19 April 2024.

²²² Eu travel tech, ‘About us’ (*eu travel tech*) <<https://eutraveltech.eu/about-us/>> accessed on 19 April 2024.

²²³ CER, ‘Position paper: Multi-modal Digital Mobility Services Regulation – roadmap feedback’ (*CER*, 2 November 2021) <https://www.cer.be/images/publications/positions/211102_CER_feedback_to_the_MMDMS_inception_IA.pdf> accessed 21 April 2024 (further: CER Roadmap Feedback Position Paper).

²²⁴ CER, ‘Position paper: Multimodal Digital Mobility Services Initiative’ (*CER*, 1 February 2023) <https://www.cer.be/images/publications/positions/230201_CER_Position_Paper_MDMS.pdf> accessed 21 April 2024 (further: CER MDMS Initiative Position Paper).

This annex is intended solely as an informative summary of the opinions of Friends of MDMS and CER to provide an illustration of the various influences and lobbying activities that the Commission encounters when regulating MDMS. It is not intended to provide a comprehensive representation of all the views of stakeholders involved in the regulation of MDMS.

The focus on CER as a stakeholder representing incumbent travel operators in this analysis stems from the availability of extensive documentation, which allows a thorough assessment of their feedback within the topic. In addition, the MDMS regulation places a strong emphasis on sustainability, encouraging a shift from air to rail transport as a more sustainable option. Given CER's commitment to promoting this modal shift, it is relevant to examine CER's feedback.

5.2 Feedback from the Friends of MDMS

5.2.1 General comments

In general, it is clear from all three position papers that the associations welcome the Commission's initiative to regulate MDMS. They are generally very satisfied with most of the content of the IIA and feel that the initiative is moving in the right direction. BEUC stresses the need for legislation to protect consumers.²²⁵ The association believes that consumers should be aware of their rights while traveling and should be able to easily enforce compliance.²²⁶ This is currently not the case, as consumers who combine different modes of transport are covered separately by different EU instruments for each segment of their trip.²²⁷ Eu travel tech also points out that the current lack of independent transport distributors offering multimodal travel in Europe is due to insufficient profitability in the market.²²⁸ By establishing fair, reasonable and non-discriminatory conditions, this problem can be addressed.²²⁹ Eu travel tech is therefore convinced that *“This initiative will pave the way to the future of passenger transport in the EU and will play a significant part in achieving the sector's ambitious climate goals.”*²³⁰

²²⁵ BEUC, 'Feedback from: BEUC – The European Consumer Organisation' (*European Commission*, 2 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2748959_en> accessed 19 April 2024 (further: BEUC Position Paper).

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Eu travel tech, 'Feedback from: eu travel tech' (*European Commission*, 1 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2748893_en> accessed 19 April 2024, 2 (further: Eu travel tech Position Paper).

²²⁹ *Ibid.*

²³⁰ Eu travel tech Position Paper (n 227) 1.

With regard to booking tickets, both AllRail and eu travel tech are very straightforward: travellers should have the ability to not only find their tickets in one place, but also buy them in one place, in a single purchase - AllRail calls this a ‘one stop shop’ digital platform.²³¹ Although the Commission initially had ambitious plans to make it possible to buy integrated tickets in this ‘one stop shop’, it appears that these plans have been toned down. There is word that the Commission's focus is now primarily on re-linking from third-party websites to tickets offered on the websites of the ticket operators.²³² In response, the "Friends of MDMS" have written an open letter to EVP Timmermans²³³, stating that “*Solely redirecting customers to several different portals of different operators is an insufficient solution with low added-value, alarmingly close to the Status Quo which is unanimously considered as unsatisfying. This approach would mean that the anti-competitive practices of dominant operators which prevent integrated booking via independent distribution channels, aiming at limiting comparison and combination across operators and modes, will not be addressed.*”²³⁴ Eu travel tech points out that although an integrated ticketing system would present the most benefits to travellers, the difficulties involved in working out this system should not be seen as a barrier that cannot be overcome.²³⁵ Instead of combining all modes of transportation into one ticket, there is also the option of offering separate tickets for each separate part of the journey.²³⁶ As long as these tickets can be combined into one transaction and payment, the ultimate goal -promoting traveller convenience- will be achieved. Daniel Mes of the cabinet of EVP Timmermans stressed that both ticketing options²³⁷ are currently on the table and that a thorough cost-benefit analysis must be conducted before a decision can be made.²³⁸ AllRail expresses the importance it attaches to a thorough cost-benefit analysis. The association stresses the need for an independent cost evaluation to prevent state-owned incumbents and public transport authorities

²³¹ AllRail, ‘Feedback from: ALLRAIL asbl Alliance of Passenger Rail New Entrants in Europe’ (*European Commission*, 2 November 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services/F2749034_en> accessed 19 April 2024, 2 (further: AllRail Position Paper).

²³² Dave Keating, ‘Can a new EU law move people from planes to trains?’ (*Energy Monitor*, 17 August 2023), <<https://www.energymonitor.ai/sectors/transport/can-a-new-eu-law-move-people-from-planes-to-trains-multimodal-ticketing/?cf-view>> accessed 10 April 2024.

²³³ Frans Timmermans was the Vice President for the European Green Deal from 2019-2023.

²³⁴ Friends of MDMS, ‘Open letter to EVP Timmermans: Multimodal Digital Mobility Services – Friends of MDMS call for ambition, halfway measures are unacceptable’ (7 June 2023) <https://eutraveltech.eu/wp-content/uploads/2023/06/BEUC-L-2023-102-Open-Letter-to-EVP-Timmermans_Multimodal-Digital-Mobility-Services.pdf> accessed 10 April 2024.

²³⁵ Eu travel tech Position Paper (n 227) 3.

²³⁶ *Ibid.*

²³⁷ Ticketing through re-linking or integrated ticketing.

²³⁸ Eu travel tech, ‘Fireside chat: What to expect from multimodal ticketing under the MDMS Regulation’ (2 August 2023, 9:42-12:47) <<https://www.youtube.com/watch?v=aSSgHcFuyog>> accessed 4 April 2024.

from inflating costs for political reasons.²³⁹ It also emphasizes the importance of an accurate evaluation of the potential for additional travellers that public transport could attract if multimodal options were easily accessible.²⁴⁰ AllRail is convinced that the introduction of well-designed integrated tickets, providing protection against missed connections, will lead to a significant increase in rail passengers.²⁴¹ Establishing a ticketing system that enables travellers to make a single booking that covers multimodal transport options is critical for the Commission to achieve its goal of a more efficient use of digital mobility services in a multimodal cross-border situation. It thus remains interesting to keep an eye on which system will ultimately be chosen for the MDMS regulation, as it will have a significant impact.

5.2.2 Feedback on Specific Policy Objective 1

To address the problem of opaque conditions for combining and re-selling mobility products, the Commission seeks to provide greater certainty and transparency for B2B commercial agreements for services that re-sell mobility products.²⁴² Below, the feedback from the Friends of MDMS regarding various aspects of this proposal is discussed.

The Commission seeks to address the perceived lack of clarity on how mobility products should be resold by clarifying that MDMS should be able to freely negotiate their pricing policies.²⁴³ Interestingly, eu travel tech and AllRail hold differing opinions on this. Eu travel tech strongly supports the Commission's choice of freedom of pricing by MDMS.²⁴⁴ It stresses that it is common for independent distributors to set their own prices, provided they bear some of the economic risk.²⁴⁵ AllRail, on the other hand, argues that there is no ambiguity about this at all, and it stands to reason that operators should retain full control over pricing.²⁴⁶ The association claims that re-sellers are faced with two options: either sell the product exactly as is, or expand the product and integrate it into a broader package that offers the traveller an improved travel experience by combining different modes of transportation.²⁴⁷ AllRail stresses that the result of the latter is not a change to the product itself but rather its integration into a value-adding

²³⁹ AllRail Position Paper (n 230) 2.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid* 3.

²⁴² MDMS Inception Impact Assessment (n 218) 2.

²⁴³ *Ibid* 3.

²⁴⁴ Eu travel tech Position Paper (n 227) 3.

²⁴⁵ *Ibid.*

²⁴⁶ AllRail Position Paper (n 230) 4.

²⁴⁷ *Ibid.*

enhancement.²⁴⁸ This statement suggests that AllRail believes that resellers generally should not have the authority to set the price, and that control over these aspects should remain with the operators.

Furthermore, the Commission mentions that transparency as regards liability *vis-à-vis* the passenger should also be part of the commercial framework.²⁴⁹ With this, it intends to establish clear conditions regarding user liability in case mobility products are sold through intermediaries. BEUC stresses the importance of clear liability mechanisms between parties.²⁵⁰ AllRail, on the other hand, labels the emphasis that is placed on this issue “*a blatant attempt by incumbents to undermine combined journeys and make through tickets only between themselves - in which there is one single transport contract - seem functionally superior to passengers - compared to the combined journeys of different operators.*”²⁵¹ In other words, the association believes user liability is unfairly cited as a deterrent to discourage travellers from undertaking combined journeys with different transportation operators. To encourage performance improvements, AllRail proposes to place the liability for delay compensation on the party that caused the delay.²⁵² It refers to a liability system already in place in the UK, where delay compensation is first paid by the ticket seller, and later reimbursed by the causer.²⁵³

Eu Travel Tech addresses the lack of regulation regarding accessing content, booking and paying for mobility services.²⁵⁴ Although this issue is raised in the context outline of the IIA, it is not addressed in the policy objectives.²⁵⁵ The policy objectives focus on non-discriminatory access to real-time information and agreements related to travel information, but do not provide a legal framework for regulated access, such as minimum requirements and transparency conditions related to transport operators’ content. Eu travel tech warns that without regulation on this matter, MDMS will primarily be controlled by incumbent transportation companies, making it difficult for online ticket sellers, intermediaries and itinerary planners to operate and innovate on an equal scale.²⁵⁶ The association advocates for granting MDMS access to all relevant transportation content, including fares, offers, inventories, and data from different

²⁴⁸ *Ibid.*

²⁴⁹ MDMS Inception Impact Assessment (n 218) 3.

²⁵⁰ BEUC Position Paper (n 224).

²⁵¹ AllRail Position Paper (n 230) 7.

²⁵² AllRail Position Paper (n 230) 5.

²⁵³ *Ibid.*

²⁵⁴ Eu travel tech Position Paper (n 227) 4.

²⁵⁵ MDMS Inception Impact Assessment (n 218).

²⁵⁶ Eu travel tech (n 227) 4.

modes, asserting that travellers can only transparently and fairly compare all options when access to content is governed by a robust framework.²⁵⁷

5.2.3 Feedback on Specific Policy Objective 2

The Commission admits in its IIA that the deployment of MDMS may be constrained by anti-competitive practices.²⁵⁸ It therefore sets as Policy Objective 2 the goal of preventing harmful market effects which may arise from discriminatory behaviour of MDMS against operators, and ensure that the deployment of MDMS is not hampered by discriminatory practices.²⁵⁹ It appears that the Friends of MDMS largely agree with the Commission's views on this issue. Their feedback will be discussed using AllRails deviation between two scenarios where incumbent MDMS may engage in practices that hinder fair competition in the market.²⁶⁰ This classification corresponds to the one made in the IIA.²⁶¹

- (1) On the one hand, incumbent transportation operators may give their own MDMS access to better data and better financial terms than other MDMS. AllRail therefore agrees with the Commission's proposal to impose FRAND conditions to address this problem.²⁶² BEUC also calls for the establishment of fair terms for the dissemination of a minimum data set of static and dynamic data between transportation operators and MDMS.²⁶³

- (2) On the other hand, incumbent MDMS may be depriving emerging transportation operators of the exposure they need to grow by refusing to display or sell their products. AllRail points out that this problem is rooted in the advantage certain incumbent MDMS have by being owned by legacy transportation operators who have inherited brands with large market shares.²⁶⁴ This puts emerging and independent transportation operators who must start their brands from scratch at an unfair disadvantage. This disadvantage makes it more difficult for these new market entrants to claim their place in the market and become known to the larger public, leading travellers to revert to more familiar but

²⁵⁷ *Ibid.*

²⁵⁸ MDMS Inception Impact Assessment (n 218) 3.

²⁵⁹ *Ibid* 4.

²⁶⁰ AllRail Position Paper (n 230) 6.

²⁶¹ MDMS Inception Impact Assessment (n 218) 4.

²⁶² AllRail Position Paper (n 230) 6.

²⁶³ BEUC Position Paper (n 224).

²⁶⁴ AllRail Position Paper (n 230) 6.

often lower quality alternatives, undermining the purpose of the MDMS Regulation. Consequently, AllRail believes incumbent MDMS should rebrand in order to give all MDMS equal opportunities in the marketplace.²⁶⁵ Similarly, eu travel tech agrees that transport operator-owned MDMS should be the main focus of the MDMS Regulation.²⁶⁶ According to the association, the introduction of measures that counter abuse of dominance by these transport operators (by engaging in self-preferencing and thus not giving a neutral presentation of different options) is in order.²⁶⁷ However, it argues that the same restrictions should not be implemented with respect to other mobility service providers. Indeed, eu travel tech claims that they have an “*inherent incentive to remain neutral in their display of options,*” and that imposing conditions on this “*will hinder innovation (e.g. by defining narrow ranking terms which hinder novel and sustainability rankings), and may thus run counter to the MDMS initiative's aim to enhance sustainability and consumer transparency.*”²⁶⁸ It seems that the Commission's intention is corresponding to the above, given they only mention imposing measures for fair and non-discriminatory cooperation regarding *incumbent* MDMS.

5.3 Feedback from incumbent travel operators

5.3.1 General comments

In its position paper, CER states that it welcomes the Commission's initiative to integrate rail services into seamless multimodal passenger transport and shares the ambition to improve international ticketing.²⁶⁹ Fully in line with the Commission's objectives, CER strongly supports efforts to increase the efficiency and sustainability of the transportation system. The documents highlight the crucial role of railroads in achieving the European Green Deal and emphasize the need for a modal shift from air to rail transportation.²⁷⁰ CER believes that a positive travel experience facilitates this shift, underlining the importance of enriching travel experiences. It proudly points to its own accomplishments, such as the CER Ticketing Roadmap, a document which states that travellers should have a seamless user experience when searching, selecting

²⁶⁵ *Ibid.*

²⁶⁶ Eu travel tech Position Paper (n 227) 5.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ CER MDMS Initiative Position Paper (n 223) 2.

²⁷⁰ *Ibid.*

and purchasing their train services.²⁷¹ Although it supports the goals of the MDMS Regulation, CER also expresses reservations about its concrete implementation as proposed in the IIA.²⁷² The association argues that the MDMS Regulation would favour digital platforms, which could adversely affect rail operators.²⁷³ It stresses that optimizing travel convenience should not come at the expense of the interests of rail operators, pointing to the importance of a fair and open market.²⁷⁴ In addition, CER calls for administrative obligations to be kept to a minimum to avoid hindering the realization of multi-faceted ticketing.²⁷⁵ The following section discusses the specific viewpoints of CER more in detail.

5.3.2 Feedback on Specific Policy Objective 1

Regarding the Commission's Policy Objective to provide certainty and transparency for business-to-business commercial agreements for services reselling mobility products for land-based modes, waterborne and maritime transport²⁷⁶, CER believes that sector-based solutions are the most effective way to do this. CER emphasizes that industry collaboration and initiatives to address challenges within the transportation sector are the fastest, most comprehensive and most efficient way to achieve a seamless passenger experience.²⁷⁷ It refers to its Ticketing Roadmap and claims that this roadmap goes beyond the MDMS initiative in addressing impediments in rail ticketing.²⁷⁸ CER accuses the MDMS Regulation of focusing solely on finding the right mobility solution and purchasing it, and not on the importance of accurate, complete and timely information before and during the journey, access to the railway network, customer care and passenger rights/journey continuation, concluding that "*MDMS as an initiative might not unfold its full potential in supporting rail ticketing in a comprehensive and systematic way.*"²⁷⁹ This can be interpreted as criticism of the MDMS regulation's reliance on regulatory frameworks to regulate all aspects of MDMS through one overarching regulation, and attests to CER's belief that innovation and progress within the transportation sector is best achieved through collaboration and investment from within the industry.

²⁷¹ CER, 'Position paper: Ticketing Roadmap' (CER, 20 September 2021) <https://www.cer.be/images/publications/positions/210920_CER_Position_Paper_Ticketing_Roadmap.pdf> accessed 21 April 2024.

²⁷² CER MDMS Initiative Position Paper (n 223) 2.

²⁷³ ²⁷³ CER Roadmap Feedback Position Paper (n 222) 1.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ MDMS Inception Impact Assessment (n 218) 1.

²⁷⁷ CER Roadmap Feedback Position Paper (n 222) 1.

²⁷⁸ *Ibid.*

²⁷⁹ CER MDMS Initiative Position Paper (n 223).

With regard to the Commission's planned measures on business-to-business commercial agreements, CER expresses its disapproval of a possible obligation for railroad companies to sell their tickets through specific channels.²⁸⁰ It argues that this would limit the freedom of choice of commercial partners and could therefore hinder economic and contractual freedom.²⁸¹ CER stresses the importance of autonomy for railway undertakings in deciding whether and with which third parties, such as ticket sellers or other railroad undertakings, they contract.²⁸² After all, railroad undertakings want to sell their products through distribution channels that fit their business models and do not wish to be forced to cooperate with third parties that may damage their brand image.²⁸³ CER states that it is committed to more and better information flow for the traveller, but does not consider imposing obligations on companies to sell tickets through or for other railroad companies to be the only solution to achieve this goal.²⁸⁴ It refers to its Ticketing Roadmap, in which rail companies have already committed to similar ideals, albeit through their own distribution channels and self-chosen cooperation with third parties.²⁸⁵ CER thus advocates for preserving commercial freedom and flexibility in agreements, and stresses the importance of a balanced approach that does justice to the autonomy of railroad undertakings.²⁸⁶

As mentioned *supra*, CER does not agree with the potential obligation to sell tickets through intermediaries. When intermediaries come into play, there is always an additional cost involved. The question therefore arises as to who should pay this cost, and what the compensation of this intermediary should be. According to CER, an upfront compensation fee will reduce the incentive to innovate and increase the final ticket price.²⁸⁷ CER therefore suggests that commission fees should depend on the added value provided by intermediaries.²⁸⁸ Higher added value corresponds to a higher commission fee, while lower added value corresponds to a lower commission fee. Intermediaries can add value by developing their own business model that offers differentiated and innovative services. This gives them the opportunity to supplement their commission income with other income, and avoids total reliance on their commission fee

²⁸⁰ CER MDMS Initiative Position Paper (n 223) 2.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ CER MDMS Initiative Position Paper (n 223) 5.

²⁸⁴ *Ibid.* 3.

²⁸⁵ *Ibid.*

²⁸⁶ CER MDMS Initiative Position Paper (n 223) 2.

²⁸⁷ CER MDMS Initiative Position Paper (n 223) 5.

²⁸⁸ CER MDMS Initiative Position Paper (n 223) 4.

as a source of funding. The logical consequence, according to CER, is that intermediaries' profits are affected by the degree of risk they take: If the risks are low for intermediaries, and high for transport operators, the profits will also reflect this ratio.²⁸⁹ CER hence concludes that the Commission should refrain from imposing regulations on commercial conditions (such as a requirement for upfront compensation fees), instead leaving them to the parties involved to handle on a contractual basis.²⁹⁰

5.3.3 Feedback on Specific Policy Objective 2

To avoid anti-competitive behaviour of transportation operators toward MDMS, the Commission wants to ensure non-discriminatory access for MDMS to real-time data and travel information from transportation operators by establishing minimum requirements and transparency conditions.²⁹¹ CER guarantees that it supports the establishment of fair, transparent and reciprocal data sharing principles. However, it emphasizes that this information sharing must be reciprocal and that all stakeholders must have equal access to the data, and therefore perceives the current proposal as unfair.²⁹² This is because it is mainly the transport operators who are obliged to share their data²⁹³, without any guarantee of data reception along their side.²⁹⁴ The association thus calls for full access at all times to any data on inquiries and usage received by the sales platforms, in order to have access to the data they helped generate.²⁹⁵ CER emphasizes that this is necessary in order to innovate and meet the needs of travellers, and to prevent data receivers from growing at the expense of data providers, which could hinder the competitiveness of railroad companies.²⁹⁶ In addition, CER highlights that this data is owned and generated by the respective railroad companies.²⁹⁷ Sharing this data incurs costs, and therefore CER disagrees with the idea that this data is owned by the broader public, and therefore should be shared cost-free with anyone who asks for it.²⁹⁸

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ MDMS Inception Impact Assessment (n 218) 4.

²⁹² CER MDMS Initiative Position Paper (n 223) 5.

²⁹³ Such as timetables, available fares, real time data etc.

²⁹⁴ CER MDMS Initiative Position Paper (n 223) 5.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ CER MDMS Initiative Position Paper (n 223) 6.

²⁹⁸ *Ibid.*

The Commission hints in its IIA that data exchange will have to follow the FRAND principle.²⁹⁹ According to CER, the interests of distributors must be balanced against those of rail operators in interpreting these concepts.³⁰⁰ The exact meaning of these principles has not yet been legally defined for data exchange, which would be desirable to avoid legal uncertainty. CER therefore presents its preferred interpretation of these principles.³⁰¹

- (1) **FAIR** - CER considers that data exchange should be reciprocal and relevant. This has already been discussed in detail above.
- (2) **REASONABLE** - As explained *supra*, CER believes that railroads should retain autonomy over their commercial agreements and that all parties should receive appropriate compensation.
- (3) **NON-DISCRIMINATORY** - CER emphasizes the importance of creating a level playing field to enter the market.

CER finally raises the point that railroads have small margins with high fixed costs, which is in striking contrast to ticket sellers, who have much higher margins and limited costs for offering their services.³⁰² It paints the picture of regulatory intervention that will reduce the margins of railroad companies, allowing ticket sellers to get away with all the profit, while they, as railroad companies, are saddled with the cost, responsibility and liability.³⁰³ This will lead to a reduction in service and increase in ticket prices, compromising the achievement of modal shift.³⁰⁴ CER emphasizes that this is not the desired effect of the MDMS Regulation, and consequently, the emergence of one or two gatekeeper MDMS platforms should be avoided at all costs.³⁰⁵

²⁹⁹ MDMS Inception Impact Assessment (n 218) 4.

³⁰⁰ CER MDMS Initiative Position Paper (n 223) 1.

³⁰¹ *Ibid* 4.

³⁰² *Ibid* 2.

³⁰³ *Ibid*.

³⁰⁴ CER MDMS Initiative Position Paper (n 223) 1.

³⁰⁵ CER Roadmap Feedback Position Paper (n 222) 1.