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COMPETITION LAW CHALLENGES TOWARDS THE DIGITAL MARKETPLACES - THE EU APPROACH

MASTER'S THESIS

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MSc Thesis

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FACULTY OF LAW AND SOCIAL SCIENCES
DEPARTMENT OF LAW

TIRANA, ALBANIA
June 2023

2023

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Thesis Submitted in Fulfillment of Requirement for the Degree of Master of Science in Law

EPOKA University

2023

APPROVAL PAGE

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Thesis Title:	Competition law challenges towards the digital marketplaces - the EU approach
Date of Defense:	04/07/2023

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COMPETITION LAW CHALLENGES TOWARDS THE DIGITAL MARKETPLACES - THE EU APPROACH

ABSTRACT

Online marketplaces' expansion has completely transformed the way in which products and services are traded, benefiting both consumers and companies in a variety of ways. However, the decentralized nature of online markets, the problem of market domination, and the growing use of big data in digital marketplaces, has brought many difficulties related to competition law. Further complicating matters is the growth of platform-to-business (P2B) partnerships. This thesis discusses recent competition cases involving online platforms and offers an outline of the difficulties faced by competition authorities in dealing with competition concerns in digital markets. The specific applicability of Articles 101 and 102 of the Treaty on the Functioning of the European Union to concerns involving digital platforms will be thoroughly examined in the main section. This will be accomplished by going through each stage of the application process and locating the problems. There will also be discussion of potential fixes for the concerns mentioned. The case study of Amazon Marketplace will be done in the thesis' final part in light of an earlier judgment made by the Commission and the German Competition Authority. The study outlines the raised concerns and offers potential solutions. Thus, it will provide a glimpse into a potential future strategy that the European Union competition authorities, including the Commission and National Competition Authorities, may adopt about online platforms.

Key words: *Competition Law, online platforms, digital economy, challenges, Platform-to-business partnerships, European Union approach, Article 101 TFEU, Article 102 TFEU.*

SFIDAT E SË DREJTËS SË KONKURRENCËS KUNDREJT TREGJEVE DIGJITALE - QASJA E BASHKIMIT EUROPIAN

ABSTRAKT

Zgjerimi i tregjeve online ka bërë të mundur përfitimin e dyanshëm midis konsumatorëve edhe kompanive në mënyra të ndryshme duke transformuar plotësisht mënyrën e tregtisë së produkteve dhe shërbimeve. Megjithatë, natyra e decentralizuar e tregjeve online, problemi i dominimit të tregut dhe rritja e përdorimit të të dhënave të mëdha në tregjet digjitale kanë sjellë shumë vështirësi lidhur me ligjin e konkurencës. Rritja e partneriteteve platformë-biznes (P2B) e komplikon më tej këtë çështje. Kjo tezë diskuton rastet më të reja të ligjit të konkurencës që përfshijnë platforma online dhe paraqet një përmbledhje të vështirësive me të cilat përballen autoritetet e konkurencës në trajtimin e shqetësimeve të konkurencës në tregjet digjiitale. Aplikimi i Nenit 101 dhe Nenit 102 TFEU në lidhje me shqetësimet që përfshijnë platformat dixhitale do të shqyrtohet thellësisht në seksionin kryesor. Kjo do të realizohet duke shqyrtuar çdo fazë të procesit të aplikimit duke nxjerrë në dukje problematikat kryesore. Do të ketë gjithashtu diskutime mbi zgjidhjet potenciale për shqetësimet e përmendura. Ne pjesen përfundimtare do te kryhet studimi i rastit të Amazon Marketplace, duke u nisur nga një vendim i mëparshëm i Komisionit dhe Autoritetit Gjerman te Konkurences. Studimi paraqet shqetësimet e ngritura si dhe zgjidhje potenciale mbi problematikat. Ne këtë mënyrë do të analizohen strategji të mundshme të paraqitura nga autoriteti i konkurencës së Bashkimit |Europian mbi platformat elektronike.

Fjalët kyçe: *Ligji I konkurences, Platforma dixhitale, ekonomi digjitale, sfida, Partneritete platform*ë*-biznes, Qasja e Bashkimit Europian, Neni 101 TFEU, Neni 102 TFEU.*

ACKNOWLEDGEMENTS

I would like to express my gratitude towards all the people who helped in the completion of this thesis, thank you all for the dedication and encouragement.

Firstly, I would like to thank my thesis adviser Prof. Dr. Endri Papajorgji for all the expertise, helpful insights and recommendations throughout the writing of this thesis.

I would like to extend my thanks to the rest of the academic as well as the administrative staff of Epoka University. Thank you for all the encouragement and valuable suggestions that have shaped my work since the beginning and have made the last 5 years unforgettable.

Lastly, I am forever indebted to my family for the unconditional support and understanding throughout all my academic journey. Thank you for all your belief and words of wisdom, they have served as my greatest motivation.

I am and always will be immensely grateful to all of you!

DECLARATION

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Irini Gjino

Date: 19/06/2023

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LIST OF ABBREVIATIONS

EU	European Union
AVC	Average variable cost
BGB	Bürgerliches Gesetzbuch (German Civil Code)
NCA	National Competition Authority
GCA	German Competition Authority (Bundeskartellamt)
FCA	French Competition Authority (Autorité de la Concurrence)
ATC	Average total cost
TFEU	Treaty on the Functioning of the European Union
DMA	Digital Markets Act
SSNIP TEST	Small but significant non-transitory increase in price Test
MFN	Most favored nation
BEUC	European Consumer Organization
CJEU	Court of Justice of the European Union

CHAPTER I

INTRODUCTION

There are several connotations when discussing a "market." The ability of shoppers to evaluate prices and make wise decisions inside a conventional farmer's market is perhaps the most notable example. Another connection might be a "bazaar" in middle eastern culture, cultures that have similar ideas, although in different variations.

What about markets of contemporary economies? Modern is frequently used interchangeably with online in the new economy because of the sector's enormous growth in innovation over the past several decades. The comparison to marketplaces like the farmer's market or the bazaar does not immediately come to mind, despite the fact that the majority of current customers utilize the internet for their regular purchases. Consumers' focus on online marketplaces has changed along with their knowledge of their involvement in a bigger market and, consequently, in a larger context. The ability for customers to compare costs, terms, possibilities, quality, and much more has never been greater than it is now. (European Commission, 2017). This is due in large part to the abundance of information available on the internet as a whole, but it's also because vertically integrated platforms are becoming more and more prevalent and play a significant role in online competitiveness. (Hoffer and Lehr, 2019).

However, the consumer is now cut off from the information source throughout the comparison process and is unlikely to engage in any direct engagement with the business beyond email or phone calls. Online platforms like Google, Facebook, and Amazon were able to develop, flourish, and thrive in this climate. This thesis will highlight the recognized

problems that online platforms might bring to competition law by using these "Tech Giants" as case studies. This thesis will discuss recent competition cases involving online platforms and offer an outline of the difficulties faced by competition authorities of the European Union in dealing with competition concerns in digital markets.

1.1 Thesis Objective and main issue.

The main issue of this thesis is whether the present legislative framework for European Union (EU) competition law is adequate to manage the new issues surrounding the digital environment and competition law. The study will be undertaken with reference to the Treaty on the Functioning of the European Union (TFEU) Articles 101 and 102 as they make up most of the legal framework.

The objective is to determine what are the problems created by traditional markets compared to online platforms related to EU's competition rules. The thesis will also attempt to offer potential answers to these problems, be it through altering competition laws or, if required, by taking more extensive legal initiatives.

1.2 Methodology

The methodology that is used to create this thesis is based on the qualitative data collection method. The theories that have been discussed are in light of a better understanding of EU competition law and the possible intervention on the digital marketplaces' operations in cases of abuse of their dominant position. Furthermore, by reviewing academic literature as well as analyzing case laws, the thesis aims to examine the adaptation of the traditional competition laws to the ever-changing online platforms. The focus has been turned to the published articles to help present possible solutions to the identified issues as well as published books in order to capture and follow the latest developments.

CHAPTER II

DIGITAL MARKETS AND THE MULTI-SIDED MARKET MODELS

Online platforms are most frequently recognized by their multisided market-based business model. As a result, economics has been included in the definition-finding process rather than sticking solely to the law and legal background. Platforms using this business model offer communication between several parties for a fee while being active on various sides of a market (Ballon and Van Heesvelde, 2010). Despite the widespread consensus that there are several parties engaging through the platform, there are many other criteria used to identify multisided marketplaces.

Focusing on the ones participating on the platform and the value they derive from this engagement is one method of defining multi-sided marketplaces. Thus, the definition of a multi-sided market is one in which the value acquired by one set of consumers grows as a result of the presence of customers on the opposing side of the market (Competition Committee, 2009). To absorb this gain in value, the platform serves as a middleman and is essential (Competition Committee, 2009).

Another definition that has been suggested focuses on the expenses associated with transactions for both parties; consequently, to be characterized as taking a more economic approach. This definition states that a market is multi-sided if the platform has influence over the number of transactions due to its pricing scheme (Hao, Shilin and Zhengang, 2017). This implies that it can raise prices for one side of the market while lowering them for the other (Hao, Shilin and Zhengang, 2017). The benefit of a platform would, however, become outdated if transaction costs were not decreased overall for both parties.

The concept put forward by Evans and Schmalensee encompasses both an economic and consumer-focused perspective. A multi-sided market is one in which there are two or more client groups that require one another in some manner but are unable to realize the benefit of this shared need on their own, relying instead on the platform to promote interactions and value that would not otherwise exist (Evans and Schmalensee, 2014). The value is produced by coordinating the various market segments and making sure that there is sufficient supply to meet demand and vice versa (Evans and Schmalensee, 2014). One may find common characteristics in the above definitions, which can serve as the foundation for a useful description of digital platforms.

To begin with, in multisided marketplaces, there are two different types of network effects, or network externalities: use externalities, where both sides profit from usage, and membership externalities, in which the platform gains value as more users on each side sign up (Evans and Schmalensee, 2014).

To lower transaction costs for both parties, the platform must secondly enable worthwhile interactions between two different groups of clients. Finally, in order to benefit from network externalities, a platform's pricing structure must enable it to implement an asymmetric pricing scheme for various market segments (Evans and Schmalensee, 2014).

The main component of multisided marketplaces, and consequently of online platforms (Rochet and Tirole, 2004), is network effects or externalities, which may be further separated into indirect and direct network effects. When the value or usefulness of an item or service supplied on the market for one group of consumers depends on the consumption of such good or service by a separate group of customers, there are indirect network effects present (Rochet and Tirole, 2004). When members of the same group of consumers consume an item or service, there are direct network effects that affect how valuable the good or service is (Rochet and Tirole, 2004). Online platforms frequently experience both direct and indirect network effects, which means a good definition must take both into account.

The market's price structure will be impacted by how strong the indirect network effects are (Rysman, 2009). One side of the market is prepared to pay a specific price to reach the other side as a result of strong indirect network effects. As a result, there will be the previously described unbalanced pricing system, where one side of the market will pay next to nothing while the other side can pay substantially more (Rysman, 2009), thus lowering the transaction cost for both sides. Multi- and single homing, which defines customer behavior in a setting where many platforms are active at once, is the last feature of multi-sided marketplaces (Mandrescu, 2017).

The price structures of multisided marketplaces will be affected in accordance with whether users of a platform are utilizing many platforms, or multihoming, or only one, or are single-homing (Evans, 2016):The opposite side of the market, which could be multi-homing, is forced to utilize that particular platform if one side of the market only offers its product or service on that one platform, producing a "competitive bottleneck" (Evans and Schmalensee, 2014). The platform can then charge the multi-homing side additional charges as a result. In the case of online platforms, single- and multi-homing effects are evident (European Commission, 2016). Social networks are only one of many instances where users and marketers are charged substantially different pricing on separate sides of the market. Thus, one objective of the digital platforms is optimizing a business model and price structure to reach the critical mass, or minimum level of profitability (Evans and Schmalensee, 2010).

2.1 Accumulation and practices of data processing

The Commission emphasizes the significance of data processing techniques and accumulation in relation to online platforms by stating that they may pose privacy and competition law concerns, notwithstanding the fact that they are closely related to the multisided market model (Martens, 2016). One must also recognize that there are differences between accessing data in an online setting and traditional enterprises while attempting to establish online platforms. The volume of data is important because online platforms operate with and rely significantly on a larger volume of data than traditional organizations would

ever have to. Online platforms are not the only ones that gather data, but their magnitude and lack of openness in this area should not be neglected when opting to define online platforms.

2.2 Market definition needs to adapt to digital markets

The EU Report implies that depending on whether an ex-ante (Article 102 of the Treaty on the Functioning of the European Union or TFEU) or an ex-post (merger control) perspective is taken, market definition in digital marketplaces may vary dramatically. Especially in the digital ecosystems that digital platforms are creating, it could be necessary to define secondary markets that are unique to a certain ecosystem in situations where consumers are confined to that environment. This would necessitate highly tightly defined secondary markets (markets where investors buy and sell securities) and, accordingly, stringent antitrust criteria under the existing EU competition law framework.

The Furman Report recognizes the value of market definition, such as in determining concentration levels used frequently in merger control by competition economics. While it draws attention to the challenges (Report, 2019) associated with market definition in digital marketplaces, it does not offer a solution.

In order to take into account the complexity of digital markets, the Commission Competition Law 4.0 advises that the Commission's Market Definition Notice of 1997 be updated. It argues that the European Commission may wish to provide distinct recommendations on how to define markets in the digital environment in light of the features of digital markets. This first piece of advice has already paid off: Margrethe Vestager, the Commission's executive vice president and commissioner for competition emphasized that in the digital world, particularly in multi-sided platforms and zero-price marketplaces, well-established approaches for establishing antitrust markets may no longer be applicable (Vestager 2019).

It is unclear if this analytical instrument can continue to fulfill its historically assigned duty of evaluating market strength in these marketplaces from a predominantly quantitative point of view given the difficulties that market definition is facing in digital contexts (Competition Law 4.0; Report, 2019). Market definition may need to concentrate on its second key function in digital markets, namely characterizing the market to provide the necessary context for comprehending the markets in question and creating a cogent theory of harm in those markets (Robertson 2020).

2.3 The reason digital platforms are different. Potential issues

In the contemporary economy, online platforms are at the center of discussions of competition law, thus it is important to understand any possible difficulties that the implementation of competition law may encounter with this relatively new business model. This section will first go through the challenges of defining a market in the context of the internet and developing market dominance. The discussion will then shift to data-related concerns by looking at the overlap between data protection and competition legislation, followed by an evaluation of the potential competitive value of data.

2.4 The online perspective of market power

Finding a market definition is the first obstacle in an online setting. The methodologies that are being employed reflect the fact that the traditional approach to defining a market places a strong emphasis on economic factors (Jones and Sufrin, 2016). Cross-price elasticities (Jones and Sufrin, 2016) and the SSNIP (small but significant non-transitory increase in price) test (the test that identifies the smallest relevant market through supply and demand substitutability of a certain focal product) (Jones and Sufrin, 2016), both quantitative procedures requiring specific prices to be determined, help identify alternative replacements for an item or service in order to describe the market. The fact that products and services are frequently provided for free presents a challenge to the tried-and-true procedures of competition law when applied to online platforms. Since there are no prices to compare,

these free goods cannot be subject to quantitative methods of market definition (Podszun and Kreifels, 2016). In light of the pricing models used by many digital platforms, where using services is free for at least one side of the market, the SSNIP test and cross-price elasticity simply fail.

However, as demonstrated by examples like Microsoft (Microsoft v Commission, 2007) and Cisco Systems (Cisco Systems and Messagenet v Commission, 2013) monetary remuneration is not a necessary component in defining the market. The Commission used qualitative approaches rather than quantitative ones to define the markets in the cases of Hoffmann-La Roche (Hoffmann-La Roche v Commission, 1979) and France Télécom (France Télécom v Commission, 2007) and it actually favors quantitative methods where qualitative ones fall short of capturing a market's unique characteristics (Hoffer and Lehr, 2019). This demonstrates the adaptability of competition law in this area and may be helpful in defining the market for online platforms.

This brings up the second problem with market definition in an online setting: the multifaceted nature of online platforms. One frequent approach to define a market in a setting with multiple sides is to identify which side of the market the behavior in issue is occurring on, by making a division of the platform into several smaller markets rather than taking into consideration all sides (Höppner and Grabenschröer, 2015). However, an economic analysis would treat a multisided market as a single market rather than dividing it into its several sides as independent markets (Evans, 2003). Since such behavior would thus be neutral overall, this method would run the danger of missing actions that may have a beneficial influence on one part while concurrently having a negative impact on another (Schweitzer, Haucap, Kerber and Welker, Projekt No. 66/17, pp 95-96).

The substantial dependence of online platforms on network effects in defining the market is another problem. When attempting to identify the relevant market, these impacts must be taken into consideration because they are signs of a bigger, multifaceted relevant market. While it is still theoretically conceivable for many markets to coexist on a same platform,

there is still present the challenge of the network effects where no aspect of the market can be evaluated without taking into consideration the other aspect (Podszun and Kreifels, 2016). In a zero-priced market, the established SSNIP test would present the issue of how to assess a price rise when it comes to data (Auer and Petit, 2015). Instead of relying on quantitative comparisons, a market definition should consider the product or service in question's capacity to be substituted on a qualitative level. Once the definition of a relevant market is resolved, the evaluation of the relevant market as a whole and the measurement of market power become difficult.

Traditionally, the relative quantity of revenue on the relevant market (Iacovides and Jeanrond, 2018) as well as other characteristics, such as the number of clients (Langen and Bunte, n.d.), are used to determine a given actor's position in that market. Market shares are then calculated as a measure of the total market power (Hoffer and Lehr, 2019). However, in an online world where the competitive landscape can change quickly, it might be challenging to assess a competitor's relative strength using this revenue strategy. Because of this, market shares are no longer as useful as they would be in conventional markets as a gauge of market power. The number of daily, weekly, or monthly users, the number of platform referrals to sellers, and the market share of items supplied by a platform have all been proposed as alternative indicators of market dominance (Iacovides and Jeanrond, 2018).

The existence of entry obstacles is another important consideration in determining market power (Competition Committee, 2006). The low bar for merely migrating from one platform to another complicates this element in the internet setting. It is challenging to portray an accurate image of the market power of an online platform due to the ongoing potential of users switching platforms, which implies that existing market power can be lost quickly.

Competition authorities must use as many criteria as possible (Organization for Economic Co-Operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, 2006) as well as take into consideration the fierce competition and

the everchanging positions of the digital platforms within the relevant markets in order to accurately estimate market power (Mandrescu, 2017).

2.5 Competition Law and Data Protection

Many online platforms may not request financial compensation from at least one aspect of the market they participate, but the services they provide are nonetheless paid for using a new kind of currency: personal information (Robertson, 2019; European Data Protection Supervisor, 2014).The usage of this money straddles the line between data privacy and protection rules on the one hand, and competition legislation on the other. The question now is whether or not data-related abuses should be under the purview of consumer protection legislation alone (European Commission, 2016).

Consumers sometimes are unaware of the quantity of information they divulge and how it is utilized to improve and develop the service or commodity, whether it is to their favor or harm (McDonald and Cranor, 2010). As a result of being directly targeted for personal data and frequently not being upfront about it, the typical customer may find it challenging to defend their privacy. (Kerber, 2016). This lack of openness is also evident in customers' propensity to provide personal information in order to use services that appear to be free at first glance, which poses issues for privacy legislation. This is particularly true when considering the potential lack of platform switching alternatives caused by powerful network and lock-in effects (Kerber, 2016), despite the possibility that a different platform would be better suited to the customer's privacy needs and would more properly satisfy them (Kerber, 2016). If we talk about the exposure of personal data, privacy issues are clear-cut, while competitive problems are less so. However, it becomes evident that impacts like being able to more properly analyze market dangers or customizing the supplied commodity pose a significant importance in the competitive process when considering how gathering and usage of data might benefit online platforms. As a result, both the privacy and the competitive sides of the law are affected by data abuse.

The Commission has explicitly stated that a differentiation exists between competition law and data protection in relation to privacy matters. This is due to the fact that privacy concerns have not been taken into account in prior rulings (Facebook/WhatsApp, Commission 2014). The differentiation between competition law and privacy laws presents a challenge, as the demarcation between the two is not readily discernible. Data protection laws and competition law frequently address similar behaviors in relation to data usage, albeit with distinct objectives for doing so. The intersection between the aforementioned legal domains is further underscored when contemplating the possibility of categorizing instances of consumer privacy breaches as market failures, thereby subjecting them to scrutiny under competition law on the basis of their detrimental impact on consumer welfare (Kerber, 2016; German Monopolies Commission (Monopolkommission, 2015).

In the given context, potential instances of market failure may manifest in the form of an overabundance of data collection and inadequate options for accommodating varying consumer privacy preferences (Kerber, 2016). A plausible resolution to the lack of clarity in this differentiation could potentially be derived from the concept of data portability (Kerber, 2016). The scenario may potentially motivate online platforms to enhance their privacy policies, with the aim of retaining consumers on their platform, while also maintaining a competitive edge by retaining access to the consumer's data in comparison to their rivals. The intersection of privacy and competition concerns presents a potential opportunity for mutually reinforcing positive effects. Specifically, competition policy and privacy laws may serve as incentives for improvement, thereby promoting positive outcomes (Kerber, 2016). Similar to the concept of data portability, the implementation of robust privacy regulations or policies has the potential to foster increased competition among online platforms. This is because heightened levels of data security may be perceived as a favorable attribute by consumers and other platform stakeholders when selecting a platform.

The question of how to address data-related abuses under competition law requires a nuanced approach, given the significant impact that data usage can have on both competition and privacy. It is imperative that the Commission maintains its stance of refraining from addressing privacy-related issues in its investigations to avoid further blurring of competencies. Nonetheless, it is imperative to acknowledge that data cannot be entirely

dismissed, as it constitutes an increasingly significant element of competition, as will be expounded upon subsequently. The treatment of data within the realm of competition law is warranted when the objective of regulating specific practices is not primarily focused on safeguarding consumer privacy, but instead on assessing the potential influence that a given policy implemented by an online platform may exert on the competitive landscape and market structure.

Given the equal negative effects that data usage may have on privacy and competitiveness, the question of how to address data-related abuses under competition law requires a distinct response. The Commission's stand on not including privacy-related issues in its investigations must be upheld to avoid obfuscating the lines of competence more than is necessary. Data cannot, however, be completely ignored because it is a developing aspect of competitiveness, as will be illustrated in greater detail below. As a result, data must be handled in accordance with competition law in scenarios when the focus of targeting certain practices shifts from safeguarding customers' privacy to the potential effects that a particular policy of a digital platform may have on the market structure and the competitive process.

2.6 Competitive value of data

Data, a new resource in the competitive process that is heavily gathered by online platforms and frequently forms the basis of the online economy, is now being used by platforms in a more comprehensive way (Kerber, 2016). However, the sheer collection of data does not increase the market power of an online platform by itself, thus it is necessary to assess how data may be used as an advantage beyond the simple possession and accumulation of data. This is particularly relevant in light of Peter Hustinx's position, which he adopted back in 2014, that data gathering and management are sources of market power. Hustinx was the previous European Data Protection Supervisor (European Data Protection Supervisor, Press Release, 2014). Since data is the primary driver of e-commerce markets and the deciding element when it comes to business choices within the online sector, market power and data could no longer be separated in 2014 and could no longer be divided in the modern economy.

It is helpful to analyze the data collected from numerous sources to gain insight about customer preferences or competition endeavors. Important data that may be utilized to modify the business plan being employed by online platforms and make them more suited to the requirements and desires of the market or marketplaces they are operating in. The production of indirect network effects through the modifications that take place depending on this data is another aspect of data collecting and possession. The multi-sided market model is based on the development of opportunities for interaction, so while platforms are enhancing the customer experience and increasing use by one side of the market, a higher engagement of users on the other side of the market is inevitable (Evans and Schmalensee, 2014). In order to increase the demand of the multisided market and the revenue that may be gained from the platform, the focused use of data acts as a catalyst to draw people to the platform. By tailoring marketing strategies to the intended audience, one can increase customer numbers through network or lock-in effects.

Along with increasing a platform's attractiveness, data may also deter potential rivals from joining the market because it is impossible to recreate the amassed volume of data and the beneficial effects it can have on the changing platform. Even if collecting the same volumes of data were eventually feasible, this would not be as efficient since it would frequently take too long for rivals to have an influence based on their own research and analysis.

The amount of accumulated data a platform has and is prepared to use might have a significant impact on its pricing strategy. With the use of algorithmic changes to the pricing structure, different customers may be charged various amounts. Based on the data gathered, a platform may infer the price a certain customer is prepared to pay, allowing for customized pricing and the best possible return for both the platform and any customers who might profit from lower rates.

Criteria such as —variety, velocity, quantity, and significance of data—provide an abstract measurement of the potential contribution of Big Data (Devins, Felin, Kauffman and Koppl, 2017) to the competitive process (Apple/Shazam M.8788, Commission Decision, 2018). As demonstrated by the Commission's judgment on the Apple/Shazam merger, each criterion

has a distinct value that must be taken into account when determining the general importance of information that is being gathered and utilized by an online platform.

With the changes in the internet environment, the worth of data is not just rising but also changing how market power is evaluated, which is now inextricably related to the volume of data a platform can gather and analyze. The marketplace value of data is significant and must be taken into account in any judgment addressing unfair practices involving data in a framework governed by competition law, so-called zero-price marketplaces should no longer be confused for such.

CHAPTER III

ANTI-COMPETITIVE BEHAVIOR IN DIGITAL MARKETS

As per the regulations stated in Article 101 of the Treaty on the Functioning of the European Union (TFEU), it is prohibited for companies to engage in agreements that are anti-competitive in nature with one another.

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Paragraph 1 enumerates a series of agreements that are deemed to be anti-competitive, including but not limited to price fixing, market or technical development control or limitation, market sharing, discrimination among trading parties, and tying or bundling. Given that this list is only illustrative, it can be customized to suit the particularities of digital markets. To date, the implementation of Article 101 TFEU in digital markets has not necessitated exceptional endeavors, given that anticompetitive arrangements seem to manifest in comparable manners in both the virtual and physical realms.

Furthermore, Article 102 TFEU enumerates the abuses by companies that hold a dominant position within the internal market:

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3.1 The Issues

Algorithms have the potential to enable a company to implement dynamic pricing strategies, which involve adjusting prices in response to prevailing market conditions or competitive actions (Autorité de la concurrence and Bundeskartellamt, 2019). Pricing algorithms may utilize user data to engage in discriminatory practices.

According to Ezrachi and Stucke (2016), consumers exhibit a preference for certain products or services. This is evidenced by their research findings which indicate that such preferences are prevalent among consumers (Ezrachi and Stucke, 2016). The potential antitrust liability associated with such conduct is contingent upon the extent to which algorithms are utilized to engage in collusion with other firms and their algorithms. In such instances, Article 101 TFEU may be invoked.

In cases where algorithms are utilized to impose varying terms on comparable transactions with different trading counterparts, the corresponding provisions of Article 101(1)(d) TFEU or Article 102(c) TFEU, which are worded identically, may be relevant. In the case of MEO (2018), the Court of Justice of the European Union (CJEU) ruled that pricing practices that are discriminatory are only deemed as such under certain circumstances.

Abusive behavior is deemed to distort competition (MEO v Autoridade da Concorrência, 2018). The applicability of price discrimination involving final consumers to Article 101(1)(d) TFEU and Article 102(c) TFEU, which explicitly refer to "other trading parties" (Graef, 2018), requires further examination.

E-commerce platforms have emerged as significant commercial channels in the virtual realm. The antitrust scrutiny has been drawn towards the limitations imposed by both suppliers and marketplaces on selling through such platforms. There exists a perception among certain individuals that there is a degree of conflict between the two approaches,

wherein competition authorities are accused of endorsing marketplace platforms by prohibiting platform bans in distribution contracts, while simultaneously scrutinizing the business practices of these platforms (Colomo, 2018). Notwithstanding, it is imperative to note that this does not inherently denote an inconsistency: Although it is crucial for retailers to retain their autonomy in terms of vending their products through diverse sales channels, it is incumbent upon marketplace platforms to adhere to the regulations governing antitrust.

It is common for digital platforms, such as those used for hotel bookings, to impose most-favored-nation (MFN) clauses upon their clients, specifically hotels. The contractual clauses stipulate that the hotels are obligated to refrain from providing their services at a lower price through alternative platforms, sales channels, or their own website, as documented in Ezrachi (2015) and the EU Report (Ezrachi, 2015; EU Report, 2019). The assessment of MFN clauses can be conducted in accordance with both Article 101 TFEU and Article 102 TFEU. Although MFNs can be observed in both online and offline contexts, the prevalence of their utilization by digital platforms has resulted in increased antitrust scrutiny.

3.2 Experience of the European Union

The Court of Justice of the European Union (CJEU) has addressed the issue of applying competition law to distribution agreements in the online domain through a sequence of preliminary rulings. This pertains to online marketplaces. The statement emphasizes that a distributor cannot be prohibited from engaging in online sales by a supplier, as such a restriction would typically be deemed incompatible with Article 101(1) TFEU (Pierre Fabre Dermo-Cosmétique, 2011). The preliminary ruling of the Court in Coty v Parfümerie Akzente (2017) established that manufacturers could anticipate specific limitations concerning online sales channels, particularly marketplace platforms, in the event of dealing with luxury goods. This was deemed necessary for the preservation of the luxury character of such goods (Coty Germany v Parfümerie Akzente, 2017).

The European Commission disclosed in 2018 that it was examining Amazon's dual function as both a sales platform for merchants and a direct competitor in various product markets. The article raises apprehensions regarding the possibility of Amazon leveraging its access to data on its merchants, as the provider of the sales platform, to enhance its own competitive standing (Schechner and Pop, 2018). The ongoing investigation by the Commission, as stated in their November 2020 press release, pertains to the case under Article 102 TFEU (European Commission, 2020; Amazon Marketplace, Case AT.40462,Commission Decision pending). However, it is worth noting that this case has the potential to provide insights into the functioning of a digital platform in a scenario governed by Article 101 TFEU. The Commission's inquiry into Amazon's engagement with the Buy Box and its provision of access to Amazon Prime customers for retailers is subject to the same considerations, as the limitations under scrutiny pertain to the contractual arrangements between Amazon and autonomous retailers (Amazon Buy Box, Case AT.40703, Commission Decision pending).

During the summer of 2020, the European Commission initiated an inquiry into Apple's purported denial of access to third-party entities seeking to utilize the tap and go feature on iPhones, as well as its purported denial of access to its mobile payment platform, Apple Pay. The subject matter is currently under scrutiny as a plausible arrangement that may impede competition, with the possibility of being deemed as an exploitation of a prevailing market position (Apple Pay, Case AT.40452, Commission Decision pending).

The proliferation of most-favored-nation (MFN) clauses in certain digital markets, particularly in the realm of hotel booking portals, has resulted in several antitrust inquiries, including the Booking.com cases (2015) (Konkurrensverket, Case 596/2013, 2015; Autorité de la concurrence, 2015; Autorità Garante della Concorrenza e del Mercato 2015; Bundeskartellamt, 2015; Higher Regional Court Düsseldorf, 2019 and the HRS case in Germany) (Kart 1/14 (V) HRS, 2015). The Most-Favored-Nation (MFN) clauses have been a topic of concern in regards to electronic books (e-books). In 2017, Amazon provided commitments to address the European Commission's apprehensions regarding the anti-competitive characteristics of its MFN clauses, as observed in the Amazon E-books case. Amazon had mandated that e-book providers must inform Amazon of any more advantageous or alternative terms and conditions they offer to other entities, and/or provide

Amazon with terms and conditions that are dependent on the terms and conditions offered to another e-book retailer (Amazon-Case AT.40153, 2017). The Commission has deemed Amazon's stance on the English and German e-book retail distribution markets for consumers as an act of dominant position abuse, (Article 102 TFEU). Alternatively, this particular case could have been resolved pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU). As per its commitments, Amazon has pledged to refrain from enforcing any parity clauses that are already present in its agreements and has also vowed not to enter into any e-book agreements that incorporate such clauses.

3.3 Abuse of a Dominant Position in the Digital Market

As per the provisions of Article 102 TFEU, enterprises that possess market power, i.e., a dominant position in the relevant market, are prohibited from indulging in unilateral conduct that is anti-competitive in nature. The provision enumerates various forms of anti-competitive conduct, including but not limited to the imposition of exorbitant prices and unjust trading conditions, the restriction of markets or technological advancements, discriminatory practices towards trading partners, and the practice of tying or bundling. Nonetheless, it should be noted that the enumeration provided in Article 102 TFEU is not deemed to be comprehensive. In the context of applying competition law to digital markets, it is noteworthy that unilateral anti-competitive behavior in the digital realm can be subject to existing forms of abuse or novel forms of abuse can be formulated in light of the unique characteristics of digital markets.

3.3.1 The Issues

The fact that large IT companies that run digital platforms operate in so many different marketplaces (Bourreau and de Streel, 2019) sets them apart from other businesses. They are able to expand their market strength from one market into nearby or maybe even rather distant markets by building complete digital ecosystems (EU Report, 2019). Additionally, the user information that digital platforms gather in a particular market that is important to

them has a multipurpose nature and might be beneficial in other markets. The question of whether competition law is still relevant in the face of digital ecosystems is raised by the dynamics of competition, even if Article 102 TFEU still applies when a dominant business uses its market power in places where it is not (yet) dominant. Like this, in order to ensure competition, huge tech corporations' frequent acquisitions of (possible) rivals must also be closely examined.

The question of whether privacy-related violations are punishable under the present competition regulations arises given how data-centric digital marketplaces are. Abuses of privacy may, for example, be connected to a platform's services being of lower quality, to the excessive collection of user data that digital platforms demand in exchange for digital services (Ezrachi and Robertson, 2019), or to the poor data protection standards that are given to user data. Insofar as consumers see privacy as an important determinant of quality, the European Commission believes that privacy-related problems may be relevant "in the competition assessment" (European Commission, 2016). However, the 'normative backdrop' (Costa-Cabral and Lynskey, 2017) of the EU's competition laws is blatantly pro-privacy, including the fundamental right to privacy and data protection guaranteed by the Fundamental Rights Charter (Charter of Fundamental Rights of the European Union, 2016 art 8) and other legal frameworks like the General Data Protection Regulation (GDPR) (Regulation EU 2016) and the proposed ePrivacy Regulation (European Commission, 2017). This may result in a more privacy-focused approach being included into EU competition legislation. However, as the two sets of regulations safeguard two distinct legal interests, a violation of data privacy laws should not be automatically interpreted as a violation of the competition laws (Robertson, 2020).

3.3.2 Experience of the European Union

The European Commission has hitherto mostly relied on already identified categories of digital monopoly abuse. The Google cases indicate what conduct the Commission deems to be an abuse of a dominating position by a dominant digital platform, particularly when generating new forms of abuses and when transferring previous abuses of dominance into

the digital arena. In Google Shopping (2017) (Google Search, 2018), the European Commission discovered that Google was self-preferencing and exploiting its market dominance in general internet search to consistently position its own comparison shopping operation close to the top of the search listings. Additionally, Google downgraded rival comparison shopping businesses in its search engine's general results. Together, these two actions impeded competition by favoring Google's own shopping comparison service and excluding other comparison sites, who were among the complainants who had brought the matter before the Commission (Google and Alphabet v Commission, 2017). The Commission's dependency on self-preferencing as a possible cause of injury will be put to the test in the appeal case before the General Court. Self-preferencing as a theory of damage is incompatible with Article 102 TFEU, according to others who claim that Google is just competing on merits by favoring its own business (Vesterdorf, 2015). Others have criticized the Commission for relying on decisions that included several conceptions of injury, such as refusal to supply, tying, and margin pressure, rather than explicitly stating which legal test it utilized for Google's self-preferencing (Colomo, 2019). Others, on the other hand, have claimed that Google's leveraging technique was anti-competitive because it relied on the dominant platform manipulating information (Colangelo and Maggiolino, 2019). Now the General Court must make a decision. In the interim, if and when the planned Digital Markets Act is passed, it will forbid gatekeepers from doing things like self-preferencing (European Commission, 2020).

The European Commission fined Google €4.34 billion for its anti-competitive behavior in Google Android (2018), its largest fine judgment to date. The license conditions for Google's Android mobile operating system were one of the things the Commission examined.

It concluded that by compelling smartphone makers to pre-install Google's search and browser apps in order to license the company's well-known Play Store, Google engaged in anti-competitive tying. Additionally, Google paid several manufacturers and mobile network providers illegally in exchange for only pre-installing its search app. By compelling manufacturers to install the Google-approved version of Android if they wished to pre-load Google apps, it also engaged in another form of anti-competitive tying. By doing so, it also

prevented the creation and dissemination of rival Android versions, or "forks" (European Commission, 2018).

The General Court is now hearing an appeal in this case (Google and Alphabet v Commission, 2018). Its idea of damage is based on conventional tie and additional single branding strategies, all of which have a solid track record in accordance with EU competition legislation. These are just applied to digital markets in the Google Android scenario.

The European Commission contends that Google's conduct with relation to display search adverts violates EU competition law in the third Google case, Google AdSense (2019). In contracts with substantial customers, Google made sure that these customers didn't see search advertisements from any of Google's rivals (exclusivity). It achieved this by requiring its clients to acquire its permission before modifying the display of rival search advertisements and by compelling these clients to offer premium position to a certain amount of Google search ads. As a result, present and future rivals were essentially barred from entering this valuable sector (European Commission,2019). Once more, in this instance, established theories of damage linked to exclusivity and single branding are applied to a digital market setting. It is thus not anticipated that the case would produce unique antitrust theories of harm particular to the digital world once the General Court decides on Google AdSense (Google and Alphabet v Commission, 2019).

3.3.3 Article 102 TFEU in an online context

The norm that holds greater relevance in the meaning of digital platforms is Art 102 TFEU, as these markets are frequently prone to tipping and monopolization, as has been widely acknowledged. The advancements observed in recent years have led to the emergence of dominant technology companies, commonly referred to as 'tech giants', which wield significant influence within their respective industries. Examples of such companies include Amazon and Facebook. This influence renders them a subject of scrutiny by competition

authorities, with particular emphasis on potential violations of Article 102 of the Treaty on the Functioning of the European Union.

The provision of Article 102 of the Treaty on the Functioning of the European Union (TFEU) is aimed at addressing instances of competition constraints arising from the independent actions of companies that hold a dominant position in the market. Similar to the provisions outlined in Art 101 TFEU, the utilization of Art 102 TFEU also entails a three-fold process, which includes the determination of the applicability threshold, the assessment of the impugned conduct, and the potential validation of such conduct. For the applicability of Art 102 TFEU, it is imperative that an enterprise possesses a superior position in the marketplace that is relevant (Jones and Sufrin, 2016, p 257). Subsequently, the evaluation of the behavior takes place in a subsequent phase and is categorized into two categories: exclusive or misuse of the dominant position. Presently, the emphasis of enforcement is on exclusionary abuses, as they are considered to be more detrimental (European Commission, 2009). There is no equivalent provision to Article 101(3) TFEU that specifically addresses the potential for justification. Undertakings have the ability to provide substantiation for their actions being unbiased and present arguments for efficiency (European Commission, 2009).

3.3.4 Establishing dominance

The initial stage in the application of Article 102 of the Treaty on the Functioning of the European Union involves the determination of the dominant position of an enterprise in the relevant market. The process involves two stages, wherein the initial stage involves the definition of the relevant market, followed by an evaluation of the market dominance of the relevant undertaking in the said market (Jones and Sufrin, 2016).

The establishment of dominance in online platforms may encounter challenges stemming from various factors, including the multi-sided market characteristics, market dynamics, and the potential for transitioning within online platforms and traditional markets (Mandrescu, 2017). It is crucial to consider the distinction among digital and traditional markets when

evaluating market power during the second phase of establishing dominance. The conventional approaches may not be entirely appropriate or sufficient in this context and may require modification to prevent inaccuracies in the evaluation (Wright, 2004).

3.3.5 Market power

The concept of market power within the predetermined relevant market is a fundamental element of Article 102 TFEU. For Art 102 TFEU to be applied to a particular behavior, it is imperative that the relevant enterprise, particularly in this scenario, the relevant online platform, holds a position of dominance in the market.

The assessment of an undertaking's market power necessitates the consideration of three fundamental components, namely existing competition, anticipated competition, and compensating buyer power (European Commission, 2009). Market shares serve as an initial indication of market foundations and may be utilized as a foundation for presuming dominance. Nevertheless, it is important to note that market shares alone do not provide adequate evidence to determine whether an undertaking holds a dominant position (Whish and Bailey, 2018). The measurement of market shares pertaining to online platforms poses a challenge due to the fact that these platforms operate across multiple markets, which may have varying market shares (Evans and Schmalensee, 2019; Faull and Nikpay , 2014). Nevertheless, it should be noted that a digital platform with limited market shares in a particular market may still exert influence by leveraging its dominant position in another aspect of the platform, resulting in an asymmetrical competitive advantage (Evans and Schmalensee, 2014). Hence, it is probable that the significance to market shares as that of a gauge of market dominance would be reduced, given that the online market's dynamics have demonstrated that market shares have the potential to fluctuate significantly over brief time intervals (Mandrescu, 2017). Alternative indicators to market shares could include quantifying the quantity of distinct users that competing websites attract or analyzing acquisition trends to obtain information about market dynamics shifts.

The present approach to evaluating market power centers on the assessment of barriers to entry that potential competitors may encounter, thereby determining the likelihood of potential competition (Graef, 2015). The GCA has put forward a proposal that aligns with this approach, which outlines various criteria for evaluating market power. These criteria include both immediate and indirect impact of networks, economies of production, multihoming and distinction, availability of data, as well as the innovation capacity of digital markets (Bundeskartellamt, 2016). The assessment of market power based on the availability and utilization of Big Data is a subject of critical examination in the context of competition (Lerner, 2014; Graef, 2015). This is due to the fact that such data often falls under the purview of privacy regulations (data protection). The uncertainty surrounding this criterion stems from the potential for Big Data to confer a significant competitive advantage, which may be offset by a rapid decline in its value if not effectively utilized and integrated into the overall business strategy (Haucap and Heimeshoff, 2014). Consequently, it is more advantageous to incorporate the utilization of Big Data in the assessment procedure, as opposed to solely having access to it. One recurring theme observed among the suggested criteria has become the ability to impede competition by establishing significant obstacles to entry. This suggests a potential change in the evaluation of market dominance, with a shift away from emphasis on present competition and towards consideration for potential competition.

It is probable that the significance of opposing purchasing capacity, which is the third base of assessment, will decrease. Digital platforms are enabling user interactions, thereby distributing the purchasing power among multiple buyers and rendering the online marketplace concept possible. The presence of opposing buyer influence would serve as a balancing force to the significant market dominance of a business entity, thus constraining its capacity to operate in a detached way from market forces (European Commission, 2009). The probability of customers switching between online platforms is low due to the presence of network effects that generate strong incentives for them to remain loyal to a particular platform.

3.3.6 Abuses of dominance in the digital sphere

The topic of how to handle abuse of dominance in such markets takes center stage in all publications on competition law in digital marketplaces. Article 102 TFEU can adapt to the environment of the digital market in many cases, as discussed in the discussion of the European Union's experience with abuse of dominance in those markets, but the particularities of platforms are still not entirely understood. In order to create a code of behavior for businesses with an advantageous market status, the Furman Report recommends creating a digital markets unit (2019). This code of conduct should specifically address how strategic market status enterprises should interact with customers and smaller businesses, and it should be guided by rules that keep particular conceptions of damage in mind. For instance, smaller businesses that rely on digital platforms with advantageous market status should have inclusive access, their position and reviews should be determined on an equal, consistent, and open base, and they should not be required to single-home on one specific platform. This strategy is reminiscent of the notion of relative market power, which is included in the competition legislation of certain EU Member States but not at the EU level. Exploitation and self-preferencing are two harmful tactics of online platforms that the EU Report cites as needing special attention. It emphasizes that self-preferencing is only considered abusive under Article 102 TFEU if it has an anti-competitive effect (2019). Additionally, it states that in digital marketplaces, factors of competition like innovation and quality are more significant than impacts based on price. At last, the EU Report calls for the strictest possible application of competition law in digital marketplaces, preferring to err on the side of excessive enforcement.

The Competition Law 4.0 Report cautions that, related to the EU Report, the elevated concentration in online markets and the gatekeeper role of digital platforms could result in a substantial cost for false negatives (Competition Law 4.0 Report, 2019).

As previously outlined, the European Commission has initiated an evaluation of the competition law framework of the European Union, with a focus on defining the digital market. Furthermore, it has also engaged in the realm of unilateral conduct. The European

Commission released a legislative proposal in December 2020, titled the Digital Markets Act, which was entered into force in November 2022 which outlines various obligations for entities known as gatekeepers. These obligations are detailed in Articles 5 and 6 of the Digital Markets Act Proposal.

Some of the responsibilities assigned to gatekeepers appear to have been derived from legal precedents that the Commission has acquired expertise in through its involvement in digital markets. The proposal incorporates a market investigation mechanism that is restricted to three distinct objectives, namely, determining the qualitative aspects of gatekeeper identification, addressing systematic violations with the Digital Markets Act, and potentially revising the legal framework to tackle competition issues in digital markets where gatekeepers are involved. These objectives are elaborated in Articles 15, 16, and 17 of the Digital Markets Act Proposal. The Commission's proposition of this tool is a limited implementation of the recommendations outlined in the EU Report and deviates significantly from the original consultation regarding the proposed new competition tool (European Commission, 2020). The responsibility of advancing the Digital Markets Act Proposal in the legislative process now lies with the European Parliament and the Council.

In the future, the relationship between the Digital Markets Act and national regulations pertaining to competition in digital markets will likely be a significant area of focus. The Ministry for Digital and Economic Affairs in Austria has initiated an evaluation of the competition law structure in Austria, with the aim of incorporating digital markets and data. In commencing this examination, the Ministry engaged in consultations with the German Ministry, the German Monopoly Commission, and the European Commission, as reported by the Federal Ministry for Digital and Economic Affairs in 2020. This initial step holds potential for the development of a comprehensive digital competition law framework across Europe.

3.4 The online perspective of ART 101 TFEU

After talking about the complexity of online platforms and potential problems with interfering with associated competition, it is necessary to determine how EU competition laws should be applied. Coordinated behavior among rivals is consistently the first thing of examination in the treaties and should thus be the first regulatory norm to be analyzed, even if it is not the primary issue in the case of online platforms.

According to Article 101 of the Treaty on European Union, both vertical and horizontal relationships may not be used to impede competition (Consten Grundig, 1966). Since online platforms operate in multisided marketplaces and frequently have vertical integration, the threshold of suitability is a crucial stage in the evaluation process. In addition, as long as relationships with parties outside the market where the banned behavior occurs contribute to the violation, Art. 101 TFEU is relevant (Treuhand AG v Commission, 2015). This becomes more important when platforms have relationships with many market participants, which, depending on how the market is defined, may be viewed as either one market or as several markets.

A distinction in approach regarding the potential for justification under Art. 101(3) TFEU results from classifying the in-question behavior as a limitation of competition via object or effect (European Parliament, 2019; Jones and Sufrin, 2016). In order to demonstrate a violation of Article 101 of the TFEU, three requirements must be satisfied: the jurisdictional level must be reached, the conduct in issue must qualify as a limitation by intent or effect, and a potential reason must be taken into account. When there is coordination in the form of a settlement, a decision, or concerted practice, the jurisdictional requirement is fulfilled (European Commission, 2010.) As limitations by object have been less probable to be justifiable under Art. 101(3) TFEU, this classification becomes crucial. The next classification of such coordination based on an effect or purpose of limiting competition has a direct impact on the likelihood of justification.

3.4.1 Establishing collusion

Any inquiry into a potential violation of Article 101 TFEU must start by determining if collusion has occurred. Such collusion has occurred when parties have reached an agreement, which requires a concordance of wills from no fewer than both parties, the enactment of which is unimportant as long as it accurately captures the parties' intents (Bayer AG v Commission, 2000).

One may differentiate between two typical types of agreements that might occur while evaluating the behavior of online platforms: agreements among two platforms on the internet and agreements inside the management of online platforms. Online platforms may allow the modification of a platform's terms of service to permit involvement on a different platform. (For instance, the Facebook interfaces such as ’Like’ or ’Share’ buttons on multiple other platforms such as Twitter.) While these actions in themselves are not inherently anticompetitive, they might become problematic if they contain price parity terms (Nihoul and Cleynenbreugel, 2018) or demand a certain pricing structure in order for the collaboration to proceed, so restricting the economic options of both parties.

On the other hand, agreements relating to the management of a website might include the sharing of information among administrators and users of the website or the acceptance by users of the administrator's monitoring. (Lücking, 2001).

Even if there are numerous ways in which online platforms are different from conventional businesses, it is doubtful that the conceptual significance of the criteria for proving collusion has to be changed in this respect (Mandrescu, 2017). However, coordination through agreements and choices of organizations can only occur when a type of human decision-taking is engaged (Ezrachi and Stucke, 2015), which might be challenging to demonstrate in an online setting.

The demonstration of concerted practices may become increasingly challenging due to the emergence of technological advancements (Heinemann and Gebicka, 2016; Journal of European Competition Law & Practice, 2019). Concerted practices refer to a type of integration that does not culminate in a formal agreement (Imperial Chemical Industries Ltd. v Commission, 1972), yet necessitates a degree of communication and shared behavior resulting from said communication (T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009). The relationship between contact and typical conduct is considered to be causal, as long as the parties involved are conscious of any such contact (Cimenteries CBR v Commission,2000; Jones and Sufrin, 2016). This causality can be established when interaction is received from the other side (Cimenteries CBR v Commission, 2000). Upon establishing contact or communication, there exists a possible presumption that integrated market conduct has occurred or will occur (P Huls v Commission,1999). In the online realm, it can be difficult to establish contact and raise awareness of said contact (Eturas and others, 2016) due to the potential for anonymity among users and the various technological means by which contact trails can be distorted or concealed. This presents a practical challenge.

This raises the inquiry as to whether it is a feasible notion to assign the responsibility of proving the presence of contact awareness in online markets to the competition authorities, or if the onus of proof should be placed on the relevant undertakings (Mandrescu, 2017).
Within the realm of digital interaction, the procedural regulations pertaining to the onus probandi (the burden of proof) necessitate modification, given the mounting challenge of generating direct or indirect substantiation (Eturas and others, 2016). Demonstrating the absence of consciousness is expected to be a relatively straightforward task, particularly if individuals are apprised of the onus of proof resting with them and are thus compelled to maintain meticulous documentation of their interactions and online activities.

In cases where both concerted practice and individual choices made by software yield comparable outcomes in terms of competition, it is inadequate to merely acknowledge that such behavior falls outside the scope of Article 101 TFEU due to the threshold not encompassing unilateral decisions (Mandrescu, 2017). One potential strategy for mitigating this unfavorable outcome involves examining the extent to which firms are cognizant of the

deployment of said software, as well as the degree to which its influence on pricing competition can be anticipated by these firms (Mandrescu, 2017).

3.4.2 Object or Effect

Once collusion has been identified in the initial stage, the subsequent step involves determining whether the coordination in question limits competition through object or effect (Whish and Bailey, 2018). Limitations by object are imposed in cases where certain practices possess an inherent capacity to limit competition (Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Cargimore) Meats Ltd, 2008). In cases where a conduct is deemed to be a by-object restriction, the requirement to demonstrate its actual anti-competitive effects is obviated. Consequently, the onus of proof shifts to the company to establish the absence of any anti-competitive effects (Société Technique Minière v Maschinenbau Ulm, 1966). The likelihood of a favorable outcome for such a rationale under Article 101(3) of the Treaty on the Functioning of the European Union is diminished in instances where a restriction by object is present (European Commission, 2004). The competitive process is impeded by certain object restrictions which are deemed highly undesirable, such as fixation of prices, product limitation, and market interacting. These restrictions are unlikely to be deemed justifiable (European Commission, 2004).

3.4.3 Justification

The final stage of the three-part evaluation process involves the potential for a rationale to be provided for the behavior in question under Article 101(3) of the Treaty on the Functioning of the European Union. In accordance with Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) (Protimonopolny úrad Slovenskej republiky v Slovenská sporitel´na a.s, 2012), practices must satisfy all four criteria in a cumulative manner. The responsibility of providing evidence falls to the projects concerned, but it shifts once they have produced convincing proof that they comply with the aforementioned criteria (GlaxoSmithKline Services Unlimited, 2006).

As per the provisions of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), any practice must serve the purpose of enhancing the manufacturing or delivery of goods, or advancing technical or economic progress, while ensuring that the consumers are provided with a just proportion of the resultant benefits. The regulations should not impose unnecessary limitations that do not contribute to achieving the intended goals. Additionally, the regulations should prohibit the companies from the opportunity to eliminate competition in a significant portion of the market that is affected.

When considering digital platforms as multi-sided markets, meeting the first two criteria can prove to be challenging as efficiency must be attained within the exact same market where the restrictive practice is implemented (European Commission, 2004). This presents a significant challenge, as the various market segments comprise distinct customer groups, rendering it highly improbable for a single group to derive advantages from the implementation of the limiting practice in question (Gürkaynak, Inanilir, Diniz and Yasar, 2017; de Pablo, 2019).

The Court's decision in Mastercard (P Mastercard Inc and Others v Commission, 2014) appears to have exhibited a relaxation of the requirement, particularly in the context of multi-sided markets. Specifically, the Court declared that evidence of customer advantage need not be confined solely to the relevant market but may also be taken into account in conjunction with benefits in associated markets. The statement elucidated that efficiencies in the pertinent market are an essential requirement and cannot be superseded by consumer benefits in an adjacent market.

The challenges encountered in providing justifications under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) underscore the heightened significance of defining the pertinent market in terms of the onus of demonstrating efficiencies within said market (Mandrescu, 2017). The probability of arguing for a practice under Article 101(3) of the Treaty on the Functioning of the European Union varies depending upon if the targeted market is viewed as encompassing every aspect of the marketplace or analyzes them to be interrelated but distinct marketplaces (Mandrescu, 2017). One potential strategy for

resolving this matter without necessitating legislative intervention is aligned with the methodology employed by the Court in Cartes Bancaires, which involves weighing the various efficiencies and anti-competitive consequences that could arise across all market participants. (Mandrescu, 2017). To ensure adherence to Article 101(3) TFEU, the focal point of a balancing assessment should prioritize consumer efficiencies.

The fourth condition stipulated in Article 101(3) of the Treaty on the Functioning of the European Union mandates that any restrictive practice that has been proven must not grant the involved undertakings the ability to eliminate opposition in a significant portion of the pertinent market. (European Commission, 2004). The assessment of online platforms may present a greater level of complexity compared to traditional markets due to their inherent susceptibility to tipping. Consequently, a comprehensive evaluation of potential elimination must encompass an analysis of the degree of network impacts, economies of scale, congestion constraints, distinction, and multi-homing opportunities (Katz and Shapiro, 1994; Evans and Schmalensee, 2007). On the opposite end of the spectrum lie dynamics that exhibit high levels of competition, which may impede tipping and thus make monopolization improbable (Evans and Schmalensee,2007). The process established by both of those extremes could be perceived as a continuous progression within a revolving system, wherein one platform supplants the other (Daigle, 2015; Facebook/WhatsApp Commission decision, 2014). Demonstrating whether or not a platform's behavior has resulted in the elimination of competition in a significant portion of the pertinent market is a challenging task. This adds to the ambiguity surrounding the potential for justification under Article 101(3) of the Treaty on the Functioning of the European Union.

CHAPTER IV

CASE STUDY- AMAZON MARKETPLACE

This section will conduct an examination of the case of Amazon Marketplace to explore the approach being employed towards online platforms. The purpose of this investigation is to examine the Amazon Marketplace and its potential implications for competition law, particularly in the context of digital platforms that extend beyond the boundaries of the European Union. Firstly, the case of Google Search (Google Search Shopping, Commission Decision 2017) will be discussed so there is a proper understanding of the Amazon Marketplace case.

4.1 Case of Google

The Google Search (Shopping) case determined that Google engaged in anticompetitive behavior by leveraging its dominant market position as a search engine to unfairly promote its proprietary product that is the Google Shopping service. The Commission charged a penalty of € 2.4 billion in response to the misconduct.

The search engine operated by Google offers search outcomes to users who exchange their personal data as payment for these services (Google Search Shopping, Commission Decision 2017). Based on the personal data provided, Google displays ads to its customers, thereby generating revenue for the company while also serving as a beneficial resource for the marketing group and the consumer. Through frequent utilization of search engines, customers receive advertisements that are highly personalized. In 2004, Google ventured into a distinct market for comparison shopping by introducing a product that was initially

referred to as Froogle. This product was later (2008) renamed to "Google Product Search" and subsequently rebranded as "Google Shopping" (2013). (Google Search Shopping, Commission Decision 2017).

The focal points of the Commission's inquiry were the business tactics and behaviors in question. According to the Commission's findings, Google has been identified as the dominant player in the general search engine marketplaces across every member nation of the European Union, with market shares exceeding 90% in the majority of these markets since 2008. The study also revealed the presence of significant barriers to entry, which can be attributed to the indirect network effects stemming from the large consumer base. The position of dominance (Nederlandsche Banden Industrie Michelin v Commission, 1983) held by certain undertakings entails specific obligations that must be fulfilled. The Commission determined that Google violated these obligations, as its conduct was deemed abusive under Article 102 TFEU. This conduct was found to have a detrimental impact on competition in the adjacent market of comparison shopping (Google Search Shopping,2017). Furthermore, the Commission dismissed a defense based on efficiency and consumer safety determining that consumers utilizing Google's services have been denied the advantages of competition, specifically authentic options and advancements. Google is obligated to provide comparable treatment to competing products as well as its own line of goods in a close market to the one in which it holds a dominant position.

4.2 Amazon Marketplace- an outlook

The following section will provide an initial outline of Amazon's operational and commercial approaches, to the extent feasible, followed by a focus on delineating conceivable theories of detriment in relation to the prior evaluation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) within a digital framework.

4.2.1 Amazon’s Strategy

Numerous evaluations have been conducted on Amazon's corporate strategy, enabling a precise evaluation of the same. Undoubtedly, Amazon has evolved into a prominent entity in the realm of e-commerce, serving as a central hub upon which numerous other enterprises rely (Khan, 2017). The absence of significant profits generated by Amazon, despite its prominent market position, can be attributed to its pricing strategy of offering products and services at a below-market rate, coupled with its extensive expansion efforts (Khan, 2017).

During its initial years, an aggressive investment strategy was pursued by Amazon resulting in a surge in its stock prices despite incurring losses. The integration of various business lines in a vertical manner has led to an increased public consciousness regarding Amazon's standing in the realm of electronic commerce, and the potential negative consequences that may arise from such a dominant position.

Amazon's approach is distinguished by two key components: a readiness to incur losses in order to allocate resources towards investments rather than profits, and the consequent ability to integrate across various business domains. Amazon has secured its market position by leveraging its position as a first-mover in the realm of internet shopping, which it subsequently capitalized on by diversifying into different lines of business and establishing a dominant structural presence.

Amazon's diversification into various other industries has primarily occurred through the procurement of pre-existing firms, which would otherwise function as rivals to the company. This strategy has been employed to facilitate expansion. Through the acquisition of these companies, Amazon was able to efficiently get rid of an opponent yet expanding its range of offerings, thereby enhancing its appeal to prospective customers. The swift triumphs achieved by Amazon in its recent forays into various sectors serve as a notable manifestation of its market dominance, which is further underscored by the ongoing process of vertical integration. The phenomenon of vertical integration, in isolation, does not necessarily imply

a specific degree of market dominance. However, it does serve as an indicator of the level of competition within a given market. The potential for Amazon to respond to competition by engaging in vertical integration suggests a dominant fundamental position.

4.2.2 Complimentary investigations.

At present, there exist two ongoing investigations pertaining to distinct divisions of Amazon at both in Germany on a national level as well as the supranational level of the EU by the Commission and the GCA.

The GCA is currently examining potential instances of abusive behavior towards merchants who utilize Amazon Marketplace Germany, taking into account the dual role and influential position of Amazon as both an online marketplace and merchant. Additionally, it takes into account the conditions of commerce and protocols pertaining to vendors.

In contrast, the Commission is currently focusing its attention on the data collection and utilization practices employed by Amazon. The extensive vertical integration of Amazon, together with its access to several market segments and the corresponding data, is regarded as a cause for concern. (European Commission, Press Release: Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, 2019). The absence of a preliminary definition of the market, in contrast to the German research, may be attributed to the challenges associated with identifying a suitable definition within the context of digital markets.

The Commission asserts that Amazon's utilization of non-public data from marketplace sellers is deemed an abuse of dominance in accordance with Article 102 TFEU. This practice enables Amazon to evade the typical risks associated with retail competition and exploit its dominant position in the marketplace services sector in France and Germany, which are the largest markets for Amazon within the EU. (European Commission, 2020).

The Commission has initiated a distinct inquiry into the practices related to the 'Buy Box' and 'Prime Label'. The Buy Box case pertains to the practice of self-preferencing and the potential discrimination against sellers who do not utilize the Fulfillment by Amazon (FBA) service. (*fulfillment by Amazon*-further explained in the sections below). Hence, it is reasonable to anticipate that the Commission will, to a certain degree, draw upon its prior ruling on Google Search (Shopping), wherein it determined that Google exhibited preferential treatment towards its own comparison shopping service in comparison to its competitors. In terms of Amazon's behavior, wherein it utilizes its marketplace to prioritize its own products in the downstream retail market over those of rival merchants, it bears resemblance to the approach adopted by the Commission in the Google Shopping case.

The determination of the theory of harm that the Commission will employ in the Marketplace investigation presents a greater level of complexity in terms of predictability. Given that the Buy Box inquiry encompasses self-preferencing to some extent, it is reasonable to anticipate that the emphasis of the Marketplace probe will diverge. In light of the considerable media coverage surrounding Amazon's operational practices and the Commission's recent declaration to scrutinize the impact of Amazon's utilization of accumulated data from marketplace sellers on competition, specifically examining how this practice enables Amazon to circumvent typical risks associated with retail competition, it appears that the Commission intends to investigate Amazon's employment of marketplace sellers' data to introduce its own private label products at the retail level. In essence, the Commission will investigate the manner in which Amazon utilizes its data advantage, stemming from its potentially dominant position in the upstream market (Amazon Marketplace).

The Commission posits that Amazon's utilization of data from third-party sellers, who are also competitors of Amazon, may result in the exclusion of these sellers from the market (Bostoen, 2019). This exclusion is attributed to Amazon's practice of introducing its private label products that directly compete with the offerings initially introduced by third-party sellers.This technique has the potential to diminish merchants' motivation to engage in innovation and negatively impact consumer welfare by limiting the range of choices available to consumers (Bostoen, 2019).

It should be underlined that this case is not just about imitating rival third-party merchants' items or giving them a competitive edge. Antitrust concerns are not raised by either replicating competitors' products or giving them a competitive advantage (Lamadrid, 2019). Digital markets are characterized by an inherent power disparity between platform and third-party suppliers. However, the analysis of the practice becomes more complicated if copying competitors' products is the result of: (1) using private competitor data that the company has access to because of its dual role as a vertically integrated platform provider, which is both a marketplace operator and a retailer; and (2) gaining from the economic dependence of third party sellers, who find it difficult to switch to competing marketplaces. In these instances, it could be argued that using sensitive competitor data to imitate their items and enter the retail market could be considered abusive leveraging if the goal is to eliminate rival retailers (OECD, 2020).

The platform might try to break into the retail industry by using its monopoly in the online marketplace market as leverage (Bostoen, 2019). Because independent merchants rely on Amazon for their livelihood, the harmful effects of the behavior are made even worse. The Commission will have to show how Amazon's actions have an anticompetitive effect because they will be judged as "by effect" abuse rather than "by object" abuse (Bostoen, 2018). In this situation, one could contend that Amazon's actions could harm the efforts of marketplace sellers to innovate. Third-party retailers who rely on a platform for access to consumers may have less incentive to develop new items or improve existing ones if a platform operator routinely appropriates their investments (Bostoen, 2019; Shelanski, 2013). As a result, systemic copycat behavior can also have a dissuasive effect on independent vendors, which could be "far more harmful to innovation" than any exclusionary impact on current rivals (Obear, 2018).

Of course, such behavior is difficult to reconcile with established theories of harm and analytical frameworks (Bostoen, 2019; Khan, 2017; OECD, 2020). Applying legal principles like refusal to deal or margin squeeze to Amazon's behavior does not seem persuasive (Reverdin, 2021; Lamadrid, 2019; OECD, 2020).

When (1) a predatory firm's market structure plausibly encourages copying for reasons other than merits-based competition, (2) the alleged copying significantly precludes competition in the relevant market, and (3) the copying was driven by exclusionary goals, the behavior is considered predatory copying (Obear, 2018). First, it is conceivable that Amazon's dual function as a retailer and a marketplace encourages copying for reasons beyond from merit-based competition. Second, it appears that the alleged copying may significantly reduce competition in the pertinent (retailer) sector, which the Commission would have to investigate. The final criteria may not have been met since it may be difficult to demonstrate that Amazon's copying was done entirely for exclusionary reasons.

If we combine Amazon's actions in the Marketplace case with the second inquiry into Amazon's actions surrounding the Buy Box, we may claim that Amazon's methods can be classified as abusive leveraging (or self-preferencing). This theory of damage focuses on how a company can utilize (or leverage) its dominating position in one market to favor its products in a related market, but it also addresses conduct of a dominant undertaking participating in numerous related markets (OECD, 2020). Amazon's leveraging takes a somewhat different form in this situation since it allows Amazon to enter the retail industry with a copycat product by using its dominance in the online marketplace business. Leveraging is made possible not only by Amazon's vertical integration but also by its aim to identify successful products and introduce its private label products to the retail sector using data from third party sellers. If it seeks to exclude rivals, it can be considered a potential exclusionary abuse of dominance (Khan, 2017).

Along with harming innovation, Amazon's strategy may also affect consumers by limiting their options. Consumers should have a large selection of sellers who are also willing to make investments in innovation, according to the European Consumer Organisation (BEUC), which supports the Commission's probe. The number of sellers will decrease, as will their incentives to innovate, if they are forced out of the market or if they are unable to recoup their investments in innovations because a rival (gatekeeper) is reaping the benefits. In the medium and long term, Amazon's business strategies may hurt customers by limiting their options for products and sellers, as well as the latter's incentives to innovate (BEUC, 2020). The BEUC also draws attention to a further intriguing aspect of the Amazon

investigation, namely the potential for Amazon's practices to unfairly steer customers toward its own products and deny them the freedom to choose what is truly best for them rather than what Amazon suggests is the best option.

4.2.3 Link to the Commission investigation into Amazon's 'Buy Box'

The correlation between the misuse of data from third-party sellers and the second investigation initiated by the Commission, pertaining to Amazon's 'Buy Box' and Prime label, is significant. The Commission has suspicions over Amazon's potential practice of artificially prioritizing its own retail offers and those of marketplace sellers that utilize Amazon's logistics and delivery services, commonly referred to as 'fulfilment by Amazon' or 'FBA' service. With the objective in mind, the Commission will conduct an investigation into the potential preferential treatment of Amazon's retail business or sellers utilizing Amazon's FBA service, resulting from the criteria employed by Amazon to select the winner of the 'Buy Box' and allow sellers to offer products to Prime users within Amazon's Prime loyalty program. The attainment of the 'Buy Box', which refers to the selection of an offer that is prominently shown in response to a consumer's enquiry for a certain product, holds significant importance in ensuring the success of sellers. According to Lanxner (2021), the search results prominently feature the offer of a single seller for the product being searched, resulting in a significant portion of overall sales for that particular commodity.

Online intermediaries have trained end users to expect the most pertinent results to be emphasized or displayed at the top of the page (Hoppner, 2021). As a result, consumers are more likely to focus on and purchase items that are more prominently presented, while ignoring those that are less prominently presented, even though they may be more accurate (a tendency to select more visible or default options) (Bordalo, Gennaioli, and Shleifer, 2012), or a default bias (OECD, 2020). Given the current situation, this also implies that a seller seeking access to end customers must be present both on the Amazon Marketplace and in the "Buy Box" or similar conspicuous location. He might lose sales compared to the organization that receives the "Buy Box" (perhaps one of Amazon's affiliates) if that is not the case. The two inquiries are related since Amazon can join the retail industry with its

"copycat" products and then prominently show them in the Buy Box thanks to the exploitation of competitors' data. If Amazon were unable to favor its products in the 'Buy Box' and influence customers to buy Amazon's products rather than the original ones, entering adjacent areas and competing with third-party sellers with its own products may have less of an adverse effect on competition.

4.2.4 Article 101 and 102 TFEU

An arrangement among Amazon and other businesses would need to be uncovered in the inquiry in order to limit competition that exists between Amazon and the businesses that use the Amazon Marketplace.

Abuse of a dominant position is the most important explanation of harm. It is first required to prove that Amazon is a dominating activity on the relevant market in order to identify such abuse. But defining the relevant market presents the biggest challenge in this situation. It is possible to view the market definition techniques utilized in the case of Google as setting the course for this study, with qualitative techniques serving as the deciding element.

There are numerous ways to classify Amazon's behavior as abusive, which have been covered in earlier sections as well. First, and in accordance with the ruling on Google, stand the self-preferencing mechanisms (Vesterdorf, 2015) that Amazon is reportedly employing. Similar to Google, Amazon is accused of giving its own items preferential attention. The positioning of Amazon's own imitation goods under the name Amazon Basics is frequently highly prominent in compared to rivals' items, thus there aren't many variations between the two scenarios. The fundamental issue is that users of Amazon can't easily recognize the self-preferencing techniques, and as a result, they frequently aren't aware that their behavior is being somewhat controlled. This type of manipulation was determined to be an abuse of competition in the instance of Google (Google Search Shopping, 2017) showing that the same conclusion might be drawn in the case of Amazon as well. Secondly, predatory pricing

is a strategy used by Amazon to lessen or eliminate competition by setting prices for items below what they are worth.

Amazon may be exploiting merchant data in violation of the law by using it to modify its business plan. The Commission's Google Shopping investigation suggests that Amazon may be judged to be abusing data in an abusive manner. To prevent data abuse, it is important to separate entities within a corporation into independent organizational units that have no access to the data of other organizational units. Amazon's data misuse is a violation of Article 102 TFEU, as it uses its dominant position to distort competition in a relevant market.

4.2.5 Remarks regarding the Amazon Study Case

Concerns about anticompetitive behavior may arise from Amazon's usage of private information from independent shops who sell on its marketplace. Anticompetitive issues may arise if Amazon takes advantage of its privileged position—resulting from its vertical integration and the economic dependence of third-party sellers on its Marketplace—to collect competitively sensitive data and launch a private label of goods that are successful on the market. Third-party sellers may be driven off the market or at the very least lose the motivation to innovate as a result of Amazon's strategy of strategic copying, which has anticompetitive repercussions. Because of Amazon's actions, consumers might wind up with fewer options and less innovation than they otherwise would have.

But the Commission's investigation into Amazon's behavior shows that it is difficult to reconcile it with established conceptions of harm. Therefore, it is suggested that new theories of harm be created that are expressly designed to address the difficulties presented by digital markets and the economic strategies of online platforms. It is suggested that certain flexibility is necessary for the implementation of competition laws in digital markets. Amazon's actions may be seen as forced free-riding (Shelanski, 2013), predatory copying (Obear, 2018), abusive leveraging (OECD, 2020), or self-preferencing if we examine Amazon's Marketplace behavior and its "Buy Box" tactics.

Undoubtedly, online platform providers may experience confusion and enforcement errors if well-established legal criteria of assessment are altered (Reverdin, 2021). Competition authorities should pursue a given market behavior, even if it has not previously been evaluated and does not easily fit into any established legal standards, if there are compelling reasons to believe that it may have anticompetitive effects (such as: foreclosure of competitors, stifling innovation, decrease in consumer choice). Furthermore, it should be noted that the Court of Justice of the European Union (CJEU), which at one point decided to veer from the well-known enforcement path, developed the case law that serves as the foundation for current legal standards of antitrust assessment. In this regard, it is important to keep in mind Obear's opinion, according to which "courts should not be afraid of a little bit of innovation in the law when it comes to protecting innovation in the markets" (Obear, 2018).

The Amazon Marketplace case demonstrates that when faced with novel market practices and the peculiarities of digital marketplaces (such as their multisidedness, network effects, and zero-priced services), the application of Article 102 TFEU may become challenging. In these markets, every potential issue with competition may not be adequately addressed by abuse of dominance enforcement as it is now practiced. One should push for the introduction of a sector-specific law targeted at the major digital firms, or the gatekeepers, such as the Digital Markets Act (DMA), given the uncertainty involved in antitrust evaluation and the possibility of enforcement errors. The DMA would specifically forbid actions like those taken by Amazon. Ex ante regulation would, to some extent, prevent unexpected ex post application of competition laws.

Knowing the rules ahead of time may aid gatekeepers in upholding them and avoiding antitrust investigation. However, a rule like the DMA shouldn't be viewed as a replacement for the enforcement of competition legislation. Due to its open, inclusive, and adaptable principles, competition law is still a useful tool for addressing potential new anticompetitive behaviors in digital marketplaces (Crémer, de Montjoye, and Schweitzer, 2019). One way to reduce the danger that gatekeepers may use the forbidden behaviors is through legislation, such as the DMA with its ex-ante perspective. On the other hand, ex post application of competition law can remedy issues with competition that are not addressed through

regulation. In order to solve the issues that arise for competition policy in digital markets, regulation and competition law should instead be understood as complementing regimes that strengthen one another (Crémer, de Montjoye, and Schweitzer, 2019; Furman, 2019). Competition law and regulation, when used concurrently and not alternatively, will aid in avoiding legal pitfalls and offer greater protection for competition in digital markets.

CHAPTER V

CONCLUSIONS

It has become obvious from the examination of the elements causing digital platforms to be a complicated field of competition law that legal standards must now allow a marginal approach. Therefore, economics must be more thoroughly considered when applying these legal standards and must take the lead in the legal analysis. This is particularly true in online changes, where legal criteria frequently remain vague if not supplemented with more clear economic terminology and judgments.

The relationship between market power and turnover is another challenge that needs to be solved by the usage and interpretation of the legal definitions. Even while certain digital platforms might not appear to make a lot of money on paper, their economic worth reflects the contrary. As a result, it is vital to modify the accepted criteria for determining market power, moving away from assumptions based on revenue and toward more flexible parameters.

Finally, changing the way competition legislation is enforced is necessary due to the characteristics of online marketplaces. Online platforms have developed certain strategies that damage, and these need to be addressed with new and adjusted enforcement strategies because the current price-centric approach has the potential to blur the distinction between object and effect restriction as well as between Art. 101 and 102 TFEU (Nowag, 2018, p 402). Such difficulties must be avoided by changing competition policies to take a more diversified and contemporary stance to maintain long-standing established enforcement techniques.

As seen by the recent case law, the debate over the integration of various factors to improve the legal terminology has evolved, but the legal foundation upon which EU competition law is built has not. However, given that the application of Article 101 and 102 of the TFEU is not limited to traditional businesses, this is not crucial. On the contrary, the application of these principles has shown to be quite adaptive and flexible. The Treaties provide a gradual comprehension of and adjustment to the features of the digital era, as proven by the diverse judgments of the Commission as well as the EU courts.

The P2B regulation, a new regulatory action, goes beyond the simple interpretation of terminology to the new conditions. In order to identify and pursue cases of abuse more easily it is proposed to increase the honesty of online platform agreements with regard to their business partners utilizing the platform. Although this policy does not directly alter competition laws, it does address the two most serious problems in digital competition—lack of transparency and data misuse. As a result, it demonstrates how modifications to enforcement strategy as well as rules governing behavior in online marketplaces may assist increase competition without overly controlling the latter.

As such, should there be implemented more legal regulations?

Competition would not be as successful if it was controlled by even more legal regulations. Since it gives market participants the required information, self-regulation through enforcing the transparency standards appears to be the most successful approach moving ahead. EU competition regulations were developed to be flexible, allowing for changes to be made to the legal definitions as necessary. However, changes to policies may be made to fix problems brought on by a lack of legislation since they are more adaptable than any sort of law could be, given how quickly the internet is developing and innovating. A fair market for competitors may be achieved to a larger extent than it is presently by making transparency one of the key factors in interactions with online platforms. In conclusion, it can be argued that the structure in place at the moment is adequate for addressing upcoming issues relating to the digital environment.

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