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EU'S APPROACH TO ABUSE OF DOMINANCE CONCERNING ONLINE PLATFORMS: A NEW ERA FOR EU COMPETITION POLICY?

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In recent years, there has been a growing concern over whether existing anti-trust regulations and tools are sufficient to deal with legal cases involving online platforms. This study aims to reveal whether further market regulation is needed to ensure fair competition in online platforms. Due to the multi-sided nature and rapidly changing structure of online platforms, defining the relevant market and determining dominance has become problematic. Besides, through landmark decisions in EU jurisdiction, existing rules are stretched to the boundaries for effective enforcement. Nevertheless, these legal cases tamed the power of tech giants only to a limited extent.

Thus, the EU introduced the Digital Markets Act that contains ex-ante rules to combat weak contestability and unfair practices in online platform markets. This study suggests that further regulation will be beneficial, as the ex-post character of the existing rules renders encountering antitrust challenges that online platforms pose ineffective. Therefore, the Digital Markets Act will pave the way for achieving this objective.

KEYWORDS

Competition law, abuse of dominance, online platforms, multi-sided markets, network effects, Digital Markets Act

CONTENT

1 INTRODUCTION

1.1 Background

In today's world, online platforms have become indispensable parts of our lives and in recent years, there is a growing concern over whether existing anti-trust regulations and tools are sufficient to deal with the cases involving these platforms. Due to their size, ability to access data and leveraging their dynamic capabilities to adjacent markets, these platforms are seen as an anticompetitive threat.[1] As these platforms gain more power, they become dominant in the market and the existing rules and practices may not be sufficient to deal with abuse of dominant position. Thus, certain distinctive characteristics of online platforms require rethinking for the antitrust cases. Among them, extreme returns to scale, role of data and network effects can be considered as the most prominent ones.

For online platforms, marginal cost for adding another user is very low and sometimes even zero. Due to this substantial economies of scale, companies can rapidly expand. Also, these platforms rely on large amounts of user data to develop new services and products. As the rapidly advancing technology enables collection and storage of huge amount of data, role of data has become much more relevant for the success of online platforms. Moreover, platforms tend to have multisided business model where they act as a platform that bring different users group together. This exclusive business model creates network externalities where as the number of users grow, value of a platform increases for the users.

These characteristics create natural tendency towards concentrated market structures causing standard competition tools to face a set of challenges

[1] Center for Strategic and International Studies, Implications of the Digitals Market Act for Transatlantic Cooperation, 2021, p. 5, available at https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation (5 April 2022).

regarding large online platforms' dominance.[2] In the first place, online platforms are part of highly dynamic markets. Due to the ex-post character of anti-trust rules, taking an enforcement action takes too much time that the competition may have been irreversibly damaged before the action is taken. Also, data technology is one of the reasons behind it. Competition authorities sometimes have quite limited insight about the algorithms of these platforms. Therefore, this informational gap retard the investigations which takes around 4-5 years, which is quite long for fast moving markets with the threat of tipping.[3]

Besides, as these platforms are built upon two-sided market model, it is challenging to assess them under current anti-trust rules.[4] The reason behind this is the difficulty in defining the market and deciding on the market power. Also, scope of application of Article 102 of Treaty on the Functioning of the European Union (TFEU) in the case of leveraging market power into other markets is quite controversial. Thus, growing evidence on the dynamics of online competition demonstrates that courts and competition authorities should adjust their tools regarding the market power analysis of online platforms.[5]

In short, since these giant platforms may abuse their dominant positions and ex-post character of the existing rules may not fit to the dynamic structure of digital economy, this phenomenon poses a new challenge for the competition policy. Also, lack of suitable remedies to adequately address the competition concerns poses another important challenge. Therefore, entrenched market power of large online platforms together with the perceived failure of antitrust investigations to secure the fair competition in digital markets, has initiated a global debate over antitrust rules' adaptation to the digital age.[6]

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[2] *Ducci*, Gatekeepers and Platform Regulation: Is the EU Moving in the Right Direction?, SciencePo Policy Brief, March 2021, p. 2, available at https://www.sciencespo.fr/public/chaire-numerique/en/2021/04/08/policy-brief-gatekeepers-and-plateform-regulation-is-the-eu-moving-in-the-right-direction-by-francesco-ducci/ (4 May 2022).
[3] *Geradin/ Katsifis*, ECJ 2021, p. 17.
[4] *Mandrescu*, ECLR 2017, p. 354.
[5] *Evans*, Coase-Sandor Working Paper Series in Law and Economics 2016, p.5.
[6] *Geradin/ Katsifis* (fn.3), p. 5.

In recent years, there have been numerous studies discussing this possibility. These studies include, but not limited to, Vestager report [7] of European Commission, Furman report[8] of UK, Stigler report[9] of US, Bundeskartellamt report[10] of Germany. These reports not only discuss the challenges of digital economy but also propose the possible ways to adapt the competition policy. Among them, ex-ante tools complementing antitrust rules is one of the options.

In this context, in December 2020, European Commission proposed the Regulation on Digital Markets Act (DMA)[11] that contains ex-ante rules to limit the market power of big online platforms and guarantee fair competition in European digital markets. According to the Commission, weak contestability and unfair practices in the digital sector has led to inefficient outcome and with this regulatory tool, it is aimed to ensure that online platforms acting as "gatekeepers" behave in a fair way. Nevertheless, this ambitious Proposal has come with its criticisms. Main criticisms came from US tech giants, as the scope of DMA directly targets them. Besides, while DMA will provide ex-ante control to online platforms, current competition rules will continue to provide ex-post control. Although it is stated that these two tools will not overlap, and instead they will complement each other, there is an over or double enforcement risk which will put too much burden on the companies.[12] Thus, it is a controversial topic in European Union (EU) nowadays. In this regard, this debate provides useful and comprehensive area of further research.

In the light of this background, with this thesis, I will try to find an answer to my research question: "Is there a need for further market regulation in order to ensure fair competition in digital platforms?"

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[7] European Commission, Competition Policy for the Digital Era, 2019, ISBN 978-92-76-01946-6, doi:10.2763/407537.

[8] UK Digital Competition Expert Panel, Unlocking Digital Competition Report, March 2019, ISBN 978-1-912809-44-8.

[9] Stigler Center for the Study of the Economy and State, Stigler Committee on Digital Platforms Final Report, 2019.

[10] German Federal Ministry for Economic Affairs and Energy, A New Competition Framework for the Digital Economy, September 2019.

[11] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15.12.2020, COM/2020/842 final.

[12] *Georgieva*, European Papers 2021, p. 28.

1.2 Structure

Application of competition rules to online platforms and challenges brought by the specific characteristics of these platforms is quite newly developed and evolving concept. Therefore, some new terms were introduced to the literature. In order to make it more comprehensible, first of all, in the following chapter, I will give brief information about the characteristics of online platforms and in particular, two-sided market concept and network effects which are directly related with the subject.

Third chapter will reveal the EU competition law framework. To be more precise, firstly primary and secondary sources of EU law will be put forward. In this study, for the sake of being more precise and to be able to go into details better, only Article 102 of TFEU will be handled thoroughly. On this basis, the application of Article 102 of TFEU to online context will be analysed. In this regard, information will be provided on how the market is defined and how the dominant position is assessed within the context of Article 102 of TFEU.

In the fourth chapter, I will focus on the EU jurisdiction and I will analyse how the existing rules are applied in recent cases. In this regard, I choose the cases that attracted considerable attention. In recent years, especially US tech giants like Google, Amazon and Facebook are under close supervision of the European Commission. Since scope of this study is limited to the abuse of dominance by online platforms, I chose Google Search (Shopping) Case - AT.39740 and Amazon market place Case - AT.40462 to examine.

In the fifth Chapter, Commission's Proposal on Digital Markets Act will be analysed. In this context, core objectives, main provisions and how they will serve to protect competition will be briefly examined. Main criticisms brought by private sector and Member States' concerns about DMA will be put forward. Also, an assessment will be made to reveal probable consequences and possible challenges.

Finally, although application of Article 102 of TFEU continues to play a pivotal role to address the challenges posed by the tech giants in online platforms, cases have not delivered the desired outcomes. Therefore, in the last Chapter, I expect

to come to the conclusion that further intervention is needed to ensure fair competition in online platforms.

1.3 Methodology and Sources

This thesis is not the first academic writing focusing on competition policy challenges regarding online platforms and it will probably not be the last. Digitalisation and regulating online platforms has been a dominant topic of competition policy considerations across the world and the EU has an ongoing regulatory study on this subject. That's why I wanted to focus on this issue.

In this context, mainly academic literature and case law will be reviewed. I will look at the EU jurisdiction in this area to see the existing practices and analyse the DMA to observe the expected changes. In the light of these observations, I will assess whether further regulation is needed in this area.

In this thesis, legal approach will be complemented with economic approach. Also, since DMA is widely debated as a political subject, political reasons behind the criticisms will also be revealed.

The study has some limitations as well. Analysis will be conducted with regard to the Article 102 of TFEU. Article 101 of TFEU and merger control is not within scope this study.

2 CONCEPTS

2.1 Online Platforms

As the online platforms touch almost all parts of our lives, people have different understandings regarding the concept. It can be used to describe wide range of services such as social media platforms, search engines, online market places, payment services and so on. Thus, making a definition for online platforms seems complicated.

According to OECD report[13], online platform is described as the service over Internet that facilitates interactions between two or more interdependent group of users who interact through this service. European Commission Staff Working Document[14] describes these platforms as the markets where platform operator brings together users with aim of facilitating interactions such as commercial transaction or exchange of information. On the other hand, Competition and Markets Authority of UK prefer to define it as *" markets … where companies develop and apply new technologies to existing businesses, or create brand new services*

[13] OECD, An Introduction to Online Platforms and Their Role in the Digital Transformation, 2019, https://doi.org/10.1787/53e5f593-en.

[14] Commission Staff Working Document, Online Platforms - Accompanying the Document "Communication on Online Platforms and the Digital Single Market", 25.5.2016, SWD(2016) 172 final.

using digital capabilities."[15] However, economists tend to talk about two-sided or multi-sided markets depending on the number of user groups, instead of the term platform.[16] Therefore, the term multi-sided markets will be elaborated more in the following heading.

Even though it is hard to find widely accepted definition, in recent studies and in literature there is a tendency to focus on some key features of these platforms. These are stated as extreme returns to scale, role of data, network effects (and multi-sided markets which is directly related to this concept). These specificities make online platform distinctive from traditional platforms such as markets or newspapers.

First of all, online platforms offer extreme returns to scale. In other words, compared to the number of customers served, cost of production of digital services is much less[17]. Indeed, marginal cost of adding another customer to online platform is essentially zero.[18] Therefore, after the establishment of the platform, the cost of additional user is quite low compared to the increase in the number of users. This feature enables the rapid scale up of businesses.

Another important aspect is the value of data. It seems that the competitive strength of these platforms is determined by the amount and variety of data they have. Online platforms such as search engines, e-shopping platforms and social networks collect personalized data. This sophisticated personal data enables the track of customer preferences either through stated preferences or revealed preferences like via actual buying behaviour.[19] With the data they have, they can recommend better buying options, more relevant search results as well as better targeted advertising. Technology reduces the cost of storing and analysing the data and thereby changing the consumers' behaviour, organization of industrial activities and as a result the operation of competition authorities.[20]

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[15] UK Competition and Markets Authority, Digital Markets Strategy Policy Paper, June 2019.
[16] *Martens*, An economic perspective on data and platform market power, JRC Technical Report, 2021, p.10.
[17] European Commission, Competition Policy for the Digital Era, 2019, ISBN 978-92-76-01946-6, doi:10.2763/407537, p.2.
[18] *Evans* (fn.5), p.21.
[19] *Budzinski/ Stöhr*, ECJ 2019, p. 23.
[20] *Ibid.*, p. 16.

Network externality is another important characteristic of these platforms. Online platforms which are described as two-sided or multi-sided platforms, act as an intermediary between two or more different set of user groups and enable the interaction of them. The actions of these different user groups may affect each other so that the value of a product may increase as the number of users adopt or use the same product increases.[21] This effect which is referred as network effect is what most of the online platforms rely on.

From the competition perspective, these characteristics have some important implications. Unique combination of these characteristics facilitates the generation of enduring market power that may not be corrected by market forces.[22] From one side, competition law aims to ensure that new entrants can enter to the market so that concentrations leading to monopoly are prevented. On the other side, it also aims to guarantee that online platforms continue to innovate in order for consumers to get better products or services. Therefore, traditional competition rules may not be sufficient to guarantee this overarching aims. In fact, the assumption is that these distinctive features demand ad hoc rules.[23] This controversial issue constitutes the backbone of this thesis so it will be analysed more thoroughly in the following chapters. Prior to this, another important concept, which is multi-sided market, will be analysed in the following heading.

2.2 Multi-sided Markets

In recent decades, multi-sided market[24] concept has become increasingly relevant for antitrust law cases. There is a common understanding that these multi-sided platforms pose challenges to competition law enforcement and without important modifications, traditional perspective, rules and tools will

[21] *Jullien/Pavan/Rysman, Marc,* CEPR Discussion Paper 2021, p.2.
[22] *Geradin/ Katsifis* (fn.3), p. 7.
[23] *Ibáñez Colomo,* JECL 2021, p. 561.
[24] In the literature, terminology differs regarding this concept. While some scholars use two-sided market term, others use multi-sided market term as some platforms may cater to more than two sides. In this thesis, both of the terms will be used interchangeably.

lose their validity to be applied.[25] However, including multi-sided market related issues in antitrust law enforcement consideration may not be easy.

This difficulty could be observed in the EU case law as well. Eventually, Court in its judgment of *Groupement des Cartes Bancaires v Commission*[26] ruled on that two-sided nature of payment systems should have been considered in antitrust analysis. Therefore, it can be inferred that this feature of the markets has started to be taken into consideration in antitrust analysis in the EU.

At this point, defining the concept will be helpful but it is not an easy task. Until now various definitions have been proposed for two-sided markets and they differ in their approach regarding the features included in the definition.

In fact multi-sided platforms is not a new concept as in the past there were offline multi-sided markets such as newspapers/magazines and payment cards[27]. However, they became known as important and distinct type of businesses by the economists after the *Rochet* and *Tirole*'s seminal work.[28]

As stated by *Rochet* and *Tirole*[29], "*A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount*". According to this definition, the focus is on the pricing structure and platforms must design their pricing structures if they want to bring both sides on board.[30] However, in some cases consumers do not even pay a price to use this platform like it is seen in search engines, newspaper or social media platforms. Therefore, it may not be possible to tie the pricing on different sides in a fixed proportion.[31]

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[25] *Lamadrid de Pablo*, The double duality of two-sided markets, 2014, p.6., available at https://antitrustlair.files.wordpress.com/2015/05/the-double-duality-of-two-sided-markets_clj_lamadrid.pdf (12 May 2022).

[26] Judgment in *Groupement des cartes bancaires (CB) v European Commission*, Case C‑67/13 P, ECR, EU:C:2014:2204.

[27] OECD Directorate for Financial and Enterprise Affairs Competition Committee, Market Definition in Multi-sided Markets, 2017, DAF/COMP/WD(2017)33/FINAL.

[28] *Evans* (fn.5), p.5.

[29] *Rochet/Tirole*, The RAND Journal of Economics 2006, p. 35.

[30] *Ibid.*, p. 2.

[31] *Gürkaynak/ İnanılır / Diniz /Yaşar*, JAE 2017, p. 103.

From a different perspective, *Ryasman* defines it as a market where two different agents interact through an intermediary and the decisions of each agent influence the other agent's outcomes generally through an externality. [32] According to this definition, two-sided market act as an intermediary and different user groups decisions affect each other.

On the other hand, *Evans* and *Schmalensee* define two-sided platforms as platforms catering two or more distinct group of customers where members of one customer group need the other group's members and the platform creates value for them that they cannot obtain without the existence of this platform.[33] Pursuant to this definition, platform is needed as an intermediary and thanks to this interaction a far greater value is created compared to the absence of platform. Payment cards can be a good example for this.

Besides, in one of the OECD reports[34] multi-sided market is defined as the

"*market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer depends on the demand from the other group(s).*"

As it can be seen from the definitions, they contain variety of differences. However, it is also possible to derive some common elements. Until now most prevalent approach has concentrated on the existence of significant cross-group or indirect network effects between customer groups in the online platform.[35] Therefore, a closer look is required for network effects, as they are one of the fundamental aspects of the multi-sided markets.

2.3 Network Effects

[32] *Rysman*, JEP, 2009, p. 125.
[33] *Evans/ Schmalensee*, NBER Working Paper No. 11603 2005, p. 2.
[34] OECD, Rethinking Antitrust Tools for Multi-Sided Platforms, 2018, available at https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf (6 June 2022).
[35] *Hagiu/ Wright*, IJIO 2015, p.4.

Contrary to the value created by traditional business models where value of a good or service is generated by supplier, in online platforms most of the value is created by the other users of the platform.[36] Basically if the utility that a consumer derives from consumption of a good increases with the purchase of goods by the others, it can be said that there is a network effect.[37] This network effect can be either direct or indirect.

If users of the online platforms directly benefits from the number of participants within the same demand group, it is referred as a direct network effect.[38] Since it enables social interaction and benefiting from other's experiences, users are attracted by the other users using this platform.[39] This is the general case in social media platforms like Facebook, Instagram and communication services like WhatsApp. For instance, the value of Instagram for the users increases as the number of users of this platform increases.

On the other hand, when it is mutually effective for both sides if the number of participants on the other side is rising, there is an indirect network effect.[40] The value, users gain from this platform, depends on the number of sellers and vice versa. Online market places like Amazon, Airbnb, etc. are good examples for this effect. For instance, if Amazon has more sellers it will attract more customers and the opposite is also true. If there are more customers, more sellers will be interested to sell their products through Amazon.

In this regard, guaranteeing huge number of users at the both side creates a so called chicken and egg problem.[41] Platform operator faces this problem to simultaneously attract high participation from both the customer side and merchant side.[42] As the platform gets more one customer group, it becomes more attractive to the other customer group and the opposite is true as well.

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[36] Commission Staff Working Document, Online Platforms - Accompanying the Document "Communication on Online Platforms and the Digital Single Market", 25.5.2016, SWD(2016) 172 final.
[37] *Graef*, World Competition 2015, p. 484.
[38] *Martens* (fn.16), p.10.
[39] *Ibid.*, p.10.
[40] *Budzinski/ Stöhr* (fn.19), p. 17.
[41] *Geradin/ Katsifis* (fn.3), p. 9.
[42] *Budzinski/ Stöhr* (fn.19), p. 17.

Due to the demand sided economies of scale via the platform, this indirect network effect encourages the concentration and eventually the emergence of narrow oligopolies and dominant platforms.[43] If the platform is particularly attractive to users, concentration caused by the network effect creates winner-takes-all market.[44] In other words, due to the dominant position, it grasps all benefits. In this case, even if there is a more innovative new entrant, it cannot compete with this firm due to the network effects.[45]

Besides, platforms decide on their prices by taking into account complex interactions between the different sides of the platform and indirect network effect is influential in that regard. While one side of the platform pays quite high, the other side pays little or nothing at all.[46] According to this pricing scheme, generally consumers gain access to the online platform for free. Hence, it can be inferred that side having higher indirect effect has to pay more. As it can be seen in examples like Youtube, Spotify, Facebook, businesses pay more to use the platform while consumers have the possibility to not pay at all.

After having explained the basic concepts regarding online platforms, current EU competition law framework will be revealed in the next chapter. In this context, challenges for the application of existing law will be more understandable.

3 EU COMPETITION LAW FRAMEWORK

EU is a *sui generis* international organization that is established under two core treaties, namely Treaty on European Union (TEU) and TFEU which sets out the EU's constitutional basis. Article 5 of TEU defines the limits of Union's power.

[43] *Ibid.*, p. 18.
[44] Institut der deutschen Wirtschaft (IW), The economics of platforms, 2018, ISBN 978-3-602-45615-4.
[45] European Commission, Competition Policy for the Digital Era, 2019, ISBN 978-92-76-01946-6, doi:10.2763/407537, p.23.
[46] *Mandrescu* (fn.4), p. 356.

Accordingly, *"the Union shall act only within the limits of the competences conferred upon it"*. In other words, Union can only act on competences that have been transferred by Member States.

In this regard, different types of competences are defined for the Union in TFEU. In Article 3 of TFEU, these competences are categorized as: (i) exclusive competence (Article 3 of TFEU) where only the EU can act, (ii) competences are shared between the EU and the Member States (Article 4 of TFEU), (iii) the EU has competence to support, coordinate or supplement the actions of the Member States (Article 6 of TFEU).

Among these competences, EU competition rules fall under the scope of exclusive competence of the Union. According to the Article 3(1)(b) of TFEU, *"establishing competition rules necessary for the functioning of the internal market"* is one of the exclusive competences of the Union. Thus, Union has the competence to apply competition rules only in cases that have an intra EU effect and cases that do not have this effect are of national concern.[47]

As primary sources of EU law, both TEU and TFEU lay down main principles of EU competition law. In this context, Article 3(3) of the TEU states that the EU *"shall establish an internal market based on a highly competitive social market economy"*. Competition policy has a vital role for the attainment of internal market and apparently competition rules are reflection of the free movement provisions. [48] These substantive provisions regarding competition law are contained in Articles 101 to 109 of TFEU. In fact, foundation of these rules goes back to the Treaty of Rome (1957) which established the creation of a system safeguarding free competition in the common market as one of its goals. Indeed, they remained substantially the same and they are now contained in the TFEU.[49]

EU competition rules mainly aim to prevent restrictions on and distortions of competition in the internal market and principally encompass a wide range of

[47] *Jones/ Sufrin,* EU Competition Law: Text, Cases, and Materials, p. 84.
[48] *Costa/ Peers,* EU Law, p. 631.
[49] *Jones/ Sufrin* (fn.47), p. 75.

areas. These can be categorized as antitrust and cartels, merger examination, State aid, the liberalisation of markets and international cooperation. However, each of them needs substantial work to go further into details. For the sake of limiting the scope of this study, only antitrust rules and procedures on abuse of dominance will be handled in this thesis.

3.1 Primary and Secondary Law

As stated earlier, as a primary source of law, Chapter 1 of Title VII of Part Three of TFEU contains the main substantive provisions on competition rules. In this regard, Article 102 of TFEU provides the general framework for the prohibition of abuse of dominance. Accordingly, abusive conduct of companies that have a dominant position in a certain market is prohibited as a rule.

In terms of the secondary law, rules are set out by Council and Commission Regulations. Council Regulation No. 1/2003 [50] on the implementation of competition rules laid down in the TFEU can be considered as the main guiding secondary law. It also provides useful clarifications regarding complex relationship between EU law and national laws. [51] On the other hand, Commission Regulation No. 773/2004 [52] contains the provisions regarding the conduct of proceedings by the Commission. In this context, it lays down the provisions regarding the initiation of proceedings, handling of complaints and hearing of the related parties.

Moreover, there are some soft law instruments like Commission Communications and Notices that shows how Commission handles specific matters and thus shed a light on how rules are applied in practice.[53] With regard

[50] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003.
[51] *Marco Colino*, Competition Law of the EU and UK, p. 58.
[52] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.4.2004.
[53] *Jones/ Sufrin* (fn.47), p. 93.

to the application of Article 102, Commission Notice[54] on market definition provides guidance on how the Commission applies the concept of relevant product and geographic market in its investigations. Also, another Communication[55] provides guidance on the Commission's enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings.

Besides, case law is also another fundamental source for the application of Article 102. As the provisions in the TFEU are drafted broadly and they lack detail, it has been left to EU courts to define expressions such as "abuse" in Article 102 via case law.[56] Over the time, Court judgments have clarified the practices causing abuse of dominance and also the definition of market and determining the market power.

3.2 Article 102 of TFEU and Application in Online Context

Article 102 of TFEU is related to the unilateral conduct of undertakings that hold a dominant position. It asserts that

"*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.*"

Accordingly, Article prohibits undertakings to abuse their dominant position within the internal market or substantial part of it where that abuse may affect trade between Member States. Then, the Article lists certain conducts that may be considered as abuse such as imposing unfair purchase or selling prices, limiting production, applying dissimilar conditions to equivalent transactions etc. These abuses can take various forms like preserving or expanding the

[54] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.
[55] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) 24.02.2009.
[56] *Whish / Bailey*, Competition Law, p. 50.

market power of the undertaking (exclusionary practices) and exploiting the power of the undertaking (exploitative practices). However, Article 102 does not provide a specific procedure to declare that an undertaking is dominant and therefore subject to the Article.[57]

There is no fixed formula to decide that an undertaking has a dominant position but defining the relevant market is essential.[58] That's why, determination of dominance requires the definition of the market where the alleged dominance takes place. Then, company's position in the market should be analysed. For this, competitors are identified and market dominance is assessed. Nevertheless, challenges deriving from the specific characteristics of digital markets affect the steps taken and instruments used to define the relevant market and assess the market dominance.[59] In this regard, following headings will elaborate more on these challenges.

3.2.1 Market Definition

In all antitrust cases, namely in relation to Article 101, Article 102 and merger control, market definition tool is used to identify the boundaries of competition between undertakings. In this context, Commission's Notice[60] on the definition of the relevant market gives the necessary guidance. Market definition enables the calculation of market shares which paves the way for assessing market power in antitrust proceedings.

In order to define the relevant market, small significant non-transitory increase price test, which is known as SSNIP test, is commonly used. With this test, whether a hypothetical monopolist can profitably increase its prices by a small amount like 5-10% in a relevant market is examined to define the relevant

[57] *Jones/ Sufrin* (fn.47), p. 279.
[58] *Marco Colino* (fn.51), p.314.
[59] European Parliament, Challenges for Competition Policy in a Digitalised Economy, 2015, IP/A/ECON/2014-
PE 542.235.
[60] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.

market.[61] Due to the price increase, customers may prefer substitute products or other geographical areas and it may end up with loss of sales. Therefore, the test is done until small but permanent increase in prices is profitable for set of products and geographical areas.[62]

Nevertheless, various scholars argue that the traditional tools used for competition analysis such as SSNIP test will not work properly without significant modification. [63] It mainly results from the multi-sided business models of online platforms and network effects caused by this multi-sidedness. Also, distinctive pricing structure of these platforms which is again caused by the multi-sidedness can be another explanation.

First of all, due to the multi-sided business model of online platforms, more than one market can be relevant for market definition. For the analysis, linkages in demand are important. Thus, isolating one customer group and making the analysis based on it could be problematic.[64] There seems to be a consensus on the fact that multi-sidedness of the platforms should be taken into account while defining the market. However, a question arises regarding whether an online platform should be seen as one market or multiple markets should be defined. There are varying perspectives on this issue.

According to Bundeskartellamt[65], in certain cases, like in case of matching platforms, defining only one market can be feasible as the actual product of the platform is to connect two different user groups. In this case, German competition authority makes a distinction between matching feature of platforms. Another perspective offered for the choice between one or multiple markets is the distinction between transaction (e.g. payment cards) and non-transaction platforms (e.g. newspaper). *Filistrucchi et al.*[66] argues that in non-

[61] *Amelio/ Donath,* Law & Economics, 2009, p.1.
[62] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.
[63] *Filistrucchi/ Geradin/ van Damme/ Affeldt,* JCLE 2013, p.2.
[64] *Gürkaynak/ İnanılır / Diniz /Yaşar* (fn.31), p. 109.
[65] Bundeskartellamt, The Market Power of Platforms and Networks Working Paper, 2016, BKartA, B6-113/15, p. 5.
[66] *Filistrucchi/ Geradin/ van Damme/ Affeldt* (fn.63), p. 29.

transaction markets two interrelated markets should be defined whereas in transaction markets single market should be defined. Besides, in OECD report[67], pros and cons of two alternatives were discussed and at the end, it is found out that as long as the interdependencies and all competitive forces on each side of the market is taken into consideration, both approaches can be considered appropriate.

Moreover, owing to indirect network effects between different customer groups, while calculating the profitability of a potential price increase in one side of the market, feedback of the other customer group should also be taken into account.[68] Because the price increase in one side may affect the other side so much that overall benefit could turn out to be zero. Also, this situation raises the question of whether the price will be increased at one side or on both sides. For the correct assessment of competitive constraints faced by firms, both sides of the market should be taken into consideration.[69]

Another challenge is how to define zero priced markets. SSNIP test examines the substitutability of the products. Firstly, it starts with a single product for the smallest market definition and expands the definition with other products until a hypothetical monopolist can profitably increase its price 5-10%. For zero price markets, 5-10% price increase means that zero price will remain which makes the test inconvenient. Nevertheless, it should not direct us to the result that there is no market. In this case, "no payment, no market" rule should not be applied as using of online platforms for free can still be regarded as a market according to antitrust considerations.[70] As it is referred earlier, both sides are closely connected and the platform operator pursues its pricing strategies accordingly. Although customer pays no price, paying may take other forms such as by being exposed to advertisements or by providing its data.[71]

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[67] OECD Directorate for Financial and Enterprise Affairs Competition Committee, Market Definition in Multi-sided Markets, 2017, DAF/COMP/WD(2017)33/FINAL, p.4-5.
[68] *Budzinski/ Stöhr,* (fn.19), p. 22.
[69] *Filistrucchi/ Geradin/ van Damme/ Affeldt* (fn.63), p.24.
[70] Bundeskartellamt (fn.65), p. 6.
[71] European Parliament, Challenges for Competition Policy in a Digitalised Economy, 2015, IP/A/ECON/2014-

All in all, existing methodologies to assess market definition have been developed for standard products and services. Nevertheless, in today's digitalized world, it seems difficult to identify properly defined markets. Therefore, more emphasis should be put on the theories of harm and identification of anti-competitive strategies instead of focusing on market definition.[72]

3.2.2 Market Power

The next step for the application of Article 102 is to assess the degree of market power that undertaking has. Commission's Communication on its enforcement priorities in applying Article 82 of EC Treaty (now 102 of TFEU) to abusive exclusionary conduct by dominant undertakings[73] provides guidance on the assessment of dominance. Accordingly, market shares provide a useful indication of the market structure and the relative importance of other undertakings in the market. However, in this Communication, it is also underlined that Commission will interpret the market shares by taking into account the relevant market conditions and the dynamics of the market.

In this context, whether traditional market power assessment methods can be used for online platforms by competition authorities is again an important consideration. Whereas the market shares were common tool to assess market power, it may not be easy to identify the market shares in online platforms. Also, these identified market shares may not be accurate indicators of market power. Thus, various scholars pointed out that market shares used for assessing market power should be done cautiously.[74] Difficulties mainly result from the same reasons indicated for market definition.

PE 542.235, p.55.

[72] European Commission, Competition Policy for the Digital Era, 2019, ISBN 978-92-76-01946-6, doi:10.2763/407537, p.46.

[73] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009.

[74] *Evans* (fn.5), p.29.

First of all, since online platforms have multi-sided structure, market shares in each market may differ and makes it complicated to compare the shares either individually or collectively.[75] In order to determine market power, competition authorities generally utilize methods like assessing concentration ratios, market shares and price levels.[76] Nevertheless, as indicated earlier, some services are offered for zero price or for little profits. However, this does not mean that undertakings do not have market powers, as we may see in the examples of Facebook, Instagram etc. While assessing the market power, considering other interdependent sides is crucial.[77]

Also, dynamic structure of the online platforms is another important threat for the correct assessment of market power as their market shares can change dramatically in short period of time. On one side, they may expand their market shares by easily adding new features and therefore entering into new markets. On the other hand, they may lose their market shares as well. Certain multi-sided platforms once accepted as dominant players failed to protect their market power and lost significant market shares.[78] Internet Explorer and MySpace can be good examples for this. In this context, while making market power analysis, constraints imposed by dynamic competition should be considered as well.[79]

Hence, it is argued that quantifying the market shares while assessing the anticompetitive effects has lost its dominant role.[80] In this regard, OECD Handbook[81] also points out that assessments of dominance and market power cannot be based solely on market shares, instead they should be based on substitutability and entry barriers including network effects. Bundeskartellamt specified several specificities that should be taken into consideration while

[75] *Mandrescu* (fn.4), p. 412.
[76] European Parliament, Challenges for Competition Policy in a Digitalised Economy, 2015, IP/A/ECON/2014-
PE 542.235, p.56.
[77] *Evans* (fn.5), p.3.
[78] *Gürkaynak/ İnanılır / Diniz /Yaşar* (fn.31), p. 111.
[79] *Evans* (fn.5), p.4.
[80] *Budzinski/ Stöhr* (fn.19), p. 49.
[81] OECD, Handbook on Competition Policy in the Digital Age, 2022, p. 22, available at https://www.oecd.org/daf/competition-policy-in-the-digital-age/ (20 June 2022).

assessing the market dominance of online platforms which are network effects, economies of scale, single/multi-homing and differentiation, access to data and innovation potential.[82] This concern is started to be taken into consideration by the Commission as well. Commission applied elements of platform economics such as network effects to assessment of markets, market power and anti-competitive effects in recent cases.[83]

Having presented current EU legal framework, examining how these rules are applied in practice to online platforms can be beneficial. Therefore, in the next chapter, two important cases will be analysed to demonstrate the enforcement.

4 EU JURISDICTION

New concepts and challenges related to online platforms and existing competition rules regarding them have been put forth in the previous chapters. However, to see the practical approach of the Commission and CJEU towards online platforms, two high profile cases namely Google Shopping and Amazon Marketplace cases will be examined in this chapter.

4.1 Google Search Case

In June 2017, European Commission issued a decision[84] about Google for abusing its dominant position as a search engine by favouring its own comparison shopping service over competing comparison shopping services. Decision resulted a record fine of 2.42 billion Euro on Google. Undoubtedly, this decision of the Commission was appealed by Google in September 2017. In November 2021, General Court issued its long-awaited judgment and largely confirmed the Commission's position. Since this judgment will have important reflections on

[82] Bundeskartellamt (fn.65), p. 9.
[83] *Budzinski/ Stöhr*, (fn.19), p. 45.
[84] Commission Decision, Case AT.39740 *Google Search (Shopping).*

antitrust case law, firstly a brief background will be provided about the case and then important aspects of the judgment will be examined.

4.1.1 Background of the Case

Due to the complaints lodged to the Commission, case against "Google Shopping" was started in November 2009; and in 2010, the Commission initiated a procedure against Google. After a long investigation period, which took 7 years, Commission announced its phenomenal decision imposing record fine to Google for abusing its dominant position.

With its decision, Commission declared that Google's more favourable positioning and display of its own comparison shopping service in general search results infringes Article 102 of TFEU and Article 54 of EEA Agreement.[85] In this context, it is ordered that Google and its mother company Alphabet Inc. should bring the infringement to an end immediately and a fine of 2.42 billion Euro[86] was imposed for the abusive conduct starting from the date of 1 January 2008.

4.1.2 Contested Decision

While assessing a competition case, definition of the relevant market of both product and geographic dimension has a definitive influence.[87] First of all, the Commission defined two different relevant markets for this case, which are market for general search services and market for comparison shopping services. As it is stated earlier, market definition plays an essential role for the assessment of antitrust cases in two-sided markets. According to the

[85] Infringement of Article 102 in relation to the national markets for specialized search services in 13 countries (Belgium, Czech Republic, Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the UK and Norway).

[86] The European Commission imposed a pecuniary penalty on Google of €2 424 495 000, of which €523 518 000 jointly and severally with Alphabet, its parent company.

[87] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.

Commission, comparison shopping services are not interchangeable with the services offered by online search advertising platforms, online retailers or specialized search services in different areas like hotels, restaurants etc.[88] Due to this limited substitutability, general search services and comparison shopping services markets are defined as separate markets. With regard to the relevant geographic market, Commission concluded that both markets are national in scope.[89]

The next step in the assessment is the market power in the relevant market. This assessment requires the combination of various factors. In this context, by taking into consideration the high and stable market shares of Google, existence of expansion and entry barriers, Google's reputation and lack of countervailing buyer power, Commission found that Google held a dominant position on the general search services market.[90] It was the case in all 31 EEA countries since at least 2008, except Czech Republic[91] where it held this position since 2011. Market shares were exceeding 90% in most of the countries. Moreover, it seems that due to the network effects referred earlier, there were quite high entry barriers.

As regards to the characterization of the abuse, Google's features should be taken into consideration. Google's main product is the general search engine which provides search results for consumers. It generates revenues through advertisement activities and the consumers pay via their data.[92] Google entered the comparison shopping market in 2004 with "Froogle" which is renamed as "Google Product Search" in 2008 and "Google Shopping" in 2013.[93] Comparison shopping service enables the consumers to compare products and prices from all type of online retailers.

Google gave prominent placement to its own comparison shopping service in such a way that the results were positioned and displayed in an eye-catching

[88] Commission Decision, Case AT.39740 *Google Search (Shopping),* para.191.
[89] *Ibid.*, para. 251.
[90] Commission Decision (Summary), Case AT.39740 *Google Search (Shopping),* para 8.
[91] Czechsia
[92] Press release - "Commission fines Google €2.42 billion for abusing dominance", 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (25 June 2022).
[93] *Ibid.*

manner and in dedicated boxes. On the other hand, rivals' comparison shopping service results could appear only as a general search result through typical blue links and due to the demotions, even the highly ranked ones could appear in the fourth page or more.[94] Commission also examined this positioning's effect on the volume of traffic through Google general search page to comparison shopping services pages. Consequently, Commission found that Google's more favourable positioning and display diverts traffic from competing comparison shopping services, as consumers tend to click more on links which are more visible on the general search results page.[95] By taking into consideration these various factors, Commission concluded that Google has leveraged its dominant market position in general internet search market into another market which is comparison shopping and it is not considered as competition on merits and therefore illegal under EU antitrust rules.[96]

4.1.3 Judgement of the General Court

Even before the Commission's decision was adopted, this investigation had triggered debates in the literature. After the adoption, Commission's interpretation of favouring (self-preferencing), exclusion of merchant platforms from the market definition and test used for assessing product improvements had been subject of intensive debates.[97] After that Google appealed the decision by mainly arguing that its actions do not likely to have anticompetitive effects as its conduct was a quality improvement in its online search service and thus competition on the merits. Moreover, duty imposed on Google by Commission is alleged to be in violation of the Bronner[98] case law so it cannot be objectively justified.

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[94] *Ibid.*
[95] Commission Decision, Case AT.39740 *Google Search (Shopping),* para. 598.
[96] Press release - "Commission fines Google €2.42 billion for abusing dominance", 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (25 June 2022).
[97] *Vesterdorf / Fountoukakos,* JECLP 2018, p.3.
[98] Judgment in *Bronner,* Case C-7/97, ECR, EU:C:1998:569.

With its 10 November 2021 judgment, General Court dismissed the most part of action brought by Google and upheld the fine imposed by the Commission. Court's judgment may have wide ranging implications for EU antitrust law and especially regarding the application of Article 102 of TFEU. On this basis, Court's judgment will be analysed based on certain important points.

4.1.3.1 Competition on the merits

One of the most important aspects of the decision was the competition on merits. Google alleged that its conduct was a quality improvement in its online search service therefore should be considered as competition on merits and not an abusive conduct. Google also claimed that since Commission asserts that Google failed to make its technologies and designs accessible to results from competing comparison shopping services, it should have established the conditions specified in the Bronner judgment.

On this basis, Court firstly pointed to the dominant firms' special responsibility to not to impair the competition[99] and Article 102's prohibition of adopting practices with exclusionary effect with methods that do not fall under competition on merits[100] and expressed that abusive practices contained in the Article 102 is not exhaustive.[101] Moreover, Court stated that not every exclusionary effect is necessarily detrimental to competition and, by referring to the Intel[102] judgment, asserted that competition on merits may lead to departure from the market or marginalization of less attractive competitors.[103]

Court stated that even on the scale of Google's position, dominant position alone cannot be declared unlawful under Article 102[104] and mere extension of a dominant position to a neighbouring market cannot be considered as a proof of

[99] Judgment of 10 November 2021, *Google Shopping,* T- 612/17, EU:T:2021:763, para. 150.
[100] *Ibid.*, para.152.
[101] *Ibid.*, para.154.

[102] Judgment in *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, para. 134.
[103] Judgment in *Google Shopping,* cited above (fn.99), EU:T:2021:763, para.157.
[104] *Ibid.*, para.159.

conduct departing from normal competition.[105] Moreover, although leveraging practices are not prohibited under Article 102, several kinds of them can be found contrary, as in the example of Microsoft.[106, 107]

Also, Court considered three important aspects pointed out by the Commission which lead to the weakening of competition on the market, namely (i) importance of the traffic generated by Google's general search engine for comparison shopping services, (ii) online search users' behaviours and (iii) large proportion of diverted traffic which cannot be effectively replaced.[108] Court reached to the conclusion that Google departed from the competition on the merits by favouring its own comparison shopping service through more favourable positioning and display, while on the other hand demoting the rivals' search results with ranking algorithms.[109]

Besides, Court made further points to support the arguments on deviation from competition on merits. Court considered Google's favouring its own specialized results over the others as a certain form of abnormality, as general search engines' rationale and value lie in their capacity to open and display search results from multiple and diverse external sources on its general results page.[110] Also, Court asserted that after experiencing a failure of its dedicated comparison shopping web page, Google changed its conduct in such a way that it promoted its own specialized search results while the visibility of the rivals' result diminished.[111] Thus, this conduct cannot constitute competition on the merits.[112]

In this case, it can be seen that favouring is considered as a certain type of leveraging. Court stated that not all kinds of leveraging are prohibited under Article 102. Thus, in order to prove that leveraging constitutes an anticompetitive practice, Commission cannot rely solely on the effects of the conduct. It should

[105] *Ibid.*, para.162.
[106] *Ibid.*, para.164.
[107] Judgment of 17 September 2007, *Microsoft v Commission*, T‑201/04, EU:T:2007:289, para. 1344.
[108] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para.169.
[109] *Ibid.*, para.185.
[110] *Ibid.*, para.178 & 179.
[111] *Ibid.*, para.184.
[112] *Ibid.*, para.185.

also be considered that conduct does not fall under the scope of competition on the merits. Court stated its reasons while it cannot be considered competition on the merits in this case but it is not known if these conditions can be applied in other cases as well.

As it is stated earlier, whether Bronner conditions should apply was one of the controversial issues. Google argued that Commission penalised the practices at issue without establishing the conditions set out in Bronner judgment.[113] In other words, Google argued that Commission should have demonstrated that without access to Google's services all effective competition could be eliminated therefore its service was indispensable for competing comparison shopping services. In this regard, Court stated that conditions of competing comparison shopping services' access to Google's general results page should be considered[114] and Google's general results page has similar characteristics to an essential facility where there is no substitute available that would enable to be replaced in an economically viable manner on the market.[115]

Court referred to Commission's finding that generic search traffic from Google's general results page could not be effectively replaced by other sources, therefore Google's service is indispensable for competing comparison shopping services.[116] However, Court also stated that not every issue of access necessarily means that Bronner conditions of refusal to supply must be applied.[117] In this context, Court stated that for the application of these conditions, (i) refusal to supply should be express, meaning that there should be a request and a consequential refusal and (ii) exclusionary effect should be triggered by the refusal.[118] Court also contended that Google's practice is not concerned as a unilateral refusal to supply a service that is necessary for competing undertakings to compete on the neighbouring market which would justify the

[113] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para.137.
[114] *Ibid.*, para. 219.
[115] *Ibid.*, para. 224.
[116] *Ibid.*, para. 225.
[117] *Ibid.*, para. 230.
[118] *Ibid.*, para. 232.

application of essential facilities doctrine.[119] Instead, it is an internal discrimination through leveraging from a dominated market.[120] In the light of these considerations, Court concluded that Commission was not required to establish Bronner conditions.[121]

4.1.3.2 Discriminatory Practices

Another important allegation of the Google was related to the discriminatory practices referred in the contested decision. Google argued that practices at issue was not discriminatory because to improve the quality of its results, it treated different situations differently, namely it applied different mechanisms to generate product results and generic results.[122] Thus, Google accepts that it treated differently. However, although Google claimed that differentiated treatment is based on the nature of the results produced, Court found that it is rather based on the origin of the results, more precisely whether they come from competing comparison shopping services or Google's own service.[123] The reason is that only Google's specialized search results can appear in the boxes displayed in rich format, while even if the results from competing comparison services would be particularly relevant they were demoted in terms of their positioning.[124]

One of options to enhance competing shopping services' display results could be to appear in boxes in return for payments. However, this is only possible for seller or intermediary platforms. Therefore, according to the Court, this would require to change business model and become a customer of Google comparison shopping service, instead of being a competitor.[125] Thus, Google again could not convince Court.

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[119] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para. 238.
[120] *Ibid.*, para. 237.
[121] *Ibid.*, para. 240.
[122] *Ibid.*, para. 272.
[123] *Ibid.*, para. 285.
[124] *Ibid.*, para. 286 & 287.
[125] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para. 351.

4.1.3.3 Anti-competitive Effects

One of the most profound part of the decision was related to the anticompetitive effects. Google argued that Commission failed to establish causal link between Google's practices have led to decrease in traffic from Google's general search result pages to competing comparison shopping services.[126] In this regard, Court emphasized that Commission took into account combination of two practices of Google, namely (i) showing its own comparison shopping service results in a prominent and eye-catching manner in dedicated boxes and (ii) showing the competing comparison shopping services' results in the form of typical blue links.[127] Thus, selection criteria chosen by Google is not contested, instead, the fact that results were not treated in the same manner with regard to positioning and display is questioned.[128]

Court also stated that Commission does not have to provide counterfactual scenario in order to demonstrate an infringement of Article 102 of TFEU as it would oblige it to show that the conduct had actual effects, whereas it is sufficient to provide that there are potential effects.[129] In order to establish actual or potential effects, Commission may rely on other information such as market participants, suppliers, customers etc. that demonstrate causal link, whereas in some circumstances undertaking may put forward the information to cast doubt on causality.[130] In this context, Court referred to the Commission's findings regarding the visibility of a result and its impact in traffic, more concretely, showing the decrease in traffic from Google's general result pages to competing comparison shopping services due to Google's conduct. At the end, Court concluded that while the Commission showed the disputed practices had led to a decrease in generic search traffic to almost all of competing comparison

[126] *Ibid.*, para. 358.
[127] *Ibid.*, para. 369.
[128] *Ibid.*, para. 370.
[129] *Ibid.*, para. 378.
[130] *Ibid.*, para. 382.

shopping services, Google failed to prove the contrary.[131] Thus, Google's argument is rejected.

Google's another argument was related to the alleged speculation of anticompetitive effects. In this context, Google argued that Commission failed to show the practices could have had anticompetitive effects leading to higher prices and less innovation and role of Google's competitors- merchant platforms- were not taken into consideration.[132] According to Court, in order to categorize a conduct as an abuse of a dominant position, an anticompetitive effect should be demonstrated, however Commission is not required to identify actual exclusionary effects, showing the potential anticompetitive effect would be sufficient.[133] In this context, Commission had identified several potential anticompetitive effects in the specialized comparison shopping services markets, namely causing rivals to cease their activities, reducing their incentive to innovate, reducing Google's incentive to innovate as well, reducing consumers' ability to access to best performing services.[134]

However, as regards to the anticompetitive effects in the general search market, Commission's argument that Google was protecting revenue generated by specialized search and in turn using this revenue to finance its general search service was not upheld by the Court.[135] Thus, Commission's finding of an infringement in respect of general search market is annulled.[136] Moreover, Google's argument that due to the presence of merchant platforms on the market, competition on the market for comparison shopping services remains strong was rejected, as those platforms are not considered on the same market.[137]

Lastly, as there was a possibility of an appeal, Google used this opportunity. The company decided to appeal the General Court's decision and asked for further

[131] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para. 394.
[132] *Ibid.*, para. 421.
[133] *Ibid.*, para. 438 & 442.
[134] *Ibid.*, para. 451.
[135] *Ibid.*, para. 456.
[136] *Ibid.*, para. 459.
[137] Judgment in *Google Shopping*, cited above (fn.99), EU:T:2021:763, para. 476.

legal clarification from European Court of Justice (ECJ) on January 2022. ECJ will have the last say on this decision.

4.1.4 Critical Analysis of the Decision

General Court's judgment dismissing Google's appeal of the European Commission's decision is a milestone in EU antitrust law. Even if there were criticisms to the content of the decision, it should be keep in mind that decision has comprehensive background work and provides in-depth argumentation.

Principally, it takes into account the facts of the digital world. In this context, in order to determine the anticompetitive practice, defining two different relevant markets and making the assessment based on their interaction was an important aspect. However, market definition that is used by the Commission can be seen questionable from one side. Since Google only offers comparison service, while other merchant platforms like Amazon, eBay offer both price comparison opportunity and buying option, they were not included in the market definition.[138] Nevertheless, whether they should be disregarded seems equivocal because it is also argued that since Google act as an intermediary linking consumer and advertiser side, it should be defined as one market and competing business models like Amazon also put competitive constraints to Google.[139] Therefore, not including merchant platforms in the market definition seems problematic.

One of the most important aspects of the decision is that it clearly states that self-preferencing constitutes an independent form of an abuse under Article 102 if it creates exclusionary effects. It is argued that legal test for independent discrimination applied in this Decision can be transferred to other possible cases.[140] On the other hand, it is also stated that clear legal test to show which

[138] *Lamadrid/ Ibañez Colomo,* Google Shopping Decision, 2017, available at https://chillingcompetition.com/2017/06/27/google-shopping-decision-first-urgent-comments/ (25 June 2022)
[139] *Broos/ Ramos,* The Antitrust Bulletin, 2017, p. 10.
[140] *Hornkohl,* JECLP 2022, p. 111.

elements should be considered for a self-referencing practice to qualify as an abuse of dominance is still missing in the Court's decision.[141] In this decision, it seems that the boundaries of Article 102 of TFEU is pushed to the limits and for the future cases, this article can be used to intervene to dominant undertakings' product and service designs. Thus, boundaries of dominant firms' equal treatment obligation seem to remain vague. It can also be inferred that this vagueness reassures the need for ex-ante rules foreseen in DMA for the prohibition of self-preferencing.

Court confirmed that self-preferencing, itself is not an abuse and even the extension of power could be considered as competition on merits. In order to establish an anticompetitive conduct, more is needed. According to Court, a conduct must depart from normal competition, more precisely, "abnormality" should be observed. In this case, Court referred to the facts causing abnormality, namely search engine should be open to results from external sources. However, as these conditions may not apply in other cases, this referral seems obscure. On the other hand, Google's change of conduct and demotion of rivals' results have more concrete grounds.

As regards to the application of Bronner criteria, Court refers to a large number of case law[142], however, none of them refers to the two criteria laid down in this case[143], namely (i) request and refusal and (ii) exclusionary effect triggered by this refusal. According to Court, in order to apply Bronner criteria, these two conditions should be fulfilled. As there was no formal request to supply that could be refused, these conditions do not apply here and Bronner criteria were not applied. Instead, Court referred to the difference in treatment. Thus, these two conditions to apply Bronner criteria can be precedent for the future cases.

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[141] *Elias*, European Papers 2021. p. 1348.
[142] Judgment in *Commercial Solvents v Commission*, Joined Cases C- 6/73 and 7/73, EU:C:1974:18;
Judgment in *CBEM*, Case C- 311/84, EU:C:1985:394;
Judgment in *RTE and ITP v Commission*, C‑241/91 P and C‑242/91 P, EU:C:1995:98;
Judgment in *Bronner*, Case C‑7/97, EU:C:1998:569;
Judgment of *Tiercé Ladbroke v Commission*, Case T‑504/93, EU:T:1997:84;
Judgment of *Microsoft v Commission*, Case T‑201/04, EU:T:2007:289.
[143] *Lindeboom*, JECLP 2022, p. 66.

Undoubtedly this decision can be regarded as a valuable source to see what constitutes anticompetitive effects and how to show these effects. For the assessment of abusive conduct, both the consumer behaviour and traffic diversion were taken into consideration. These new criteria can be precedent for the following cases. Moreover, Court carried out an in-depth review regarding the Commission's evidences and annulled the part of the judgment. This demonstrates that Court's analysis of the potential effects will not be merely formal.[144]

Remedy was another controversial aspect as the decision does not specify specific remedy. Instead, it required the Google to bring the abuse to an end and refrain from any conduct or act that would have the same or similar effect. In other words, it is left to Google to choose a remedy that will effectively bring the infringement to an end. Although it seems that it protects Google's freedom, it may create ambiguity again. Should Google stop advertising its own comparison shopping service totally? Or if Google is required to behave the sponsored and non-sponsored ones in the same way which will create an unfair advantage. This situation also leads to debate regarding whether DMA enforcement will enable the Commission to effectively design the remedies.

Besides, due to the constraints of the existing law, both the Commission and the General Court has substantial law-making discretion which may raise the issue of legitimacy concern. [145] As the recent antitrust cases concerning online platforms generally targets the US giants, EU should rule out this legitimacy concern. In this context, constraints of the existing law should be eliminated with necessary adjustments in legislation.

Last but not least, apart from its legal importance, the decision has also some other important implications. Most importantly, political aspect of this decision also comes into question. Especially in the last two decades, EU's competition policy is used as a tool to combat with the US tech giants. From the criticism it

[144] *Bezzi*, JECLP 2022, p. 124.
[145] *Lindeboom* (fn. 143), p. 63.

can be observed that the decision was seen as highly political decision. Some even argue that competition policy in its form today is used as a legal mean to serve a political objective. Thus, this situation also reveals the need for a new regulation need in this area.

4.2 Amazon Marketplace Case

Similar to Google Shopping, there is another important investigation initiated by European Commission in recent years. On 17 July 2019, Commission started a formal antitrust investigation procedure against Amazon in Case AT. 40462 in order to assess whether its use of sensitive data from independent retailers that operate on its marketplace breaches EU competition rules. Amazon's practices are scrutinized by the Commission as it has dual role as a platform, namely sells products on its platform as a retailer and at the same time it provides a platform to independent sellers that can sell products to consumers directly.

According to Commission's first assessments Amazon collects data about the activities of independent sellers in its platform regarding sellers, their products and transactions on the market place and uses this commercially sensitive data.[146] In this regard, Commission focused on agreements between Amazon and sellers that allow Amazon to analyse and use the marketplace seller data as a retailer and their effect on competition. Also, Amazon offers a Buy Box that is displayed prominently and allows the customers to add items to their shopping carts directly and most of the transactions are realized with this utility. As this tool plays an essential role for sellers, Commission also looks into details of the role of data in the selection of sellers that will be displayed in Buy Box.

As a result, Commission sent the Statement of Objections to Amazon on 10 November 2020 regarding Amazon's use of non-public independent seller data to benefit of its own retail business. Amazon collects commercially sensitive data

[146] Press release - Commission opens investigation into possible anti-competitive conduct of Amazon, 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291 (3 July 2022).

such as independent sellers' orders, revenues on the marketplace, number of visits etc. As these data directly accessible to Amazon's retail business employees, they use these data to arrange Amazon's offers and to shape strategic business decisions to the detriment of these sellers.[147] According to the Commission, that enables Amazon to get rid of the risks of retail competition and to leverage its dominant position in marketplace services in France and Germany which are the biggest markets in the EU for Amazon. The reason is that Amazon can offer lower prices compared to original sellers thanks to use of third-party data that is unfairly obtained.

At the same day, Commission initiated another investigation[148] as regards to Amazon's practices related to Buy Box and Prime Label. Commission decided to investigate the criteria used for the selection of sellers that will be displayed in BuyBox which is exhibited prominently on Amazon's websites and permits customers to add items from a specific retailer directly into their shopping carts. Additionally, whether market place sellers can effectively reach Prime users is another area of concern for the Commission. As these users generate more sales compared to non-prime members, reaching these customers is important for the sellers.

As it can be seen in the case of Amazon, if platforms both perform the service and act as the content provider, they tend to favour their own contents and services at the expense of rivals.[149] In recent years, there is a growing belief that these differentiated treatments by favouring may produce anticompetitive effects but how to analyse these conducts remains uncertain and there is no clearly established standards.[150] Therefore, this case is another challenge for the Commission.

In addition to the difficulties regarding defining market and Amazon's dominance on it, finding a fitting theory of harm is also hard. For this case,

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[147] Press release - Commission sends Statement of Objections to Amazon, 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (3 July 2022).
[148] Case AT.40703 Amazon – Buy Box
[149] *Budzinski/ Stöhr* (fn.19), p. 20.
[150] *Reverdin*, JECLP 2021, p. 182.

Commission has to come up with credible theory of harm. Principally, Commission can make inferences from Google Shopping case, but in Amazon's case, use of third party seller data seems to be at the heart of the investigation. Thus, self-preferencing behaviour of Amazon does not fit precisely with the existing case law.[151]

It is argued that these anticompetitive concerns can be captured better with an approach towards preserving a competitive process and market structure instead of focusing consumer welfare.[152] The reason is that if the possible harm to competition is assessed primarily through price and output, it will be misleading, as in the short term consumers will benefit from low prices. Nevertheless, self-preferencing can take other forms that would create anticompetitive effects. For instance, Amazon's unfair usage of Amazon Prime to force independent sellers to use its logistics services reduces the competitiveness of other logistics providers.[153] Consequently, it may lead to crowding out of these logistics providers from the market.

Fortunately, to address the Commission's concerns, Amazon came up with commitments pursuant to Article 9 of Regulation No. 1/2003 on the implementation of competition rules. Accordingly, first of all, Amazon committed not to use non-public data relating to, or derived from, the activities of independent sellers on its marketplace, for its retail business that competes with those sellers. With regard to Buy Box, Amazon committed to apply equal treatment to all sellers for the purposes of identifying the offer displayed in the Buy Box (the 'Featured Offer'). Also, it will display a second competing offer to the Featured Offer if there is a second offer that is sufficiently differentiated from the first one on price and/or delivery. Regarding Prime Amazon, it will set non-discriminatory conditions and criteria for the Prime eligibility of third party sellers and offers, it will allow Prime sellers to freely choose carriers and negotiate rates and commercial terms with those carriers and it will not use any

[151] *Ibid.*, p. 199.
[152] *Khan*, The Yale Law Journal 2017, p. 716.
[153] *Bougette /Budzinski/ Marty*, The Antitrust Bulletin 2022, p. 192.

data relating to the terms or performance of third party carriers for its own logistics operations.

These commitments will apply to all current and future market places in EEA[154] and they will remain in force for 5 years. In accordance with Article 27(4) of Regulation (EC) 1/2003, the Commission invited interested third parties to submit their observations on the proposed commitments.[155] The Commission intends to adopt a decision under Article 9(1) of Regulation No. 1/2003 to make those commitments binding. These commitments will allow Amazon to avoid huge penalty that would cost billions of Euros.

To sum up, these two cases demonstrate that how challenging it is to make antitrust assessments regarding online platforms. Each of them has its way of doing business and making correct assessments require analysing complex data. In the next chapter, new regulatory tool of the EU will be examined to show in which ways it is expected to help controlling the power of giant online platforms.

5 DIGITAL MARKETS ACT

[154] In view of the decision of 30 November 2021 of the Italian Competition Authority which already imposed remedies on Amazon, commitments regarding Buy Box and Prime will not apply in Italy.

[155] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40703 Amazon – Buy Box and AT.40462 - Amazon Marketplace (C(2022) 5078) 2022/C 278/06 C/2022/5078.

Modernizing the existing competition tools to address structural competition problems in a timely and efficient manner has been in the agenda of the European Commission in the last years. Executive Vice-President in charge of competition policy Margrethe Vestager has always underlined the need to fit the competition rules to rapidly changing and increasingly digitalized world.[156] Against this background, in June 2020, Commission opened a public consultation to explore the need for a new competition tool.[157] Then, Commission came up with a proposal for Digital Markets Act (DMA) which was published on 15 December 2020.

DMA seems to confront the main deficiencies of competition law in online platforms, namely being slow in antitrust proceedings and remedies that are not deterrent enough.[158] In this context, DMA foresees an ex-ante intervention principle, in other words it aims to intervene before the harm on the market is realized. Therefore, with this new regulatory framework, it is envisaged that certain companies will be qualified as gatekeepers and they will have specified obligations to guarantee contestable and fair digital markets. As this means an intervention to how big tech giants will operate in European digital markets, the Proposal has come with the criticisms. Thus, in this Chapter, the main content of the Proposal will be revealed, comments from different stakeholders will be put forth and lastly certain conclusions will be drawn.

5.1 Content of the Proposal

Reasons for and objectives of DMA is thoroughly presented by the Commission via legal text of the Proposal. Accordingly, first of all, benefits of the digital services like increasing consumer choice, improving efficiency and

[156] Press release - Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms, 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_2450 (5 July 2022)
[157] Public consultation regarding new complementary tool to strengthen competition enforcement, 2020, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en (5 July 2022)
[158] *Monti*, ECRLR 2021, p. 90.

competitiveness of the industry and enhancement of civil participation are mentioned.[159] However, it is also highlighted that although more than 10,000 online platforms operate in Europe, only limited number of large online platforms captures the benefits of the overall value generated.[160]

Besides, common characteristics of these large online platforms are cited as having strong network effects, intermediating the majority of transactions between business users and end users, enjoying entrenched and durable position which reinforces existing entry barriers.[161] These characteristics seem to be the referral point for the Commission in defining the criteria for qualifying the companies as "gatekeepers". DMA will apply to *"…core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union…".*[162] In this context, before anything else, it is important to touch upon the concepts referred in DMA, namely core platform services and gatekeepers.

According to Article 2 of DMA, eight services are specified as core platform services and these services covers online intermediation services, online search engines, online social networking services, video-sharing platform services, interpersonal communication services, operating systems, cloud computing services and advertising services. However, within the context of Article 17, Commission has the discretion to conduct an investigation in order to examine whether new categories should be added to this list.

Then, Article 3(1) specifies three criteria that core platform service has to fulfil in order to be designated as gatekeeper. In this regard, if a provider of a core platforms service (i) has a significant impact on the internal market, (ii) operates important gateway(s) for business users to reach end users, (iii) enjoys or possible to enjoy an entrenched and durable position in its operations, it should be designated as gatekeeper.

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[159] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15.12.2020, COM/2020/842 final.
[160] *Ibid.*
[161] *Ibid.*
[162] Article 1(2) of DMA

For each of these quantitative criteria, certain qualitative threshold is set with Article 3(2). To have a significant impact on the internal market signifies having an annual turnover in European Economic Area equal to or above 6.5 billion Euro in the last three financial years, or average market capitalisation or the equivalent fair market value of the undertaking amounting to at least 65 billion Euro in the last financial year, and providing a core platforms service in at least three Member States. Operating important gateway between business users and end users means having more than 45 million monthly active end users [163] established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year. Lastly, enjoying an entrenched and durable position requires fulfilling the two criteria mentioned regarding number of users in each of the last three financial years.

If these thresholds are met by a provider of a core platform service, it is considered as a gatekeeper and it should notify the Commission within three months after those thresholds are satisfied.[164] Then, Commission has 60 days to designate the core platforms service that meets all thresholds as a gatekeeper.[165] Also, core platform service provider may demonstrate that it does not satisfy the requirements to be considered as a gatekeeper by presenting sufficiently substantiated arguments with its notification.[166] Nevertheless, Commission has still the discretion of conducting a market investigation and designating a core platform service as a gatekeeper in accordance with the procedures foreseen in Article 15. In this case, Commission may designate a core platforms service as a gatekeeper by taking into consideration certain factors such as size, entry barriers, structural characteristics etc.

When the core platforms service provider is designated as a gatekeeper, it has certain responsibilities to fulfil and to refrain from. Mainly Article 5 and Article 6 of DMA form the basis of this regime and lay down certain obligations for

[163] Nearly 10% of total EU population
[164] Article 3(3) of DMA
[165] Article 3(4) of DMA
[166] Article 3(4) of DMA

gatekeepers. Article 5 indicates seven general obligations which constitute the main pillar of the DMA. In this context,

a) Without the consent of the users, gatekeepers cannot combine personal data from the core platform service with data from other services offered by the gatekeeper itself or from third party services.
b) Gatekeepers should allow the business users to offer their products or services through other online mediation services at better prices or conditions.
c) Gatekeepers should allow business users to promote offers and conclude contracts with end users acquired via the core platforms service even if they do not use the core platform services of gatekeeper for that purpose.
d) Business users should not be restricted from raising issues with any public authority.
e) Gatekeepers should refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper.
f) Gatekeepers should not require business users or end users to subscribe to any other core platform service as a condition to access, sign up or register.
g) Upon request, gatekeepers should be transparent to advertisers and publishers to which it supplies advertising services in terms of ad relevance and revenue.

In addition to the directly applicable obligations stated in Article 5, other obligations susceptible to being further specified are listed in Article 6. These obligations hint Commission's intention to intervene the gatekeepers' ecosystems. They mainly aim to confront the gatekeepers' possible transformative practices in digital spheres. In this regard, these obligations designed to prevent strengthening, leveraging and exploitation of market power of gatekeepers.[167] These obligations can be summarized as follows:

[167] *Ibáñez Colomo* (fn.23), p. 565.

a) Gatekeepers should refrain from using any data, in competition with business users, which is not publicly available and generated or provided by business users of its platform services.
b) Gatekeepers should allow end users to uninstall preinstalled software applications on its core platforms service.
c) Gatekeepers should allow the installation and effective use of third party software applications or software application stores that use or interoperates with the operating system of that gatekeeper.
d) Gatekeepers should refrain from treating more favourably in ranking services and products of the gatekeeper itself or a third party belonging to the same undertaking.
e) Gatekeepers should not restrict the ability of end users to switch between different software applications when using the operating system of the gatekeeper.
f) Gatekeepers should allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are used by its own ancillary services.
g) Gatekeepers should provide advertisers and publishers with access to the necessary information to carry out their own independent verification of their advertisement hosted by the gatekeeper.
h) Gatekeepers should provide effective portability of data generated through the activity of a business user or end user.
i) Gatekeepers should provide business users with free of charge, effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data that is provided for or generated through using the relevant core platform service and the end users engaging with the products or services provided by those business users.
j) Upon request, gatekeepers should provide to any third party providers of online search engines, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to search generated by end users on online search engines of the gatekeeper.

k) Gatekeepers should apply fair and non-discriminatory general conditions of access to its software application store for business users.

Most of the practices listed in Article 6 seem to be related to the concern about leveraging market power from core platform service to adjacent services in other platforms. [168] For instance, Article 6 (1)(d) on prohibition of treating more favourably in ranking services and products offered by the gatekeeper itself or third parties belonging to same undertaking is related to the concerns raised in Google Shopping case.

Furthermore, according to Article 7, measures established to comply with the obligations specified in Article 5 and 6 should be "*effective in achieving the objective of the relevant obligation."* If the Commission finds that these measures do not ensure effective compliance within the context of Article 6, it may notify with a decision the measures that gatekeeper should implement. However, this specification made unilaterally by the Commission seems to undermine the cooperation between the Commission and undertakings referred in the preamble of the Proposal.[169]

Moreover, DMA contains other obligations, namely Article 12 obligation to inform about concentrations within the meaning of Merger Regulation and Article 13 regarding obligation of independently audited description of profiling techniques of consumers. Also, it allows suspension of (Article 8) or exemption for obligations (Article 9). In this context, Article 8 sets out the conditions under which obligations can be suspended for core platform service and Article 9 grants exemption possibility on grounds of public interest.

Besides, DMA includes provisions regarding enforcement and implementation. In this context, rules for market investigation procedures and also investigative, enforcement and monitoring powers of the Commission which are very similar to the antitrust proceedings are regulated. It also contains rules regarding request for information (Article 19), power to carry out interviews and take

[168] *Ibáñez Colomo* (fn.23), p. 565.
[169] *Monti* (fn.158), p. 94.

statements (Article 20), on-site inspections, ordering interim measures (Article 21). Moreover, it allows for the commitment procedure (Article 23) offered by the gatekeeper to ensure compliance with the obligations in Article 5 and 6.

Apart from these provisions, enforcement rules also comprise provisions regarding non-compliance and imposition of fines and periodic penalty payments. In case of non-compliance Commission may take non-compliance decision (Article 25) as well as it can impose fines (Article 26). Accordingly, if the Commission finds that gatekeeper fails to comply with obligations laid down in Article 5 and 6, it may impose fines up to 10% of its total turnover in the preceding financial year. Also, Commission may impose periodic penalty payments up to 5% of the average daily turnover in the preceding financial year per day, in case of non-compliance due to supplying incorrect, incomplete or misleading information, failing to provide access to data bases, refusing to submit to an on-site inspection etc. Moreover, if the gatekeeper systematically infringes the obligations laid down in Article 5 and 6 and further strengthens or extends its gatekeeper positions, Commission may impose behavioural or structural remedies to ensure compliance with the Regulation (Article 16). These non-financial remedies can even cause the divestiture of a business.

In sum, application of DMA provisions can be categorized under three steps. Firstly, gatekeepers that will be subject to DMA should be designated. Secondly, obligations that they have may be specified further. Lastly, gatekeepers' practices are closely watched and if there is an infringement, prohibition or imposition of a fine decision is given by the Commission. In all of these stages, Commission is the sole authority to enforce DMA provisions.

Proposal reveals that Member States have relatively limited role in the enforcement of DMA. According to Article 33, three or more Member States may request the Commission to open an investigation for the designation of core platform service as gatekeeper. Also, before taking certain decisions like non-compliance or imposing fines, Commission will be assisted by the Digital Markets Advisory Committee which is composed of Member States representatives.

Last of all, DMA Proposal follows the ordinary legislative procedure. Thus, in order to enter into force, both the European Parliament and the Council of the EU should approve it. On 15 December 2021, Parliament adopted its negotiating mandate by introducing certain changes to the Proposal. Also, several trilogue meetings between, Council, Parliament and Commission were realized. On 24 March 2022, European Parliament and the Council of the European Union reached a provisional political agreement on the Proposal and it was adopted by European Parliament on 5 July 2022. Then, it is also adopted by Council on 18 July 2022 and it is expected to be published in the Official Journal of the EU. It will enter into force on the twentieth day following that of its publication and it will apply from six months after its entry into force.

5.2 Stakeholder Views and Concerns

EU's intention with the new regulatory framework foreseen under the DMA is to enhance the opportunities for high tech European companies to become more competitive globally and indeed pave the way for accomplishing technological sovereignty that it is expecting. However, for most of the policymakers and business communities in the US, DMA proposal is seen as an attack towards US companies for being so large and successful in Europe.[170] Therefore, most of the criticisms seem to come from the US private sector. US Commerce Secretary in December 2021 pointed to the concerns on Proposal's possible disproportionate impact on US based tech firms that will affect their ability to serve EU customers and upholding security and privacy standards.[171]

According to US based policy research organization Center for Strategic and International Studies (CSIS), US stakeholders are mainly concerned for the DMA obligations' possibility to limit engaging in pro-competitive, efficient and

[170] Center for Strategic and International Studies, Implications of the Digitals Market Act for Transatlantic Cooperation, 2021, p. 7, available at https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation (7 July 2022).

[171] Politico EU - US pushes to change EU's digital gatekeeper rules, 2022, available at https://www.politico.eu/article/us-government-in-bid-to-change-eu-digital-markets-act/ (7 July 2022).

welfare enhancing practices.[172] The reason is that since for the application of ex ante rules, size of the company will matter and competition brought by the gatekeepers and investment incentives for future developments will be ignored.

Most of the concerns focus on DMA's possible harm on big tech companies' incentive to innovate.[173] For instance, Oxera which provided consultancy for big tech firms argued that DMA has the risk of reducing innovation overall and therefore causing lower economic growth and harm for European consumers.[174] The idea is that innovation is an important driver of long-term economic growth and the DMA has the potential to reduce the ability and incentives of providing innovative products to consumers and businesses if they are designated as gatekeepers.

Innovation concern has also another aspect. As the proposal contains obligations regarding self-referencing practices, core platform service and adjacent market relationship comes into question. In this context, London based think-tank Centre for European Reform (CER) argued that proposed rules should focus on increasing the competition on gatekeeper's core platform rather than tackling ancillary services.[175] For instance, for the success of ancillary service these companies may need huge amount of consumers and it can succeed it only by using its core platform.

Furthermore, definition of active end users is another area of concern. As stated earlier, number of active end users is one of the criteria to be designated a gatekeeper. However, big companies like Booking.com, Zalando, Wolt came together and via a letter asked from the Council to be cautious about this

[172] Center for Strategic and International Studies, Implications of the Digitals Market Act for Transatlantic Cooperation, 2021, p. 6, available at https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation (7 July 2022).

[173] Centre for European Reform (CER), No Pain, No Gain? The Digital Markets Act, 2022, p.5, available at https://www.cer.eu/publications/archive/policy-brief/2022/no-pain-no-gain-digital-markets-act (8 July 2022).

[174] Oxera, The impact of the Digital Markets Act on innovation, 2020, p.1, available at https://www.oxera.com/wp-content/uploads/2020/11/The-impact-of-the-Digital-Markets-Act-on-innovation_FINAL-3.pdf (8 July 2022).

[175] Centre for European Reform (CER), No Pain, No Gain? The Digital Markets Act, 2022, p.7, available at https://www.cer.eu/publications/archive/policy-brief/2022/no-pain-no-gain-digital-markets-act (8 July 2022).

definition as active end users are defined inaccurately as visitors.[176] In other words, end users that just visit the website/ app and end users who make a purchase from the website/app are different. If the end users that just visit the website/app are considered as end users for the designation of gatekeeper, these companies may be caught by DMA. Therefore, this distinction between visitor and user is crucial.

On the other hand, an influential Brussel based think-tank Centre on Regulation in Europe's (CERRE)[177] concerns are noteworthy. It is stated that for the designation of gatekeepers, size is not directly linked to gatekeeper power, thus in order to enhance legal predictability, it is advised for the Commission to adopt a delegated act or guidelines to explain how it will apply these indicators. Also, as regards to the obligations, it is underlined that more flexibility is needed, therefore black list should be very limited and detailed. Also, measures to comply with the obligations should be co-determined by gatekeeper and the Commission. Besides, it is suggested that Commission should have the possibility to not apply certain obligation to specific gatekeeper if there is no measure both effective and proportionate. Lastly, need for more responsibility for national authorities in the enforcement is pointed out by the institution.

As one of the agencies of the EU, Body of European Regulators for Electronic Communications (BEREC) prepared a report[178] to share the views on DMA. According to the report, in order to assure regulatory certainty and predictability, scope of application of obligations foreseen in Article 5 and 6 should be clarified. Also, as digital environments evolve rapidly, new concerns may arise easily as well. Therefore, in order to design regulatory measures to guarantee that DMA

[176] Reuters- Online businesses urge EU to rethink definition of "active end user", 2021, available at https://www.reuters.com/article/eu-digital-enduser-idUKL8N2RN59L (8 July 2022).

[177] Centre on Regulation in Europe (CERRE), The European proposal for a Digital Markets Act: A First Assessment, 2021, available at https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/ (8 July 2022).

[178] Body of European Regulators for Electronic Communications (BEREC), Report on the ex-ante Regulation Of Digital Gatekeepers, 2021, available at https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers#:~:text=On%2015%20December%202020%2C%20the,gatekeepers%E2%80%9D%20in%20the%20digital%20sector. (10 July 2022).

is effective and future-proof, additional powers should be given to the Commission. Moreover, cooperation with and between the national competition authorities is essential to benefit from expertise, gathering national data, monitoring of markets etc.

As regards to the Member States' views on this Proposal, main reaction came from Ireland. As most of the tech giants that will be subject to DMA enforcement have their headquarters in Ireland, this reaction is not surprising. Basically, Ireland has some concerns about the necessity of ex-ante measures complementary to competition policy. On September 2020, it published its national position[179] and stated that ex ante measure will be welcomed only in case of convincing demonstration of increased competition potential in markets that are not contestable and innovation is weakened by large platforms. Also, it is highlighted that measures should be proportionate and appropriate balance should be ensured between different stakeholders.

Estonia functioning as a digital hotspot has also similar concerns. It is stated that the draft "will not undermine the well-functioning aspects of the digital environment" and "it is important to avoid overregulation".[180]

On the other hand, there are some interventionist Member States that strongly support DMA. With a leading role in antitrust cases concerning online platforms, Germany is one of them. Germany supported the Commission's assessment that existing legal framework does not provide fair competitive opportunities for all market participants operating in markets characterized by large platforms acting as gatekeepers, and therefore ex-ante regulation is needed.[181] In fact, reform had been made in German Competition Act in order to proceed more effectively against anticompetitive conduct of major digital companies in early

[179] The Irish position on the EU Commission's proposed Digital Services Act package, 2020, available at https://assets.gov.ie/87419/2f59bc38-7cdb-47c5-a1b1-ad924798f637.pdf (10 July 2022).

[180] ERR News, Minister: EU digital act will not hamper tech giants' Estonian activity, 2021, available at https://news.err.ee/1608421913/minister-eu-digital-act-will-not-hamper-tech-giants-estonian-activity (10 July 2022).

[181] Non-Paper of the German Federal Government on the Digital Services Act Package, 2020, available at https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/201130-DEU-Non-Paper-on-DSA-Package-EN.pdf (10 July 2022).

2021.[182] Right after the entry into force, the agency started proceedings against tech giants like Facebook and Google. Germany as a leading Member State in regulating these online markets supports the idea that all sources of the Member States should continue to be used and their competencies should not be cut off.[183] Nevertheless, Brussels side seem to follow the idea that it is more efficient to deal global players at EU level.

France is another Member State that tries to tame the power of tech giants. In 2019, it had introduced tax on tech giants like Google, Amazon, Facebook despite the retaliation threats from US side. Therefore, Commission's work on new competition tool is welcomed by France. In October 2020, "Considerations of France, Belgium and the Netherlands regarding intervention on platforms with a gatekeeper position"[184] was published and these Member States revealed their willingness for stricter enforcement of competition rules. In this context, they referred to the need for intervention through preemptive action prior to the stage where damage becomes irreversible.

Sweden also welcomed the Commission's review of ex-ante regulation in order to encounter the competition problems in online platforms.[185] However, in the Position Paper it is underlined that any negative incentive for growth should be avoided and for the definition of significant market power in addition to the market size, other factors such as control over data, network effects should also be taken into consideration.

Besides, during the legislation process the Proposal has been subject to certain modifications. Parliament wanted to limit the scope of the application therefore

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[182] Bundeskartellamt web site – Digital Economy, available at https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html (10 July 2022).

[183] Politico EU - German competition chief sees vanguard digital role at risk, 2021, available at https://www.politico.eu/article/germany-competition-chief-sees-vanguard-digital-role-risk/ (10 July 2021).

[184] Considerations of France, Belgium and the Netherlands regarding intervention on platforms with a gatekeeper position, 2020, available at https://www.government.nl/documents/publications/2020/10/15/considerations-of-france-and-the-netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position (10 July 2022).

[185] Clarify European rules for digital services and ensure appropriate responsibility for platforms – Sweden's input to a Digital Services Act, 2020, available at https://piratpartiet.se/wp-content/uploads/2020/11/SE-positionspapper-DSA_200923.pdf (10 July 2022).

needed adjustment in the thresholds. More precisely, Parliament asked for an increase in the turnover threshold from 6.5 billion Euro to 8 billion Euro and market capitalisation threshold from 65 million Euro to 80 billion Euro which would limit the application of legislation directly to US firms. Nevertheless, after all, these numbers were decided as 7.5 billion Euro and 75 billion Euro respectively. Moreover, Parliament asked for further requirements for the interoperability of the services and they agreed with the Council that largest messaging services such as Whatsapp and Facebook Messenger should open up and interoperate with smaller messaging platforms if requested. This will enable the consumer to exchange messages, send files and make videocalls across messaging apps. Another concern for the Parliament was expanded role for national authorities. In this regard, in the approved text specific provisions were added with regard to the cooperation and coordination with national authorities. Lastly, as regards to the fines, Parliament asked for the changes in order to make them more deterrent. In this regard, Parliament demanded the minimum fine to be 4% and up to 20% of total worldwide turnover. According to agreed text, in case of repeated infringements, Commission may impose fines up to 20% of gatekeeper's total worldwide turnover.

5.3 Assessment

With DMA, Commission departs from the structure and approach of Article 101 and 102 of TFEU and launches an ad hoc regulatory regime.[186] Accordingly, main objective is different from protecting undistorted competition, instead it is aimed to ensure that markets are and remain contestable and fair where gatekeepers are present and anticompetitive effects of a conduct is irrelevant.[187]

In fact, for the assessment of antitrust cases, structure of the relevant market and company's power is the focal point and the competition authority or the

[186] *Ibáñez Colomo* (fn.23), p. 561.
[187] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15.12.2020, COM/2020/842 final. (Preamble para 10).

Commission has to demonstrate the dominant position. However, with DMA, for the intervention, thresholds regarding turnover/market capitalization and number of users are taken into consideration. Therefore, rivalry between competitors does not seem to play part in the assessment. Nevertheless, although it seems that the criteria for designating as a gatekeeper is independent from antitrust rules on finding of a dominance, de facto the criteria will only capture platforms that are considered dominant within the context of Article 102.[188]

The main reason behind this can be substantial overlapping of prohibitions foreseen in DMA with the existing competition rules. Since most of the obligations stated in DMA are related to the practices that Commission has found infringing or the investigation is still ongoing, it is not a surprising fact. Also, both the substance and the process of investigation foreseen in DMA have the look of competition law investigation[189], e.g. commitments, fines, request for information, on-site inspections. Thus, in order to prevent the overlapping of these two competing rules, interplay between them should be specified clearly. Otherwise, it may create uncertainty for businesses.

As stated earlier, DMA contains self-executing obligations (Article 5) and obligations that are susceptible to specification (Article 6). Most of the obligations listed in Article 6 seem to be related to the concern about leveraging market power from core platform service to adjacent services in other platforms. [190] Moreover, these obligations seem to be related to the self-referencing practices that have been investigated by the Commission in the past years. For instance, Article 6 (1)(d) on prohibition of treating more favourably in ranking services and products offered by the gatekeeper itself or third parties belonging to same undertaking is related to the concerns raised in Google Shopping case. Since most of them are inspired from the previous cases, they have a narrow scope of application. However, according to Article 17 of DMA,

[188] *Hutchinson/ Treščáková,* ECJ 2022, p.23.
[189] *Desai,* ECRLR 2021, p.21.
[190] *Ibáñez Colomo,* (fn.23), p. 565.

the Commission may conduct a market investigation to detect new types of practices and therefore to extend the scope of obligations.

As mentioned above, Commission is the sole authority for the application of DMA. As these gatekeepers tend to operate in all Member States, designation of Commission as the only authority has some benefits. There will be no transaction costs, risk of divergence for interpretation of obligations will be minimized and it will allow accumulated expertise.[191] Most importantly, it will allow the quick intervention of Commission which was one of the main aims of DMA. Moreover, according to the finally agreed text, Commission's cooperation and coordination with Member States is specifically regulated. Therefore, Member States' supportive role will be useful as it will enable exchange of information and accumulated knowledge.

However, whether DMA will enable the Commission to tame the power of tech giants is an issue of concern. It seems that for most of the cases, largest platforms will not face strong direct competitors even when the DMA will put into practice.[192] Nevertheless, when certain obligations are assessed together, it can be inferred that new regulation may at least allow the erosion of incumbent firm's power. For instance, article 6(1)(b) enables the users to uninstall preinstalled applications and article 6(1)(e) permits the end users to switch between the applications easily. Also, article 6(1)(j) allows the third party providers of online search engines to ranking, query, click and view data on online search engines of the gatekeeper. Thus, these provisions may promote the contestability in online search engines market.

As regards to the enforcement, there are several issues that need further support from Commission side. In this context, Commission's support in how gatekeepers intend to comply with obligations foreseen in Article 5 and 6 is vital. In this way, unilateral approach will be crowed out by more interaction between

[191] *Monti* (fn.158), p. 92.

[192] Centre for European Reform (CER), No Pain, No Gain? The Digital Markets Act, 2022, p.3, available at https://www.cer.eu/publications/archive/policy-brief/2022/no-pain-no-gain-digital-markets-act (8 July 2022).

the Commission and undertakings. Besides, different characteristics of the sectors should be taken into consideration by the Commission during the enforcement. The reason is that the business models of core platform services vary significantly and due to the rapid technological changes they may change easily.

Last but not least, if only US companies become the target of the DMA, it should be guaranteed that it will not cause protectionism. As mentioned earlier, ambitious rules foreseen in DMA has the possibility to diminish these companies' abilities and incentives of providing innovative products to consumers. In extreme cases, it may even cause the tech giants to exit from certain service markets if new regulations become too burdensome for them. For instance Google gave up from Google News services in some countries after the copyright reform had been introduced in 2019. Therefore, proper balance should be maintained in order not to cause protectionism against US firms.

6 CONCLUSION

Digitalization process changes the structure of the markets and paves the way for different business models. However, these new business models pose new challenges for competition policy. As online platforms diverge from the traditional business structures, they make the antitrust assessments more difficult. Specific characteristics of these platforms, where extreme returns to scale, role of data and network effects are the most prominent ones, make the antitrust assessments more complicated. The reason is that due to these specific characteristics defining the market and quantifying the market power is more difficult.

Besides, dynamic structure of these markets is another challenge for the antitrust cases. As traditional antitrust proceedings take long time, competition may have been irreversibly damaged before the action is taken. Also, remedies to adequately address the competition concerns pose another important challenge. Although competition authorities and courts have outstanding decisions regarding big tech companies, it is still controversial if these remedies are sufficient.

Therefore, there is a growing concern over whether existing anti-trust regulations and tools are sufficient to deal with the cases. On one hand, it is argued that current competition rules and tools will be sufficient to deal with competition cases, only enforcement should be improved. On the other hand, some argue that new regulatory tools will be required to ensure fair competition in online platforms. Although in the case law there is a perspective change regarding the market definition and market power, it is a question whether traditional practices will be left to adapt to digital age. Especially, particular characteristics of online platforms require rethinking of the current competition

rules. Hence, in recent years, there is a debate on how much market regulation is needed to control online markets.

As regards to the EU, it can be asserted that since 1957, Commission has been responding to the challenges resulting from the economic developments by making the necessary adjustments in competition policy.[193] Also, Commission has extensive powers like imposing fines, deciding on structural remedies like dividing of the firms and Commission together with the national competition authorities have been paying particular attention to online platforms. In recent years, there are outstanding antitrust investigations and decisions regarding big tech giants like Google, Facebook and Amazon. Nevertheless, investigations and decisions have done little to weaken the market power to the benefit of consumers. [194] Therefore, Commission came out with Proposal on Digital Markets Act in December 2020 which contains ex-ante rules to limit the market power of big online platforms and it is adopted recently.

DMA will be applicable to platforms that act as "gatekeepers". These are the platforms that have significant effect on the internal market, serve as an important gateway for business users and enjoy an entrenched and durable position. Accordingly, these gatekeepers will have series of obligations to ensure fair and open markets. For non-compliance, various sanctions are foreseen and in case of repeated infringements sanctions will be harsher.

DMA will complement the enforcement of competition law at the EU and national level. Therefore, Article 102 of TFEU will remain applicable to gatekeepers' practices. However, as the intervention requires complex investigation procedures and takes long time, complementation of current rules with the new regulatory rules is likely to enhance the enforcement.

Traditional antitrust framework limiting competition concerns to consumer welfare based on short term price effects is impotent to get the structure of

[193] *Matos Rosa*, JECLP 2020, p. 404.
[194] *Geradin/ Katsifis* (fn.3), p. 4.

market power in the modern economy.[195] Within the context of this rethinking, enhancing the consumer welfare should not be limited to low price, instead more innovation, quality and choices should be the focal point. As the DMA aim to manage the state of the market rather than a consumer welfare as an area of focus, it will be more appropriate for today's realities.

Nevertheless, there may be some drawbacks of the new regulation. Constant modifications in regulations, launching of new legal concepts or various competing regulations aiming the same company increases the legal uncertainty.[196] Also, too much competing regulations for the same company may limit the investment. Thus, enforcement should be done in a way that it will not cause any legal uncertainty and excessive burden on companies.

Besides, EU is not alone in taking action against big online platforms. The speed of change and extensive international reach of these global players makes it more difficult for authorities acting unilaterally.[197] Other jurisdictions like UK and US also working on parallel rules to existing competition toolkit that will apply to tech giants. However, EU has a unique position, as EU companies' part in the digital platform space is limited compared to US companies. Dominance of US and Asian firms in European digital economy will be continuing.[198] Thus, creating a level playing field via new rules can pave the way for rise of start-up companies with increase of competition in digital economy. Main target seems to be the US companies but it should not be forgotten that they are vital for the European economy as they offer expansion opportunities for European companies. Also, EU should refrain from creating further pressure for the innovation environment in Europe. Thus, balanced approach is vital.

To sum up, it will be very hard for online platforms to predict how existing rules can be stretched and applied to their practices if there is too much room for

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[195] *Desai* (fn.189), p. 12.
[196] *Büschel/Rusche*, Intereconomics, p.209.
[197] UK Competition and Markets Authority, Digital Markets Strategy, 2019, available at https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy (15 July 2022).
[198] *Büschel/Rusche* (fn.196), p.208.

interpretation.[199] Ruling based on whether that conduct constitutes an abuse of dominance on a case by case basis is open to mistakes. Therefore, new regulatory framework that comprises ex-ante rules will help to guarantee the contestability of online platform markets. However, new rules should be applied in such a way that it will not cause uncertainty and protectionism.

[199] *Reverdin* (fn.150), p. 199.

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