UNIVERSITY OF CYPRUS

Department of Law

European Competition Law and the Effective Regulation of Digital Markets: An Analysis of Article 102 TFEU and the Digital Markets Act

Stephany Hettinger

LAW 540 Master Thesis

European Commercial Law

Fall Semester 2022

Supervisor: Dr Michael Chatzipanagiotis

Word Count: 17611

Signature:

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List of Abbreviations

AFA	Anti-Fragmentation Agreement
API	Application Programming Interface
CJEU	Court of Justice of the European Union
Commission	European Commission
Court of Justice	See ‘CJEU’
CSS	Comparison Shopping Service
DMA	Digital Markets Act
EEC	European Economic Community
EU	European Union
EU Report	Commission-Funded Report ‘Competition policy for the digital era’ (2019)
MADA	Mobile Application Distribution Agreement
RSA	Revenue Share Agreement
SSNDQ	Small but Significant Non-Transitory Decrease in Quality
SSNIP	Small but Significant Non-Transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1. Background

The previous two decades have seen a boom in innovation and technological advancements. Almost all aspects of daily life have become digitalized, leading to the expansion of the digital economy and of digital markets. Consumers enjoy a wide variety of benefits: information is easily accessible, communicating with others has never been as easier, transactions can safely be done in a matter of minutes and distributors can reach their target audiences in an unprecedently fast and uncomplicated manner.[1] Many industries have become intertwined with and rely on the digital sector, making effective protection of competition in digital markets crucial.

While the benefits of digitalization are undeniable, legislators around the world have questioned whether digital markets are regulated sufficiently. The rise of a handful of digital giants, such as Google, Amazon, Meta, Microsoft and Apple, and their establishment as main players in the digital sector, has raised concerns regarding their business practices and ever-increasing market power. Numerous competition authorities have opened investigations against these undertakings in recent years and new legislative initiatives have been proposed in various jurisdictions to address anti-competitive behaviour in digital markets. The majority of which involve infringements of Article 102 of the Treaty on the Functioning of the European Union ('TFEU'), which prohibits the abuse of a dominant position.[2]

In the European Union ('EU'), there is a general perception that competition law cannot effectively address abusive practices in the context of digital platform markets. [3] The rationale behind such discussions is that digital markets and platforms possess certain characteristics that have proven to be incredibly challenging for competition law authorities to tackle abusive behaviours in this context.[4] As such, a new EU Regulation was adopted called the Digital

[1] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the digital era* (Report, European Commission, 2019) 12 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 24 November 2022
[2] Ibid
[3] Antel J, Barbu-O'Connor C, Carroll J, Daw K, & Klotz R, Effective Competition in Digital Platform Markets: European Competition and Regulatory Law Review Volume 6, Issue 1 (2022) 35 <https://doi.org/10.21552/core/2022/1/7> accessed 24 November 2022
[4] Slavica Purić 'New European Solutions for Strengthening Competitiveness in Digital Markets' in Aleksandar and Erceg Dubravka Akšamović (eds), *Competition Law (in Pandemic Times): Challenges and Reforms* (ECLIC 5 Special Issue 2021) 298 <https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18827> accessed 24 November 2022

Markets Act, the purpose of which is to regulate the large players in these markets by imposing a set of obligations they must comply with. This new Regulation was created to complement existing competition rules, Articles 101 and 102 TFEU, to better address the unique characteristics of digital platform markets that hinder the effective application of competition rules.[5]

Digital markets, including digital platform markets, are mainly known for their fast-paced and dynamic nature. For the purposes of this paper, there are four main characteristics that must be mentioned. Firstly, digital markets are characterised by strong network effects.[6] Network effects are the phenomenon in which service quality improves depending on the number of users who use that service. When a platform gains a large user base, the quality of the provided services improves and becomes more convenient for its users.[7] This creates an incentive for consumers to prefer a service that has a larger user base and, consequently, better service. At the same time, users have fewer incentives to adopt a different platform, thus discouraging newcomers from entering the market and reducing contestability.[8] New entrants would have to provide higher quality services than those offered by established undertakings and at more appealing prices to convince users to switch services, which would be incredibly difficult for start-up companies.[9]

Secondly, digital markets have extreme returns to scale. This means that the cost of providing a product/service decreases in the long run as the undertaking increases its production. However, as Purić stresses, in traditional markets the decrease in provision/production costs do not exceed a certain point, but in digital markets these returns to scale are so extreme that the costs of providing a service is disproportionately low to the number of users, leading platforms to oftentimes offer their services for extremely low costs or even zero cost.[10] They continue stating that this goes hand-in-hand with the practice of large digital undertakings offering their services at zero cost and choosing to generate their revenues through advertising.[11] The zero cost of the services provided generates a larger user base, which in turn, makes advertising on the platform more appealing. Combined with the above network effects, this feature leads to the generation of large quantities of business revenue with very low production costs and

[5] Crémer, Montjoye and Schweitzer (n 1) 40-41
[6] Purić (n 4) 299
[7] Ibid
[8] Ibid
[9] Ibid
[10] Ibid 298
[11] Ibid

creates a significant competitive advantage.[12] This advantage, in turn, raises barriers to entry for existing and potential competitors, all of which would face significant difficulties when attempting to compete with these large digital undertakings.

Thirdly, digital markets often operate on multi-sidedness.[13] This is characterised by undertakings that can connect 'many business users with many end users' because their platforms comprise of multiple sides.[14] Additionally, undertakings have developed digital ecosystems, which consist of different product and service markets. Products and services offered in an ecosystem are more compatible with other products or services of the same ecosystem. This preferred compatibility creates an incentive for consumers to prefer services and products deriving from the same ecosystem, thereby creating a 'large unrivalled user base'.[15]

Finally, data plays a crucial role in digital markets. The quality of digital services depends on the quantity and quality of data available to an undertaking. When an undertaking has a large user base, it has access to larger quantities of data and 'data-driven feedback' that, in turn, enhances the quality of services provided.[16]

All of the above characteristics contribute to the existence of a few dominant undertakings in digital markets. Thus, the structure of the market raises barriers to entry and reduces contestability and the market conditions are such that a new entrant faces significant difficulties in their attempt to become established.

1.2. Purpose and Research Question

The purpose of this paper is to research how effectively EU competition law and the Digital Markets Act address abuse of dominance by Big Tech within digital markets. The possibility that existing competition rules are underenforced or enforced ineffectively in digital markets creates an environment that favours the increase of market power of a few market players and

[12] Ibid
[13] Stavros Aravantinos, 'Competition Law and the Digital Economy: the Framework of Remedies in the digital Era in the EU' (2021) 17(1) European Competition journal 135 <https://www.tandfonline.com/doi/full/10.1080/17441056.2020.1860565> accessed 30 October 2022
[14] Purić (n 4) 298
[15] Ibid 299
[16] Ibid

the foreclosure of digital markets to new entrants, thus reducing competition to the detriment of consumers. In the absence of effective regulation in digital markets, it is crucial that new solutions are found to promote competition in these markets.

The research question this dissertation addresses is:

'Could the ex-ante regulation of undertakings by the newly adopted Digital Markets Act effectively address abuse of dominance taking place within digital markets in the EU?'

1.3. Methods and Materials

The first step to answer this research question is to determine whether the Digital Markets Act is necessary. To reach a conclusion of necessity, it is vital to examine the efficiency of existing competition laws. The examination will be limited to the efficiency of Article 102 TFEU for addressing anti-competitive practices in digital markets because the majority of such behaviour concerns the abuse of a dominant position. This will be done by examining primary sources of EU law, including Treaties of the European Union and judgements of the European Court of Justice, in addition to secondary sources of EU law, to which less emphasis will be given. Such examination will be based on the linguistic interpretation of EU law, which centres on the wording of the provisions, and, most importantly, the teleological interpretation of EU law, which focusses on its aims and purposes.[17]

Having examined the aims and purposes of Article 102 TFEU, an analysis will be conducted examining whether these aims and purposes are achieved in the context of digital markets. This section will focus on the particular characteristics of digital markets and potential difficulties they may pose regarding the provision's application. By conducting such an analysis, a conclusion can be made regarding the necessity of the Digital Markets Act for the regulation of digital markets.

Following the above, the provisions of the Digital Markets Act will also undergo linguistic and teleological interpretation. Special emphasis will be given during the evaluation of the

[17] Rafał Mańko, 'The EU as a community of law Overview of the role of law in the Union' (EPRS 2017) <www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf> accessed 23 November 2022

Regulation's effectiveness on its scope and objectives, stated in its preamble, and its complementary nature to existing competition laws of the EU.

As the Author of this paper, I will inherently provide my opinion, interpretation and conclusions of the necessary analyses described herein, also providing examples to illustrate salient points.

1.4. Outline

The thesis is divided into four sections, of which the first and last sections comprise the introduction and conclusions, respectively, whereas the second section addresses the effectiveness of Article 102 TFEU in addressing anti-competitive practices found in digital markets and the third section describes the effectiveness of the DMA in addressing said markets.

The second section will analytically address the challenges that the Commission faces when assessing the relevant market and determining a position of dominance and applicable theories of harm. Following, the third section will delve into the scope and purposes of the DMA, its recipients, the obligations it imposes on such recipients and its overall effectiveness in addressing the unique characteristics of digital markets.

2. Application of Article 102 TFEU in the Context of Digital Markets

2.1. General Comments on Article 102 TFEU

Article 102 of the TFEU consists of five elements, which are prerequisites for the enactment of the provision. Firstly, this provision is applied to undertakings. The Treaty does not define the concept of an undertaking;[18] however, the Court of Justice of the European Union (CJEU or 'Court of Justice') has offered valuable insights through its case law and has clarified that

[18] Richard Whish and David Bailey, *Competition Law* (Ninth Edition, Oxford University Press, 2018) 83

an undertaking is 'every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'.[19]

Secondly, it must be determined whether this undertaking enjoys a dominant position within the internal market or in a substantial part of it. If the undertaking does not fulfil this criteria, Article 102 TFEU will be inapplicable.[20] According to the CJEU in its landmark case *United Brands v Commission*, the dominant position 'relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'[21]. It must be noted that for establishing a dominant position for the purposes of Article 102 TFEU, many factors can be considered and all cases are inherently different.[22] However, all cases share a common starting point, which is the determination of the relevant market[23] and is an essential step for the establishment of a dominant position.[24] The relevant market consists of the relevant product market, the geographic market and the relevant period in which the undertaking has allegedly established its dominance.[25] According to the European Commission's ('Commission') Notice on the definition of relevant market, the relevant product market consists of products or services that share the same characteristics and have the same intended use and prices so as to be viewed by the consumer as being substitutable or interchangeable.[26] In other words, these products or services cater to the same need of consumers.[27] Additionally, the Commission's Notice defines the relevant geographic market as being 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.[28]

[19] Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161 para 21
[20] Whish and Bailey (n 18) 187
[21] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, para 65
[22] Sandra Marco Colino, *Competition Law of the EU and UK* (Eighth Edition, Oxford University Press, 2019) 314
[23] Ibid
[24] Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECLI:EU:C:1973:22 para 32
[25] Colino (n 22) 314
[26] Commission 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C 372/5 para 7
[27] Continental Can (n 24) para 32
[28] Commission Notice on the definition of relevant market (n 26) para 8

After successfully determining the relevant market, the next step is to determine whether the undertaking in question enjoys a dominant position in said market.[29] As mentioned, a combination of many factors can be considered to determine the existence of a dominant position, many of which cannot be determinative if assessed on their own.[30] According to paragraph 12 of the Commission's Guidance Paper, the assessment must consider at least the following factors: 1) the market position of the undertaking in question and of its competitors, 2) the possibility of 'future expansion by actual competitors or entry by potential competitors (expansion and entry)', and 3) 'the bargaining strength of the undertaking's customers' i.e. the countervailing buyer power.[31] By analysing the above factors, one can conclude that a position of dominance exists. Once dominance is established in the relevant market, Article 102 TFEU requires that such a dominant position be held within the internal market or in a substantial part of it.[32] If this criterion is not fulfilled, the provision cannot be applied.

The fourth requirement concerns the establishment of abuse on behalf of the undertaking. Note that undertakings which enjoy a position of dominance are entrusted with a special responsibility not to abuse their dominant position.[33] Article 102 lists a few examples of abusive behaviours, which constitute a non-exhaustive list of the forms an abuse can take.[34] This is critical as theoretically the Article can be moulded to fit different types of abusive behaviour. There are many types of abuse, which are categorised either as exclusionary or exploitative abuses.[35] The abuse criterion will be further analysed in chapter 2.3 titled: 2.3 The Notion of Abuse of Dominance. Lastly, the problematic conduct must affect trade between two or more member states.

[29] Whish and Bailey (n 18) 188
[30] Ibid
[31] Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Communication) [2009] OJ C 45/7 para 12
[32] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326 Article 102
[33] Whish and Bailey (n 18) 204
[34] Continental Can (n 24) para 26
[35] Fanni Oroszi, 'Possible theories of harm as regards Amazon's business practices' (2021) Pázmány Law Working Papers 2021/06 16 <https://plwp.eu/images/2021/PLWP_2021-06_Oroszi.pdf> accessed 18 October 2022

2.2. Establishing the Relevant Market and Dominant Position

2.2.1. The Relevant Market

As stated, determining whether an undertaking holds a dominant position is one of the key elements that surround the application of Article 102 TFEU. When an undertaking enjoys a position of dominance, it is enshrined with the special responsibility to not distort competition on the common market.[36] This is additionally highlighted by the fact that the same conduct that could be deemed as unlawful if carried out by a dominant undertaking, could be deemed as perfectly lawful if carried out by non-dominant undertakings.[37]

In the previous chapter, it was briefly mentioned that to determine the existence of a position of dominance, it is necessary to define the relevant market.[38] The relevant market is a composition of the relevant product market, geographic market and period in which the dominant position existed.[39] By defining the relevant market, competition authorities can reach a conclusion regarding the undertaking's economic strength by assessing its market power, market shares, as well as other influential economic factors.[40] In this chapter, we will examine why the traditional competition tools used to define the relevant market are insufficient in the context of digital markets.

The CJEU first stated in the Hoffmann-La Roche judgement that the relevant market 'presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned'[41]. In accordance with the aforementioned, the Commission's Notice on the definition of relevant market states that the relevant product market consists of products or services that share the same characteristics and have the same intended use and prices so as to be viewed by the consumer as being substitutable or interchangeable.[42] In other words, these products or services

[36] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313 para. 57
[37] Whish and Bailey (n 18) 187
[38] Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases & Materials* (Oxford University Press, 2019) 844
[39] Colino (n 22) 314
[40] Viktoria H.S.E. Robertson, 'Antitrust Law and Digital Markets' in Heinz D. Kurz and others (eds.), *The Routledge Handbook of Smart Technologies* (Draft First Edition Routledge 2022) 6. <https://ssrn.com/abstract=3631002> accessed 20 October 2022
[41] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36, para 28
[42] Commission Notice on the definition of relevant market (n 26) para 7

cater to the same needs of the consumers.[43] Additionally, the Commission's Notice defines the relevant geographic market as being 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.[44] Therefore, in order to determine the relevant market, it is necessary to distinguish which products or services are viewed as interchangeable and substitutable for consumers to satisfy their needs.

The Commission's Notice on the definition of the relevant markets states that to find the substitutable products and, subsequently, define the relevant markets, it is necessary to determine two forms of competitive constraints: 'demand substitutability' and 'supply substitutability'.[45] The former is defined as the 'range of products which are viewed as substitutes by the consumer'[46], and can be determined with the use of the SSNIP test, which relies on a hypothetical scenario based on small and permanent price increases on the relevant product, and the latter evaluates whether suppliers could switch production to the relevant products to keep up with consumers' demands for competing products without 'incurring significant additional costs or risks'.[47] These tests are useful when applied in static, traditional markets; however, digital markets are characterised by network effects that cause markets to tip, digital ecosystems that lock consumers in and reduce competition, a 'winner takes all' nature, fast pace, the practice of offering products or services for zero price and multiple market sides.[48]

As a first example, undertakings tend to promote their digital ecosystems, which cater to all or almost all of consumers' digital needs. Take for example, Apple's ecosystem, which consists inter alia of mobile phone devices, computers, electronic watches, device accessories and software. The products that Apple produces deliberately have better interoperability with other devices or software manufactured by Apple than with devices or software manufactured by their competitors, such as Android. This creates an incentive for consumers to prefer Apple's products of services to satisfy their needs rather than resorting to a competitor's products and therefore locks in these consumers.[49] This example shows how it would be difficult to establish

[43] Continental Can (n 24) para 32
[44] Commission Notice on the definition of relevant market (n 26) para 8
[45] Ibid para 13
[46] Ibid para 15
[47] Ibid para 20
[48] Robertson (n 40) 6
[49] Crémer, Montjoye and Schweitzer (n 1) 47-48

the demand and supply substitutability for these specific products because consumers would possibly not consider competitive products as being viable substitutions offering the same levels of convenience and interoperability. Additionally, there may be significant switching costs that consumers will have to take into consideration before switching to a competing product. However, supplying substitutable products might be too costly or risky. The report titled 'Competition policy for the digital era' (the 'EU Report') suggests that it is necessary to establish different market definition regarding ecosystems and aftermarkets of these ecosystems.[50]

Furthermore, in static markets, it is easy to apply a substitutability test because the needs of consumers do not undergo rapid changes that would then lead to constantly differentiating the substitutable products/services. However, digital markets are also characterised by a fast-moving nature.[51] This means that new products are constantly introduced at a rapid pace and consumers' needs are constantly being altered. As a result, products having a substitutable relationship a few years ago may quickly become replaced with other products as consumers find that they no longer satisfy their needs.[52] This can create challenges to defining the relevant product market, as a definition of the relevant product market based on the current substitutable products can be deemed too narrow, whereas if all products that hold a substitutable relationship are taken into consideration the market may be too wide.[53]

Another important parameter regarding the definition of the relevant product market is that the same product may be available both in 'online' and 'offline' forms.[54] Take for example the market for books, in which customers can purchase the same books both in printed physical 'offline' forms or in digital 'online' forms as e-books.[55] The question that arises is to what extent are these books substitutable and interchangeable to most consumers. It could be stipulated that these books are interchangeable as they offer the same reading content to the consumers, and thus, consist of a single relevant product market. However, in the case that a significant number of consumers prefer to own a physical copy of a book, it might be necessary to establish two different product markets, as they will not inherently consider an e-book as a

[50] Ibid
Robertson (n 40) 6
[52] Crémer, Montjoye and Schweitzer (n 1) 47
[53] Ibid
[54] Robertson (n 40) 6
[55] Ibid

substitute for the physical copy. This additionally illustrates how the process of identifying the relevant product market contains an element of subjectivity.[56]

Moreover, platforms that offer their services or products for zero-price cost have also been significantly problematic in the application of the SSNIP test. The SSNIP test, which was briefly mentioned above, plays a significant role in the methodology of the market definition process.[57] SSNIP stands for 'small but significant non-transitory increase in price'[58] and the test examines whether in a hypothetical scenario, a monopolist could 'profitably and permanently increase their prices by 5-10% in a given market'.[59] This is done by examining whether consumers would, following a small but permanent price increase, turn to purchasing competing products outside the candidate market, and if the suppliers of such products have the necessary incentives and capacity to adequately supply the competing product and meet the customers' demands.[60]

According to Mandrescu, the problem with zero-price digital markets is that the SSNIP test is price oriented.[61] As a result, he rightly states that the SSNIP test is insufficient for products with zero price because it is mathematically impossible to expect to see results from this formula when the starting price is zero.[62] Additionally, many online platforms that offer their products/services for zero price will not foreseeably change their business practices and increase their prices in the future, making the scenario in which the undertaking will raise their prices implausible.[63] Thus, the test is inapplicable in such circumstances.[64] However, the SSNIP test may be replaced in such cases by applying a similar test that relies on the quality of the product/service rather than its price. This is referred to as the 'small but significant non-transitory decrease in quality' or the SSNDQ test[65], which was utilised by the Commission in the Google Android case. Similar to the SSNIP test, this test examines whether a small but

[56] Colino (n 22) 316
[57] Daniel Mandrescu, 'The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms' (2018) 2(4) European Competition and Regulatory Law Review 247 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337765>accessed 31 October 2022
[58] Colino (n 22) 317
[59] Andrea Amelio and Daniel Donath, 'Market definition in recent EC merger investigations: The role of empirical analysis' (2009) Concurrences N° 3-2009 1 <https://ec.europa.eu/dgs/competition/economist/merger_investigations.pdf> accessed on 10 October 2022
[60] Ibid
[61] Mandrescu (n 57) 247
[62] Ibid 248
[63] Ibid
[64] Ibid 249
[65] Case T-604/18, *Google and Alphabet v Commission (Google Android)* [2022] ECLI:EU:T:2022:541 para. 141

significant decrease in the quality of the products/services would cause consumers to find alternatives.[66]

In addition to these factors, multi-sided platforms are also problematic. Multi-sided platforms are usually intermediation platforms, such as Facebook, that have different sides/markets that are targeted to different groups of consumers.[67] The conditions for the use of these platforms' services/products are often subject to different conditions. For example, Facebook acts, on the one hand, as a social media platform that users can use free of charge to communicate with their loved ones. On this side of the platform, the use of the services/products is subject to the exchange of data, not money. On the other hand, Facebook also has a side market for advertisers to reach their target audiences. On this side of the platform, advertisers must pay to have their advertisements displayed. Additionally, the platform has no incentive to change its zero-price policy for the social media side of its platform, as it is a key factor to increase the number of users and creates larger incentives for advertisers to pay this platform to display their advertisements. Therefore, there is a clear influence between the different market sides of this platform.

The above example illustrates the reason why general uncertainty exists regarding whether these markets/platform sides should be evaluated together as a whole during the market definition process or if it would be more beneficial to be evaluated separately.[68] This is because if the relevant market is wrongly defined or is defined too narrowly or widely, it can be detrimental to the correct application of competition rules. Additionally, the acquisition of data instead of money in exchange of services or products has also raised questions as to market definition.[69] Lastly, Mandrescu states that there is additional uncertainty when distinguishing the relevant product that the substitutability test should be based on.[70]

[66] Ibid
[67] Robertson (n 40) 6-7
[68] Mandrescu (n 57) 249-250
[52] Robertson (n 40) 7
[70] Mandrescu (n 57) 249-250

2.2.1.1. Examples of Market Definition in the Digital Sphere

In the Google Shopping case, the Commission had, after an evaluation of the product/service characteristics and the nature of the supply and demand[71], identified the relevant product markets as the market for general search services and the market for online comparison shopping services.[72] The Commission accepted that the provision of a general search service free of charge to its users constitutes an economic activity because users paid for the services by allowing the search engine operator to collect their data.[73] The Commission acknowledged the 'two-sided' nature of the platform, by referring to one side as being free of charge and directed towards users and the other side as being directed towards advertisers who were willing to pay to display their advertisements on Google's display pages.[74] However, the Commission did not utilise the two-sided nature of the platform and its two groups of consumers to define the market. This may further demonstrate the existence of the aforementioned uncertainties that surround the definition of the relevant markets in the case of multi-sided platforms[75].

In the Google Android case, the Commission identified four distinct but interconnected digital markets.[76] These markets were as follows: 'i) the worldwide market (excluding China) for the licensing of Oss, in the sense of the licensing of smart mobile device operating systems', '(ii) the worldwide market (excluding China) for Android app stores; (iii) the various national markets, within the EEA, for the provision of general search services; and (iv) the worldwide market for non OS-specific internet browsers designed for mobile use'.[77] The General Court, and the Commission, had taken into consideration the competitive pressure that Apple had on Google.[78] This is because of the interconnected nature of the markets in question, which require that competitive constraints imposed by a company that is not necessarily active in the same product market are required to establish the relevant product market. In this case, it was necessary to assess the existence of competitive pressures that were exerted by Apple and its iOS ecosystem on Google and its Android ecosystem. It was found that Apple did not

[71] Case T-612/17, *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763 para 41
[72] Ibid para 42
[73] Ibid para 43
[74] Ibid para 43
[75] Robertson (n 40) 7
[76] Google Android (n 65) para 120
[77] Ibid
[78] Ibid para 122

sufficiently exercise competitive pressure on Google and the Android ecosystem[79] and Google held a position of dominance except in the product market for non-licensable operating systems.[80] It is important to mention that the Court noted that 'while the relevant markets are presented separately in the contested decision, they cannot be artificially separated in so far as they all had complementary aspects'.[81]

Additionally, the Commission had performed a SSNDQ test because of the zero-price nature of the product/services that Google offered. The General Court made an impactful statement regarding the application of the SSNDQ test in paragraph 180 of its judgement. It held that it is not required that a 'precise quantitative standard of degradation of quality of the target product' for the application of the test.[82] This provides valuable insight for such zero-price cases, in which traditional tools reliant on economic quantification cannot be applied. This also means that cases that do not involve quantitative measures of abuse do not evade the application of Article 102 TFEU and are in accordance with the nature of the Article, which is ever evolving to capture all concepts of abuse of dominance.

2.2.2. The Dominant Position

Article 102 TFEU itself does not define what is a dominant position; the CJEU has defined dominant position as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'[83].

According to Lianos, Korah and Siciliani, structural factors such as market shares are the most usual indicators of a dominant position[84] and include the undertaking's market shares and barriers to entry or expansion.[85] There are three main categories of assessment used for finding a dominant position. Firstly, quantitative assessments of market structure derived using the market definition and market shares. Secondly, qualitative assessments of market

[79] Google Android (n 65) para 122
[80] Ibid para 131
[81] Ibid para 126
[82] Ibid para 180
[83] United Brands (n 21) para 65
[84] Lianos, Korah and Siciliani (n 38) 844
[85] Ibid

characteristics, including barriers to entry, countervailing buyer power and other parameters affecting the level of competition. Lastly, prices and profits can be directly assessed in some circumstances.[86]

Generally, the assessment of an undertaking's market shares is the first step to assessing whether it holds a position of dominance.[87] The Court of Justice in Hoffmann-La Roche held that many factors may influence a finding of dominance, which if evaluated separately would likely not be conclusive, and notes that a 'highly important' factor is the undertaking's market shares.[88] Furthermore, the Court stated that 'although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position'[89]. These statements indicate the importance of market shares in the process of finding a dominant position. Additionally, in the AKZO Chemie case, the Court of Justice found a presumption of dominance if the undertaking's market shares reach 50%.[90]

However, it has been stated that using market shares as the traditional way to measure market power might not be the best evaluation tool in the context of digital markets. According to the EU Report, market shares are estimated by the ratio/percentage of an undertaking's sales to the total sales in the market. However, this method would be extremely insufficient when confronted with strong network effects and zero-price services[91], and if necessary, its application would have to consider the various markets that reside in digital ecosystems.[92] Additionally, multi-sided platforms can alter where and to what groups of consumer suppliers, such as advertisers, can have access to, taking on the role of an intermediary.[93] Lastly, a platform with many sides can also create a bottleneck effect when consumers only rely on such a platform, and thus, influence market shares.[94] The EU Report mentions that the application of the traditional assessment of market shares to find a position of dominance cannot accurately represent an undertaking's market power in markets where network effects are present. This is because 'the prices do not necessarily represent the value of the good or service to the

[86] Ibid
[87] Ibid
[88] Hoffmann-La Roche (n 41) para 39
[89] Hoffmann-La Roche (n 41) para 41
[90] Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECLI:EU:C:1991:286 para 60
[91] Crémer, Montjoye and Schweitzer (n 1) 49
[92] Robertson (n 40) 11
[93] Ibid
[94] Ibid

consumers or to the firms which are selling them'[95] and therefore the percentage would not accurately represent the undertaking's actual market power.[96] Additionally, quantitative analysis is inefficient when the prices are not only zero but there are differences in pricing regarding the quality of their provided services.[97] Such examples are video streaming services or music streaming services, like Spotify, which provides a free version of their services that is monetised through the company's ad revenues and a higher quality version of their services for which payment is required. Note that the measurement of market power is also impacted from possible barriers of entry in digital markets. This is because these barriers to entry are attributed to the strong network effects and the dynamic nature that characterise these markets, which create additional difficulties when assessing an undertaking's markets shares and market concentration ratios.[98] Lastly, the role of data should not be overlooked when assessing market power, the value of which is akin to gold in the context of digital markets.[99]

As Robertson pointed out, there is general concern whether the inadequacy of market shares in establishing a position of dominance in digital markets leads to certain behaviours going under the radar of Article 102, thereby avoiding its application.[100] To combat the above, the German Competition Act was amended in 2017 to alter the market power assessment in multi-sided markets and platforms.[101] The amended assessment will rely on 'direct and indirect network effects, the parallel use of services from different providers and users' switching costs, the undertaking's economies of scale arising in connection with network effects, the undertaking's access to data relevant for competition and innovation-driven competitive pressure'.[102] Similarly, it has been suggested that a new Commission guidance be drafted regarding the assessment of market power in digital markets.[103]

[95] Crémer, Montjoye and Schweitzer (n 1) 48
[96] Ibid 49
[97] Ibid
[98] Robertson (n 40) 10
[99] Ibid
[100] Robertson (n 40) 11
[101] Ibid
[102] Ibid
[103] Ibid

2.3. The Notion of Abuse of Dominance

To determine whether Article 102 is sufficient to tackle possible anti-competitive behaviours within digital markets, we first need to mention its scope. In the early 1970s, there was considerable division in the literature regarding the scope and application of the former Article 86 of the EEC Treaty.[104] Lianos et al. illustrated this division by referencing the different interpretations of René Joliet and Ernst-Joachim Mestmäcker.[105] The former believed that the provision's goal was to prevent the exploitation of consumers, whereas the latter firmly believed that the application of Article 102 TFEU is to ultimately safeguard undistorted competition within the common market.[106]

By looking at the text of the Article alone, one cannot reach a solid conclusion as to the aims of this prohibition. For example, Article 102(b) seems to concern the protection of consumers from abusive behaviours, whereas Article 102(c) refers to a situation that involves other competitors who will ultimately benefit from this provision.[107] In addition, Articles 102(a) and 102(d) prohibit unfair trading conditions and practices in which a dominant undertaking forces contracting parties to accept additional obligations irrelevant to the subject of these contracts.

In 1973, the Court of Justice addressed this issue and interpreted the provision in the Continental Can case.[108] The Court had established that since Article 102 TFEU (then Article 86 EEC) was based on Article 3(f) of the EEC Treaty, which 'provides for the institution of a system ensuring that competition in the common market is not distorted', and, as such, requires that the competition is not eliminated.[109] The Court continues that the existence of competition is so important that the lack of competition would cause multiple provisions to be rendered pointless and is a necessity to fulfil the tasks enshrined to the Community as described in Article 2 EEC, which includes the promotion of 'a harmonious development of economic activities' throughout the Community.[110] Therefore, the Court held that Article 102 TFEU aims to maintain effective competition in the common market to safeguard the principles laid down

[104] Lianos, Korah and Siciliani (n 38) 878
[105] Ibid
[106] Ibid; Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Articles 82 ED' in CD Ehlermann and M Marquis (eds,) *European Competition Law Annual 2007: A Reform Approach to Article 82 EC* (Hart, 2008)
[107] Lianos, Korah and Siciliani (n 38) 816
[108] Continental Can (n 24)
[109] Ibid para 23-24
[110] Ibid para 24

by Articles 2 and 3 of the EEC Treaty.[111] Consequently, Article 102 TFEU must be interpreted so as to prohibit an abuse of dominance that, if left unchecked, could distort competition in the common market. The Court additionally clarified that the behaviours which were listed in Article 102(a), (b), (c) and (d) do not comprise an exhaustive list of abusive behaviours, but rather consist of a few examples of abusive behaviour. [112] Securing a system of undistorted competition ultimately leads to the protection and benefit of consumers, i.e. the welfare of the consumer.[113] This interpretation has since been illustrated in many cases brought to the CJEU, such as the TeliaSonera[114], Post Danmark[115] and recent Intel case[116]. Therefore, Article 102 TFEU prohibits behaviours that would harm consumers, either directly or indirectly. Additionally, consumers are described by the Commission as including both the final consumers of the products or services and intermediaries, such as distributors or manufacturers, who depend on these products/services to deliver the final product/service.[117]

2.4. Theories of Harm

The above interpretation will be the basis for which we will analyse recent antitrust cases in the realm of digital markets. As stated, digital markets and the undertakings that engage in such markets have certain characteristics that should be taken into account when assessing the existence of abuse. The EU Report suggests that new theories of harm should be established that would take such characteristics and empirical evidence into consideration when assessing abusive conduct.[118] Further, the EU Report claims that such an approach is necessary to successfully apply the consumer welfare criterion in digital markets, which are fast-paced and are affected in a different way by prices than traditional markets.[119] Overall, theories of harm are ways in which we can link a certain behaviour to consumer harm and can be done by taking into account qualitative and quantitative factors[120], such as prices, quality, innovation,

[111] Ibid para 24-25
[112] Ibid para 26
[113] Ibid
[114] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83
[115] Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, para. 21-23
[116] Case C-413/14 P, *Intel Corp. v European Commission* [2017] ECLI:EU:C:2017:632, para. 133 (view 133-135)
[117] Commission Guidance (n 31) para 19
[118] Crémer, Montjoye and Schweitzer (n 1) 40-41
[119] Ibid
[120] Commission Guidance (n 31) para 19

consumer choice and production.[121] The EU Report suggests that innovation and quality are the two criteria most important for assessing these cases.[122]

Most abuses by Big Tech consist of cases where dominant undertakings use non-pricing means to foreclose competition, that is, to exclude equally efficient competitors from the market, such as tying and bundling practices, or contractual obligations. Additionally, the multi-sidedness of platforms and the nature of digital ecosystems enable such undertakings to abuse their dominant position in one market to gain market shares in another adjacent market, i.e. leveraging their position.[123] The importance of data and network effects will also be examined as a way to gain competitive advantages to the detriment of competitors. Finally, even the behaviours of consumers can be utilised to gain competitive advantages. The following chapter will illustrate how tying and bundling, an existing theory of harm, was applied in the Google Android case and how existing theories of harm must be adapted accordingly to the characteristics of digital markets.

2.4.1. Existing Theories of Harm – Tying and Bundling

Tying defines the practice in which a supplier of a product, the tying product, makes the purchase of said product subject to the purchase of an additional product, the tied product.[124] Tying is perceived as harmful to consumers because it impacts their freedom of choice.[125] Tying is also associated with the practice of leveraging, where undertakings use their dominant position in the market of the tying product to create anti-competitive effects in the market for the tied product,[126] thereby creating a foreclosure effect.[127] However, tying is not always abusive and can be beneficial to consumers because it improves product quality or leads to fewer production costs; therefore, a set of criteria must be met in order to establish this practice as an abuse under Article 102 TFEU.[128]

[121] Crémer, Montjoye and Schweitzer (n 1) 41
[122] Ibid
[123] Ibid 47-48
[124] Whish and Bailey (n 18) 705
[125] Ibid 706
[126] Ibid
[127] Ibid
[128] Ibid; Crémer, Montjoye and Schweitzer (n 1) 37

There are many cases of undertakings in digital markets that tend to leverage their dominant position in one market to an adjacent one through tying. As mentioned previously, tying can be beneficial to consumers; however, in the sphere of digital markets, foreclosure effects can be especially detrimental if present and, if not addressed, could render market entry impossible due to network effects[129], switching costs and extreme economies of scale. Tying practices are of particular concern in the digital sphere because of the existence of the network effect.[130, 131]

Usually, when a platform gains a large user base, there is a high chance that it will expand the range of offered services, many of which were introduced to the market by new-comers, thereby preventing them from entering the market or gaining the user base that they would have had if the tying practice had not taken place.[132] The Commission had recently opened investigations regarding the possibility that Facebook (now Meta) tied its social media platform with Facebook Marketplace as an 'online classified ads service' which focussed on leveraging based on the collection of data.[133] In this chapter, we will discuss the form of abuse that had taken place in the Google Android case and provide commentary on the General Court and Commission's assessment. As stated, this case regards an abuse of dominance in the setting of Google's digital ecosystem. The issue arises when an undertaking that operates in many markets simultaneously uses its market power in one market to leverage its market power in an adjacent one.[134] The Commission had found that Google held a dominant position in the following: a. 'the worldwide market (excluding China) for the licensing of smart mobile device operating systems'; b. 'the worldwide market (excluding China) for Android app stores' and c. 'the various national markets, within the EEA, for the provision of general search services'.[135] The case concerned itself with three types of abuse. In this chapter, we will examine two of the three practices that concerned the Court, which concern tying and bundling practices.

[131] Ibid
[132] Ibid
[133] Case AT.40684 Opening Proceedings, Facebook Marketplace <https://ec.europa.eu/competition/antitrust/cases1/202247/AT_40684_7765426_1812_4.pdf> accessed 14 November 2022
[134] Robertson (n 40) 15
[135] Commission, 'The General Court largely confirms the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine' (2022) Press Release No 147/22 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf> accessed 14 November 2022

2.4.1.1. The First Abuse: Tying

The first type of abused regarded 'Mobile Application Distribution Agreements' or 'MADAs' that made the acquisition of a license to use Google's app store (the Play Store) by manufacturers of mobile phone devices subject to the pre-installation of Google's general search (Google Search) and browser apps (Chrome). This practise could be regarded as an example of Google leveraging its dominant position in the market for Android app stores to increase its market power in the market for its general search and browser apps.[136] We analyse two of Google's abusive conducts, consisting of anti-competitive tying and bundling practices.

The General Court analysed whether Google had abused its dominant position via tying by referring to the precedent laid out in the Microsoft case.[137] The Court started its analysis by firstly stating that it is not unlawful for an undertaking to enjoy a position of dominance nor is it wrong to compete on the merits; however, an abuse can occur when a certain behaviour has such exclusionary effects outside 'the scope of competition on the merits'.[138] Such effects occur when actual or existing competitors cannot have access to a market or part of that market, not because of their own inefficiencies, but rather because of the behaviours of a dominant undertaking that aims to strengthen its position and leads to detrimental effects to the consumer.[139] Therefore, the fact that the effects are presented in a different market than the market in which dominance is established does not preclude the application of Article 102 TFEU.[140]

Moreover, the Court states that not every exclusionary effect is anti-competitive in nature, only effects that can hinder competition on the merits.[141] It is very true that tying is a normal commercial practice and can be beneficial to consumers because it can create economies of scale or scope, significantly reduce production costs and create lower prices or promote better product quality.[142] Therefore, it is necessary to use an effects-based assessment to not penalise conduct that has no detrimental effects to competition on the merits and to properly assess the

[136] Johannes Persch, 'Google Android: The General Court takes its position' (Kluwer Competition Law Blog, 20 September 2022) <http://competitionlawblog.kluwercompetitionlaw.com/2022/09/20/google-android-the-general-court-takes-its-position/> accessed 14 November 2022
[137] Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2007] EU:T:2007:289
[138] Google Android (n 65) para 276
[139] Ibid para 280-281
[140] Ibid para 282
[141] Ibid para 278
[142] Whish and Bailey (n 18) 706

'gravity of the conduct'.[143] In order to achieve this result, the Court decided to follow the test established in the Microsoft case[144] so as to determine whether the practice consists of a tying abuse.

It must be determined that:

1. 'The tying and tied products are two separate products;
2. The undertaking concerned is dominant in the market for the tying product;
3. The undertaking concerned does not give customers a choice to obtain the tying product without the tied product;
4. the practice in question "forecloses competition";
5. that practice is not objectively justified.'[145]

The General Court, having previously established that the first three criteria were met, assessed whether the practice 'forecloses competition' relying on the finding of the Microsoft case. In paragraph 290, the Court stated that the fourth criterion would be fulfilled if the practice is 'capable of restricting competition' and does not require that such anti-competitive effects be demonstrated in 'classical tying cases'[146].

The Commission found that the first abuse consisted of two instances of tying. The first instance was related to the Google Search app being tied with the Play Store and abusing Google's dominant position in the worldwide market for Android app stores, and the second instance was regarding the Chrome browser being tied with the Google Search app and the Play Store, where Google abused its dominant positions in the worldwide market for Android app stores and in the national markets within the EEA for general search engines.[147] The Commission found that the tying and tied products are distinct products that could not be offered separately to consumers and that Google held a dominant position in the market of the tying product, i.e. the worldwide market for Android app stores and national markets for general search engines.[148] Therefore, the first three criteria were met.

When assessing whether Google's practice forecloses competition i.e. the fourth criteria, for the first instance of tying, the Commission relied on several factors to reach its conclusion. The

[143] Google Android (n 65) para 295
[144] Microsoft (n 137)
[145] Google Android (n 65) para 284 citing Microsoft (n. 105) para 869
[146] Google Android (n 65) para 209
[147] Ibid para 300
[148] Ibid para 756-772

Commission found that, firstly, Google enjoyed a competitive advantage against competing general search service providers. This was illustrated by a significant increase in the number of searches conducted on mobile devices during the infringement period, in relation to the number of general searches conducted on personal computers. Moving on, the Commission, very interestingly, focussed on consumers' behavioural biases, and especially their status quo bias, to present that pre-installation of an app is a critical tool for the distribution of general search services on mobile devices. Consumers tend to prefer using a pre-installed app or an app that is set as default rather than install a different browser or search service to satisfy their needs. According to the Commission's analysis, only a small group of consumers who are tech savvy prefer to use other search services. This consumer bias leads to prolonged usage of this app by users, while the pre-installation ensures that every device with Google Android has its general search app installed. Furthermore, users were incapable of uninstalling the Google Search app, and competing search service providers cannot offset the competitive advantage that Google enjoys as a result of the app pre-installation. Lastly, the Commission found that Google's market shares for general search queries confirms its thesis.[149]

Secondly, the Commission illustrated that Google's conduct was abusive by showcasing that the exclusionary effects produced were particularly detrimental. Evidently, Google's practices had decreased competitors' incentives to innovate and invest, resulting in significant difficulties in competing alongside Google as they could not gain the necessary search queries, data and revenue needed to improve. Furthermore, Google had 'increased barriers to entry' as Google had 'shielded itself' from competing search services which would have to put in a significant amount of time, effort and costs to be able to compete alongside Google in the relevant markets. Lastly, the Commission found that Google's practice 'is also capable' of causing consumer harm directly or indirectly because consumers' choice of general search services had been limited.[150]

Regarding the second instance of tying, the Commission had similar findings. It found that the tying practice between the Chrome app and the Play Store and Google Search app was 'capable of restricting competition' because Google again gained an important competitive advantage that cannot be offset by other mobile web browsers, which are not specific to a particular operating system, and hampered innovation to the detriment of consumers.[151] Similar to the

[149] Ibid para 305
[150] Ibid para 306
[151] Ibid para 308

earlier point, important parameters for ensuring this competitive advantage are the pre-installation of Google's Chrome app as an important distribution method, the inability for users to uninstall the application, competing web browsers cannot offset this competitive advantage by means of pre-installation agreements or user downloads, and lastly, the Commission found an increase in Google's market shares.[152]

The anti-competitive exclusionary effects are similar to those mentioned above, they included the 'deterrence' of innovation in regard to web browsers because it hinders the development of innovative web browsers, the interference with the normal competitive process and consumer harm resulting from fewer choices for web browsers, and the preservation and strengthening of Google's dominant position for general search services, subsequently leading to competing web browsers not attaining the necessary search queries, data and revenue for improving their services.[153] These findings were not affected by Google's argument that during this period, Google had enabled users to change their default browser and that users were free to download competing apps.[154]

Furthermore, the Commission found that Google did not objectively justify these tying practices. Firstly, these practices were not necessary to generate the revenue to cover its investment in Android or to cover the costs arising from its free services. Google also did not prove that the practice was imperative to provide higher quality service and experience to its users, nor i.e. prove that these practices were necessary for it to generate the needed revenue for its free apps and investment in Android because Google had other means of generating revenue. Moreover, it 'did not have an interest in developing Android in order to counter the risks to its business model resulting from the shift to mobile' or to explain why manufacturers did not have to pay a fee to install the Play Store.[155]

Google had argued that users could easily obtain browser and general search apps that competed with the tied products.[156] Although the General Court agreed with Google, it pointed out that the essence of this case did not revolve around the accessibility that users had to obtaining those apps, but rather the incentives that made them choose such apps.[157] This view is an important distinction because theoretically there are many apps within digital markets that

[152] Ibid para 309
[153] Ibid para 311
[154] Ibid para 312
[155] Ibid para 313
[156] Ibid para 292
[157] Ibid

can offer the same service and satisfy the same needs; however, users usually do not know or care about them. This can be seen as the result of strong network effects and consumer biases, which have been strengthened through Google's practices. The Court examined whether Google had created a consumer status quo, or default, bias by requiring manufacturers to pre-install their browser and general search app, which were displaced in a prominent position, and set those apps as default. The General Court refuted the arguments presented by Google regarding the Commission's assessment that the pre-installation of such applications had created a competitive advantage[158] and upheld that these practices had created anti-competitive effects because competitors could not offset such advantage.[159]

Closing the chapter on the first abuse conducted by Google, the General Court examined whether this behaviour could be objectively justified. This means, as stated by the Court of Justice in the Post Danmark case, that the dominant undertaking justifies their anti-competitive behaviour.[160] This is done either by demonstrating that it was necessary for the undertaking to behave in such a way or that the positive effects produced for consumers outweigh the exclusionary effects caused by the conduct in question.[161] Therefore, it is up to the dominant undertaking to prove that its conduct is objectively justified, not the Commission's.[162]

Google presented the following as its objective justifications for their tying conduct. Firstly, the conduct was legitimate because it generated the funds necessary for Google to invest in and maintain Android, and secondly, to keep its apps free for consumers to use. The General Court rejected these pleas of objective justification because; firstly, Google had other means of generating the necessary revenue to fund its investments in Android, such as through the revenue generated by the Play Store or data it had gathered,[163] and secondly, Google failed to prove that such practices were necessary to keep the apps free of charge.[164]

As of such, the Commission's contested decision was upheld by the General Court and Google's tying practice was deduced as being within the scope of the prohibition set out in Article 102.

[158] Ibid para 418
[159] Ibid para 436
[160] Post Danmark (n 115) para 40
[161] Ibid para 41
[162] Google Android (n 65) para 601
[163] Ibid para 605-610
[164] Ibid para 618

2.4.1.2. Evaluation of the Judgement

The General Court could have done a more in-depth analysis on Google's argument that a competitive advantage does not necessarily equal anti-competitive behaviour. Given the nature of the practice in question, which is not illegal per se, Google argued that to establish a foreclosure effect had been created, which is the key parameter in establishing that a tying practice is anti-competitive, one must show that market entry for competing undertakings is very difficult or impossible.[165] The General Court, however, promptly rejected this argument, stating that the Commission had clearly demonstrated the link between the MADA pre-installation conditions and the competitive advantage, which could not be offset by competitors and the anti-competitive effects that it creates.[166] Additionally, criticism can also be cast regarding the fact that when analysing Google's argument that users could access competing search services via their browsers, the General Court did not further specify the reasons why users could 'not in practice access other general search services through browsers and only rarely change the default settings for those browsers'.[167] Moreover, the General Court had accepted that manufacturers had the ability to pre-install apps that competed with the Google Search and Chrome apps. The Commission showed that such pre-installation of competing apps did not take place during the time of the infringement due to the combined effects of the MADAs, Revenue Share Agreements (RSAs) and Anti-Fragmentation Agreements' (AFAs), despite that some of the Commission's reasoning was faulty.[168] The General Court could have given more emphasis on assessing whether the quality of Google's services was superior to that of its competitors, which could potentially explain why so many users decided to conduct their daily activities using Google's apps and not their competitors'. In terms of quality, the General Court merely assessed that 'assuming that Google Search and Chrome are superior in terms of quality to the services offered by rivals, that would not be decisive since it is not claimed that the various services offered by the rivals are not technically capable of meeting consumer needs.'[169] This does not adequately explain why the quality of Google's apps is not significant for the case's outcome because it would be logical to assume that a better quality

[165] Ibid para 543
[166] Ibid para 564
[167] Ibid para 562
[168] Ibid para 537
[169] Ibid para 577

product would attract more customers whether it is tied or not. The assessment done by the Court seems somewhat incomplete, which could hint at a feeling of necessity for the General Court to uphold the Commission's decision as a way to impose a level of control on Google and their practices. It could be stipulated that a more careful assessment should have been made because of the nature of the practice in question, which is often beneficial to consumers.

As a final comment, the General Court illustrated how a practice can be unlawful if conducted for promoting a well-known, high-quality app, such as Google's apps, but if conducted by a lesser-known undertaking for promoting their apps, i.e. Google's competitors, the same practice is deemed perfectly lawful. This showcases the special responsibility that dominant undertakings have to not disturb the system of undistorted competition in the internal market and is in accordance with the interpretation of EU competition laws. This is done by presenting how users have the capability to easily download the apps of Google's competitors for general search apps and browsers, but they either opt not to or download such competing apps in an insufficient proportion to offset the competitive advantage.[170] If a smaller undertaking was to pre-install their apps on mobile devices, then the result would probably not be the same because they would use such a practice to promote a lesser known product to consumers, who could later decide the app they prefer, rather than conveniently promoting a leading app which would only further strengthen an existing position of market dominance. However, this could be deemed as controversial because the same conduct is prohibited when carried out by a dominant undertaking, but celebrated when performed by a weaker undertaking. This could be viewed as punishing an undertaking for their success and innovation.

2.4.1.3. The Second Abuse: Bundling

The second abuse related to tying relates to Google's AFAs, which are perceived as a form of bundling. Bundling is a practice similar to tying, and it refers to the instance in which an undertaking provides certain products only in the form of a bundle (i.e. package) and not separately.[171] According to the Commission's decision, Google had 'abused its dominant position in the worldwide market, excluding China, for Android app stores and in the national

[170] Ibid para 557
[171] Lianos, Korah and Siciliani (n 38) 1162

markets for general search services by making the licence for the Play Store and Google Search conditional on acceptance of anti-fragmentation obligations'.[172]

These AFAs impose a minimum compatibility standard for all devices that run on Android or an Android fork (which is an operating system that relies on the Android source code)[173], which among other things, requires these devices to have certain safety features, enable the installation of apps and include a complete set of Android application programming interfaces (known as APIs).[174] Devices that operate on such operating systems need to pass a series of compatibility tests to illustrate that they comply with the minimum compatibility standard.[175] The General Court only challenged the conduct by which manufacturers who wished to install Android on one device must comply with the AFAs for all other devices they manufacture, basically forcing them to use the Android source code for all of their devices. This, in turn, is viewed as abusive because it forbids the marketing of devices that run on incompatible Android forks.[176] Such practice could act as leverage for Google's dominance in the market for mobile app stores in the market for general search services.

The Commission relied on the aforementioned criteria set out in the Microsoft judgement[177] to establish that Google had implemented an abusive bundling practice 'aimed at depriving non-compatible Android forks of commercial markets.'[178] The first three criteria were met as, firstly, the anti-fragmentation obligations were distinct and unrelated to the licences of the Play Store and Google Search app; secondly, Google holds a dominant position in the market for Android app stores and the market for general search services; and, thirdly, the acquisition of the licences for the Play Store and Google Search was subject to the acceptance of the anti-fragmentation obligations and could not be acquired elsewise.[179] Although the Commission accepted Google's statement that a minimum compatibility requirement is necessary for devices on which its apps have been installed, it found that such a requirement diminishes the non-compatible Android fork market presence.[180] In its contested decision, the Commission based the foreclosure effects on the following: a. 'non-compatible Android forks constitute a

[172] Google Android (n 65) para 809
[173] Ibid para 807
[174] Ibid para 806
[175] Ibid para 807
[176] Ibid para 809
[177] Microsoft (n 137)
[178] Google Android (n 65) para 812
[179] Ibid para 815
[180] Ibid para 828

credible competitive threat to Google;' b. 'Google defines the anti-fragmentation obligations, the content of which it thus controls, and actively monitors OEMs' compliance with them;' c. 'the anti-fragmentation obligations hinder the development of non-compatible Android forks;' d. 'Android-compatible forks do not constitute a credible competitive threat to Google;' e. 'the capability of the anti-fragmentation obligations to restrict competition is reinforced by the unavailability of Google's proprietary APIs to non-compatible Android fork developers, which reduces the incentive for developers to design apps intended to function on such OSs' and f. 'Google's conduct maintains and strengthens its dominant position in the national markets for general search services, deters innovation and tends to harm, directly or indirectly, consumers'.[181]

The General Court held that Article 102(b) prohibits, among other things, practices which may abuse a dominant position by 'limiting production, markets or technical development to the prejudice of consumers' and for the Article to be applicable.[182] The application of Article 102 TFEU is subject to first proving the existence of the practice and, secondly, that the practice is capable of restricting competition.[183]

The existence of the practice was established by Google's answers to the written questions of the Court, which confessed that the anti-fragmentation obligations were imposed to manufacturers from the date of Android's inception to ensure that its reputation to both consumers and developers was not hindered by possible app malfunctions resulting from the development of incompatible Android forks.[184] This conclusion was backed by Google's behaviour of monitoring and reminding manufacturers of their obligations.[185]

Regarding the capability of the practice to restrict competition, the Court examined whether Google, firstly, had anti-competitive objectives and, secondly, whether the practice had effects that hindered competition.[186] As for the first element, it was apparent from internal documents that Google did implement this practice to hinder the access of non-compatible Android forks to the markets.[187] More specifically, this was apparent by internal emails, which showed that Google did not want non-compatible forks to have access to the Android ecosystem and enjoy

[181] Ibid para 816
[182] Ibid para 829
[183] Ibid
[184] Ibid para 831
[185] Ibid para 832-833
[186] Ibid para 836
[187] Ibid para 837

the same marketing as compatible forks, and Google recalled that such AFAs were necessary to protect their ecosystem and the interoperability of the products and services offered in this ecosystem.[188] As for the anti-competitive effects, the General Court held that it was sufficient to conclude that non-compatible Android forks would have been potential competitors in the market for licensable operating systems, and Google was not able to dispute this conclusion,[189] and that these AFAs had prevented the development of these incompatible forks.[190] It must be noted that the above conclusion was reached by the Commission by examining the failure of a non-compatible Android fork known as Fire OS. Google had argued that Fire OS did not succeed because of various commercial reasons, which were not backed by evidence. However, it was acknowledged by all parties that the main reason this operating system did not manage to succeed was because it had no access to the Play Store.[191] This example robustly illustrates how by bundling the licensing of the Play Store with the obligation to conform to the AFAs, Google had made it impossible for undertakings that wished to create a non-compatible operating system to succeed in the market for licenced operating systems. An undertaking that wishes to establish a place in the market would have to go to great lengths and take substantial great risks upon itself to establish a digital ecosystem of its own.

Lastly, Google had failed to objectively justify its practice. The first objective justification that Google brought forth was that these AFAs were necessary to prevent the fragmentation of the Android ecosystem and to protect compatibility. The Court clarified that, according to the Commission's decision, it was not the AFAs themselves that were abusive, but the prohibition of marketing and distribution of devices powered by non-compatible Android forks. As of such, compatibility issues were not relevant to justify the bundling practice.[192] Furthermore, hindering competitors' whole-market access for the reason of protecting compatibility was not proportionate.[193] The General Court further rejected Google's other justifications concerning its reputation, windfall effects and the time of the conduct.[194] Lastly, Google argued that the Commission should have considered the pro-competitive effects that were created as a result of maintaining compatibility and ensuring that the Android ecosystem remains unfragmented. The Court held that because of the lack of necessity between ensuring compatibility and the

[188] Ibid para 838-839
[189] Ibid para 843-847
[190] Ibid para 850
[191] Ibid
[192] Ibid para 878
[193] Ibid para 879
[194] Ibid para 881-888

exclusion of competitors from the market, the Commission had not erred in not weighing such pro-competitive events.[195]

2.4.1.4. Evaluation of the Judgement

The above case illustrates two instances of non-price related abuses conducted by Google. Tying and bundling have existed as a theory of harm for decades; however, in this case, it was applied in the context of digital ecosystems. The General Court had illustrated a strong incentive to penalise non-price–related abusive behaviours by applying the formal approach taken in the Microsoft case.[196] However, by reading this case, it could be argued that the Court could have analysed a few factors more in depth. Firstly, it must be said that by reading this judgement one may come to the conclusion that the General Court had pre-decided that Google was at fault and did not exactly examine the facts of the case as thoroughly as it should. For example, regarding the first instance of tying, the Court could have further analysed Google's argument that competitive advantage does not necessarily constitute a foreclosure of competition. This is especially true when the practice in question is not illegal per se and has generally been accepted to create pro-competitive effects. In my opinion, the Court should have given more emphasis on the quality of the user experience and innovation as pro-competitive effects for consumers, especially regarding Google's objective justifications regarding the integrity and interoperation of the services within its ecosystem. This is because other open-source platforms like Fire OS were plagued by incompatibilities, which in turn, hindered their commercial success.

2.4.2. New Theories of Harm – Self-Preferencing

The Commission creates new theories of harm from time to time to combat problematic behaviours that cannot be adequately addressed by existing theories of harm. This practice of introducing new theories of harm when faced with exceptionally challenging cases can be assessed as a reminder to undertakings of Article 102 TFEU's versatile nature, making it clear

[195] Ibid para 891
[196] Microsoft (n 137)

that anti-competitive behaviour will not be tolerated no matter its form. However, new theories of harm do not promote the same level of legal certainty that existing theories of harm do.[197] It can be argued that in the cases of new theories of harm, dominant undertakings may engage in practices that were previously never addressed by antitrust watchdogs, not knowing that such behaviours are unlawful. Such an argument was made by Google in the Google Search (Shopping) case[198] that will be analysed bellow. In my opinion, this is true to an extent, however, having in mind, firstly, that competition laws are basically aimed at protecting consumers and undistorted competition within the internal market and, secondly, the repeatedly addressed fact that dominant undertakings bear a special responsibility not to inhibit competition, undertakings with significant market power should be weary of potentially anti-competitive behaviour, regardless of its form. In this chapter we will be analysing the ground-breaking Google search (Shopping) case.

The Google Search (Shopping) case was the first instance in which the notion of self-referencing was explored as a possible theory of harm. In this case the Commission concerned itself with one of Google's practices. Google offered two kinds of services, general search services and specialised search services, among which was inter alia Google's own comparison shopping service ('CSS'), 'Google Shopping'.[199] The Commission in its decision had concluded that the abuse that had taken place in the present case had taken form as ' the more favourable positioning and display, in Google's general results pages, of its own comparison shopping service compared to competing comparison shopping services'[200] More specifically, comparison shopping services that competed with Google would be displayed in the form of blue links as general search results.[201] These results would also be displayed according to the ranking they were given regarding their relevance with the query provided by users. However, there was a tendency for competing CSSs to be demoted by Google's algorithm, and thus were displayed less favourably than Google's own shopping service.[202]

[197] Claudia C. Cantell, 'Abuse of Dominance in the Digital Era: Different Ways for EU Competition Law to Control Gatekeepers' (LLM thesis, University of Stockholm 2021) 39
[198] Ibid
[199] Google Shopping (n 71) para 42
Moreno Belloso, Natalia, 'Google v Commission (Google Shopping): A Case Summary' (2021) 1 <http://dx.doi.org/10.2139/ssrn.3965639> accessed 20 November 2022
[200] Google Shopping (n 71) para 57
[201] Ibid para 59-60
[202] Ibid para 59

Interestingly, Google's CSS was displayed as one of the top results in the search results page, granting it a more favourable position than other CSSs.[203] Additionally, Google's CSS was featured in an eye-catching manner with 'richer graphical features' and images.[204] Thus making it more enticing for users to prefer clicking on the links directing to Google's own CSS and diverting traffic there, rather than to other CSSs. Additionally, Google's own CSS was not subject to the same ranking criteria imposed on other CSSs.

The Commission found, after a seven-year investigation, Google's differential treatment of its own CSS and those of competitors lead to an increase in the amount of traffic generated towards Google's own CSS, while at the same time decreasing the traffic gathered by other CSSs.[205] This was because the prominent placement and display of Google's own CSS made it more enticing for users to prefer it than other results that were showcased less prominently.[206] As a result, significant traffic was diverted from others CSSs to Google's own CSS which could not be sufficiently replaced through other sources of traffic[207], thus extending Google's dominant position in the market for general search services to the markets for specialised comparison shopping search services to the detriment of consumers.[208]

Google argued that the practice described was a mean of improving the quality of services and as such does not constitute an abuse, but rather constitutes an example of competition on the merits.[209] The General Court begun its assessment by emphasizing the well-established special responsibility of dominant undertakings to refrain from distorting competition on the internal market.[210] The Court continues by citing the Post Danmark judgement[211], in which it is stated that Article 102 TFEU is applicable to conduct that is different from the conduct found in the normal competitive process with the result of hindering existing competition or future competition in the market, to the detriment of consumers.[212] Moreover, practices that have exclusionary effects to the detriment of consumers, either directly or indirectly, also fall under the prohibition of Article 102 TFEU.[213] Lastly, and very importantly, the General Court

[203] Ibid para 61
[204] Ibid para 62
[205] Ibid para 68
[206] Ibid para 65
[207] Ibid para 68
[208] Ibid
[209] Ibid para 139
[210] Ibid para 150
[211] Post Danmark (n 115)
[212] Google Shopping (n 71) para 151
[213] Ibid para 152-153

reminded that Article 102 TFEU is characterised by flexibility and the list of abusive behaviours can be expanded if needed.[214]

Having said the above, the General Court established that abusive conduct 'may take the form of an unjustified difference in treatment'.[215] The Court applied the general principle of equal treatment, which means 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'.[216] This is extremely important as the case law that the Court referred to concerned public undertakings. As of such, this obligation has been extended to apply to private undertakings as well.[217] The Court continued to say that Google's practice does not coincide with the nature of a general search engine, which requires that it shows results from a variety of third-party sources so as to enhance user experience and benefit from networks effects and economies of scale.[218] Such a practice would otherwise be detrimental to the development of a general search engine, as it hinders user choice and credibility.[219] Therefore, the Court found that such differential treatment should have been be justified.[220]

As to address the issue whether the Commission had adequately proven that Google's conduct was not in accordance with competition on the merits, the General Court had acknowledged that the principle of legal certainty requires that the implementation of EU law be void of inconsistencies.[221] The Court was satisfied by the Commission's reasoning and assessment that Google's behaviour was not in line with competition on the merits. The Commission found that Google's practice constituted a leveraging abuse.[222] It was found that the practice was opposed from competition on the merits because firstly, it 'diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service' and secondly is capable of producing anti-competitive effects in

[214] Ibid para 154
[215] Ibid para 155
[216] Ibid
[217] Alfonso Lamadrid and Pablo Ibáñez Colomo, ' The General Court in Case T-612/17, Google Shopping: the rise of a doctrine of equal treatment in Article 102 TFEU' (Chillin' Competition, 10 November 2021) <https://chillingcompetition.com/2021/11/10/the-general-court-in-case-t%E2%80%91612-17-google-shopping-the-rise-of-a-doctrine-of-equal-treatment-in-article-102-tfeu/> accessed 20 November 2022
[218] Google Shopping (n 71) para 178
[219] Ibid
[220] Ibid para 179
[221] Google Shopping (n 71) para 194
[222] Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 [2017]

the national markets for comparison shopping services and general search services.[223] This conclusion was further strengthened by the important role of traffic and the fact that other sources of traffic could not replace the traffic loss that competing CSSs incurred. Additionally, the Court rejected Google's potential objective justifications and pleas regarding the applicable legal test.[224] Having the above in mind, the General Court rejected this part of Google's plea.

Google additionally plead that the requirements laid out in the Bronner case should be applicable relating to the essential facilities doctrine[225], and argued that it was in a similar position with Mediaprint.[226] As such, Google argued that the Commission did not satisfy the conditions laid out in the relevant case law.[227]

The Bronner case concerned itself with an undertaking that was the only provider of home-delivery newspaper services. This undertaking, Mediaprint, refused a competitor access to its services. In this case, the CJEU introduced the essential facilities doctrine that facilitates the obligation of dominant undertakings to grant access to their facilities to competitors under the requirement that certain criteria are fulfilled. In paragraph 40 of the Bronner decision, it is established that access to a facility must be granted if a) the refusal to do so would likely eliminate all competition on the secondary market, b) the refusal prevented the appearance of a new product which consumers would potentially demand, c) the facility itself is 'indispensable' for the conduct of business and that d) such refusal cannot be objectively justified.[228] The doctrine applies only to 'exceptional circumstances' and was introduced so as to simultaneously protect competition and consumers, on one hand, and the dominant undertaking's freedom to contract.[229]

In the present case, the General Court stated that the contested decision concerned the refusal of Google to provide equal access to competing comparison shopping services.[230] Importantly, the Court carried out its assessment by reaching the conclusion that Google's general search service has characteristics that are 'akin to those of an essential facility' because it recognises

[223] Google Shopping (n 71) para 194-198
[224] Google Search (Shopping) Commission Decision (n 222) para 342
[225] Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. [1998] ECLI:EU:C:1998:569
[226] Google Shopping (n 71) para 199-204
[227] Ibid
[228] Bronner (n 225) para 40
[229] Lianos, Korah and Siciliani (n 38) 976
[230] Google Shopping (n 71) para 222

that there is no viable substitute. [231] Therefore, Google's general search results are akin to, but do not constitute, an essential facility. Additionally, the Court emphasises that the Commission in its decision did not rely on the criteria laid out in the Bronner case, but rather on case-law related to abusive leveraging practices.[232] Moreover, even though there are similarities between the access issues that exist in the current case, they do not comprise of the same abuse that concerned the Bronner case.[233] The General Court distinguishes Google's practice from refusal to supply by citing the Advocates General of the Court of Justice to further illustrate the differentiation between cases regarding discriminatory behaviour and those concerned with refusal to supply.[234] Overall, the reason why the conditions laid out in Bronner were not applied in the present case is because of the different nature of the abuse that had taken place in each of the cases.

Furthermore, Google had argued that the Commission failed to demonstrate the anti-competitive effects that Google's practices had created[235] and the decision is 'based on pure speculation about potential effects and does not examine the actual situation and development of the markets'.[236] The General Court rejected this argument, by reminding that the Commission was not under the obligation to present actual exclusionary effects that had taken form, nor actual consequences of the restriction or elimination of competition but must demonstrate potential anti-competitive effects.[237] Also, the Commission is neither obliged to conduct a counterfactual scenario for the purposes of illustrating an infringement of Article 102 TFEU[238] nor prove the existence of a foreclosure effect.[239] Nonetheless, as was previously mentioned, the Commission had successfully demonstrated in its decision a link between Google's practice and the decrease in traffic towards competing comparison shopping services and an increase towards its own and that a significant number of traffic gained by competing comparison shopping services was generated from Google.

Finally, Google disputed the imposition of a pecuniary penalty for the conduct. Google argued that it should not be fined because, firstly, this was the first time the Commission had assessed

[231] Ibid para 224
[232] Ibid para 223
[233] Ibid para 229
[234] Ibid para 239
[235] Ibid para 221-422
[236] Ibid para 422
[237] Ibid para 442-444
[238] Ibid para 378
[239] Ibid para 523

'conduct aimed at improving quality as abusive'[240]. The General Court found that Google intentionally engaged in conduct that could constitute an abuse of dominance.[241] Therefore, the General Court upheld the fine of €2.42 billion imposed on Google.[242]

2.4.2.1. Evaluation of the Judgement

Firstly, I commend the General Court for accepting self-preferencing as an acceptable theory of harm. The expansion of the list of abusive practices that fall under the scrutiny of Article 102 TFEU aligns perfectly with its non-exhaustive and continuously evolving nature. This also ensures the effective protection of consumers and of undistorted competition within the internal market without prejudice to the economic landscape and structure of the market. Furthermore, this new theory of harm has proved itself to be a very useful tool for competition authorities as numerous new investigations have taken place which feature such practices being exhibited within digital markets. Its significance lies on the fact that having established self-preferencing as an acceptable theory of harm, competition authorities save time and resources during the assessment procedure and the risk of legal uncertainty is also reduced. Considering the fact that the investigation had taken 7 years to reach an end, it is evident that the Commission struggled during its assessment. However, my only comment is that the General Court could have used this case as an opportunity to establish a set of principles that comprise a legal test that can be universally applied to all cases involving self-preferencing practices.

As for the General Court's conclusion that the essential facilities doctrine does not apply in this case, the Court clearly stated that the current abuse is a completely different form of abuse than that committed in the Bronner case. The Court pointed out that even though both cases had an element of discrimination, they were ultimately different and as such there was no need for the doctrine to be applied. In my opinion, it is best that the Court chose to differentiate these two abusive behaviours because, firstly, in the Bronner case competitors were entirely excluded from the home delivery service that concerned the Courts. Whereas, in the present case, Google's business model relied on, and benefitted, from displaying third party sources on its

[240] Ibid para 598
[241] Ibid para 616
[242] General Court, 'The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services' Press Release No 197/21 1 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>

results page. The infringing behaviour did not take the form of an explicit denial of access to competitors but rather as a differential treatment of those. Moreover, the Court clarified that even though Google's general search engine has characteristics similar to those of an essential facility, it does not fit into that category.

Finally, I believe that Google's argument regarding the imposition of a fine indicates how new theories of harm have a certain degree of legal uncertainty. This is not to say that they are not useful or necessary. On the contrary they are essential for the safeguarding of undistorted competition and the protection of consumers. However, it is expected that criticism will be voiced by opposing individuals. For example, there are supporters of the opinion that self-preferencing constitutes competition on the merits and that it should not be punished.[243] In my opinion, Google carried out this practice with the knowledge that such gave it a competitive advantage. As a dominant undertaking in the market for general search services, it should have acted in accordance with its responsibility to not inhibit undistorted competition. Therefore, even though this practice did not correspond to an existing theory of harm during the period it took place, Google should have anticipated the enforcement of competition laws.

2.5. Effectiveness of Application of 102 TFEU in Digital Markets

According to the interpretation given to Article 102 TFEU by the CJEU, it should be able to withstand the test of time and be effectively applied in all circumstances. Its exemplary list of abusive practices enables it to continuously evolve and cover all behaviours that pose a threat to the undistorted competition within the internal market, regardless of their form. However, in the context of digital markets this theoretically flexible provision has been proven to be inefficient.

When it comes to the application of Article 102 TFEU, the Commission can only intervene ex-post.[244] This means that the application of Article 102 TFEU is subject to a case-by-case analysis that relies on the assessment of legal criteria.[245] Such assessment of legal criteria was

[244] Purić (n 4) 300
[245] Marios C Iacovides and Jakob Jeanrond, 'Overcoming methodological challenges in the application of competition law to digital platforms—a Swedish perspective' (2018) 6(3) *Journal of Antitrust Enforcement* 439

examined in previous chapters of this thesis and concerned the determination of the relevant market, the position of dominance and the applicable theory of harm. The previous chapters illustrated how certain characteristics of digital markets challenge the proper assessment of these legal principles because the relevant methodological tests rely on the economics of traditional markets, thus influencing the effective enforcement of Article 102 TFEU.[246]

Note that the enforcement gap starts with the difficulty in assessing the relevant market, which is the starting point of every investigation, and impacts every other aspect, including the definition of the relevant theory of harm.[247] Moreover, the biggest challenge that competition authorities are faced with is the determination of the relevant theories of harm. This is because of the extremely complex and dynamic nature of digital markets[248] that must be analysed leading to the prolongation of the investigation process and the drainage of resources.[249] Motta and Peitz refer to the Google Search (Shopping) case[250] to illustrate such difficulties present in the investigation process.[251] They highlight that during the span of the seven year investigation conducted by the Commission, the structure of the market had changed considerably, making any harm incurred irreversible, and adding to the complexity of the investigation process.[252] The complexity of such cases therefore makes the assessment process more challenging and renders the enforcement of Article 102 TFEU inefficient because by the time the Commission reaches a decision it is too late to offset the negative effects of the anti-competitive practices.

The difficulty of assessing the proper theory of harm is evident when assessing the Commission's recent investigations against Amazon.[253] These cases also indicate that data must additionally be taken into consideration during investigations. The Commission has yet to specify the theories of harm that apply to the alleged infringements of Article 102 TFEU in these cases. It has been speculated that this could indicate that the Commission has yet to conclude the nature of the abusive behaviour due to the complexity of Amazon's business

<https://doi.org/10.1093/jaenfo/jny005> accessed 20 November 2022
[246] Ibid 440
[247] Robertson (n 40) 6
[248] Massimo Motta and Martin Peitz, 'Intervention Triggers and Underlying Theories of Harm' in Massimo Motta, Martin Peitz and Heike Schweitzer (eds), *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 60
[249] Ibid
[250] Google Shopping (n 71)
[251] Motta and Peitz (n 248) 60
[252] Ibid
[253] Amazon - Buy Box and Amazon Marketplace (Cases AT.40462 and AT.40703) (C(2022) 5078) 2022/C 278/06

model or perhaps because a new theory of harm is being developed.[254] Note that the proceedings brought by the Commission will likely close subject to the adoption of commitments on behalf of Amazon, making it improbable that we will find out the nature of the infringements in question.

The first practice concerns Amazon's dual role as a retailer and a marketplace in which individual sellers are able to reach consumers and sell their products.[255] As a platform, Amazon collects vast quantities of third-party sellers' data related to their commercial conduct online. What concerned the Commission was whether Amazon had infringed Article 102 TFEU by utilizing this data on a regular basis for its own retail activities, which directly compete with those of third-party sellers, thus gaining a competitive advantage.[256] The utilisation of this data would take the form of identifying when and which products should be launched or should go on sale, the terms and prices on which products are sold wholesale, the prices of products that Amazon sells as a retailer and the optimal way to manage Amazon's inventories, as well as establish the identity of suppliers.[257]

The second practice concerns the criteria for which the Amazon Buy Box and access to users who buy under Amazon's loyalty programme, Amazon Prime, is awarded to retailers who sell on the platform[258]. The Buy Box is a valuable tool for sellers as it prominently features a seller's offer for a product to consumers, making it more enticing for consumers to instantly purchase said product.[259] According to the Commission, most consumers only buy the offer featured on the Buy Box and do not refer to other offers displayed elsewhere on the website.[260] Additionally, it is equally important for sellers to reach prime users because firstly, they make more purchases and buy on a more consistent basis from Amazon Marketplace, and secondly, it increases the chances of these sellers winning the Buy Box.[261] In its preliminary assessment, the Commission illustrated its concerns that Amazon had infringed Article 102 TFEU by establishing discriminatory criteria for awarding sellers the Buy Box and access to Prime users.

[254] Oroszi (n 35)
[255] Commission, 'Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon' (Press Release, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 20 November 2022
[256] Commission, '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' [2022] OJ C 278 para 3
[257] Ibid para
[258] Amazon Buy Box (Case AT.40703)
[259] Ibid para 8
[260] Ibid
[261] Ibid para 9

Such discrimination takes the form of favouring Amazon's own retail offers and those of individual sellers who use Amazon's logistics and delivery services, known as Fulfilment by Amazon.[262]

The value of data and the multi-sidedness of Amazon's platform are the key components in this case. Oroszi stipulates that the abuse taking place in this specific case is that of discriminatory leveraging.[263] She identified three theories of harm that could possibly be applicable in this case depending on the way the Commission choses to conduct its analysis. These are: self-preferencing, predatory pricing and unfair trading conditions.[264] This illustrates how it is not always easy to categorise the type of abuse that concerns a specific case. Such cases can also be seen as an opportunity for the Commission to establish a new theory of harm that is based on the ability of an undertaking to abuse its dominant position by utilizing vast amounts of data. As a final note, the Commission will have to prove the abusive nature of the practice, meaning that it has the burden of proof to illustrate that the undertaking holds a dominant position in the relevant market and that this undertaking's practices are capable of distorting competition.

Note that up until November 2022, Google has been fined a total of 8.25 billion euros by the Commission for infringement of competition laws.[265] These colossal fines however do not seem to deter Google from committing future infringements, as there are currently pending investigations against it. Furthermore, other undertakings that comprise Big Tech do not seem to be affected by these fines either as they are also being investigated by the Commission and competition authorities of other jurisdictions. It follows that fines imposed do not contribute to the prevention of future infringement.

In conclusion, the application of Article 102 TFEU is not as effective in digital markets in comparison to traditional markets. The rapid developments in these markets, the interconnection between different market sides and the value of data complicate the Commission's investigation process because the current legal tests were designed for abusive practices taken place in traditional markets. Furthermore, the ex-post enforcement does not

[262] Ibid para 7
[263] Oroszi (n 35) 17
[264] Ibid 17-20
[265] Reuters, 'Google loses appeal against record $4 billion EU fine' (CNN Business, 14 September 2022) <https://edition.cnn.com/2022/09/14/tech/google-loses-eu-fine-appeal/index.html#:~:text=The%20European%20Commission%20has%20imposed,back%20more%20than%20a%20decade> accessed 20 November 2022

seem to be able to properly remedy the negative effects of anti-competitive behaviours thus reducing contestability in digital markets and reducing the degree of consumer protection.

3. The Digital Markets Act

3.1. A Brief Introduction to the DMA

The Digital Markets Act refers to the EU Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.[266] The Regulation was proposed by the European Commission on the 15th of December 2020 and recently entered into force on the 1st of November 2022. The rules set out in the DMA will effectively apply from the 2nd of May 2022, and by March 2024, the obligations set out in the Regulation will become applicable to their recipients.[267]

The DMA is an ex-ante and sector-specific regulation[268] designed to complement EU competition laws to ensure fairness and contestability in digital markets.[269] According to the DMA's preamble, the Commission took the initiative to propose this regulation because it found that certain characteristics of 'core platform services' are prone to exploitation by the undertakings that provided them and can lead to reduced contestability and unfair commercial relationships between platform users and providers as well as fewer choices for users, especially when such exploitation is combined with unfair business practices on behalf of the provider.[270] According to the European Commissioner for Competition, Margrethe Vestager, 'The DMA will change the digital landscape profoundly. With it, the EU is taking a pro-active approach to ensuring fair, transparent and contestable digital markets. A small number of large

[266] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265
[267] Commission, 'Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force' (Press Release, 31 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423> accessed 20 November 2022
[268] Cappai, Marco and Colangelo, Giuseppe, 'Taming digital gatekeepers: the more regulatory approach to antitrust law' (April 10, 2020). Stanford-Vienna TTLF Working Paper No. 55; a modified version is forthcoming in Computer Law & Security Review 16 <https://ssrn.com/abstract=3572629> accessed 20 November 2022
[269] DMA (n 266) Preamble para 10
[270] Ibid Preamble para 2

companies hold significant market power in their hands. Gatekeepers enjoying an entrenched position in digital markets will have to show that they are competing fairly.'[271]

3.2. Scope and Objectives of the DMA

The DMA is an internal market law, with its relevant legal basis being Article 114 TFEU. That being said, the DMA has differentiated itself from competition law not only regarding its legal basis but also regarding the scope and aims of this Regulation. According to its preamble, the purpose of the Regulation is defined to 'contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.'[272] It follows that the DMA enforces a set of harmonised ex-ante legal obligations applicable to some undertakings that, firstly, provide 'core platform services' and, secondly, fulfil a particular set of criteria so as to be designated as 'gatekeepers' with the aim to ensure contestable and fair digital markets within the internal market.[273] The notion of a gatekeeper will be defined in chapter 3.3.

The Commission made it clear that the DMA protects a different legal interest than that of competition laws in paragraph 11 of the Preamble and that the application of the DMA is without prejudice to the application of Articles 101 and 102 TFEU.[274] The DMA's legal interests of fairness and contestability in digital markets within the internal market are further explained in paragraphs 32–34 of the preamble.

The meaning of contestability has been defined in paragraph 32 of the preamble as 'the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services'.[275] It is further explained that such barriers to entry and expansion are attributed to characteristics of core platform services, like economies of scale and network effects, which lead to weak contestability and overall a reduction in incentives to innovation and quality improvement. Reduced contestability can also be attributed to situations where a core platform service has more than one gatekeeper. The

[271] Commission, Press Release (n 267)
[272] DMA (n 266) Article 1.1
[273] Ibid Preamble para 8
[274] Ibid Preamble para 11
[275] Ibid Preamble para 32

Commission concluded that the DMA should ban practices of gatekeepers capable of increasing barriers to entry or expansion and impose obligations on gatekeepers who conduct such practices. Lastly, these obligations must also be imposed to 'situations where the position of the gatekeeper may be entrenched to such an extent that inter-platform competition is not effective in the short term, meaning that intra-platform competition needs to be created or increased'.[276]

Subsequently, the following paragraph describes the notion of 'unfairness', rather than that of 'fairness'. Admittedly, this convention is unorthodox, as one would expect a definition of fairness, rather than that of its antonym. As such, we must interpret fairness as being the opposite of the situation described in paragraph 33 of the preamble. For the reason of the DMA, unfairness is described as 'an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'[277]. In continuity, unfairness is additionally linked with the gatekeeper using its 'gateway position and superior bargaining power' for conducting practices that prevent both business and end users from fully enjoying the benefits of their own innovations and contributions to the core platform service and set unilaterally 'unbalanced conditions' for the use of their core platform service or other linked services.[278] Finally, it is stated that '[s]uch imbalance is not excluded by the fact that the gatekeeper offers a particular service free of charge to a specific group of users, and may also consist in excluding or discriminating against business users, in particular if the latter compete with the services provided by the gatekeeper. This Regulation should therefore impose obligations on gatekeepers addressing such behaviour.'[279]

These clarifications regarding the protected legal interests of the DMA are much appreciated. This is mostly because the Commission's proposed text of the DMA did not have any further explanations regarding the terms 'fairness' and 'contestability' and these objectives were seen as incredibly vague and similar to the objectives of competition law[280], causing concerns

[276] Ibid
[277] Ibid Preamble para 33
[278] Ibid
[279] Ibid
[280] Zlatina Georgieva, 'The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles' (2021) 6(1) European Papers <https://www.europeanpapers.eu/en/europeanforum/digital-markets-act-proposal-european-commission-exante-regulation> accessed 20 November 2022;
OECD (2021), Ex ante regulation of digital markets, OECD Competition Committee Discussion Paper 16-19
<https://www.oecd.org/daf/competition/ex-ante-regulation-andcompetition-in-digital-markets.htm> accessed 20 November 2022

whether the DMA would cause an infringement of the principle of ne bis in idem. The Court of Justice of the European Union in the Toshiba case held that 'in competition law cases, that the application of this principle is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same'.[281] Therefore, there will be no infringement of the ne bis in idem principle in the case where an undertaking, which is also a designated gatekeeper, was found in infringement of competition law and also found to be non-compliant with the obligations imposed by the DMA.

3.3. The Notion of Gatekeepers

The DMA defines a gatekeeper as 'an undertaking providing core platform services, designated pursuant to Article 3'[282] and core platform services are defined as being any type of service contained in an exhaustive list provided in Article 2(2). The list of core platform services entails online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.[283]

Article 3 sets out the quantitative criteria in which the Commission designates undertakings as gatekeepers. An undertaking will be designated a gatekeeper if all of the following three criteria are met:

'(a) it has a significant impact on the internal market;

(b) it provides a core platform service which is an important gateway for business users to reach end users; and

(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.'[284]

The first criterion is satisfied if the undertaking achieves an annual Union turnover of at least 7,5 billion euros in its last three financial years or if the undertaking's 'average market

[281] Case C-17/10, *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2012] ECLI:EU:C:2012:72 para 97
[282] DMA (n 266) Article 2(1)
[283] Ibid Article 2(2)
[284] Ibid Article 3.1

capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States'.[285] As for the second criterion, the core platform service must have 'at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union' in the last financial year.[286] Finally, the third criterion is satisfied when the second criterion has been fulfilled for the previous three financial years.[287]

Undertakings that do not satisfy all of the above criteria can also be designated as gatekeepers following a market investigation.[288] During the market investigation, the Commission can take certain factors into account, such as the size and position of the undertaking; the number of users, network effects and data related advantages; effects of scale or scope and user lock-in and foreseeable developments regarding such factors.[289] The existence of this process stems from the aforementioned that even a new entrant in the market could be designated as a gatekeeper based on its future potential to expand. Additionally, business structures do not appear to be critical in the designation process, but rather every type of undertaking can consist of a gatekeeper if the Commission deems it to have a significant influence.

The designation process is meant to be fast, and undertakings must self-assess whether they qualify as a gatekeeper, providing all relevant information to the Commission no more than two months from the time the threshold is met.[290] In the absence of such notification, the Commission can designate an undertaking as a gatekeeper on the basis of information that is available to it[291] and the designation process should not take longer than 45 business days.[292] It is important to mention that the undertakings have the ability to oppose such a designation by providing any relevant information to prove that they do not fulfil the aforementioned quantitative criteria.[293] As Colomo stresses, under Article 102 TFEU it is the competition authority's burden to prove that an undertaking holds a position of dominance, whereas under the DMA the undertaking in question must prove that they do not qualify to be designated as a

[285] Ibid Article 3.2(a)
[286] Ibid Article 3.2(b)
[287] Ibid Article 3.2(c)
[288] Ibid Article 3.8
[289] Ibid
[290] Ibid Article 3.3
[291] Ibid
[292] Ibid Article 3.4
[293] Ibid Article 3.5

gatekeeper.[294] The whole designation process is designed to be as rapid as possible, with the underlying intent that the DMA can withstand the fast-paced nature of digital markets. Additionally, the burden of proof is on the undertaking to prove through its notification that it does not fulfil the quantitative threshold required to designate it as a gatekeeper. As the OECD report highlights this is the opposite to the situation in which a process under Article 102 TFEU requires that the competition authority proves that the undertaking holds a position of dominance.[295]

3.4. The Obligations of Gatekeepers

The obligations of gatekeepers are listed in Articles 5, 6 and 7 of the DMA. These three articles contain lists of do's and do not's that gatekeepers must abide by. These obligations are effective automatically.

Article 5 concerns obligations that all gatekeepers must comply. Such obligations concern themselves with, inter alia, personal data collection and processing, the imposition of most favourable nation clauses to business users, transparency regarding online advertising and forcing users to use or subscribe to certain services offered by the gatekeeper.[296]

On the other hand, Article 6 concerns itself with obligations that gatekeepers must comply with following the opening of proceedings by the Commission. The obligations listed in this Article are reminiscent of cases that have recently been or are currently under investigation either by the Commission or by national competition authorities. For example, the obligation set out in paragraph 2 regarding non-public data concerns practices such as those exhibited by Amazon in its Amazon Marketplace case.[297] Additionally, paragraph 3 describes a situation akin to that of the Google Android case, and paragraph 5 concerns itself with the practice of self-preferencing. It is evident that these obligations were designed by drawing inspiration from recent competition case law. Therefore, the Commission uses its knowledge of prior problematic practices to prevent them from resurfacing and exhibited in the future and to

[294] Pablo Ibanez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (22 February 2022)
<https://ssrn.com/abstract=3790276> accessed 22 November 2022
[295] OECD (n 280) 29
[296] DMA (n 266) Article 5
[297] Case AT.40462

reduce the negative consequences of these behaviours. Finally, Article 7 focuses on the interoperability of communication services.

3.5. Effectiveness of the DMA in Regulating Digital Platform Markets

Firstly, it must be mentioned that providing an exhaustive list of obligations catering to a particular group of recipients provides legal certainty and harmonisation within the internal market. The Commission claims that the obligations imposed by the DMA are proportionate, as it only affects a small number of gatekeepers and only interferes to the point where it is necessary to ensure fair and contestable digital markets[298]. In my opinion, the DMA is in accordance with the principle of proportionality because it only affects the behaviours of a handful of very powerful undertakings, which are unaffected by other means of enforcement, and operate in very specific markets. Take, for example, the absurd fines that the Commission imposes on Google for breach of Article 102 TFEU, that exceed 8 billion euros in total[299],which have for Google and/or other big players in the digital markets.

Moving on, these markets have certain characteristics that create an environment susceptible to tipping and create situations in which competition is reduced exponentially. According to Marco Cappai and Giuseppe Colangelo, due to the fact that the characteristics and structure of these markets are important factors in the reduction of competition, sector-specific regulation, such as the DMA, would be the optimal solution to combat problematic practices in these situations.[300] In addition to the above, the DMA would be much more effective in ensuring that such markets are contestable and fair, and therefore, restore healthy competition in these markets. Firstly, as Motta and Peitz point out, Article 102 TFEU can only address certain business practices, and is not broad enough to ensure contestability generally in the market.[301] This consideration is important because the DMA's ex-ante nature does not require a lengthy and resource-consuming process to restore, or attempt to restore, undistorted competition in a specific market, which is required for the application of Article 102 TEFU, as the behaviour of gatekeepers is regulated ex-ante. This is particularly important in the context of digital markets

[298] DMA (n 266) Preamble para 107
[299] Reuters (n 265)
[300] Cappai and Colangelo (n 268) 5
[301] Motta and Peitz (n 248) 30

because of their complexity and fast-paced nature. When investigating possible infringements of competition law in the digital sector, the Commission must take into account many complex factors during its investigations, leading to inherently lengthy investigations, such as that of the Google Search (Shopping) case, which lasted seven years. By the time the Commission reaches a decision, it could very possibly be too late to effectively address the anti-competitive practice and restore the market to the way it was before the infringement took place[302]. Therefore, the DMA can remedy the negative effects that cannot be addressed or effectively remedied by competition rules by proactively enforcing obligations to gatekeepers, thereby bypassing the lengthy and complicated enforcement process of competition laws.

It is important to keep in mind the fast-moving nature of the digital markets even when analysing the contents of the list of obligations laid out in Articles 5, 6 and 7. As mentioned previously, these exhaustive lists of obligations are able to effectively address the problematic practices that currently concern competition authorities. However, because of the rapidly changing and dynamic nature of digital markets, these obligations would quickly become outdated, and the DMA would be rendered obsolete. As of such, the Commission cleverly granted the DMA the flexibility needed to effectively address new practices via a crucial market investigation tool. The market investigation tool enables the Commission to update existing obligations[303] and add new obligations to the lists of Articles 5 and 6 and identify new core platform services[304]. This is an exceptional tool because it allows the Commission to be systematically updated accordingly to new developments in the digital sector and 'future-proof' (to the best extent currently envisioned) the DMA[305]. Furthermore, the market investigation tool enables the Commission to distinguish and tackle the strategies used by gatekeeper in a precise manner.[306] Additionally, it relieves legislators of the burden of predicting and regulating every possible scenario that could potentially need regulatory intervention.

Moreover, the market investigation tool addresses situations of systematic non-compliance.[307] It must be noted that in cases of non-compliance, the Commission has the power to adopt an implementing act[308] and to impose fines not exceeding 10% of the gatekeeper's total worldwide

[302] Ibid 60
[303] DMA (n 266) Article 12
[304] Ibid Article 19
[305] OECD (n 280) 26
[306] Motta and Peitz (n 248) 30
[307] DMA (n 266) Article 18
[308] Ibid Article 29

turnover of the previous financial year.[309] However, in the case of repeated non-compliance, the Commission can impose fines of up to 20% of the gatekeeper's total worldwide turnover generated in the previous financial year,[310] but also has the power to impose behavioural and structural remedies to the degree where they are necessary and proportionate.[311]

Furthermore, the Commission also foresaw the possibility of undertakings altering the structure of the core platform services they provide so as to circumvent the aforementioned quantitative criteria and has incorporated Article 13, which forbids undertakings to take any measures that would hinder the effective and full compliance with the provisions and obligations of the DMA.[312] What I find commendable is that the Commission condemns any behaviour that intentionally undermines the provisions laid down in the DMA. Such behaviour has been described, inter alia, as including practices of contractual, technical or commercial nature or as making the collection of personal data especially cumbersome or degrading the quality of their services so as to render useless the obligations laid down in Articles 5, 6 and 7.[313] In addition to this effort, the Commission encourages persons or undertakings that know of the infringement of the DMA's rules to not hesitate to alert the Commission through its whistle-blower tool.[314] Taking these facets into consideration, it seems that the DMA has been designed to minimise any incentives that gatekeepers have to not comply with the obligations imposed upon it. In my opinion, by imposing structural and behavioural remedies in cases of non-compliance, the Commission can more effectively regulate the behaviours of gatekeepers, as the fines imposed by the Commission and Courts generally do not t discourage gatekeepers from abusing their entrenched market position. Additionally, the fines that can be imposed can be very high, and act as another reason to avoid infringement.

For the reasons stated above, I firmly believe that the DMA is an effective tool in combating abusive practices in the context of digital markets.

[309] Ibid Article 30.1
[310] Ibid Article 30.2
[311] Ibid Article 18
[312] Ibid Article 13
[313] Ibid Articles 13.4-13.6
[314] Ibid Preamble para 102

4. Conclusions

Digital markets are comprised of certain characteristics that reduce contestability and can be exploited by established undertakings to reduce the natural competitive process. Network effects, extreme returns to scale, data importance, the dynamic and rapid changes that take place and the multi-sided nature of digital markets are the main factors that enable Big Tech to behave in an anti-competitive manner.

In the digital sphere, Article 102 TFEU has been proven to be ineffective in efficiently addressing Big Tech's abusive practices. Although flexible in theory, the assessment process for finding an infringement of Article 102 TFEU relies on multiple legal tests that cannot be utilised in a coherent manner when faced with certain characteristics of digital markets. In fact, competition authorities cannot properly assess abusive conduct in digital markets because the assessment relies on legal tests that were designed specifically for addressing abusive behaviour in traditional markets. The main challenges that the Commission faces when applying Article 102 TFEU are determination of the relevant markets, existence of a position of dominance and delineation of the corresponding theory of harm.[315]

Considering the first challenge, the multi-sided nature of digital markets increases the difficulty of defining the relevant market because it is difficult to differentiate which and how many market sides should be incorporated in the market definition.[316] Therefore, the Commission runs the risk of defining the market too widely or too narrowly. Secondly, the assessment of market power is traditionally done by assessing an undertaking's market share, however, network effects and zero-price policies renders traditional assessment tools insufficient. Thirdly, existing theories of harm must be adapted to apply in the digital sector, and in fact, particularly complex cases may require the establishment of a new theory of harm. Whatever approach the Commission chooses to assess the anti-competitive behaviour in question will be extremely complicated and will be a time- and resource-consuming process. This was clearly illustrated in the Google Search (Shopping) case[317], in which the Commission's investigation took seven years to reach a conclusion, and by the time the Commission reached a conclusion, the market had changed drastically and the negative effects on the market were irreversible.[318]

[315] Purić (n 4) 300
[316] Ibid
[317] Google Shopping (n 71)
[318] Motta and Peitz (n 248) 60

Lastly, the inefficiency in addressing the negative effects of Big Tech's behaviour is attributed to the ex-post enforcement, which requires the previously described extensive assessment process. In conclusion, Article 102 TFEU cannot be effectively enforced in digital markets, and thus, creates a need for additional regulatory enforcement.

The DMA seems to be the solution to the complicated situation described above. It has a complementary application to the application of Article 102 TFEU, so can address the problematic behaviours that cannot be effectively addressed by Article 102 TFEU. The ex-ante regulation of a few powerful undertakings does not require an extensive investigation process prior to their application. As such, the obligations of Article 5 are effective immediately after the designation process is completed. This is important because the DMA deliberately targets the problematic behaviours which have adverse effects on digital markets. If found necessary, the Commission can impose additional obligations on undertakings, which are listed in Articles 6 and 7 of the DMA. The obligations have been specifically designed not only to combat abusive behaviour that is currently taking place but also prevent it from happening in the future.

It is crucial that the DMA includes a market investigation tool. This tool is key to the DMA withstanding the test of time and digital markets' rapid and dynamic nature without its provisions becoming obsolete. The market investigation tool enables the Commission to designate new gatekeepers under different criteria than those described in Article 3, to include new obligations that gatekeepers that must comply with and include new forms of core platform services that fall under the ex-ante regulation. The process related to the use of the market investigation tool is designed to expand the list of gatekeepers, obligations and core platform services as quickly as possible to restrict any negative effects on contestability and fairness.

In conclusion, the DMA provides a concise list of obligations to specific recipients and a) halts any current abusive behaviours that have yet to be addressed by competition law, b) prevents such behaviours from being exhibited in the future and c) remedies these behaviours' impact on contestability and fairness between all market players, which in turn will restore competition in these markets. It combats any negative behaviours that cannot be effectively addressed by Article 102 TFEU because it was designed to withstand the characteristics of digital markets. At the same time, behaviours that cannot be addressed by the DMA are subject to the application of Article 102 TFEU. That being said, the DMA seems to be the most promising tool for addressing abusive practices in the context of digital markets in the EU. To answer the

research question, I conclude that the newly adopted Digital Markets Act effectively addresses abuse of dominance within digital markets in the EU.

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