LUISS

Dipartimento di Giurisprudenza

Cattedra di European Union Law

Article 102 TFEU and the Digital Market Act: An Insight in light of the *Google Shopping* Case

Chiar.mo Prof. Daniele Gallo

RELATORE

Chiar.mo Prof. Giacomo Biagioni

CORRELATORE

Elisabetta Cristalli

150503

CANDIDATA

Anno Accademico 2021/2022

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INTRODUCTION

Over the last few decades, the digital economy has grown to be extremely important to many citizens in the EU and around the world. Our society is currently dependent on digital technologies and cannot work without the intermediation of digital platforms. Nevertheless, it did not take long for this shift toward a more digitalized world to reveal not only its benefits but also, and more importantly, its drawbacks. The challenges of this new path became clear, particularly at the intersection with European competition law. Indeed, technological advancement has put EU Competition law's fundamental framework to the test. On closer inspection, such 'digital revolution' has highlighted several problems that were already present in the system but had been overlooked for a long time, such as the oligopoly and the monopsony problems.

More importantly for the thesis' purpose, the digitalization has highlighted the peculiar power held by some companies - the so called 'Big Giants' who act as gatekeeper in the market where they operate -, i.e. the regulatory power. Such power enables these 'impersonal entities' to make decision that affect the legal sphere of users which 'populate' the gatekeeper's platform and represent the distinguish feature of this digital age.

The Google Shopping case is appropriate in this context where, for the first time, in a 'pure' Article 102 TFEU's case, it has been recognised the 'principle of equal treatment'. Because of this recognitions, it is one of the most discussed cases in European competition law in recent years, which gives the chance to highlight the implications that gatekeepers-related cases have posed to Article 102 TFEU's 'basic' framework, as well as the difficulties that such cases pose to the finding of an antitrust violation, which has led to the adoption of a new tool that 'circumvents' such difficulties, i.e. the DMA. The choice of analysing such case lies in the peculiar outcome and finding of the case – by both the Commission and the General Court - which gives the possibility to examine such interesting case critically in relation to the current interpretation of antitrust provisions.

The main argument will be that our society is confronted with a new type of power held by these peculiar economic operators, known as gatekeepers, defined as the

ability to produce relevant effects in a unilateral way. Today's digital platforms can either contribute to the realization and expansion of a person's fundamental freedoms – such as the one of expression or to conduct a business – or, as its flip side, can contribute to the restriction and weakening of such freedoms. Such power enables these economic operators to have an impact on the market in which they operate, by fixing the 'rules of the game' for the user which use the gatekeeper's platform.

A further consideration must be added to this changing scenario, which concerns the economic dimension of the subjects - typically commercial - that today produce and trade these technological products or services capable of interfering with our freedoms. These are the world's most powerful economic and financial players, capable of amassing capital and economic resources far exceeding those of many nations. This circumstance necessitates further careful consideration of the companies' still (only) private nature. Because of this new power, it appears that Europe is attempting to 'chase' the technological phenomenon, even as it continues to evolve rapidly, opening up new scenarios in a territory that increasingly eludes the 'traditional' antitrust tools. In this regard, the thesis will investigate the difficulties that competition law is confronted with in this ever-changing digital scenario by highlighting the potential impact that this digital environment has on Article 102 TFEU and the Union's decision to 'hit' the problem posed by such economic operators with a different tool, i.e. the Digital Market Act, specifically tailored for such peculiar operators.

In this regard, because of this new power, and in order to comprehend its implications on European competition law discipline, Chapter I will refer to the state of the art, namely to the discipline of competition law which can be found in the TFEU, the Commission's Regulations, Guidelines, Notices and Communication of the Commission – the so called 'law of the books'- and will relate it to the case examined throughout the thesis, namely Google Search (Shopping), in order to understand the way in which the law in applied and enforced in practice, i.e. the so called 'law in action'. This chapter will examine the European Union's antitrust discipline, its foundations, and the three main instruments, namely Articles 101,

102, and 106 TFEU. After defining the concepts shared by the first two articles - namely the one of undertaking, relevant market, restriction of competition and prejudice to trade between Member States - particular attention will be given to Article 102 TFEU, since that the case at the hearth of the thesis, the Google Shopping case, relates to an abuse of dominant position. Furthermore, a reference will be made to the intersection of Articles 102 and 106 TFEU, as one of the principles typical of the latter provision – the one of equal treatment - is taken into account in the case's resolution. From this purely normative framework, a reference will be made to the European Commission's more economic approach – in order to better comprehend the introduction of the DMA - and antitrust rules' sponge-like nature - which will be shown trough the examination of the Chicago and Neo-Brandeis schools of thought – in order to put the basis for the Google Shopping case's in-depth analysis. The Chapter will then introduce the problem posed by economic operators like Google and Europe's ongoing digitalization process, emphasizing how this digital revolution challenges established paradigms like market power assessment and market's definition. To this end, the "Google cases" will show how the Commission has focused on this unusual operator - which can be compared to a "omnivorous" creature that feeds on its users, whether they are business or non-commercial ones – in order to highlight the importance that such undertaking plays in today's society. The examination conducted in this Chapter is a prerequisites and constitute the groundwork for the following two Chapters and for understanding how (and if) the Google Shopping case has innovated competition discipline and whether Europe's choice to create a complementary instrument – compared to the three aforementioned provisions -, to address the problems posed by economic operators like Google, is a suitable instrument to face such problems.

From the particularly repressive approach recently shown, through the 'Google cases saga', by the European Commission towards Google, the thesis, in Chapter II, will focus on one of the most discussed cases involving this peculiar operator, namely the Google Search (Shopping) case. The chapter will examine the case through both the Commission's and the General Court's 'lens', by analysing two of

the most discussed finding in recent years, namely the conduct in which Google has engaged into, i.e. self-preferencing, and the recognition of the principle of equal treatment upon Google. Such finding have brought to light interesting insights in relation to Article 102 TFEU's 'lodestars' - namely the special responsibility concept, the competition on merits paradigm and the consumer welfare principle – which will be analysed in-depth trough the chapter and will pose the reflection of whether 'there is room' for a 'new face' of Article 102 TFEU. The insight on the special responsibility concept – 'Article 102 TFEU's Yin' – will investigate the possibility to envisage an enhanced special responsibility upon such undertakings which seems to resemble the one under Article 106 TFEU. To this end, the main point which will be advanced will be that such peculiar operators have a sizable economic advantage - or, in Warren Buffet's words, an 'economic moat' - i.e. its regulatory powers, which can be exploited by such operators to diriment of competition and thus pose the problem of envisaging a major responsibility upon them. Such examination will call into question, and thus will transpose the debate over the evolution of Article 102 TFEU's Ying to the 'Yang of Article 102 TFEU', namely the concept of competition on the merits, i.e., the 'enumeration' of the conduct in which an undertaking can engage into without countervailing Article 102 TFEU -, leaving open the possibility to envisage an 'enlargement' of the conduct in which an undertaking like Google can engage into. The discussion will converge to the potential evolution of the consumer welfare standard - which can be considered the 'true judge' of dominant undertaking's conducts and fills of significance the aforementioned 'lodestars' - into an effective competition standard that is suitable for this new type of power.

From the analysis conducted in Chapter II, the possibility to envisage a 'new face' of Article 102 TFEU is left open and arguably the Commission, by acknowledging that *"because of the innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely difficult to estimate consumer welfare effects of specific practices"*.[1] Despite such awareness,

[1] Jenny F., *Competition law enforcement and regulation for digital ecosystems: Understanding the issues, facing the challenges and moving forward*, in Concurrences, No. 3, 2021, pp. 38-62.

it seems ‘reluctant’ to envisage the shift from the consumer welfare standard - the ‘polar star’ of competition law – to a new benchmark. To this regard, Chapter III will discuss the adoption of the DMA as a means to bypass the obstacle to ‘engrave’ on Article 102 TFEU fundamental paradigms and to guide digital transformations for achieving an integrated digital single market. The Chapter will critically analyze the adoption of the DMA, by focusing on several provisions and recitals of the Regulation. Particular attention will be given to the gatekeeper’s designation, under Article 2 of the DMA, and to the obligations, under Article 5 and 6 of the DMA, which such economic operators are burden of. After having examined the several obligations, as laid down in the Regulation, particular attention will be given to a particular conduct which is at the hearth of the thesis, namely self-preferencing, which the DMA bans under Article 6(d). To this regard, a look will be given to Article 102 TFEU’s case-law, apart from *Google Shopping*, which seems to have inspired the adoption of such ban in the Regulation. Furthermore, the relationship between antitrust investigation and the adoption of an ex-ante instrument will be touched by highlighting that idea behind the DMA mainly lies in the rationale of imposing certain additional obligations in order to anticipate, as far as possible, the effect of ensuring an open and competitive market, which the ex post application of antitrust rules was unable to guarantee due to the peculiar characteristics of this economic sector.

Chapter I: EU Competition law's approach to the abuse of dominant position through the analysis of Article 102 TFEU

1. Setting the context: The Google Shopping case and its implications

In recent times, the Google Shopping case has raised significant interest and debate in the European Union.

This is due to the Commission's finding about the abusive conduct in which Google has engaged into, namely self-preferencing. Indeed, it should be noted that, from a purely empirical standpoint, the fact that an operator prefers its own goods/services, or at the very least its own business, is the normality and not a peculiarity of the case at hand. For example, if a user wants to buy a book on Amazon, he will first see the offer relating to the price proposed by Amazon and then (after another click by the user) that of the other sellers active on the platform.

Furthermore, there is nothing new in undertakings acting in a 'dual mode', i.e. acting both in the upstream market and downstream market, and engaging into self-preferencing practices. Indeed, such situation can be seen in the supermarket sector where, supermarket, while operating as retailers also offer their own private label products and may engage in self-preferencing practice by favoring their own products over the ones offered by third parties. In other words, it is quite normal for an economic operator to favor its own business over that of its competitors, both in the digital and non-digital markets.

Nevertheless, the finding of the Commission in the Google Shopping case has 'demolished' the figure of self-preferencing as a normal business practice in which economic operator usually engages into. Indeed, such finding has putted to the test the basic principles underlying Article 102 TFEU's enforcement activity, such as the one of special responsibility and competition on the merits, as will be discussed in Chapter II.

In the light of the practical implications of the EU Commission's decision, it is critical to analyze it in order to understand the potential developments in terms of (possibly new) anti-competitive behavior by digital companies such as Google.

The Commission opened an investigation into Google's possible abusive conduct in the provision of comparative search services in November 2010, following

complaints from a large number of search service providers of the same type from various EU countries, who complained of unfavorable treatment within Google's search results and an alleged preferential positioning of Google's shopping services.[2]

The European Commission's investigations were lengthy and complex, in part due to the technical subject matter involved. On March 13, 2013, the Commission issued a preliminary assessment against Google, in which the Commission discovered four business practices that were likely to violate Article 102 TFEU. Indeed, the Commission accused Google of giving preferential treatment to its vertical web search services over competing ones. [3]

Google responded to these allegations by denying that it had engaged in such unfair business practices. Nonetheless, in accordance with Article 9 of EC Regulation No. 1/2003 and in order to assuage the Commission's concerns, the company proposed commitments aimed at correcting the aforementioned abusive behavior.

In particular, the company made three sets of escalating commitments in April 2013, October 2013, and January 2014.[4] As a result, the matter appeared to have been resolved without the need for sanctions.

This case appears is at outmost importance since that it recognized a peculiar interpretation of Article 102 TFEU case-law which bring up interesting insights on the application of Article 106 TFEU's typical principles to private undertakings which have peculiar position in the market, i.e. the of de facto regulator, which will be considered in details in Chapter II.

Nevertheless, in order to understand the outcome of the Google Shopping case, it is necessary to first discuss the state of the art of the subject and the 'environment' in which competition law cases are decided before devolving into the innovative 'print' which the Google Shopping case has introduced in the EU competition law realm. In particular, the General Court's decision seems to have brought to light

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[2] European Commission*, Press Corner, Antitrust: Commission Fines Google €2.42 Billion For Abusing Dominance As Search Engine By Giving Illegal Advantage To Own Comparison Shopping Service* (2017) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>.

[3] Cristina Caffarra*, Google Shopping: a shot in the arm for the EC's enforcement effort, but how much will it matter?,* 13 December 2021, in e-Competitions Antitrust Case Laws e-Bulletin, available at <https://www.concurrences.com/en/bulletin/special-issues/big-tech-dominance/104053>.

[4] Ibid.

several considerations, in addition to those of the Commission, which may have an impact on future competition law's enforcement.

Indeed, the case has arguably brought to light a new conception of the core principles underlying Article 102 TFEU case-law, namely the one of special responsibility, competition on the merits, and consumer welfare, which appears to give the provision a "new face" by recognizing on undertakings that held a unique position in the market, such as Google, a different risk assessment of their conduct, bringing them closer to Article 106 TFEU case-law. Nevertheless, to better comprehend the quid novi of the Google Shopping case, it is necessary to first refer to the status quo which enables to understand that, despite the outcome of the case could not have any sense in other jurisdiction, such as in the US, which does not share the same 'DNA' of the European Union which among other values, welcomes the one of market integration, which is peculiar of the system.[5]

In relation to this aspect, it is important to keep in mind that, historically speaking, there have been recognized to be a total of four major freedoms relating to persons, goods, services, and capital within the context of the single market of the European Union. According to Article 26 TFEU, *" The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"*. In order to realize each of these unified markets, the obstacles—both technical and legal, as well as bureaucratic and logistical—that hampered free trade and free movement among EU member countries were gradually eliminated. At the same time, the EU took the initiative to ensure that these broader liberties did not jeopardize, among other things, fairness, consumer protection, and environmental sustainability.

Today, in addition to the four "single markets" that were mentioned earlier, a fifth one must be considered, and that is the "single digital market." The "single digital market" is the strategy that the European Commission developed in 2015 to expand

[5] Ariel Ezrachi*, Sponge,* 5 Journal of Antitrust Enforcement 49, (2017).

digital opportunities for individuals and businesses while also strengthening Europe's position as a leader in the digital economy.[6]

As pointed out by Commissioner Vestager, if the process of European integration has torn down borders in the aforementioned markets, the digital market is still have borders which makes the digital market fragmented.[7] In such environment, it is difficult to foster the emergence of European digital-economy players capable of competing on the world stage. Consequently, in order to achieve a single digital market, it is necessary that *"all players – large and small – can compete on the merits of their products"*.[8]

Such framework, of an integrated market, emphasizes that the principle of an open market economy with free competition is the subject of principle provisions that affect almost all areas of European policy intervention, establishing the protection of competition as a general principle of European Union law. To accomplish this, apart from these provisions which establish principles and competences, there are the substantive ones, Article 102 to Article 109 TFEU which regulates the subject. Nevertheless, in the light of the thesis' purpose, only 102 TFEU will be considered in depth. Despite the crucial role played in Article 102 TFEU in this thesis, other provisions will be taken into account.

Firstly, Article 101 TFEU mainly for the sake of comparison for better understanding their mutual characteristics. Secondly, also Article 106 TFEU will be taken into account, in the light of the recognition of the 'principle of equal treatment', typical of Article 106 (1) TFEU's case-law, which has been recognized for the first time in relation to a private undertaking in the *Google shopping case*. Indeed, as explained in Chapter II, the General Court in the Google Shopping decision referred to a principle, that of equal treatment, which is typical of Article

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[6] Guido Alpa*, Towards the Completion of the Digital Single Market: The Proposal of a Regulation on a Common European Sales Law,* 26 European Business Law Review 347 (2015); Stefano Montaldo*, Internet governance and the European Union: between net neutrality and the implementation of the digital single market,* 3 Il Diritto dell'economia 601 (2015); Jacques Pelkmans*, What strategy for a genuine Single Market*?, CEPS Special Report No. 126 (2016); Irene Bertschek and Jörg Ohnemus*, Europe's digital future: Focus on Key Priorities,* 2 ZEW policy brief (2016).

[7] *Competition policy for the Digital Single Market: Focus on e-commerce, Berlin, 26 March 2015, Bundeskartellamt International Conference on Competition*, European Commission – Speech.

[8] *Ibid.*

106 TFEU case-law. Despite the lack of a special or exclusive right granted by a Member State to Google, that does not consent, at least prima faciae, the application of Article 106 TFEU, the General Court has recognized this typical principle derived from Article 106 TFEU for the first time in relation to a private undertaking's conduct, even if the legal basis of the decision is based on Article 102 TFEU.

As a result, the case that it recognized a peculiar interpretation of Article 102 TFEU case-law which bring up interesting insights on the application of Article 106 TFEU's typical principles to private undertakings which have peculiar position in the market, i.e. the of de facto regulator, which will be considered in details in Chapter II. Furthermore, throughout the analysis of these provisions, references will be made to the various currents of thought on which the Commission relies on, which play a critical role in the application of these provisions.

2. EU competition law foundations

Since the beginning of the European integration process, it is possible to note that the Treaties of the European Economic Community (EEC) prioritized the creation of a single market, characterized by the elimination of all barriers to the free circulation of goods, people, services, and capital among Member States.[9] The intention to create a common market within which European companies could compete can be found in an early form in the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris in 1951.[10]

Despite the absence of any provision directly related to competition rules, a primitive form of the single market has begun, the supervision and protection of which was expressly provided for by a court, the ECSC High Authority, with the power to express itself in order to guarantee and safeguard market competitiveness

[9] Aurelio Pappalardo*, Il diritto comunitario della concorrenza profili* sostanziali (Torino: UTET 2007); see also Alfonso Mattera Ricigliano*, Il mercato unico europeo. Norme e funzionamento* (Torino: UTET 1990); Roberto Santaniello, *Il mercato unico europeo* (Bologna: il Mulino 2000); Peter Oliver and Wulf-Henning Roth, *The internal market and the Four Freedoms* 41 Common Market Law Review 407 (2004); Chaterine Barnard, *The substantive law of the EU: The Four* Freedoms (Oxford: Oxford University Press 2010).

[10] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (Oxford University Press), (2014).

conditions. If the founding states' objectives with the ECSC Treaty were limited to the steel sector, the Treaties of Rome set a more ambitious goal, to be achieved gradually until the creation of a single market in which goods, people, services, and capital could freely circulate.[11] The single market had to be achieved through a series of sectoral policies, including the adoption of an economic policy based on the principles of an open market economy and free competition by the Community and the Member States.[12]

The Treaty of Paris then laid the groundwork for what would later become the true engine of Community antitrust discipline: the Treaty of Rome, which established the European Economic Community in 1957.[13] The Treaty's underlying principle, and ultimate goal, was to establish basic rules that would allow the economies of the Member States to participate in a process of increasingly gradual integration. This goal was pursued through the creation of liberal rules based on a set of fundamental concepts that can be found in the establishment of a common market supported by free movement of goods, services, and people.

However, the removal of customs barriers, which allowed the market to expand, was insufficient to ensure that the market would function properly: it needed to be protected. Indeed, even if the barriers to entry are removed, it is still possible to makes the entrance to the market difficult, by engaging in anticompetitive practices which are detrimental to the competitive market. Nonetheless, the Treaty of Rome has evolved over time.

The rules were then amended by the Single European Act, signed in 1986, and by the Maastricht Treaty of 1993, which both have a pivotal role in relation to the development of the European market. Indeed, it should be noted that if with the Treaty of Rome, there was the reference to the notion of 'common market', such reference gradually disappeared and have been replaced with the notion of 'internal market or single market'. Generally, the major difference between the common market and the internal market relies on the different discipline and interpretation of free movement. In the common market, it is understood negatively as the

[11] Joanna Goyder and Albertina Albors-Llorens, *EC Competition Law* (Oxford University Press), (2009).
[12] Aurelio Pappalardo, *Il diritto comunitario della concorrenza profili sostanziali*
[13] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials,* (Oxford University Press), (2019).

prohibition for Member States to apply discriminatory treatment to people, goods, services, and capital, with the resultant national treatment. While in the internal or single market, the freedoms of movement are understood in a positive sense, namely that the EU states must apply the most favorable treatment, in the perspective that the treatments are completely harmonized and unified.

The rules were then amended by Regulation No 4064/89 and the Lisbon Treaty of 2009, with the latter specifically containing provisions on competition law in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which ensure the proper functioning of the internal market by maintaining an adequate level of effective competition[14]. Indeed, the TFEU is the primary source of the guardian rank of the fundamental provisions in the field of competition law.[15] In this regard, it is worth noting that a pivotal role in enforcing competition law provisions, as stated in Article 105(1) TFEU is played by the European Commission.

The Commission has made the greatest contribution to the development and definition of the Union's antitrust legislation. Not only does it present to the Council proposals for regulations and directives concerning (among other things) competition law, but it also adopts regulations, communications, and guidelines aimed at clarifying the principles and scope of application of this legislation. The Commission has the power to apply Articles 101 and 102 TFEU by adopting decisions establishing possible violations of these rules by undertakings, which may be subject to fines of up to 10% of their annual turnover, as well as to authorize or prohibit concentrations with a Community dimension (if they could significantly impede effective competition in the common market). To make the Commission's enforcement activity more effective, Regulation 1/2003 envisage upon the Commission various investigative powers, such as the power to request information and conduct inspections at company headquarters in order to find evidence of a

[14] Consolidated Version of the Treaty on European Union (2008) OJ C115/13, from now on 'TFEU'.
[15] Since then, a number of regulations have been enacted, which contain general guidelines for implementing the Treaty's provisions and regulate the framework's more specific aspects. Furthermore, the Commission adopted a number of non-binding documents (notices, guidelines, etc.) to explain in greater detail the Commission's policy on rule interpretation and the procedures used in the investigation, see Ariel Ezrachi, *EU Competition Law Goals and the Digital Economy* (2018). Oxford Legal Studies Research Paper No. 17/2018, available at <https://ssrn.com/abstract=3191766>.

violation. As a result, the Commission combines both investigative and decision-making powers.[16]

The Commission's decisions can be challenged in front of EU judges in the application of the Treaties rules.

The General Court and the Court of Justice of the EU, as judges of first and second instance, have played a critical role in defining the boundaries of competition law, intervening on numerous occasions to annul Commission decisions vitiated by legal errors or by confirming the Commission's interpretation of Community legislation. Furthermore, it is important to recall that, pursuant to article 267 TFEU, the Court of Justice is the single instance judge in matters referred for a preliminary ruling by national courts. This competence has resulted in numerous extremely important antitrust legislation rulings that have provided guidance on the interpretation of Articles 101 and 102 to all operators, not just the national judges who have activated the mechanism envisaged by article 267 TFEU.

Within the articles in the TFEU, as updated by the Treaty of Lisbon in 2009, all agreements between undertakings which have the object or effect of distorting competition, such as cartels or territorial protection clauses, are prohibited under Article 101 TFEU.[17] Furthermore, under Article 102 TFEU, it is prohibited the abuse of a dominant position by an undertaking to the detriment of consumers and competitors.[18] In relation to the application of these rules, The Commission is the main body responsible for ensuring their correct application and has extensive powers of control and investigation. In this regard, Council Regulation EC No. 1/2003 should be mentioned, which gave national competition authorities and courts an important executive role.[19] Coordination between national and European authorities is critical in this context of decentralized application; this is the role of the European Competition Network (ECN), an information exchange platform comprised of national competition authorities and the Commission.

[16] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[18] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

[19] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2002); now Articles 101 and 102 TFEU.

It should be pointed out that 'competition' is not protected as a value per se, but rather it is protected as a necessary means to achieve a more ambitious and broad goal. Indeed, competition protection is not regarded as a primary goal of the European Union, but rather as a tool for achieving socially beneficial outcomes and, ultimately, collective well-being.[20] Indeed, the Commission, in its 'Guidelines on the Application of Article 81(3) of the Treaty', pointed out that the value of competition is protected *"as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"*.[21]

Nevertheless, it has been argued that competition law aims at protecting *"not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such"*.[22] Furthermore, in the light of the regulatory framework which has been considered, it should be also mentioned another objective, namely the one of protecting the European market integration. Such goal has been emphasized by the Commission who has argued that *"the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers"*.[23]

In light of the foregoing, it is reasonable to conclude that the current version of the Treaties recognizes and reaffirms the importance of the single market. To begin, Article 3, paragraph 3 of the Treaty of European Union (TEU) states that: "the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific andtechnological advance". Thus, one of the Union's goals is to achieve *"a regime designed to ensure that competition is not*

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[20] Renato Nazzini *The Foundations of European Union Competition Law* (Oxford University Press), (2011).

[21] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C101/97*, para. 13.

[22] *GlaxoSmithKline Services Unlimited v. Commission and Others* of 6 October 2009, case C-501/06 P (2009 I-9291), para. 63. See also *T-Mobile Netherlands and Others* of 4 June 2009, case C-8/08 (2009 I-4529), paras. 31, 36, 38-39*;* European Commission*, Green Paper on Vertical Restraints in EC Competition Policy,* COM(96) 721 final, para 180.

[23] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009) OJ C 45/02, paras. 1, 5-7.

distorted in the common market", as stated in Article 3, paragraph 1, letter (g) of the EC Treaty, and, according to Articles 119, 120, 127, 170 and 173 TFEU to ensure an *"open market economy with free competition"*.[24]

Furthermore, Protocol No. 27 on the internal market and competition, which incorporates the aforementioned Article 3 TEU, states that the internal market includes a system that ensures that competition is not distorted and that the European Union is thus entitled to adopt measures on the basis of the Treaty provisions, including the flexibility clause provided for in Article 352 TFEU.[25]

From a systematic standpoint, it is critical to emphasize that, according to Article 51 of the EU Treaty, the protocols are a "integral part" of the Treaties. As a result, the principle of "undistorted competition," which had vanished from the general objectives, reappears in a provision with constitutional significance. Articles 119 and 120 TFEU, similarly to Article 3 TEU, establish that *"the States members and the Union act in accordance with the principles of an open market economy with free competition, favoring an effective allocation of resources, in accordance with the principles of art. 119".* In turn, this final article states that the European Union's and Member States' economic policies are established *"for the purposes set out in Article 3 TEU "*. [26]

Moreover, the TFEU states in Article 3, paragraph 1, that *"The Union shall have exclusive competence ... (in) establishing the competition rules necessary for the functioning of the internal market" and, in Article 32, letter c, states that "the Commission shall take care to avoid distorting conditions of competition between Member States"*. Article 119, paragraph 1 of the same treaty states that *"the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition"*.

[24] Alison Jones, Brenda Sufrin and Niamh Dunne*, EU Competition Law: Text, Cases, And Materials*
[25] *Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition* OJ C 115, 9.5.2008.
[26] Richard Whish and David Bailey*, Competition Law*, (Oxford University Press), (2021).

In accordance with the principles established in the aforementioned provision, Article 120 TFEU states that *"The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources"*. In addition, Article 7 TFEU states that *"The Union shall ensure consistency between its policies and activities, taking all of its objectives into account"*. Such provision suggest that, Union policies, and therefore also competition policy, should be implemented taking into account a wide range of interest, for example taking into account the right to conduct a business as recognized ex Article 16 of the Charter of Fundamental Rights of the European Union.[27]

3. EU Competition law fundamental provisions

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) seek to prevent the economic system from shifting from a competitive to a monopolistic structure; proposes, for those markets that have an oligopolistic or monopolistic structure (and, perhaps, they cannot fail to have it: consider so-called natural monopolies), to ensure that the behavior of undertaking is as close as possible to the behavior of undertakings who operates in a competitive situation. this is done by prohibiting them from behaviors typical of the monopolist or oligopolist, as they are particularly harmful to the interest of other economic operators and consumers.[28]

With this in mind, EU competition law provisions aim to protect the market and its competitiveness from direct or indirect anticompetitive behavior. A line can be drawn between Articles 101 and 102 TFEU in relation to the nature of the conduct (direct or indirect). The former provision aims to prevent collusion, which is a direct distortion of the competitive market mechanism caused by coordinated action among competitors. Such coordination is likely to directly increase prices, restrict output, and increase the profits earned by the undertakings.[29] Article 102 TFEU, on

[27] *Ibid.*
[28] *Ariel Ezrachi, EU Competition Law Goals and the Digital Economy; see also* Marco Botta and Silvia Solidoro, *Hipster antitrust, the European way*?, Policy Briefs, 2020/02, available at <https://cadmus.eui.eu/handle/1814/65747>.
[29] Joanna Goyder and Albertina Albors-Llorens, *EC Competition Law*

the other hand, aims to prevent exclusion and exploitation, which indirectly harm market competitive pressure. Indeed, exclusion has an indirect impact on the competitive market mechanism by excluding competitors (raising costs/limiting access) and increasing the market power of the remaining undertaking (s). Whereas exploitation causes a distortion of normally 'expected' market consequences (for example, price) that harms consumers, customers, and/or trading partners.

As a result, both Articles 101 and 102 TFEU are critical pieces in the vast mosaic of competition policy, and their effective application promotes the proper functioning of markets for the benefit of businesses and consumers, as part of the larger goal of achieving an integrated internal market.[30]

3.1. Competition law's tool for collusive behavior: Article 101 TFEU

Article 101 TFEU expressly prohibits, in the first paragraph, all those "agreements between undertakings", " decisions by associations of undertakings" and in any case also all those " concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" for then proceeding with an illustrative enumeration of the possible abusive behaviors.[31] These include all those

[30] Ariel Ezrachi, *EU Competition Law Goals and the Digital Economy*

[31] Article 101 TFEU states that :

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

agreements, of a collusive nature, which are formed both vertically and horizontally. The former are collusive behavior between two or more undertakings, each of which operates at a different level of the production or distribution chain. On the other hand, horizontal collusive behavior are those which are carried out by two or more undertakings operating at the same level of the production or distribution chain. Article 101 has been structured, by the Community legislator, in such a way as to affect any type of agreement, whether it has been drawn up in writing, or whether it has been agreed in oral form.

Furthermore, Article 101 aims at preventing that the collusive agreement can be carried out also implicitly. In order to do so, it relies on the notion of 'concerted practice' which is the coordination between undertakings which, without having reached an agreement, have knowingly substituted practical cooperation for the risks of competition.[32]

The second paragraph of the article then establishes the absolute nullity ex tunc of the abusive agreements. Nevertheless, the third - and last - paragraph expressly provides for some cases in which this prohibition may not be applied. Indeed, undertakings can escape the prohibition through Article 101(3) TFEU which enables the claimant to overcome the anticompetitive presumption by demonstrating that the conduct leads to efficiencies i.e. economic benefits. In particular, such agreements will be tolerated only if they contribute to "improving the production or distribution of products or promoting technical or economic progress". Agreements that operate in this sense, therefore, will be exempted, but this only where they do not expand their margins of intervention in such a way as to broaden their influence on operations not strictly connected to the pursuit of the particular objective and provided that they are not such as to excessively limit competition within the reference sector. In any case, the need remains for the final

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which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[32] Alison Jones, Brenda Sufrin and Niamh Dunne*, EU Competition Law: Text, Cases, And Materials*

consumer to derive the greatest advantage resulting from any added profit that these agreements have made possible.[33]

Article 101(3) TFEU importance can be considered in two circumstances. The first is that a comparable provision like Article 101(3) lacks in other jurisdiction, like in US.[34] Indeed, the contextual analysis conducted under 101 (3) TFEU is addressed to every type of restriction i.e., by object and by effect restrictions. On the contrary, Section 1 of the Sherman Act does not envisage any provision like 101(3) TFEU. Under Section 1 of the Sherman Act, such contextual analysis is permitted only in relation to conduct which are under the 'rule of reason'; a possibility which is deprived to conducts which falls under the 'per se' restriction. Despite this difference, when it comes to cases of abuse of dominant position, the two systems align. Indeed, in both Article 102 TFEU and Section 2 of the Sherman Act there is not such a thing as a provision like 101(3) which enable dominant undertaking to escape Article 102 TFEU infringement. [35]

In making the decision on those recurring cases in which the required conditions of Article 101(3) are always valid, the European Commission now adopts the block exemption Regulations, with which the characteristics required for the agreements in question have been specifically defined. These Regulations are periodically reviewed by the Commission itself, in order to ascertain that the conditions contained therein still represent an advantage in the economic context of the period in which the Commission finds itself carrying out its assessment. Furthermore, with a subsequent regulatory intervention, the European Commission has broadened the range of action of the power of exemption, extending it to those agreements that are considered "of minor importance". In fact, with a Communication published in August 2014, the Commission declares that it wishes to exempt from the application of Article 101 (1) TFEU also to existing agreements between small enterprises,

[33] Ibid.

[34] Section 1 of the Sherman Act, which states that:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person,$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

[35] Richard Whish and David Bailey, Competition Law

provided that these do not cover the market in question to an extent that is greater than 10% of its size. It should be specified, however, that the agreements from which the setting of a non-competitive price derives are considered expressly excluded, even from the latter provision.[36]

Finally, given the difficulty encountered over the years in detecting the existence of restrictive competition agreements, the European Commission has recently put in place some procedures that encourage collaborative behavior on the part of companies. Among these, worthy of mention are the so-called "leniency program", aimed at those undertaking that voluntarily step forward in communicating the existence of a cartel agreement involving them, for which measures are envisaged that reach total immunity at the moment. in which the fine that the contracting companies will be ordered to pay will be quantified. Furthermore, it seems correct to include Regulation no. 622/2008, following which a rapid settlement procedure was introduced concerning those proceedings relating to the existence of collusive cartels, if companies recognize the offense against them and prove to be cooperative in the course of the dispute. In particular, they will be granted penalty discounts of up to 10% of the otherwise provided fine.[37]

3.2. Competition law's tool for unilateral behavior: Article 102 TFEU

Article 102 TFEU expressly prohibits the abuse of a dominant position in the market, where and to the extent that it adversely affects trade between Member States. On closer inspection, such adverse effect seems to be considered to be 'inherently' present in several situation which are enumerated directly by the Article itself, on the grounds of the fact that they are likely to have a detrimental impact on the competitive structure of the market. In this regard, potentially abusive conducts are the application of unfair selling prices, the imposition of unequal or unfair conditions on the contracting parties or, more generally, the adoption of any

[36] Vivien Rose and David Bailey (eds)*, Bellamy and Child: European Union Law of Competition* (Oxford University Press), (2013).

[37] Lennart Ritter and David Braun Braun, *European Competition Law: A Practitioner's Guide* (Alphen aan den Rij: Kluwer Law International), (2005).

conduct which results in a restriction on the production or technological development of the sector.[38]

It is worth noting that the abusive conduct enumerated in both Article 101 and Article 102 TFEU are similar. Nevertheless, the Articles involves two different situation. First of all, Article 101 TFEU needs the undertakings to 'cooperate' in the abusive behavior, it addresses collusive agreement that can involve one of the behaviors enumerated in the provision. At the same time, the behavior can be carried out also by one undertaking.[39] For example, price fixing is a conduct which can be implemented by a dominant undertaking alone, i.e. unilaterally, or with the collaboration two or more undertakings, i.e. collusively. In relation to this, it is worth noting that Article 102 TFEU mentioned that the abusive conduct, which is the result of the abuse of the dominant position, can be carried out by one or more undertaking. Such reference to 'one or more undertaking' could be deceptive. Indeed, the concept of collective dominance, which Article 102 TFEU implicitly refers to, is different from a collusive behavior in the sense of Article 101 TFEU.[40] Such situation can be observed in oligopolistic market where, due to the peculiar market condition i.e. few number of economic operators, there can be a situation of collective dominance. This is the position *"held by two or more economic entities legally independent of each other, which from an economic point of view, present themselves of act together on a particular market as a collective entity"*.[41] Consequently, at least at first glance, the two provisions seems to overlap with each other, but, in realty, they are different. Indeed, in order to have an Article 102 TFEU's infringement there need to be a quid pluris. In the aforementioned case of price fixing, it is necessary that the imposed price, fixed by dominant undertaking, are unfair.[42]

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[38] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*

[39] Richard Whish and David Bailey, *Competition Law*

[40] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

[41] *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v. Commission of the European Communities* of 16 March 2000, joined cases C-395/96 P and C-396/96 P (2000 I-01365), para. 45.

[42] Akman Pinar, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (London: Hart), (2012).

Furthermore, differently from the more frequent orientation in US antitrust law, the existence of a dominant position, nor its creation, is not considered illegal by the EU legislator. Indeed, in order to have an infringement of Article 102 TFEU, it will be necessary that the dominant undertaking is abusing its position in a way that it is detrimental to consumer or hinders free trade between member states. Such choice derives from the fact that the Commission considered that punishing those undertakings that had legitimately - and therefore for their commercial merits - conquered 'important' positions in their sector could be excessively damaging to the freedom to carry out economic activities. Such a view has been largely shared by the jurisprudence, which had often expressed itself in favor of the such interpretation.[43] Moreover, the European Commission in 2009 with the publication, in the Official Journal, of a Communication concerning the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings has confirmed that *" it is not in itself illegal for an undertaking to be in a dominant position"*, underlining that *" such a dominant undertaking is entitled to compete on the merits"*.[44] In the same communication, the Commission goes on by warning the aforementioned undertakings, stressing their social responsibility and encouraging them to weigh their conduct, to ensure that they do not harm the competitive market. Nevertheless, the Commission does not give any definition of the term 'competition on the merits', nor it does so in relation to the 'special responsibility', which give rise to legal uncertainty.[45] If undertaking are burden of a special responsibility not to impar the competitive process and to compete on their own 'merits', in which way a dominant undertaking can understand if its conducts are 'based on its merits', and therefore understand if their behvior could infringe article 102 TFEU? Sometimes such answer is not clear-cut, since that is strictly linked with the context in which the (abusive) practice take place. Such problem has been highlighted recently in the Google Shopping case, and will be touched later in Chapter II.

[43] Richard Whish and David Bailey, *Competition Law*
[44] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*
[45] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

3.3. The interplay between Article 106 and Article 102 TFEU

The creation of the European single market, through the realization of free movement and competition policy, has limited the state's ability to intervene unconditionally and indiscriminately in the economy. Thus, the progressive evolution of EU economic law has made the assessment – and, in some cases, sanctioning – of these interventions by European institutions increasingly difficult. Within this framework, the Union has exercised control over both direct and indirect forms of state intervention in the economy. The former are cases in which the state reserves to itself the management of a given activity through the creation of public undertaking and cases in which the State entrusts the management of a given activity to a private entity via administrative law instruments. In this case, the Union institutions (particularly the Commission and the Court of Justice) stepped in to limit the 'special powers' that Member States had reserved for themselves in the governance of certain privatised companies, which were not proportionate to the actual shareholding in public hands. Indirect forms of State intervention in the economy, on the other hand, concern all cases in which the State, while not directly involved in the management of an enterprise, supports certain operators or certain national productions through public funding.[46]

Whether direct of indirect, in either case the main implication is that the State should not create situation in which the undertaking - public undertaking or an undertaking on which it has conferred special or exclusive rights - is likely to infringe Article 102 TFEU, merely by exercising the rights conferred by the state. Furthermore, and most importantly, the states measure should not lead to inequality of opportunity between economic operators which is likely to be detrimental to competiton. [47]

The legal basis for removing access barriers to these markets is represented by Article 106 TFEU. This provision has laid the groundwork for the liberalization of activities traditionally regarded as "public services" in national legal systems and

[46] Daniele Gallo, *Public Services and EU Competition Law: the Social Market Economy in Action* (London: Taylor and Francis), (2022).
[47] Robert O'Donoghue KC and Jorge Padilla, *Law and Economics of Article 102 TFEU* (London: Bloomsbury Publishing), (2020).

thus excluded from market rules. [48] Art. 106 TFEU is divided into three paragraphs. First, Article 106(1) states that Member States should not enact or keep in force any measure that is in violation of the rules contained in the TFEU, including but not limited to the competition provisions, in the case of public undertakings or undertakings to which Member States grant special or exclusive rights. It is important to note that Article 106(1) TFEU cannot be applied on its own and can only be used in conjunction with other TFEU provisions. Secondly, under Article 106(2) TFEU, Member States may, in exceptional circumstances, entrust an enterprise with the operation of services of general economic interest.[49]

In this case, the enterprise may be exempt from certain TFEU rules, including the competition rules, to the extent that their application would interfere with their ability to perform the specific tasks that have been assigned to them. Finally, Article 106(3) relates to the Commission's powers to adopt acts of general application on the subject. [50]

State intervention in the economy can take many forms, including the establishment of public enterprises or the granting of special or exclusive rights to an undertaking by the state. These methods of intervention are the subject of Article 106 (1) TFEU, which establishes the prohibition against issuing or maintaining, with regard to public companies and those holding special or exclusive rights, measures contrary to the rules of the Treaties, particularly the principle of non-discrimination and the rules on competition. [51] Thus, such an infringement may be proven where the State actions in question alter the market's structure by fostering unfair competition between undertakings, by enabling the public undertaking or the undertaking that

[48] *Daniele Gallo, Public Services and EU Competition Law: the Social Market Economy in Action*

[49] Article 106 TFEU, which states that:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[50] Daniele Gallo, *Public Services and EU Competition Law: the Social Market Economy in Action*

[51] Ibid.

was granted special or exclusive rights to maintain, strengthen, or extend its dominant position, thereby restricting competition, without proving the existence of actual abuse. [52]

In this sense, in a situation where a dominant firm is given, via a State measure, a 'regulatory' role over competitors' access to the market such as in MOTOE where the Court ruled that Articles 106(1) and 102 TFEU preclude a rule that gives a legal person that organizes motorcycling competitions the power to grant consent to applications for authorization to organize such competitions without subjecting this power to restrictions, restrictions, and revisions. [53] As a result, the state is expected to ensure equal opportunity in order to grant access to the market to all economic operators. Consequently, giving an undertaking the authority to control its own rivals, without any control on its power, would result in a conflict of interest that is inherently in violation of Article 106 TFEU. As a result, it goes without saying that the obligations placed on States are more stringent than the obligations placed on private undertakings under Articles 101 and 102 TFEU. When undertakings do not receive exclusive or special rights, the strict non-discrimination principle, to which public authorities must abide, is irrelevant. Indeed, private undertaking do not have the authority to create legal monopolies, unlike the State. Only undertakings that are in circumstances that are, in law or in fact, comparable to those where a legal monopoly is at stake would be subject to the strict obligations to which public authorities are subject under Article 106 TFEU, and in particular the principle of equality of opportunity. [54]

Indeed, such principle has been recognized in situation where, for example, a vertically integrated undertaking can be compelled to deal with rivals. This is the case, among others, of Bronner and Magill.[55] As a result of the first two cases, there have been the creatin of three condition in order to find an abuse of dominant

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[52] Ibid.

[53] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio* of 1 July 2008, case C-49/07 (2008 I-48).

[54] Pablo Ibáñez Colomo, *Will Article 106 TFEU Case Law Transform EU Competition Law?,* 13 Journal of European Competition Law & Practice 385 (2022).

[55] *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* of 26 November 1998, case C-7/97 (1998 1998 I-0779); *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities* of 6 April 1995, joined cases C-241/91 P and C-242/91 P (1995 I-00743).

position when the undertaking refuse to deal, or in different wording, refuse to give access to an essential facility. Such doctrine can be traced back to the US system, where on the contrary the Supreme Court has chosen to abandon such doctrine.[56] Differently in EU, there have been its recognition by establishing a set of condition that need to be fulfilled in order to have a access to an essential facility. Firstly, as the name suggests, the input must be indispensable or objectively necessary. In order to fulfill such condition it is necessary that there are not actual substitutes available or that the duplication is physically or legally impossible and is not economically viable for an undertaking of the same size. Furthermore, such denial should be capable of excluding effective competition in the downstream market and it not objectively justified.[57]

Recent case law raise the possibility that Article 106 TFEU case law may be influencing Articles 101 and 102 TFEU case law in a way that is different from the previous case law, like Bronner and Magill, where the court recognized that in order to amount to an infringement of Article 102 TFEU, a refusal to supply, or to give access, should involve an indispensable or objectively necessary input, which does not have substitutes or its duplication is impossible.[58]

In Article 102 TFEU realm, the general principle of equal treatment has been recognized by the General Court in Google Shopping, in paragraph 155. Such recognition is remarkable for two reasons. Firstly, it is worth noting that the GC has cited judgment which relates to the behavior of public authorities such as *GT-Link, Aéroports de Paris v Commission* and *Irish Sugar v Commission*.[59] And

[56] This has been done in *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP* of 13 January 2004 - 540 U.S. 398, 124 S. Ct. 872 (2004), where the Supreme Court has rejected that discriminatory access may violate Section 2 of the Sherm Act and has raise doubts about the validity of such doctrine. On closer inspection, the essential facility doctrine, as recognized in EU, has been made along the lines of the lower court in US, which, in contrast to the Supreme Court, laid down the criteria in order to have a violation of Section 2 of the Sherman Act.

[57] Inge Graef, *Essential facility, Global Dictionary of Competition Law,* available at <https://www.concurrences.com/en/dictionary/essential-facility>.

[58] *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, para. 43; *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, para. 53.

[59] *GT-Link A/S v. De Danske Statsbaner (DSB*) of 17 July 1997, case C-242/95 (1997 I-04449), para. 41; *Aéroports de Paris v. Commission of the European* Communities of 24 October 2002, case C-82/01 (2002 I-09297), para. 114; *Irish Sugar plc v. Commission of the European Communities* of 7 October 1999, case T-228/97 (1999 II-02969), para. 140.

secondly, it seems that the GC is going beyond what established in Deutsche Telekom where the court recognized such principle of equal treatment only where the input is indispensable.[60] An example of such influence is International Skating Union where the General Court suggests a stricter stance toward sports governance.[61] The *International Skating Union* effectively broadens the application of the equal opportunity principle to include all organizations in charge of managing a sector of the economy.[62] Furthermore, in the Google Shopping case the general court suggested that dominant firms like Google, which act as 'de facto regulator', are subject to a duty of equal treatment. Such aspect will be considered in depth in Chapter II. Nevertheless, in this section it is worth noting that this obligation would imply that ,unless objectively justified, any disparity in treatment between affiliates of the dominant firm and their competitors on adjacent markets would be abusive, as done in Article 106(1) in conjunction with Article 102 TFEU case law. [63]

4. Article 101 and 102 TFEU's (mutual) basics

Some of the elements of Article 101 TFEU and Article 102 TFEU are mutual to both the provisions and namely the notion of undertaking, the anticompetitive effect on inter-state trade and, most importantly, the definition of the relevant market.[64] The latter element is crucial in both cases, i.e. 101 TFEU and 102 TFEU cases, but if in relation to the former market defintion is needed just to calculate the consistency of the prejudice, in the latter case market definition is needed to establish an abuse of dominant position as such and therefore have a much more profound impact.[65]

Before devolving in depth into Article 102's TFEU ' real basics', namely the concept which characterize the abuse of dominant position, it is necessary to make a reference to the general concepts, mutual to both Article 101 and 102 TFEU,

[60] *Deutsche Telekom AG v. European* Commission of 14 October 2010, case C-280/08 P (2010 I-09555).
[61] General Court, *International Skating Union* v. *European Commission* of 16 December 2020, case T-93/18, EU:T:2020:610.
[62] Pablo Ibáñez Colomo, *Will Article 106 TFEU Case Law Transform EU Competition Law?*
[63] Ibid.
[64] Lennart Ritter and David Braun Braun, *European Competition Law: A Practitioner's Guide*
[65] Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust* (Torino: Giappichelli), (2019).

which are precondition for their application. With this in mind, it will be touched the concept of 'undertaking'; the concept of relevant market, that is, that sphere of economic reality, consisting of a set of typed acts of exchange, against which any anti-competitive effect must be assessed; the notion of restriction of competition; and the notion of prejudice to trade between Member States, as a substantial prerequisite for the application of EU competition rules. Once touched upon these concepts, the thesis will devolve into Article 102 TFEU peculiarities, namely the concept of dominant position, the concept of abuse and the 'bipartition' of the practices carried out by a dominant undertaking into two categories (exclusionary practices and exploitative ones).

As previously stated, Article 102 TFEU prohibits undertakings from abusing a dominant position held within the internal market or a substantial portion of it, where the abuse may have an impact on trade between Member States. Once an undertaking meets the criteria for dominance, it becomes dominant, and its behavior becomes potentially prohibited. Although subparagraphs (a)-(d) provide examples of abuses, they do not provide a comprehensive list of specific types of prohibited conduct. Indeed, in Continental Can it has been said that Article 102 TFEU *"states a certain number of abusive practices which it prohibits (and) the list merely gives examples, not an exhaustive enumeration of the sort of abuses"*.[66] As a result, atypical abuses, namely abuses which goes beyond the enumeration of Article 102 TFEU, such as the one found in Google Search, have emerged.[67]

The list's non-exhaustive nature has also been highlighted by the digital economy, which has given rise to new (possible) types of abuse and the Google Shopping case is an example. This raises issues with the principle of legal certainty which aims to allowing dominant undertakings to assess their conduct's lawfulness in the light of their special responsibility under article 102 TFEU, as stated in Telekom.[68] As a result, undertakings should be able to determine whether their actions are prohibited or not with a reasonable degree of certainty and predictability. However it has been argued that the high level of discretion in identifying new types of abuse gives

[66] *Europemballage Corporation and Continental Can Company Inc v. Commission of the European Communities* of 21 February 1973., case C-6/72 (1973 00215), para. 26.
[67] European Commission, *Google Search (Shopping),* decision of 27 June 2017, case AT. 39740.
[68] *Deutsche Telekom AG v. European Commission*, para. 202; see *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio.*

dominant undertakings less legal certainty because competition authorities, as it will be explained while facing Article 102 TFEU's 'basics', have been unable to define the meaning of abuse of dominant position properly. [69]

It has been argued that such lack of a clear and well-defined definition is in tension with one of EU law's general principles, namely the one of the principle of legal certainty. This principle can be considered to be one of the fundamental pillars of a democratic society and it shields both natural and legal persons from arbitrary state action and deters people from breaking the law.[70] The principle requires laws to be clear and foreseeable in terms of implications, especially when it comes to criminal penalties. Open-ended provisions, like Article 102 TFEU, are not necessarily problematic by virtue of the mere requirement that the law must be clear and precise.[71] Indeed, it is crucial in this context that prior case law give some guidance on the application of such provisions in order to grant legal certainty. [72]

However, as previously stated, the Commission have a high level of discretion in applying such provision and therefore, have the power to find new types of abuses, as done in the Google Shopping case, based on new theories of harm, which give rise to 'friction' with the legal certainty principle.[73] Nevertheless, despite the high level of discretion upon competition authorities, in order to have an infringement there need to be five condition.[74] Therefore, despite the high level of discretion upon the Commission, it is necessary that these conditions are met. The first condition is that the anticompetitive conduct should be carried out by one or more undertaking.

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[69] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press), (2013) p. 213.

[70] Magali Eben, *Fining Google: a missed opportunity for legal certainty*? 14 European Competition Journal 129 (2018).

[71] Alison Jones, *Brenda Sufrin and Niamh Dunne, EU Competition Law: Text, Cases, And Materials*

[72] Richard Whish and David Bailey, *Competition Law*

[73] Magali Eben, *Fining Google: a missed opportunity for legal certainty?*

[74] Article 102 TFEU, which states that:

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

Such abuse may, in particular, consist in:

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

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

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

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

Secondly, in order to have an article 102 TFEU infringement, there is need to find the dominant position held by the undertaking(s), for which the assessment of the relevant market is crucial. Furthermore, there should be an abuse of that dominant position, since that holding a dominant position is not a recrimination in itself and what is prohibited is the abuse of that position. Finally, it is necessary that the dominant position is held within the internal market or a substantial part of it and that the effect of the abuse of the dominant position affect the inter-state trade.

4.1.The notion of undertaking

EU competition law is expressly addressed to undertakings, either Article 101 and 102 TFEU expressly refers to undertaking. In favour of the crucial role played by the notion of undertaking in the EU competition law, there are clear textual arguments arising from the express formulation of these provisions. Art. 101 TFEU prohibits agreements between *undertakings*, decisions of associations of *undertakings* and concerted practices between *undertakings* as regards restrictive practices. Art. 102 TFEU prohibits the abuse by one or more *undertakings* of a dominant position on the market. Indeed, the Court of Justice of the European Union has consistently held that EU competition law concerns the activities of undertakings.[7576]

The correct reconstruction of the antitrust notion of undertaking is indeed a necessary and essential operation to ensure effective competition rules and adequate protection of market freedom against any form of its possible squeeze. The centrality of the concept in the system of competition can be seen, in particular, in two complementary aspects. Subjectively, the concept of an undertaking for antitrust purposes, having a unitary scope and meaning in relation to the provisions on restrictive practices and abuses of a dominant position, it allows the

[75] Most recently, *Court of Justice, Vantaan kaupunki v. Skanska Industrial Solutions Oy and Others of 14 March 2019, case C-724/17, ECLI:EU:C:2019:20*; *Court of Justice, European Commission v. Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp of 18 December 2014, case C-434/13 P, ECLI:EU:C:2014:2456.*

[76]Lennart Ritter and David Braun Braun, *European Competition Law: A Practitioner's Guide.*

identification of the categories of market players to which the competition rules apply, thus determining the scope ratione personae.[77]

From an objective point of view and in a more system-specific perspective, it should be noted that the competition rules, net of limited derogations and partial exemptions, it has now reached almost universal application, indeed the apply peacefully to all economic sectors. [78]

The centrality of the category of undertaking, as a logical and legal precedent for the application of competition rules, is, however, at odds with the lack, both in the Treaties and in secondary legislation, of a legislative definition of the concept of undertaking. Nevertheless, there is substantial agreement that the gap is far from being accidental, considering it rather as the result of a deliberate choice by the legislator.[79] This is due to the considerable difficulty of reconciling the different concepts developed by the individual Member States and the need not to incorporate into the Treaties a formal and binding concept of an undertaking which is set back on the concept of a specific legal order, with the risk of being prejudiced, in this way, the uniform and effective application of antitrust legislation in different countries.[80]

As noted by Advocate General Kokott in the case *Schindler Holding Lid*, the notion of undertaking must be interpreted and applied in a uniform manner throughout the Union, and cannot depend on the particularities of national company law in the Member States.[81] Otherwise, a uniform legal framework could not be ensured for undertakings active in the internal market. In the silence of the legislator, the Court of Justice had to draw, by a necessarily empirical method and with a predominantly economic focus, the boundaries of the notion of undertaking.[82] By placing it within the specific antitrust system and interpreting it in line with the interests and objectives pursued by it: the suppression of anti-competitive behaviour and the guarantee of effective competition between undertakings. To this regard, the

[77]Conclusions A.G. Jacobs, 28.1.99, *Albany International BV v. Stichting Bedriffspensioenfonds Textielindustrie of 21 September 1999*., case C-67/96 (1999 I-05751), para. 206.
[78] For example, retail, regulated markets: telecommunications, post, energy, transport, insurance, etc
[79] Aurelio Pappalardo, *Il diritto comunitario della concorrenza profili sostanziali*
[80] Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust*
[81] *Schindler Holding Ltd and Others v European Commission,* Case C-501/11 P Opinion of Advocate General Kokott (2013), ECLI identifier: ECLI:EU:C:2013:248
[82] Ibid.

concept of undertaking, adopted in EU competition law, is very board. Despite the lack of a legal definition, EU institutions have always interpreted the term 'undertaking' in very broad terms, as to include *"any entity engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded"*.[83] Such defintion is also confirmed by case-law, see for example *Case C-41/90*, where the Court states that *"the notion of undertaking embraces any entity carrying out an economic activity"*. [84]

4.2.The relevant market

The concept of the "relevant market" is a logical prerequisite for antitrust analysis, which is essential for understanding the rationale, aims and limits of competition law and which, for this reason, is applicable in all regulated cases, both at European and national level. The European Commission, through the " Commission Notice on the definition of relevant market for the purposes of Community competition law", has formally defined the concept of the relevant market as the framework within which, on one hand competition authorities are required to observe and assess competitive dynamics, and therefore it *"establishes the framework within which the Commission applies competition policy principles"*.[85] On the other, for the undertakings operating in the market, it constitutes the perimeter of competition, the arena within which the competitive confrontation must be carried out and therefore *"identify, in a systematic way, the competitive constraints that the undertakings involved face"*. [86]

The TFEU does not define the relevant market, nor this definition can be found in European or national legislation. Despite the Commission's trying to give a

[83] European Commission, *Directorate-General for Competition, Glossary of terms used in EU competition policy: antitrust and control of concentrations,* Publications Office, 2003.
[84] *Klaus Höfner and Fritz Elser v. Macrotron GmbH* of 23 April 1991, case C-41/90 (1991 I-01979).
[85] European Commission, *Notice on the definition of relevant market for the purposes of Community competition law,* Document 31997Y1209(01) available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29>.
[86] Ibid.

definition in its Notice on the definition of relevant market for the purposes of Community competition law, as long as notion proposed by national competition authorities, no source of legislation has ever lent itself to a precise definition of this essential concept.[87] Indeed, the European Commission itself, through its Notice, has limited itself to indicating which method to use for the systematic identification of the relevant market. In particular, it is a method of economic analysis based on a detailed examination of the supply and demand of a given product or service in a given geographical area which is based on a dual criterion: product and geographical. The former comprises all those products and/or services which are regarded as interchangeable or substitutable by reason of product characteristics, prices and intended use. Therefore, the relevant market should not (necessarily) consist of a set of products which share similar characteristics. Rather it should consist of a set of products that exercise some competitive constraint over each other. As a result, the main criterion to use is the one of Interchangeability which imply that if products or services in question are interchangeable with one another, they are considered to be in the same market. In relation to the geographical market, it *"comprises 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 neighboring areas, because the conditions of competition are appreciably different in those areas"*. [88]

[87] European Commission, *Notice on the definition of relevant market for the purposes of Community competition law, 5–13.*
[88] Ibid.

4.3. Restriction of competition

The cases relevant to antitrust law consist, as mentioned above, of the conduct of undertakings, which are likely to produce anticompetitive effects within a specific market (relevant market), or in several markets at the same time. Business initiatives can have a direct positive effect on the competitive process (for example: by lowering prices, or through the launch of a new product), they can be neutral or at most susceptible to indirect and not immediate effects (for example: an internal reorganization), on the other hand, they can also have negative effects.[89]

The EU competition law rules define the anti-competitive effect in various terms: Article 101 TFEU prohibits agreements which have the object or effect of preventing, restricting or distorting competition; Article 102 TFEU prohibits the "abusive exploitation of a dominant position", without further defining the case in terms of negative effects on the market, except for some illustrative indication (prices [..] or unfair transaction conditions, damage to consumers); art. 2, Reg. 139/2004 / EC, prohibits mergers that significantly hinder effective competition in the common market.[90] As can be seen, the indications of the normative texts are very generic and do not even coincide in their formulations. It is therefore not very interesting to investigate, as the first interpreters tried to do, the differences in meaning between "impediment", "restriction" or "distortion" of competition, or other textual differences. living antitrust Competition remains an indeterminate legal concept, which, in the very intention of the Community legislator, must be concretized in the jurisprudential context.[91]

In Eu jurisprudence, the linguistic use of preferring the term "restriction of competition" has been affirmed, as a summary term of the essential objective connotation of the antitrust offense. In determining the characteristics of this element, the jurisprudence has specified that not every limitation of the freedom of action of a company (e.g., due to participation in an agreement) constitutes in itself a restriction of competition. Instead, the limitation to individual freedom of initiative must also translate into a limitation of effective competition. On the other

[89] Jonathan Faull and Ali Nikpay, *The EU Law of Competition*

[90] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).*

[91] Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust.*

hand, it may happen that, from the latter point of view, an agreement or behavior has a positive effect (for example, it improves the offer towards the final consumer) or neutral.[92] By way of example, it can be said that any agreement, unilateral act, concentration operation or public intervention which, alternatively or cumulatively: artificially hinders the entry of new companies into a certain market will be anti-competitive; hinders innovation and therefore the enlargement and improvement of the supply of goods and services (prejudice to the dynamic efficiency of the markets); artificially keeps the prices of certain goods or services high (prejudice to the allocative efficiency of the markets); imposes the use of inefficient production factors (prejudice to the productive efficiency of firms and therefore to the overall efficiency of the markets); guarantees or allows the success of certain businesses, without this success being a consequence of free consumer choices.[93]

However, it should be noted that the anti-competitive effect, which the antitrust rules intend to counter, can be actual or even only potential. In fact, it would be clearly irrational not to intervene, waiting for competitive damage to actually occur, when the established facts already allow us to predict that damage could occur, if certain preparations were carried out. Indeed, it can be said that it is a general principle of industrial law (which is also found in the discipline of unfair competition and the protection of intellectual property rights) that according to which the legal system reacts even in the presence of mere preparatory acts for what it considers a unacceptable alteration of the proper functioning of a market. The rationale for this' generalized introduction of preventive injunction protection lies above all in the consideration that the "game of competition" can have unpredictable developments, so that letting a move contrary to the rules take place can have the most disparate outcomes. be completely unsuitable to restore conditions of effective market functioning, so it is advisable to intervene as soon as possible, with specific remedies.[94]

[92] Joanna Goyder and Albertina Albors-Llorens, *EC Competition Law*

[93] Valentine Korah, *An Introductory Guide to EC Competition Law and* Practice (London: Bloomsbury Academic 2007).

[94] Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases and Materials* (London: Bloomsbury 2007).

4.4.The prejudice to trade between Member States

The European antitrust rules have historically been established with the primary objective of creating a single European market, replacing the various national markets, protected by customs and administrative barriers, which had characterized the previous economic history. Furthermore, the creation of the single market appeared as a justification for the Community's interference in the regulation of the economic activities of national companies, on which, at the beginning of the history of the Community itself, seemed to want to maintain wide political discretion.[95]

Consistently with this approach, the application of European competition rules is not conditioned only by the assumption, indicated above, of the "anti-competitive effect", but also by a second assumption, consisting of the relevance of the case considered on the flows (of goods, services or capitals) between one country and another of the European Union. In this way, small events or those which, due to the characteristics of the relevant market, cannot affect interstate trade flows (think of certain markets protected by language barriers) remain outside the scope of application of European competition rules. At the same time, entrepreneurial behaviors are treated with great severity which, through the combination of contracts between private individuals, attempt to restore a division of the markets according to national borders (e.g. by establishing strict exclusive zones for different companies, within different territories. nationals).[96]

The requirement, which in the text of the Treaty seems to have a strictly qualitative character, has been progressively understood in an ever more elastic sense, with an accentuation of the quantitative profile of the case. In particular, the Union jurisprudence has affirmed the sufficiency of even a potential prejudice, thereby shifting the emphasis on considering the dimensions of the phenomenon to be taken into consideration. This then led to clarifying that the restrictive acts of competition, in order to fall within the scope of application of the European rules on the subject,

[95] Joanna Goyder and Albertina Albors-Llorens, *EC Competition Law*

[96]Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases and Materials.*

must be of such a size as to justify an intervention by the Community authorities (in other words, there must be a "Community interest "to the intervention).[97]

5. A focus on Article 102 TFEU

The application of Article 102 TFEU revolves around two intrinsically linked elements: the undertaking holding a dominant position in a relevant market and the conduct that can be seen as an abuse of that position. Indeed, what is prohibited is not the dominant position itself, nor the possibility of making a "just" profit from it; rather, it is the potential abuse of this power which makes the undertaking able to set prices above the competitive level, provide lower-quality products, and reduce its rate of innovation below that of a competitive market. In order to understand the meaning of abuse, it is necessary to address its precondition, namely the concept of dominance. [98]

5.1. The dominant position

In general, dominance is defined as an advantageous position of power held by a firm that enables it to limit competition in a specific market by acting *"independently of its competitors, customers, and ultimately of its consumers"*.[99] As a result, in the presence of a dominant position, the company can direct its commercial policies in a truly unilateral manner, without regard for the eventual reaction of competitors and customers. Moreover, in the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct is stated that a company is in a dominant position when it has the ability to influence the parameters of competition to its own advantage, and to the detriment of consumers, and is not subject to effective

[97] Ibid.
[98] Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (New York: Cambridge University Press, 2010).
[99] *Hoffmann-La Roche & Co. AG v. Commission of the European* Communities of 13 February 1979, case C-85/76 (1979 00461), para. 38.

competitive pressure.[100] Nevertheless, the legislature has not generally defined the concept of a dominant position.

This gap has been filled by the Court of Justice, which, in the United Brands case , refers to *"a position of economic power by which the undertaking holding it is able to prevent the persistence of effective competition on the market in question and has the possibility of behaving quite independently vis-à-vis its competitors, customers, and, ultimately, of consumers"*.[101] This definition of case law is, however, impractical, since it lacks concrete parameters, therefore, over time a practice based on quantitative techniques for measuring market power has established itself, subsequently accepted by the European Commission.[102]

The assessment of market power held by an undertaking requires a definition of the relevant market in order to analyze the competitive pressures to which the undertaking is subject.[103] Indeed, defining the relevant market is critical in order to establish an abuse of dominant position. In fact, the existence of a dominant position is inextricably linked to how the relevant market is defined. This has implications for the determination of an abuse of dominant position since that there is an inverse relationship between the size of the identified relevant market and the dominant position of the undertaking. Indeed, the greater the size of the relevant market identified, the smaller the market share of the company and vice versa. In other words, If we restrict the relevant market, it will always be possible to identify a monopolist.[104]

In relation to the inverse relationship between the definition of the relevant market and the finding of an a dominant position in that market, it is worth noting the market's definition in the Google Shopping case. In this case the Commission has narrowly construct the relevant market, but in reality its reconstruction did not have any influence on the finding of Google's dominant position. Indeed, the dominant

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[100] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*

[101] *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities* of 14 February 1978, case C-27/76 (1978 00207).

[102] Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law*

[103] European Commission, *Notice on the definition of relevant market for the purposes of Community competition law*

[104] Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market* Power (Alphen aan den Rij: Kluwer Law International 2020).

position in the Google Shopping case has been found in the search engine market, although the anticompetitive practice has been found in the Comparative Shopping Service market. [105]

This is because a dominant position in one market can constitute an abuse in another related market where the undertaking does not have a dominant position. As a result, the market where the abuse occurs could be a different related market. This is because a company's economic strength in one market can be used to exert anticompetitive pressures in other markets, thereby extending its dominance in the latter.[106] In fact, 'double dominance' is not required to have an abuse of dominant position because it is assumed that if an undertaking is dominant in one market and holds a prominent position in another related market, the undertaking's position in the latter situation is equitable to that of holding a dominant position.[107]

Therefore, as states in *TeliaSonera*, *"while the application of Article 102 TFEU presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market, the fact remains that in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated, market and having effects on that associated market"* is not affected. [108]

Once the relevant market has been identified, it is necessary to determine whether or not the undertaking has a dominant position within the relevant market. This assessment is based on the analysis of the market power, i.e. specific ability of a company to control the conditions of the market, of the company, through a series of indices. To this end, it shoud be mentioned that the assertion of dominant position is a factual restructuring exercise that is not based on formal or predetermined elements but rather on the concrete power conditions of the firms.[109] In this regard, some structural parameters are observed, which allow the analysis of the market

[105] *Google Search (Shopping)*
[106] *Konkurrensverket v. TeliaSonera Sverige AB* of 17 February 2011, case C-52/09 (2011 I-00527).
[107] *Tetra Pak International SA v. Commission of the European Communities* of 14 November 1996, case C-333/94 (1996 I-05951).
[108] *Konkurrensverket v. TeliaSonera Sverige AB*, para. 86.
[109] Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market Power*

structure and its characteristics, identifying the position of the company under investigation and its competitors. The most important starting point is an examination of the companies' market shares, understood as measure for the relative size of a firm in an industry or market, in terms of the proportion of total output, sales or capacity it accounts for.[110]

Consequently, if an undertaking have a 50%, or even higher, market share there will be a rebuttable presumption of dominance.[111] If the market share is lower than 50%, there is no presumption as such, but if the market share is between 40% and 50%, the Commission can demonstrate dominance, as done in United Brands (45%) and British Airways (39.7%). On the contrary, if the market share is lower than 40%, dominance is not likely to be found.

Nevertheless, even if market share are a crucial indicator of market power, their analysis should not be conducted in 'isolation'. Indeed, even if market share can be considered to be a 'proxy' for market power, in order to assess whether the undertaking have market power, external factors need to be taken into account as well. Otherwise, at first glance, every undertaking with high market share would be considered to have market power; but this would be an erroneous assumption.[112] This danger has been be dispelled by the "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" where the Commission has pointed out that in the assessment of dominance the competitive structure of the market should be taken into account.[113]

Indeed, as pointed out in *Hoffman-la Roche*, *"a substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets"*.[114] In order to identify whether the undertaking have market power, its

[110] European Commission, *Directorate-General for Competition, Glossary of terms used in EU competition policy: antitrust and control of concentrations*

[111] *AKZO Chemie BV v. Commission of the European* Communities of 3 July 1991, case C-62/86 (1991 I-03359).

[112] Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market Power*

[113] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*

[114] *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, para. 40.

market shares need to be confronted with external factors. Firstly, the undertaking's high market share need to be considered in the light of the competitive pressure that (actual or potential) buyers are able to exert on the undertaking itself. Since it is assumed that a high contractual power of the customers is able to counterbalance the economic power of the company, limiting the possibility that it abuses its dominant position within the market. Furthermore, market shares need to be seen in the light of its competitor's position and market share. As a result, the greater the disparity between the market share of the larger company and that of the competitors, the greater the possibility of establishing a dominant position because, from a competitive standpoint, competitors of modest size exert a relatively lower commercial pressure. And, most importantly, market share need to be considered in the light of the presence of barrier to entry, namely the presence of circumstances that prevent or hinder companies from entering a specific market. [115]

Furthermore, the need to distinguish elements other than market share for the purposes of determining dominance is particularly emphasized in more dynamic or emerging markets where higher market share may be only temporary in the absence of entry barriers for competitors and, thus, does not represent a firm's market power.[116] If prior to the advent of the digital economy, dominance was established by taking into account market quotes and determining whether or not the quantitative threshold of 50% in the reference market was exceeded. Adhering to this parameter no longer appears to be sufficient. The dominance of digital eco-systems is based on the "intermediation power" that allows them, through the use of now-essential digital infrastructure, not only to stabilize who can access the market of reference and re-direct to a specific group of customers, but also to extend their position of power in markets where no economically significant power exists. To this regard, and as will be explained in more detail in Chapter II, it seems that, after the *Google Shopping* decision, also another parameter should be taken into account in relation to the dominant undertaking's power, namely the regulatory power exercised by the 'Big-giants' which allows them to distort competition.

[115] Robert O'Donoghue KC and Jorge Padilla, *Law and Economics of Article 102 TFEU*
[116] European Commission, *Microsoft, decision of 24 March 2004, case COMP/C-37792,* paras. 448 464 e 515-540.

5.2. The abuse of dominant position

As pointed out in paragraph 9 of the Guidance on the Commission's Enforcement Priorities in Applying Article 82 (now 102) of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, after having established the existence of a dominant position through the qualitative-quantitative analyses described above, the conduct of the undertaking will be analyzed in order to determine whether or not it may constitute abuse. To do so, it is necessary to identify the unlawful conduct which is the result of the improper exercise of market power, in terms of power to control price in the market or the power to exclude competitors. For this purpose, the generic formula contained in paragraph 1 of Article 102 TFEU is supported by the indication, although not exhaustive, of the conduct which could potentially damage competition and therefore are prohibited.[117] Such conduct are listed in paragraph 2, and consist in the following behaviors: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[118] These represent only the most recurrent conduct of abuse of a dominant position, but such enumeration is an open list, which gradually welcomes the elaboration of new types of conducts, which try to make up for the lack of a definition ex lege of abuse. [119]

In *Hoffmann-La Roche*, para 91, abuse is defined *as "an objective concept relating to the behavior of an undertaking in a dominant position which is such as to*

[117]Robert O'Donoghue KC and Jorge Padilla, *Law and Economics of Article 102 TFEU*
[118] Article 102 TFEU
[119] Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market Power*

influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, as the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[120] Such vision has been interpreted as behavior that is not rational from an economic point of view that cannot be explained by anything else than the desire to push out competitors or to harm customers, and therefore to have an exclusionary or exploitative effect.

The definition given in *Hoffman-La Roche* clearly shows the objective nature of the case: it is not relevant whether there is a specific anti-competitive intent of the undertaking to invoke the abuse. Indeed, some practices, depending on their persistence or lack of abusive intent, have the potential to change the market's competitive structure for the sole reason that they are carried out by a dominant company and, as a result, they are abusive even in the absence of specific abusive intent.[121] In fa cat, it has been pointed out, in *Clearstream*, that intent is generally irrelevant.[122] Nevertheless, this does not rule out the possibility that the abusive intent will be useful in some other situation, either in the verification of the abusive practice or in the determination of the amount of the penalty to be applied.[123]

Furthermore, the configuration of a violation of Article 102 TFEU does not require the demonstration of the existence of concrete anti-competitive effects resulting from the abuse of the dominant position, being sufficient to verify the abusive potential effect of such conduct, namely the suitability to produce effects of exclusion or exploitation in the market.[124] Moreover, The CJEU began with the

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[120] *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, para. 91.

[121] *Europemballage Corporation and Continental Can Company Inc v. Commission of the European Communities*, para. 29; *Hoffmann-La Roche & Co. AG v. Commission of the European Communities,* para. 91.

[122] *Clearstream Banking AG and Clearstream International SA v. Commission of the European Communities* of 9 September 2009, case T-301/04 (2009 II-03155).

[123] In particular, the abusive intent acquires particular importance in ascertaining the unlawfulness of a conduct pursuant to art. 102 TFEU, in the case of the imposition of predatory prices; see *AKZO Chemie BV v. Commission of the European Communities*, para. 72 and European Commission, *Tetra Pak II,* decision of 24 July 1991, 92/163/EEC, par. 41; *Irish Sugar plc v. Commission of the European Communities,* par. 114; *ITT Promedia NV v. Commission* of 17 July 1998, case T-111/96 (1998 II-02937), para. 56.

[124] *AKZO Chemie BV v. Commission of the European Communities*, paras. 76-82.

assumption that in a market led by a dominant undertaking, the degree of competition is lower than it would be without the presence of the dominant undertaking in the market. As a result, competition is already weakened in the light of its presence. Indeed the market, rather than being 'populated' by non-dominant undertakings, suffer the competitive pressure exercised by the dominant undertaking who compete with few non-dominant ones.

As a result, if market competitiveness is already hampered by the presence of the dominant undertaking as such, it is logical to imply that any abuse of its power cannot be tolerated. In this regard, and as will be seen in more detail in Chapter II, dominant undertaking are burden of a 'special responsibility' not to impar the competitive process.[125] As Chapter II will discuss, the recognition of such responsibility upon dominant undertaking does not clarify what the term 'abuse' means in practice.

5.2.1. Types of abuse

In order to facilitate identification and systematization, the various types of abusive conducts, competition authorities have identified various ways in which the abuse of dominant position can occur through the case-law.[126] A first distinction can be made between pricing and non-pricing practices. In the former category, there are several practices which can occur. An example is excessive pricing, namely when a dominant undertaking charges a price that is excessive relative to an appropriate competitive benchmark in a way that seems it unfair. In addition there is predatory pricing, that is a strategy of driving competitors out of the market by setting prices below costs. Furthermore, there is margin squeeze, that occurs when a vertically integrated undertaking sells an upstream bottleneck input to rival companies that also compete with the monopolist in a downstream market for the provision of a downstream product, this creates a "margin squeeze," which is an exclusionary

[125] *Nederlandsche Banden Industrie Michelin v. Commission of the European* Communities of 9 November 1983, case 322/81 (1983 -03461).

[126] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

abuse of dominance. When the difference between the price the monopolist charges for the downstream product and the price at which the monopolist charges its competitors for the upstream bottleneck product is "too small," an efficient downstream rival is said to be in a margin squeeze.[127]

Apart from pricing practices, there are also non-pricing practices such as tying which is a commercial practice of conditioning the sale of one product on the purchase of another product. Moreover, there is the refusal to supply, that occurs when a dominant undertaking refuse to supply an indispensable or objectively necessary input to a competitor. On closer inspection, the rationale behind the refusal to supply is the same as the one in margin squeeze. Indeed, it has been argued that margin squeeze is a constructive refusal to supply in which the dominant undertaking, rather than refusing access to the input, makes its access too expensive to afford for its competitors.[128]

Furthermore, in the realm of this first distinction, between pricing and non-pricing practices, there is also a clear distinction, based on the anti-competitive effects produced by the behaviors, between two 'families' of abuses: exploitative and exclusionary.[129] The former are abuses in which dominant companies use their market power to directly harm consumers, such as by charging excessive prices. While the latter are *"business tactics that harm consumers by undermining the competitive process, typically by disrupting or undermining the ability of rivals to meet the needs of customers"*.[130] As a result, in both practices, what counts is that the challenged conduct harms consumers.

Moreover, in the non-pricing exclusionary realm, there are different theories of harm. One of them is leveraging, in which a company uses its dominant position to establish or increase its position in another market. Indeed, the establishment of a link between the abusive practice and the dominant position is not required for the

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[127] *OECD, Policy roundtables, Margin squeeze* (2009) available at https://www.oecd.org/daf/competition/46048803.pdf>.

[128] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

[129] Giorgio Monti, *'The General Court's Google Shopping Judgment and The Scope of Article 102* TFEU' (2021), 7 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963336>.

[130] Carl Shapiro, *Exclusionary Conduct, Testimony Before the Antitrust Modernization Commission* (2005), 2 available at <https://faculty.haas.berkeley.edu/shapiro/amcexclusion.pdf>.

prohibition under Article 102.[131] Nevertheless, it should be noted that when the Court approved the application of Article 102 TFEU to abusive conduct carried out in a market other than that in which the undertaking holds a dominant position, but closely connected to it, recognized that the provision presupposes the existence of a link between the dominant position and the allegedly abusive behavior.[132] And it is in relation to this theory that has been found the abusive conduct in the google shopping case, in which Google has leveraged its dominant position in the general search market into the vertical one, i.e. comparison shopping service, as will be explained in Chapter II.

In relation to exclusionary abuses, the Commission has adopted the 'competition on the merits' criterion, assessing whether the dominant company has used means other than those that govern normal competition.[133] As a result, where the dominant firm achieves economically favorable results due to its commercial merits - that is, greater efficiency, a higher quality of the good offered on the market, or a higher degree of innovation on his own part - this conduct will not infringe Article 102 TFEU. Otherwise, the dominant company will be punished under this provision if its strategies have the sole effect of preventing access to the market or expelling other equally efficient competitors from it, despite the absence of a valid economic justification. Conversely, the examination of the legality of practices that can be classified as exploitation abuses is primarily based on the principle of proportionality: it verifies whether the dominant company's strategies are necessary and adequate for the established economic objective. As a result, the dominant undertaking will infringe Article 102 TFEU if, taking into account what happens in normal commercial practice, it has implemented an excessive and disproportionate strategy in relation to the goals pursued. [134] Nevertheless, such criterion is highly contextual and do not provide a list of the behavior which can be considered to be based 'on the merits' and which, on the contrary, are considered to fall outside this

[131] *Europemballage Corporation and Continental Can Company Inc v. Commission of the European Communities*, para. 13.
[132] *Tetra Pak International SA v. Commission of the European Communities.*
[133] OECD, *Competition on The Merits (2005) available at <https://www.oecd.org/competition/abuse/35911017.pdf>.*
[134] *OECD, What Is Competition on The Merits?* (2006) available at <https://www.oecd.org/competition/mergers/37082099.pdf>.

concept. Such difficult aspect, together with the special responsibility, will be delt in depth in Chapter II in the light of the Google Shopping case and its implication over these concepts.

5.3. Main school of thought in the application of Article 102 TFE

Competition law provisions, as any other type of provision, is subject to interpretation. In the competition law realm, such interpretation needs to be considered in the light of the school of thought which the European Commission decides to follow in its enforcement activity. Indeed, in the light of the above analysis of the main competition law provsions, one could conceive competition law as a stable discipline, based on economic consideration and on very clear parameters, almost mathematical in nature.

Nevertheless, such view of competition law is deceptive because it does not take into account the 'social' side of competition law. Indeed, it should bear in mind that competition law, as any other law, is a social construct and therefore it adapts to values of each jurisdiction and absorbs them like a sponge.[135] This discipline, in the European Union realm, forms part of the wider matrix of values and norms that are advanced by the Union, and it reflects the values embodied in the European Union, recognized in its treaties and the Charter of Fundamental Rights of the European Union.[136] Indeed, competition policy does not have a unique aim, as suggested by the wording of Article 7 TFEU, but rather is aimed at pursuing several aims, including promotion of efficiency and consumer welfare, the protection of market structure and economic freedom, and market integration.[137] Such pluralism, i.e. wide range of aims, suggests that *"competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and*

[135] Ariel Ezrachi, *Sponge.*
[136] *Charter of Fundamental Rights of the European* Union 2012 OJ C326/02.
[137] European Commission, *Guidelines on the Application of Article 81(3) of the* Treaty (2004) OJ C101/08 para. 13; European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* paras. 5–7.

social context" [138] ,or in slightly different wording, as argued by Margrethe Vestager, competition cannot be considered a lonely portfolio. [139]

In order to alt the 'sponge-like' characteristics of competition law, economics has always been seen as a 'membrane' which cover the sponge and limits its absorbing properties and therefore allowing competition law to be consistent with economic thinking.[140] Starting from this parallelism of the sponge-membrane, a line can be drowned between two different (and main) school of thought that have been influencing competition law (and antitrust in general). On one hand, there is the Chicago School of thought which introduces economics in competition law, and therefore resembles the 'membrane'. On the other, there is the Neo-Brandeis, or New Brandeis, school of thought which, on the contrary, is less focused on the economic thinking and descends from the ordoliberal school of thought. Such school of toughs can be seen as two conflicting 'forces' which has not yet reached an equilibrium and over the time have always been 'in conflict'. [141]

In the context of growing, but not undisputed, dissatisfaction among scholars with approaches inspired by the so-called Chicago school, the US and the EU, and even individual countries, have gradually questioned the effectiveness of the current antitrust approach in countering digital platforms' overwhelming market power. Starting with the United States, where big techs have their headquarters, it seemed to emerge clearly among scholars - not only with regard to digital platforms, but more broadly with regard to market concentration in a variety of economic sectors - the inadequacy of an approach based on the cornerstones of "modern" antitrust theory: that is, the binomial of "consumer well-being" and "economic efficiency", on which the Chicago School is based on. In recent years, such approach has increasingly contrasted with other schools of thought - variously named, sometimes with irony, hipster, Woodstock or new brandeisian antitrust - which advance the enhancement of criteria related to structural elements of the markets and their competitive dynamics, such as: the existence of barriers at the entrance; conflicts of interest that may arise where the same dominant subject in a given market

[138] European Commission, *XXIInd report on competition policy 1992*, Publications Office, 1993.
[139] Margrethe Vestager, *Approval hearing before the Economic and Monetary Affairs Committee of the European Parliament* (2 October 2014).
[140] Anne C. Witt, *The More Economic Approach to EU Antitrust* Law (Oxford: Hart 2016).
[141] Ibid.

extends its presence in related markets; the emergence of 'bottlenecks' or gatekeepers; the dynamics of bargaining power; the control and use of data.

Although, as mentioned, the criticisms do not concern only the new digital markets, there is no doubt that the approach of the Chicago school has proved more unsuitable precisely with reference to the competitive dynamics of digital markets, in relation to which the criterion of price dynamics enter into crisis primarily due to the absence of a monetary consideration for the services offered by big techs, given their remuneration through the use of user data. In particular, according to the critics of the Chicago school, it was precisely the inadequacy of the criteria solely valued by this doctrine that prevented an effective contrast to the abnormal growth of the major tech companies, known by the acronym GAFAM (Google, Apple, Facebook , Amazon and Microsoft). [142]

Supporters of the new theories first dispute that 'consumer welfare' is the only interest pursued by antitrust legislation and they claim that Article 102 TFEU is also aimed at pursuing other purposes, such as: protection against concentration and abuse of economic power; the defense against the possibility for large companies to make monopoly profits, harmful to the general public; the protection of economic freedoms and the freedom of private economic initiative, to be achieved above all by leaving the markets open; the guarantee of the freedoms of individuals. Such vision is arguably at odds with the 'more economic approach' which the Commission has embraced to, but, as Chapter II will explain, it seems that EU is going trough an implicit change of school of thought and the Google Shopping case is an example of such 'change of course'.[143]

5.4. The Commission's more economic approach

The analysis of the two main school of thought which have always played a pivotal role in the application of competition law provisions, is essential in order to make

[142] Giorgio Monti, *Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States* 67 The Antitrust Bulletin 40 (2022).
[143] Johannes Laitenberger, *Competition enforcement in digital markets: using our tools well and a look at the future* (2019) available at <https://ec.europa.eu/competition/speeches/text/sp2019_03_en.pdf>.

a reference to the ‘modernization’ period which European Competition Law has undergone over the last 25 years. Indeed, the Chicago school of thought, pioneered by Judge Posner, has played a significant role in Europe, owing to its normative prescription in favor of a more economic approach, characterized by the main criticisms leveled against the Antitrust intervention centered on the overly formalistic approach to competition case-law. Indeed, the Commission adopted legal standards close to a judgment approach that can be defined as a ‘per se’ judgment which recalls the US per se prohibition, that rather than focusing on the effects produced by the conduct, it relies mainly on the conduct’s form. [144] Such formalistic approach has been criticized and a ‘more economic path’, i.e. based on the effects rather than the form of the conduct, has been undertaken, by using the Chicago school of thought as the main driving force for competition law provisions’ enforcement.

The Commission embarked on a lengthy process of rethinking and redesigning its antitrust policy in the late 1990s. The reform of the enforcement system was one component of this review, which culminated in the Council decentralizing the enforcement of Articles 101 and 102 TFEU in Regulation 1/2003.[145] Along with the procedural reform, the Commission initiated a substantive law review. Its goal was to completely overhaul EU antitrust rules by introducing a "more economic approach" that would place a greater emphasis on economics. To implement the way the Antitrust Authority investigates conduct that has the potential to harm competition between companies, an alternative analysis that is focused on the "effects" of the conduct rather than the "form" of the conduct can be used. A less expensive approach would reduce the risk that behavior not detected by authorities, because it is not on the "list" of illegitimate conduct, will allow the company to avoid controls.[146]

Due to the lack of a sufficiently coherent investigation method, some conducts, despite having negative effects on consumers, may receive a more lenient treatment and thus be preferred by businesses. Furthermore, condemning certain behaviors

[144] See for example *Court of Justice, Tomra Systems ASA and Others v. European Commission of 19 April 2012, case C-549/10 P, ECLI identifier: ECLI:EU:C:2012:221*

[145] *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*

[146] Anne C. Witt, *The More Economic Approach to EU Antitrust Law*

solely on their form can, in some cases, harm consumers due to the pro-competitive effects that the conduct itself could have generated. The shift to an economic approach would require the authorities to calculate the harm to competition using facts and empirical evidence in order to evaluate the resulting effects scientifically. Furthermore, companies will be required to follow the same criteria as defined in the Guidance Paper (2009) in order to demonstrate the capacity of the efficiencies generated by their conduct to outweigh the harm done to consumers.[147]

Furthermore, the new criterion would be capable of limiting a risky managerial approach aimed solely at protecting a competitive market form for its characteristics. This would tend to protect companies that are inefficient, allowing them to continue producing without guaranteeing consumers the highest possible quality. Finally, by analyzing the effects of a specific conduct that may be harmful to consumers, the new approach reduces the importance of the estimate of the company's dominant position found in the approach based on the form, as this is inherent in the ability to harm the competitive mechanism. A more effective and coherent intervention would be obtained through an assessment focused on the effects of the conduct, increasing the predictability of the judgment.[148]

To this regard, the Commission issued a comprehensive discussion paper on December 19, 2005, rejecting the previous formalist approach in favor of an effects-based approach.[149] In terms of content, the Discussion Paper concentrated solely on exclusion abuses, which were deemed potentially more harmful to consumer welfare by DG Comp. In terms of goal, despite the reformist spirit, the Discussion Paper did not seek to propose a radical change in this discipline, but rather to establish its fundamental principles by reconstructing the experience gained in enforcing Article 102 TFEU and the European jurisprudence developed in relation to this provision. The Discussion Paper also serves a didactic-educational purpose, as it aims to develop and explain the most recent theories of competitive prejudice, which, in the opinion of DG Comp, must be applied in the investigation of the most

[147] European Commission, *Guidelines on the Application of Article 81(3) of the Treaty*

[148] Doris Hildebrand, *The Role of Economic Analysis in The EC Competition Law* (Alphen aan den Rij: Kluwer Law International 2016).

[149] European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (2005).

common abusive practices in order to implement the (new) policy intended to be carried out in the context of the application of Article 102 TFEU.

Subsequently, the "Guidance on the Commission's Enforcement Priorities in Applying Article 82 (now 102) of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" was adopted in February 2009, following a lengthy public consultation.[150] Two of the primary reasons for the drafting of the Guidance Paper were the need to clarify the process of analyzing exclusive conduct and to increase the degree of predictability regarding the behaviors that could be investigated by the Commission. In this regard, the guidance paper first describes the economic and effect-based approach that will guide the Commission in assessing exclusionary practices, followed by a framework for assessing the most common exclusionary conducts, such as exclusive dealing, conditional rebates, tying and bundling, predatory pricing, refusal to supply and margin squeeze. The measurable effects on the market of an exclusionary conduct are crucial in evaluating it under this approach. Indeed, with this approach the Commission aims to drown a line between conducts which are considered to be based 'on the merits', i.e. benefits consumers, which are protected, from conducts which would result in anticompetitive foreclosure, which would harm consumers. [151]

Such novel approach based on economics analysis demands a close examination of how competition functions in each specific market and of the examination of the economic effects of particular business practices. In this regard, it is essential to make a 'balance' between the efficiency gains and the adverse effect of the conduct.[152] Consequently, a violation of Article 102 TFEU can be seen solely in the case where the adverse effects outweigh the efficiency gains, and vice versa, there will be not an infringement of the aforementioned Article, whether efficiency gains outweigh adverse effects. Such approach requires that the determination of the harm to competition and the likelihood of harm to consumers are based on economic theories. In the same way, efficiency gains should be evaluated in the light of economic analysis as well. Such balance is of vital importance in order to

[150] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*
[151] Anne C. Witt, *The More Economic Approach to EU Antitrust Law*
[152] Ibid.

identify which behaviors, both in the short-term and long-term, are able to foreclose competitors and, in turn, harms consumers in terms of higher prices, less innovation and reduced quality.[153]

As a result, the concept of 'anticompetitive foreclosure' is the focal point of this analysis. Such term has been defined in the Guidance as *"situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers"*.[154] The Communication's definition of anticompetitive foreclosure appears to imply that determining this vulnerability does not necessitate a complete foreclosure for competitors in terms of access in the affected markets. This appears to be consistent with the above-mentioned redefinition of art. 102 TFEU objectives: to ensure positive effects for consumers, an effective competitive process must be protected. Thus, anti-competitive foreclosure may exist when other operators are unable to exert effective competitive pressure on the dominant company, allowing it to profitably raise prices with negative consequences for consumer well-being. Furthermore, recent jurisprudence has ruled that it is not necessary to establish that the dominant company has already implemented the price increase, but only that the exclusionary strategy it has implemented allows it to do so. [155]

In terms of application, the Commission will examine a variety of factors in order to determine the existence of an anticompetitive foreclosure. First and foremost, the dominant undertaking's position is given special consideration, because the stronger this position, the more likely it is that conduct aimed at protecting the dominant's market power will result in anticompetitive foreclosure. Certain factors already assessed in the dominance analysis will be considered in determining the anti-competitive foreclosure, such as market conditions and the position of competitors,

[153] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

[154] European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*

[155] Doris Hildebrand, *The Role of Economic Analysis in The EC Competition Law.*

customers, or suppliers of the factors of production.[156] The goal is to examine the allegedly anti-competitive behavior in the context of the market in which it was implemented, in order to determine whether it worsens the market's conditions and competitive dynamics. The extent and duration of the alleged abusive behavior are also relevant in the examination of anticompetitive foreclosure: in general, the longer the duration of this practice and its regular application, the greater the potential foreclosure effect. [157]

In this context, in order to distinguish between conducts which can be considered to be based 'on the merits' and those which falls outside this concept, the Commission has adopted the as-efficient competitor test in order to evaluate the harm to competition caused by particular business practices.[158] Such test is essentially about whether, given the practice putted in place by the dominant undertaking, an as efficient competitor would have the ability to compete on the market where the effects are manifested. Such test has been applied in the Google Shopping case and its application will be critically assessed in Chapter II.

6. Europe goes digital

In the light of the fact that European economy is undergoing significant transformations and that the digital technology is revolutionizing even the most traditional industries, as pointed out by Margarethe Vestager, the position of Europe on world markets is changing in the light of increasingly sophisticated global rivals competing with European companies. And such changes, inevitably, should be taken into consideration and Europe's policies, including competition policy, must adapt to these modifications.[159] Indeed, Europe's initiative in the digital sector are not confined to competition policy. This is just one small part of a grater plan that

[156] European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*
[157] Akman Pinar, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*
[158] Ibid.
[159] *Competition and Europe's digital future, Brussels,* 14 March 2019, *Bundeskartellamt 19th Conference on Competition,* 14 March 2019 European Commission – Speech.

sees involved other branches of law, such as privacy, cybersecurity, consumer protection and fundamental freedom protection. [160]

The turning point in relation to Europe's initiative in the digital sector can be traced back to the COVID-19 pandemic, which has fundamentally altered the role and perception of the digital sector in our society and economy in just one year, highlighting the need to accelerate its development. Work, study, entertainment, socializing, shopping, and access to a wide range of services, from health to culture, now require the use of digital technologies. The pandemic, on the other hand, has highlighted the vulnerability of our digital space, its reliance on non-European technologies, and the impact of misinformation on our democratic society. [161] In light of these challenges, the European Union has stated its intention to pursue digital policies that assist people and businesses in achieving a more human-centered, sustainable, and prosperous digital future.[162]

The European Union will have to build an open and competitive Digital Single Market that embodies European values on its own.

The Digital Single Market strategy was unveiled in May 2015, when the European Commission's President, Jean Claude Juncker, along with the Commissioner for Digital Economy and Society, Guenther Oettinger, and the Vice-President responsible for the Digital Single Market, Andrus Ansip, unveiled the blueprint for a highly innovative and critical EU policy for the future.[163] On this occasion, it was noted that the EU's digital sector was not in line with non-EU countries' – such as United States and China, which remain leaders in this field- digital sectors. As a result, the EU has decided to prioritize the development of the digital single market among the various policies pursued. The European Commission defines a Digital Single Market in its communication 'A Digital Single Market Strategy for Europe'' as *" a Digital Single Market is one in which the free movement of goods, persons,*

[160] Ibid.

[161] Divina Frau-Meigs, *Societal costs of "fake news" in the Digital Single Market, Study for the Committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2018, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2018/626087/IPOL_STU(2018)626087_EN.pdf.*

[162] Euoropean Commission, *Shaping the digital transformation in Europe*, 2020, 7.

[163]Giuseppe Simeone, *Mercato unico digitale* (2016) available at <https://www.treccani.it/enciclopedia/mercato-unico-digitale_%28Diritto-on-line%29/>.

services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence".[164]

In this context, the adoption of New Competition Tool (NCT) by the Commission, fits. The Commission has launched a reform project aimed at identifying new remedies for structural problems encountered in some markets in the course of cases examined in recent years under Articles 101 and 102 TFEU. Indeed, in digital markets, due to the presence of online platform which acts as gatekeeper and thus have complete market knowledge, there is a risk of a reduction in the overall degree of competition and the possibility - for dominant undertakings dominant - of adopting anticompetitive strategies in adjacent markets and - for even non-dominant undertakings which have at least a bit of market power - to adopt strategies in their own market that cannot be counteracted by traditional antitrust remedies. The presence of extreme economies of scale and scope in digital markets, as well as strong network externalities, combined with a high degree of market concentration and the existence of barriers to entry, also due to so-called zero pricing and the centrality of data, are all factors that favor the risk of a sudden drop in competition once a company has reached a certain critical threshold in that market, i.e. so-called tipping market.

Nevertheless, it should also be noted that NCTs are not proposed as the sole remedy for platform dominance, as evidenced by the Commission's presentation of two regulatory proposals (the Digital Services Act (DSA) and the Digital Markets Act (DMA) aimed at introducing ex ante and platform-specific regulation. Indeed, the two instruments - competition and regulation - converge, albeit at different times and in different ways, in order to maintain or create conditions that allow markets to become or remain fair and contestable for innovators and new entrants and competitors.

The call for such new regulatory instrument can be connected to the several cases in which the European Commission has engaged into, against the so-called

[164] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, a Digital Single Market Strategy for Europe*, doc n. 2015DC0192, 3.

'GAFAM'. This acronym stands for the 'Big Five', namely Google, Amazon, Facebook, Apple and Microsoft which, in the market where they operate, benefit from a 'peculiar' dominant position, which, in contrast to 'merely' dominant undertakings, which does not benefit from the GAFAM's peculiar position, enables them to have a more profound impact on the market. Among several cases involving these peculiars operators, the Google Shopping case will be considered in depth in order to examine the impact that such case had on Article 102 TFEU's 'evergreen' concepts – i.e., special responsibility, competition on the merits and consumer welfare standard – and to put the basis for discussing the DMA.

Nevertheless, before going into these aspects, and specifically on the DMA, which will be touched in depth in Chapter III, it will be first necessary to give an overview of digital economy's characteristics, in order to better comprehend the difficulties that competition law is facing because of these peculiar digital market's characteristics and the reason why of the introduction of such ex-ante instruments, which does not have the same prerequisites of the traditional competition law provisions.

6.1. Article 102 TFEU's 'problematic' basics in digital markets

Before devolving into the Google Shopping case, its implication on Article 102 TFEU and the introduction of an ex-ante mechanism, it is necessary to explore the peculiarities of digital markets and big tech. Indeed, since the 1990s, the internet has seen tremendous growth in terms of both its user base and its technical capabilities; as a result, it now plays an important role in today's society and cannot be ignored.[165] Since the beginning of this new era, digital markets, also referred to as the "digital economy," have experienced a rise in both their level of prominence and popularity. The traditional economy, which did not use digital technology, has given way to the digital economy, which is based on the internet. This has simplified a wide variety of activities, including the purchasing of goods or services.

[165] John Naughton, *The evolution of the Internet: from military experiment to General Purpose Technology* 1 Journal of Cyber Policy 5 (2016).

Numerous activities are made possible thanks to the digital economy, which is characterized by a seemingly endless list of possibilities. But this is just one perspective. On the other hand, it is clear that this adaptable sector of the economy is heavily controlled and run by a small group of companies collectively referred to as 'Big Tech'.

It is an essential part of the digital economy and serves as an example of the difficulties that the distinct qualities of digital markets present to the general framework of traditional competition law. Articles 101 and 102 TFEU does not make a distinction between digital and non-digital markets. However, this structure, which was traditionally designed and developed for an era in which digital technology did not exist, is confronted with significant challenges in today's digital economy. When dealing with unilateral conduct within digital markets, which would typically fall under the scope of Article 102 TFEU, it becomes conceivable that the significant challenges that the digital economy poses to the current framework of EU competition law are extremely difficult to face. Indeed, it has been argued that technological advancement has put EU competition law's fundamental frameworks to the test.

On one hand, digital markets has highlighted problems that, despite already present in the system, have been overlooked for a long time. For example the employment of algorithms by undertakings which highlights the problem of tacit collusion, namely when undertakings engage in parallel behavior, without recurring to an express agreement.[166] Furthermore, also the monopsony problem has been overlooked by the system, but it is becoming accentuated with the advent of the online gig economy, namely an economic sector consisting of part-time, temporary, and freelance jobs which are in the hands of one single platform which thus have monopsony power, i.e. namely platform's labor market power that allows them to determine wages, appropriate surplus trough anticompetitive practices that affect

[166] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017) available at <https://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm>; see also Ariel Ezrachi and Maurice E. Stucke, *Sustainable and unchallenged algorithmic tacit collusion,* (2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3282235>; Michal S. Gal, *Algorithms as illegal agreements* (2018) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171977>; Richard A. Posner, *Review of Kaplow, "Competition Policy And Price Fixing*" 79 Antitrust Law Journal 76 (2014).

gig workers. [167] On the other hand, apart from accentuating some already existing problems, such as the aforementioned ones, which have been just highlighted with the advent of the digital economy, its advent have given rise to new problems, which are typical of digital markets. A perfect example is the Google Shopping case which seems to have given to Article 102 TFEU's a 'new face', as it will be discussed in Chapter II.

6.1.1. Digital Markets

It should be pointed out that traditional (non-digital) markets have an equivalent in digital markets. When compared to traditional markets, which typically only offer and sell goods and services in a limited number of locations, the digital economy provides a greater degree of flexibility. The fact that digital markets are based on the internet is the primary structural difference between them and analog markets.[168] This makes digital markets more accessible to customers[169], as well as to the relevant counterparties, such as sellers or advertisers. There are many aspects of digital markets that are distinctive from traditional ones. The fact that many of these services are provided 'for free', the presence of network effects and the fact

[167] OECD, *Monopsony and the Business Model of Gig Economy Platforms* (2019) available at <https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf>; see also Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption to Them* (2017) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015477>; Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, *Re-thinking the competition law/labour law interaction: promoting a fairer labour market* 10 European Labour Law Journal 291 (2019); OECD, *Competition in Labour* Markets (2020) available at <https://www.oecd.org/competition/competition-in-labour-markets-2020.pdf>; Eric A. Posner and Cristina A. Volpin, *Labor monopsony and European competition* law (2020) available at <https://www.concurrences.com/en/review/issues/no-4-2020/droit-et-economie/eric-a-posner>; Frederik van Doorn, *The Law and Economics of Buyer Power in EU Competition Policy* (The Hague: Eleven International Publishing 2015); OECD, *Competition Policy for Labour Markets* (2019) available at <https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf>); Suresh Naidu, Eric A. Posner and Glen Weyl, *Antitrust remedies for labor market power* 132 Harvard Law Review 537 (2018).

[168] Cf. 'Market' - Oxford Dictionary available at <https://www.lexico.com/definition/market> and 'Digital Economy' - Oxford Dictionary available at <https://en.oxforddictionaries.com/definition/digital_economy>.

[169] "Costumers" will be referred to as "users" in the following pages.

that these types of markets have a diverse range of uses – thus are 'multi-sided' - are three of the most notable aspects.[170]

In relation to the 'free' characteristic, the general consensus is that services within the digital economy are provided at no cost, which means that they do not anticipate receiving payment in return.[171] Nevertheless, such assumption is not completely correct. To begin, it is critical to pay attention to the structure of these markets. The vast majority of digital markets are multi-sided, which indicates that they are not constructed in the same manner as conventional markets, which are characterized by a direct connection between buyers and sellers.[172] Instead, multi-sided digital markets are characterized by an increased degree of complication. It is not uncommon for digital markets to be 'populated' by 'platforms' who serve as an intermediary between users and advertisers. This not only makes the structure of these markets more difficult to understand, but it also alters the possible payment flows and the payment methods that are associated with them.[173]

Since the users do not make any monetary payments, the platform gives the appearance of providing its services to the users at no cost, except in cases where a different arrangement has been made (for example, during subscriptions).[174] Simply put, the financial consideration has been moved from the relationship that existed between the user and the platform to the relationship that existed between the platform and the advertiser. In addition, there may be instances in which users give something up in exchange for something else, such as their personal information or their attention to advertisements. These particular idiosyncrasies, in particular,

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[170] OECD, *The Evolving Concept of Market Power in the Digital* Economy (2022) available at <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>; OECD, *Competition Policy Roundtable Background* Note (2022) available at <https://www.oecd.org/daf/competition/competition-and-inflation-2022.pdf>.

[171] Cf. John M. Newman, *Antitrust in Zero-Price Markets: Applications* 94 Washington University Law Review 49 (2016).

[172] OECD, *The Evolving Concept of Market Power in the Digital Economy*; OECD, *Competition Policy Roundtable Background Note, p. 5.*

[173] Magali Eben, *Market Definition and Free Online Services: The Prospect of Personal Data as* Price 14 Journal of Law and Policy for the Information Society 227 (2018).

[174] Tiago S. Prado, *Assessing the Market Power of Digital Platforms,* 23rd Biennial Conference of the International Telecommunications Society (ITS): *"Digital societies and industrial transformations: Policies, markets, and technologies in a post-Covid world",* Online Conference / Gothenburg, Sweden, 21st-23rd June, 2021, International Telecommunications Society (ITS), Calgary (2021) 7, available at <https://www.econstor.eu/bitstream/10419/238048/1/Prado-Assessing.pdf>.

present some challenges to the antiquated EU competition law framework as well as related concepts, such as the evaluation of market power.

6.1.2. Big Tech

In the context of digital markets, it is pivotal to make a reference to the the term 'Big Tech', or 'Tech Giants', which refers to the players who wield the greatest amount of influence over the digital economy. The word 'Big Tech' can refer to a number of different companies, but it is most commonly used to refer to the so-called 'big five', (GAFAM).[175] The GAFAM has access to a significant amount of financial resources, and the fact that they serve a diverse range of markets makes them somewhat ubiquitous.[176] There is not a proper definition, but the Commission renamed them, interchangeably, as 'online intermediaries' or 'online platforms'.[177] Such categorization comprehend "Internet search engines, social media, knowledge and video sharing websites, news aggregators, app stores and payment systems"[178] which held a dominant position in their respective areas.

Furthermore, large companies in the technology sector typically participate in multiple markets rather than just one. It is therefore possible for them to transfer their market power to other markets through leveraging or self-preferencing, as done in the Google Shopping case. Subsequently, they can quickly build up a position in these markets or significantly increase it, due to their widespread presence, which is also caused by taking a "position" as platforms, i.e. "infrastructures that connect two or more groups (of market participants), and enable them to interact with one another".[179] Consequently, this makes it possible for them to transfer their market power to other markets, by leveraging their

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[175] Anne C. Witt, *The More Economic Approach to EU Antitrust Law*

[176] See Jessica Clement, *Google, Amazon, Meta, Apple, and Microsoft (GAMAM) - statistics & facts* (2022) available at <https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam/#dossierContents__outerWrapper>.

[177] Martin Moore, *Tech Giants and Civic* Power (2016) CMCP Policy Institute King's College London, 6, available at <https://www.kcl.ac.uk/policy-institute/assets/cmcp/tech-giants-and-civic-power.pdf>.

[178] *Have your say on geo-blocking and the role of platforms in the online* economy (2015), press release available at <http://europa.eu/rapid/press-release_IP-15-5704_en.htm >.

[179] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*

dominant position held in a market, into a connected one.[180] Therefore, in the light of the foregoing, there is a growing concern towards these platform's enormous power to the extent that there haven a growing number of investigation against them. [181]

6.1.3. Gatekeepers

When dealing with Big tech and digital markets it is impossible to not make a reference to the concept of "gatekeeper". Such undertaking, with such a privileged position in the market, have the power to decide whether or not a potential competitor can enter their same market. [182] Such concept will be touched in in Chapter II and will be explored in more detail in Chapter III while dealing with the introduction of the Digital Markets Act. In this Chapter, it is essential to point out that such position enables gatekeeper to obstruct access from the advertiser side to the user side and vice versa. Indeed, users (also known as consumers) and advertisers are typically found on both sides of the transaction in multi-sided markets, where these actors serve as an intermediary between the two parties (undertakings).[183] Such position allows them to influence consumer behavior and, most importantly, can both exclude competing businesses from competition and exert extensive control over entire markets. As a result, and as will be explained in more detail in Chapter II, due to their position in the market, gatekeepers need 'extra' attention, comparable to the 'extra' attention that is commonly given in Article 106(1), since that it has been argued that today's biggest platform business resemble nation-states. [184]

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[180] Cf. European Commission, Directorate-General for Competition, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era,* Publications Office, 2019.
[181] Stavros Aravantinos, *Competition law and the digital economy: the framework of remedies in the digital era in the EU* 17 European Competition Journal 135 (2021).
[182]OECD, *The Evolving Concept of Market Power in the Digital Economy;* OECD, *Competition Policy Roundtable Background Note.*
[183] Ibid.
[184] Geoffrey G. Parker, Marshall W. Van Alstyne, Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy - and How to Make Them Work for You* (New York: W. W. Norton & Company 2017).

6.2. Market power's assessment

In order to understand the peculiarities of digital markets, gatekeepers, and Big Tech with regard to the evaluation of market power, it is first necessary to demonstrate how market power is determined in traditional market. [185] The assessment of an undertaking's level of dominance in a market amounts to the evaluation of its market power, as previously explained in subparagraph 4.1. Such power refers to the undertaking's ability to raise prices above the competitive level.[186] When dealing with this provision, the assessment of market power is of the utmost importance. When analyzing a company's position in the market, market power can be determined by looking at a number of different factors. Market shares and barriers to entry are the two variables that are given the most consideration. [187]

6.2.1. The 'traditional' assessment

Market shares are one of the most common indicators that are used to determine whether or not a particular company has market power. They are relatively easy to measure, give a clear picture of the degree to which the market is concentrated, and most importantly, act as an indicator of a company's market power.[188] Despite their importance, they are not, in and of themselves, sufficient to decide whether or not an undertakng has market power. The definition of the "relevant market" is an important concept that is used in conjunction. This concept serves as the foundation for all subsequent tests or factors, such as the evaluation of market power and the test for whether or not an undertaking has abused its market power. The process of identifying the relevant market can be relatively straightforward in certain

[185] Masako Wakui, *On Market Power and Economic Dependence, OECD Roundtable on the Evolving Concept of Market Power in the Digital* Economy (2022) available at <https://one.oecd.org/document/DAF/COMP/WD(2022)61/en/pdf>.
[186] Richard Whish and David Bailey, *Competition Law*
[187] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials*
[188] Jens-Uwe Franck and Martin Peitz, *Market Definition and Market Power in the Platform Economy,* Report – Centre on Regulation in Europe, 2019 available at < https://cerre.eu/wp-content/uploads/2020/05/report_cerre_market_definition_market_power_platform_economy.pdf>.

circumstances, but it can be extremely challenging in other circumstances due to the specifics of the situation or the characteristics of the markets themselves. In addition to market shares, numerous other factors can be considered while assessing dominant undertaking's market power. Firstly, by considering how long market shares have been held. This supporting factor, which is also known as the "transience of market shares," is almost always brought up in discussions about how to measure market power in the digital economy.

Furthermore, the concept of entry barriers plays a significant role in the process of determining market power as well. In a general sense, the term "barriers to entry" refers to anything that acts as an obstacle in the way of entering the market. There are many different kinds of entry barriers, and each one has the potential to influence how market power is determined. Only examples of entry barriers that could, in theory, be taken into account in relation to the digital economy will be provided in the following examples.[189] In a nutshell, the primary indicator of market power is most frequently the consistency of the dominant undertaking's market share. In the absence of sufficient information that market shares alone can provide, additional factors, such as entry barriers, or more specific information about market shares, such as their durability, must be taken into account in order to produce adequate results. However, there are situations and scenarios in which those factors do not appear to present a sufficient framework for the analysis of market power. One of these situations is determining which companies have the most market power in the digital economy.[190]

6.2.2. The 'digital' assessment

It is possible to define barriers to entry in a general sense as a collective term for everything that constitutes or could potentially constitute obstacles for an enterprise to enter the relevant market. This definition applies to both actual and potential

[189] Giorgio Monti, *Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States*
[190] Ibid.

obstacles.[191] Such entry barrier can be any one of a large number of different factors or a combination of different factors. As time goes on, it seems only reasonable to assume that this catalogue will become even more comprehensive as a result of the peculiarities of the digital economy.[192] The analysis of market power in digital markets may take into account a number of different types of barriers to entry, including network effects and switching costs. When conducting an analysis of barriers to entry, it is possible that other factors that are present in the digital economy, such as (positive) feedback loops.[193]

When determining market power in the context of digital markets, network effects are likely the most important component of entry barriers that can be facilitated. Network effects are generally characterized as a mechanism that raises the value consumers place on a product or service, usually based on the total number of users. Network effects can be direct or indirect. In contrast to direct network effects, which refer to how the number of users of a product increases its value, indirect network effects occur when a product's user base boosts the value of a related product. A large user base is typically regarded as being necessary for a platform's success, importance, and subsequently, the market power of its operator.[194] Given that the majority of the other factors mentioned, such as switching costs and feedback loops, are intimately related to the idea of network effects, it is conceivable that network effects are particularly significant in the context of this assessment. [195] network effects are not a digital economy's peculiar feature; indeed hey exist in analog markets as well.

Nevertheless, network effects are not only more important in the context of digital markets than in that of analog markets, but are also influenced by a wider range of factors. Firstly, network effects may prove to be a very helpful consideration when

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[191] Johannes Laitenberger, *Competition enforcement in digital markets: using our tools well and a look at the future*

[192] Ibid.

[193] Marc Bourreau and Alexandre de Streel, *Digital Conglomerates and EU Competition Policy* (2019) available at<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512#references-widget>.

[194] European Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, Communication from the Commission*, Brussels, 25 May 2016.

[195] Amelia Fletcher, *Digital Competition Policy: Are Ecosystems Different*? (2020) available at<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)96&docLanguage=En>.

determining market power in the digital economy. Such effects can prove to be a very valuable feature, especially when considering the size of one undertaking's platform's user base.[196] It is important to keep in mind, though, that this factor might not always produce results that are ultimately comprehensive and conclusive. Despite having no realistic chance of effectively utilizing high network effects, new and innovative companies continue to successfully disrupt and reshape what appear to be immutable market constellations. A notable example is the substantial user migration from MySpace to Facebook, as well as the explosive growth in popularity and significant market share of apps like TikTok and Snapchat.[197] Therefore, such markets' high dynamics and degree of unpredictability present a challenge.

In relation to switching costs, these are the expenses a user incurs when he or she decides to switch from one platform to another. These costs can take many different forms. A user may incur switching costs in some circumstances as a result of losing social connections, links created on one platform, or data in general. In other situations, there are significant switching costs if the users, for instance, lose accessory compatibility.[198] This may be especially important when discussing so-called 'ecosystems', namely a group of interconnected goods and services that can only be accessed from goods and services found in the same system. Switching costs appear to be a valuable factor to take into account when determining market power because they have strong network effects. Furthermore, the type of user behavior, also referred to as "homing," is another aspect that can be taken into account when determining the significance or strength of network effects. Such behavior can be divided into two categories: single- and multi-homing. A user's choice to single- or multi-home indicates something about their unique product usage habits. If users are observed "using [...] multiple competing products at the same time," they are multi-homing. Users choosing to only use one product from a pool of several competing products, therefore, can confirm single-homing.[199]

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[196] Ibid.

[197] S. Dixon, *Number of daily active Snapchat users from 1st quarter* 2014 to 1st quarter 2022 (2022) available at <https://www.statista.com/statistics/545967/snapchat-app-dau/> and Mansoor Iqbal, *TikTok Revenue and Usage Statistics* (2022) available at <https://www.businessofapps.com/data/tik-tok-statistics/>.

[198] Marc Bourreau and Alexandre de Streel, *Digital Conglomerates and EU Competition Policy*

[199] Ibid.

Moreover, exclusive access to a rare input can be another factor taken into account when determining market power. It is conceivable that such rare input could be represented by data in the digital economy.[200] This may be the case, in particular, if the data in question, whether specific or general, is fundamentally required for an undertaking to compete in a particular market. If this is the case, it is necessary to assume that data could, at the very least, represent a significant barrier to market entry. [201]

6.3. Google in the crosshairs of competition law

The problematic Article 102 TFEU's 'basics' can be seen in almost all the digital cases. Among different economic operators against which antitrust investigations has been made, Google has gained particular attention during the recent years. [202] Indeed, it has been argued that Margarethe Vestager has begun a 'crusade' against this particular operator. Indeed, such particular attention given to Google is confirmed by the different investigation that been made against such company in the last years. To the extent that all the Google related cases have been considered to be placed within the so-called Google saga, i.e. the entirety of the European Commission's investigations into the US big-giant.[203] In the light of the Commission's particularly repressive stance toward Google, which has been sanctioned three times for conduct involving abuses of a dominant position between 2017 and 2019, the cases which are considered to be part of the saga should be considered: *Google Shopping, Google Android and Google AdSense.* [204]

[200] Amelia Fletcher, *Digital Competition Policy: Are Ecosystems Different?*
[201] Ibid.
[202] Ioannis Kokkoris, *The Google Saga: episode I*
[203] Ibid.
[204] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763; General Court, *Google and Alphabet* v. *Commission (Google Android)* of 14 September 2022, case T-604/18, ECLI:EU:T:2022:541; European Commission, Google Search (AdSense), decision of 20 March 2019, case AT.40411 available at <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf>.

6.3.1. Google Shopping

This case, as pointed out in the previous pages, will be at the hearth of the thesis and will be considered in depth in Chapter II. In this section, it worth recalling that the European Commission fined Google a total of EUR 2.42 billion in its decision on June 27, finding that the company abused its dominant position in the search engine market by favoring its own online shopping platform, Google Shopping, to the detriment of competitors. According to the Commission, Google systematically placed the link to its own Google Shopping service among the very first results of consumers' searches, while relegating competitors' commercial comparison websites to secondary positions, thus placing them on the next pages of search results, which are traditionally less frequently viewed. [205]

This was allegedly accomplished by Google by changing the criteria of the algorithm that determines the ranking, and thus the positioning, of the websites that appear among the results of Google searches, in order to increase the visibility of the results managed by Google Shopping and, as a result, the traffic of users who turn to that service, as well as the revenues generated by the sale of promotional spaces.

6.3.2. Google Android

The Commission imposed the highest antitrust fine ever imposed on Google in 2018, totaling 4.3 billion euros. The complaint in that case was about Google's abusive use of its proprietary Android mobile operating system for the purpose of consolidating its dominant position in the online search engine market through restrictive behavior. Given that the in question operating system is currently installed in approximately 80% of mobile devices in Europe, the Commission determined during its investigations that, while Google provides its Android

[205] Ranking Results – *How Google Search Works (Google Search – Discover how Google Search works*) available at <https://www.google.com/search/howsearchworks/how-search-works/ranking-results/>.

operating system free of charge to users (the so-called open source system), the services and services provided by that system are not restricted in any way. [206] Google's own additional services and applications were provided as part of a package that included Plav Store (Google's portal through which users can access applications for Android smartphones), Google Search (Google's search engine), and Google Chrome (the related browsing application through which search itself is accessed). Google has now, according to the Commission, strengthened its market power associated with its search engine on mobile devices through a three-pronged strategy. Firstly granting smartphone manufacturers a license for the installation of Play Store, which is considered essential for access to Android apps, on the condition that they also pre-install Google Search and Google Chrome on the same devices: the Commission saw this as a tying practice aimed at ensuring the pre-installation of Google's search engine and browser potentially on every Android device, to the detriment of the (already limited) competition.[207] Secondly, granting substantial financial incentives to certain manufacturers and mobile network operators in exchange for exclusively installing Google Search on the entire range of Android devices. Furthermore, by prohibiting device manufacturers from using non-Google-approved versions of Android (effectively neutralizing the open source nature of the operating system) and refusing to allow the installation of Google's own applications and services.

6.3.3. Google AdSense

In 2019, the Commission fined Google another EUR 1.4 billion for abusive behavior in the search engine advertising intermediation market. In this market context, Google acts as an intermediary between advertisers and owners of websites (via search engines) who want to sell advertising space through the tool 'AdSense for Search.' The Commission recorded a Google share in the relevant market that never fell below 70% from 2006 to 2016, indicating a clear indication of dominance. According to the Commission, Google's abusive strategy in this case

[206] *Google Android*, para. 433.
[207] Ibid., para. 721.

was implemented by including certain clauses in its contracts with site owners. Such as certain exclusivity clauses that prohibited site owners from showing competitors' advertisements on their pages, 'premium positioning' clauses that guaranteed that the most profitable advertising spaces would be reserved for advertisements provided by Google, thus excluding competitors from the most visible spaces of the web pages. And certain clauses requiring site owners to obtain Google's written permission before changing the way competitors' advertisements were published, allowing Google to constantly monitor the attractiveness of its competitors.[208]

The three cases mentioned above are critical in understanding the Commission's 'special' attention paid to Google. If the last two cases of the saga are only relevant to the analysis that will be conducted in Chapter III - which deals with the introduction of the DMA - the first case of the saga, Google Shopping, is at the heart of the thesis and has relevance for both the analysis that will be conducted in Chapter II - as suggested by the name of the Chapter - and Chapter III.

[208] *Google Search (AdSense)*, para. 223.

Chapter II: Google Shopping's implication on Article 102 TFEU's 'lodestars'

1. The Google Shopping case: the legal 'history'

1.1. The Commission's decision

On June 27, 2017, the European Commission ordered Google[209] to pay a fine of EUR 2.42 billion 38 for abusive conduct consisting of treating its own comparative shopping service more favorably, both in terms of positioning and display in its general pages of search results, than services of the same kind offered by competing operators.[210] The company has undeniably gained absolute leadership in the generic search market over the years, whereas until the 2017 decision, the other market to which Google had decided to turn its attention, price comparison services, was less obvious.[211] Before devolving into the Commission's arguments against Google, it is first necessary to describe how the price comparison shopping service operates in order to fully understand the behavior in which Google engaged into.

1.1.1. Google's conduct in the context of the functioning of its service

The Google Shopping case focuses on the competitive dynamics between horizontal or generalist search engines (Google Search, Bing, and Yahoo!) and vertical search engines (i.e. dedicated to specific market segments or groups of end users): those in the latter category offer a price comparison based on the product being searched for online (so-called comparative shopping services). According to the Commission, Google used a leveraging strategy to extend its influence in the 'downstream' market of comparative shopping services by leveraging its dominant position in the 'upstream' market of generic search engines (held through Google Search). The Commission has underpinned a detailed analysis of the mechanism by

[209] Google LLC, formerly Google Inc., established in Mountain View, California (United States), Alphabet, Inc., established in Mountain View.
[210] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, para. 351.
[211] Ibid., para. 54.

which the price comparison engine operates, which is of pivotal importance in order to understand the decision.

Every user has the option of viewing the so-called general search results divided into two types by connecting to the search engine Google Search and entering the keyword related to the topic on which he/she wishes to obtain information in the google search bar: the first includes both generic search results (generic search results) and specialised search results (specialised search research), and the second, sponsored search results (online search advertise). [212] The latter are advertisements chosen by an algorithm that collects data on users and interprets their tastes and preferences through the Google Adwords software (renamed Google Ads in 2018). The search engine search engine receives a fee from the advertisers who published the ad for each click by Internet users on it (pay per click system).[213]

In the case of Google Shopping, however, generic search results and specialized search results have gained prominence. The former are also known as organic results and appear as blue links (blue links). They are linked to a brief description (snippet) of the web page to which they are referring.[214] The second type of link is known as a specialised link because it contains information specific to the type of request made by the user. generic content, on the other hand, displays any type of information.[215]

Vertical web search services (vertical search or specialised search services, which are programmed to group together information related to products or services of the same category and, in most cases, images are also provided for them) generate specialised content.[216] One of these is Google Shopping, an online price comparison engine developed with the goal of allowing users, after typing the desired information into the Google search bar, to compare products and prices in order to find the most convenient offers from the largest number of digital retailers.[217]

Google's own comparison shopping services was born in 2004 as "Froogle," was renamed Google Product Search in 2007, and was only launched in 2012, an

[212] Ibid., paras. 9-10.
[213] Ibid., paras.18-22.
[214] Ibid., para. 14.
[215] Ibid., paras.22-24.
[216] Ibid., paras.23-24.
[217] Ibid., paras. 26-28 and para. 151.

updated and evolved version of the second.[218] The need for such new version was needed when Froogle, which did not appear among the first results of the search engine, was unable to attract the traffic required to increase the number of users and thus failed. As a result, Google decided to change strategy, albeit at the risk of undermining the competitive pressure on the comparison shopping services market.[219] Indeed, Google's innovations concerned the mechanism imagined by Google to increase its dominant position in the related market of comparison shopping services. Google realized that, to increase traffic, its service needed more visibility, thus it needed to appear in the top search results.

After all, as the Commission discovered during its investigations, users' attention is typically captured by the first five generic search results, with results below this threshold being ignored.[220] Therefore, to be first competing sites had to be excluded from the position that Google desired, so it was decided to demote them in the results. To implement this strategy, the company used ranking systems comprised of a series of generic search algorithms to sort website pages in the Google search index and select only those relevant to the user's query from thousands of information.[221] The investigations revealed that the company used the "Panda" algorithm to demote competing services within the general search pages, making them less visible to users.[222] At the same time comparison shopping services, which was not subjected to the same algorithm, become the first to be viewed.[223] As a result, the company met its goal of increasing user traffic to its service by improving its visibility in general searches.[224] In other words, it reduced the indexing of competitors' online search results who, in the company's discretion, did not meet the standards outlined in its guidelines, proposing low quality and unoriginal

[218] Ibid., paras.28-424.
[219] 'Press Corner, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, (2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>.
[220] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, paras. 454 – 455.
[221] Ranking Results – How Google Search Works' (Google Search – Discover how Google Search works) available at <https://www.google.com/search/howsearchworks/how-search-works/ranking-results/> accessed 28 May 2022.
[222] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, paras. 349 – 359.
[223] Ibid., paras. 379 – 382.
[224] Ibid., paras. 452 and 453.

content.[225] On the contrary, because the Google service was not subject to the Panda algorithm's filtering operation, it gained a position of primary importance on general search pages, becoming important on general search pages, and thus becoming the first to be displayed.[226] The company had achieved its goal of increasing its visibility in general searches and, as a result, user traffic on its price comparison service, albeit at the expense of its competitors.[227]

1.1.2. The Commission's arguments against Google

According to the Commission, the strategy should be viewed in the context of self-preferencing. The positioning of Google Shopping among the first results of Internet searches, leaving competitors in the dust, demonstrates how the Californian company preferred its own comparison shopping service over those of its competitors.[228] Such conduct constituted an abusive practice because it was carried out in violation of the principles of competition and consumer choice as defined in Article 102 TFEU.[229] In order to understand the reasons why self-preferencing is deemed unlawful conduct, it is necessary to focus on the key concepts of 'leveraging' and 'equal treatment'. The first term refers to the business model of vertically integrated platforms, which, rather than competing on their own merits, use their dominant position in the upstream market to extend and assert their dominance in the downstream markets.[230] The issue at hand is determining what it means for a vertically integrated firm to leverage upstream dominance.

The European Commission's decision is an example of how leveraging is used to exploit market power abusively in vertically integrated cases. In fact, Google leveraged its upstream position of economic power in the generic Internet search

[225] Ibid., paras. 348 and 358.
[226] Ibid., paras. 379-382.
[227] Ibid., paras. 452-453.
[228] Press Corner, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, (2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>.
[229] Nicholas Banasevic, Beatriz Marques and Aurélien Portuese, *The Google Shopping decision* 2 *Concurrences* Art. N° 86714, 25 (2018).
[230] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, para. 334.

market. By abusing it, the search engine was able to illegally change the order in which the results appeared on general pages, with the sole purpose of granting an illegal advantage to its 'Google Shopping' service.[231] This was due to its leadership position that made it the only one able to govern the algorithms for indexing the pages of websites, including those for price comparisons, and thus the only one able to drive the positioning of pages on the web.[232]

Clearly, as the Commission argued, the digital company's practice on the market for comparison shopping services could not be said to be based on its own merits.[233] First, because core traffic, a source of revenue in digital markets, increased for Google Shopping, but decreased for competitor services. Secondly, the maximisation of profits for the Californian company corresponded to a detriment not only to competitors - who were no longer spurred to innovate - but also to consumers who were restricted, de facto, in their freedom of choice.[234]

According to the arguments of the European Commission, the abusive nature of the preferential treatment would not only be inferred from having unfairly excluded competitors from the first search results, practising unfair competition not based on merit, but also from having violated the principle of equal treatment closely linked to the special responsibility borne by dominant undertakings.

To assess how the ruling spoke of equal treatment, it should be remembered that competition law imposes a special responsibility on each undertaking in a dominant position.[235] It states that the undertaking must refrain from abusing its power and avoid all practices that, if carried out by non-dominant undertakings, would undoubtedly be lawful.[236] The European Commission believes that this special responsibility stems from the dominant undertaking's duty not to jeopardize the

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[231] Thomas Hoppner. *Symposium On Google Search (Shopping) Decision · Duty to Treat Downstream Rivals Equally:(Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse* 1 *European Competition and Regulatory Law Review* 206 (2017).

[232] Nicholas Banasevic, Beatriz Marques and Aurélien Portuese, *The Google Shopping decision* 2 *Concurrences* Art. N° 86714, 25 (2018).

[233] Eduardo Aguilera Valdivia, *The Scope of The Special Responsibility Upon Vertically Integrated Dominant Firms After the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain From Favouring Own Rel*, 41 *World Competition* 43 (2018).

[234] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, para. 341.

[235] Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust* (Torino: Giappichelli 2019).

[236] *Ibid*.

proper and fair conduct of effective competition in the market by engaging in discriminatory conduct that benefits certain competitors at the expense of others.[237] In this regard, the decision in the Google Shopping case stated that when a monopolist undertaking provides equal opportunities to its direct competitors in the digital market, competition is not distorted.[238] According to the European Commission's reasoning, the principle of equal treatment imposes a non-discrimination duty, whereby the vertically integrated platform ensures that downstream competitors can "duel" on an equal footing without being discriminated against in any way.

The proposed remedy to end the exclusionary practice is a clear example of this. Indeed, pursuant to Article 7(1) of Regulation (EC) 1/2003, the Commission, once it has established an infringement of Article 102 TFEU, *"may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end"*.

In light of this, the Commission requested that Google implement a remedy that would not only prevent competitors from being downgraded, but also subject competing services to the same procedures and methods of positioning and display that the Google Shopping service was subjected to.[239] In doing so, the company was reminded of the principle of equal treatment between competing comparative purchasing services and its own service to ensure competition genuinely based on merits and to prevent similar companies from denying competitors the chance to compete on an equal footing.[240] because, as the European Commissioner for Competition Margrethe Vestager rightly reminds us, digital companies must also be given the opportunity to "compete on equal terms".[241]

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[237] *Ibid*.

[238] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, paras. 331- 332.

[239] *Ibid*., paras. 693-700.

[240] 'Press Corner, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, (2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>.

[241] Margrethe Vestager, *Technology with Purpose*, D-Congress, Gothenburg, 5 March 2020, available at <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/technology-purpose_en>.

1.2. The appeal to the General Court

The abusive conduct challenged by the Commission was twofold. First of all, the attribution of greater visibility to Google Shopping results (placed inside dedicated boxes at the top of the page) in Google Search pages. Moreover, the application to competing comparison shopping sites of an algorithm capable of decreasing their ranking in the search results provided by Google Search (the so-called ten blue links). Consequently, the Commission, starting from the special responsibility of the dominant undertaking not to distort competition, deduced an obligation for the platform to refrain from conduct of preferential treatment.

Nevertheless, the Commission's decision has been challenged by Google before the European Union's General Court[242].

Google's main legal arguments in its action were several. First, that Google did not favor its comparison shopping service and that the decision "misstates the facts" because Google introduced such mechanism not "in order to drive traffic to its own comparison shopping service […] but to improve the quality of its results and their display for users".[243] Furthermore, it has been also claimed that the decision violated the legal standard for evaluating Google's objective justifications because it did not differentiate between "product results" and "generic results." According to the applicant, the decision erred in concluding that treating grouped product ads and free generic results differently constitutes favoring Google Shopping. Furthermore, the Commission allegedly violated the legal standard for evaluating Google's objective justifications for displaying Shopping Units in this context. The second claim is specific to Shopping Units, and it challenges Google's findings that it prefers its comparison shopping service.

In addition, Google argued that the decision erred in concluding that the abusive conduct likely had anticompetitive effects and that it failed to provide evidence of the decrease or increase in online traffic in the comparison shopping services. It

[242] *General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763,* para. 763.
[243] *Ibid.*, para. 138.

also claimed that the decision erred in concluding that the alleged abusive conduct diverted Google search traffic. Regarding the latter, Google claimed that the decision was based on assumptions about possible anticompetitive effects without taking into account actual market developments, such as the competitive restraints imposed by merchant platforms, and that it had incorrectly taken into account abusive quality improvements in general search. In addition, the Commission ordered Google to comply with the legal requirements outlined in Bronner by giving access to its product improvements to comparison shopping services. Nevertheless, the Commission, while imposing such duty to 'supply, have failed to show " access to its services was indispensable for competing comparison shopping services and that, without such access, all effective competition could be eliminated ".[244] Indeed, as argued by Google, the possibility that other internet traffic sources are "less efficient" than Google's search traffic does not prove that price comparison services cannot be created.[245] The Court made it clear in CBEM that consideration should be given to the necessity of the services and the risk of eliminating all competition given the lack of access to that resource when dealing with active conduct.[246] In a similar way, Google is in the exact same position as a company on which a duty to supply is directly imposed due to the fact that it was given the freedom to decide how to stop the conduct. In this regard, the Commission reiterated its claims that the *Bronner* criteria were inapplicable while emphasizing that it did not impose a duty to supply because *"set out in the contested decision, referred to in paragraphs 204 and 205 above, and maintains that it left it to Google to decide how to ensure equal treatment of its own comparison shopping service and competing comparison shopping services, which covered either the possibility of continuing to display Shopping Units on its general results pages by incorporating, by contract, results from competing comparison shopping services, or the possibility of no longer displaying Shopping Units on that page"*.[247] Last but not least, Google argued that since the Commission put forth a novel theory, no fine should have been levied.

[244] *Ibid*., para. 203.
[245] *Ibid*., para. 144.
[246] *Ibid*., para. 201.
[247] *Ibid*., para. 208.

Nevertheless, the General Court upheld the EUR 2.42 billion fine imposed by the European Commission in 2017 on Google for abuse of its dominant position in the price comparison service Google Shopping in November 2021, rejecting Google's entire appeal against the Commission's decision. The EU General Court upheld the fine amount, rejecting Google's appeal grounds and confirming that, due to the bias of the search result ranking algorithms, Google did not compete with rival services on merit. In doing so the General Court supplemented the Commission's decision by including a number of considerations that could affect future competition law's enforcement.

To begin with, the prohibition on preferential treatment was incorporated into a general principle of EU law, that of fair treatment, which states that comparable situations should not be treated differently unless there is an objective justification.[248] The European Union has expressly provided for an obligation of equal treatment in the market for the provision of internet services (which is upstream from that of search engines): the provider may not discriminate against internet traffic, favoring some content over others, according to the principle of net neutrality.[249] According to the Court, the analysis of the downstream market - that of generic search engines - cannot ignore the same requirement: Google's special responsibility as a super-dominant – or ultra-dominant - in this market may imply an obligation to ensure equal access to the results.[250] Such aspect arguably give rise to an enhanced special responsibility on ultradominant undertaking like Google, which makes them burden of a greater responsibility, than merely dominanant ones, to the extent that they are called to ensure the general principle of equal treatment.

In light of the foregoing, the General Court appears to confirm a search neutrality principle that can also be found in Union legislation following the adoption of the

[248] *Ibid*., 155.

[249] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R2120-20201221>.

[250] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, paras. 177-180.

contested decision.[251] As authoritative doctrine emphasizes, search neutrality does not imply limiting the search engine's legitimate discretion in defining its indexing criteria (an element on which the engine's quality depends), but rather ensuring that they are applied in a fair and transparent manner.[252]

The rationale for this obligation is the search engine's "quasi-monopoly" role (i.e. market shares in excess of 90%) and the low substitutability of traffic generated by it for competing sites. For the Court of First Instance, Google's position is super-dominant: the term appears, albeit infrequently, in EU case law in relation to undertakings with extremely high market shares.[253]

Furthermore, the platform's dominant position appears to have ramifications in terms of the burden of proof. When the platform engages in behavior that appears to be 'abnormal' - and therefore falls outside the meaning of competition on the merits - in relation to its business model (in this case, preferential treatment of its own content at the expense of overall search quality), it is up to the platform to demonstrate that such behavior is, in fact, in accordance with competition law.[254]

[251] European Commission, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services**.**

[252] Frank A. Pasquale and Oren Bracha, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search* 93 *Cornell Law Review* 1 (2008); Nicolo Zingales, *Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging*, *Competition Policy International- Europe Column* (2018) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707797>.

[253] *Konkurrensverket* v. *TeliaSonera Sverige AB* of 17 February 2011, case C-52/09 (2011 I-00527), para. 81; *Compagnie maritime belge transports SA*, *Compagnie maritime belge SA* and *Dafra-Lines A/S* v. *Commission of the European Communities* of 16 March 2000, joined cases C-395/96 P and C-396/96 P (2000 I-01365), para. 114.

[254] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, para. 179.

2. The conduct at stuck: Self-preferencing

Before devolving into the quid novi that the *Google Shopping* case has bought to EU competition law jurisprudence, it is first necessary to give an overview of the practice which is at the heart of the case.

The practice has been called 'self-preferencing' and the European Commissioner Vestager offered a definition of self-preferencing as «*Businesses that act as both player and referee – that run a platform, and also compete with other companies that rely on that platform – can be tempted to misuse that position, to give their own services a head starts over their rivals*».[255] In the Google Shopping case the term refers to the conduct adopted by the online search engine which consist in favouring its own service - Google Shopping - over those offered on the same platform by rivals by reserving a better position, in terms of ranking, to its own service.[256]

Two conditions must be met in order for such behavior to be implemented. To begin, it must be a vertically integrated company that is willing to expand its market power by extending its preeminent power position in markets related to the one in which it already has consolidated power, i.e., engages in leveraging.[257] The term refers to the modus operandi of vertically integrated platforms, which leverage their dominant position gained in the upstream market to extend and affirm their dominance in the downstream one.[258]

In the context of *Google Shopping*, Google has used its position of power in the upstream market, general search one, to increase its position in the downstream market, comparison shopping one, when it realized it was the only viable and faster way to gain relevance in the latter.

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[255] Margrethe Vestager, *Technology with Purpose*, D-Congress, Gothenburg, 5 March 2020, available at <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/technology-purpose_en>.

[256] Christophe Samuel Hutchinson and Diana Treščáková, *Tackling Gatekeepers' Self-Preferencing Practices* 18 *European Competition Journal* 567 (2022).

[257] Nora Lampecco, *Self-favouring by a vertically integrated undertaking: from discrimination to self-preferencing* (2021) available at <https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/cb8ed744-ac61-4edb-857a-d933fdba6a42/2021_02_NL.pdf?guest=true>.

[258]General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, para. 334.

On closer inspection, rather than abusing its market power, the undertaking arguably (ab)used its regulatory power, a reflection of its leadership position in the upstream market, which made Google the only one able to govern the algorithms for indexing website pages, including price comparison ones, as will be explained in more detail in the following subchapters.[259] Indeed, the other condition that allows self-preferencing to be linked to vertically integrated companies is the role that platforms play as digital market regulators.[260]

In fact, once companies like Google, namely with a gatekeeper position and regulatory powers, enter the downstream market, they tend to compete with suppliers, but they start 'the competition race' with an advantage, or, in Warren Buffet's words, with a 'moat', as it will be explained in the following subchapters. In other words, such undertakings will be able to favor their own services by relying on their de facto regulator position, which allows them to engage in potentially anticompetitive practices, such as self-preferencing, which are expression of their specific power, i.e., regulatory one. This dual role is visible in the Google Shopping context, where Google not only operates as a search engine, allowing competitors to provide their own comparison shopping services, but it also offers its own comparison shopping services in competition with third-party providers and it does so by relying on its de facto regulator position in the upstream market, which can be (ab)used in the comparison shopping services market.

[259] Joshua Wright and Aurelien Portuese, *Antitrust Populism: Towards A Taxonomy* 21 *Stanford Journal of Law, Business and Finance* 131 (2020), available at <https://awards.concurrences.com/en/awards/2020/academic-articles/antitrust-populism-towards-a-taxonomy>accessed 15 August 2022.

[260] Margrethe Vestager, *Technology with Purpose*, D-Congress, Gothenburg, 5 March 2020, available at <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/technology-purpose_en>.

2.1. Is Google Shopping an essential facility case?

The reflection on market power relates to an issue that remained unresolved in the Google Shopping decision, namely the possibility of classifying a generic search engine as an essential facility. In this regard, the Court notes some differences between the big data sector and "classic" case law on so-called essential facilities.

As is well known, an infrastructure is essential to the extent that its owner's competitors must have access to it in order to provide their services to customers: where the undertaking owning the infrastructure holds a dominant position, denying access to competitors may constitute an infringement of Article 102 TFEU.[261]

However, since the Bronner decision, the Court of Justice has made the finding of abuse subject to the fulfillment of rather stringent requirements, most notably the indispensability of access for the competing undertaking.[262]

However, it is necessary to clarify the economic purpose of this limitation: in the cases examined thus far, the infrastructure consists of an asset whose value is dependent on the owner's ability to retain exclusive use of it, as is the case, for example, with a distribution network. In such cases, the possibility of refusal provides an incentive for the dominant undertaking to invest in infrastructure, stimulating market innovation, and a refusal (or limitation) of third-party access does not appear to be illegal, at least up to the limit of such access's indispensability.[263]

The Court draws parallels and differences between the above theory and the current case. In terms of the former, a search engine resembles an essential infrastructure in that it provides an essential source of traffic for those operating in the downstream market. [264] The differences are that a search engine is by definition an

[261] Aurelio Pappalardo, *Il diritto comunitario della concorrenza profili sostanziali* (Torino: UTET), (2007).

[262] *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* of 26 November 1998*,* case C-7/97 (1998 I-0779), para. 41.

[263]General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, para. 217.

[264] Ibid., para. 224.

open infrastructure, and its success is dependent on its ability to index and present as many third-party web pages as possible in its search results. [265]

As a result, the Court states that the conditions of the Bronner test do not apply where the dominant undertaking makes access to the infrastructure subject to unfair conditions: access has already been granted in such circumstances, so there is no need to protect the proprietor's exclusive right through the requirement of indispensability. [266] In the present case, the Court finds that there is not only a (mere) refusal of access, but also active discriminatory behavior.[267]

As a result, in the present case, merely giving access is not enough and would not change the outcome of Google's conduct.[268] Therefore the Court imposed on Google a duty of equal treatment towards third-party comparison shopping service in order to have fair competition. Indeed *"for competition to be fair, the playing field must be level. Our competition rules are there to make sure that happens - in other words, to make sure that what determines the winners and losers is how well they play the game, and nothing else"*.[269]

[265] Ibid., paras. 177 -178.

[266] *Deutsche Telekom AG* v. *European Commission* of 14 October 2010, case C-280/08 P (2010 I-09555), paras. 48-50.

[267]General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, paras. 229-245.

[268] See Press release No 197/21, *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*, 10 November 2021 available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf> : "The general results page has characteristics akin to those of an essential facility in as much as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market. However, the General Court confirms that not every practice relating to access to such a facility necessarily means that it must be assessed in the light of the conditions applicable to the refusal to supply set out in the judgment in Bronner, on which Google relied in support of its arguments. In that context, the General Court considers that thepractice at issue is based not on a refusal to supply but on a difference in treatment by Google for the sole benefit of its own comparison service, and therefore that the judgment in Bronner is not applicable in this case".

[269] European Commission, Speech/22/6203, EVP Vestager Remarks at the Schwarzkopf Foundation virtual event: "Competition: the Rules of the Game", (2020) available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6203>.

2.2. Self-preferencing through the lens of the EC and the GC

Although the Commission and the General Court agreed that self-preferencing can amount to an abusive conduct, the reasoning that leads to Google's liability is arguably different.[270] The Commission has applied the naked abuse test of capability to foreclose which EU law usually apply to practices which, in a clear way, falls outside the competition on the merits paradigm and which solely serves to accommodate an exclusionary conduct.[271] By using this test, the Commission has arguably circumvented the hard question that is crucial in exclusionary cases, namely whether the conduct was likely to exclude equally efficient competitor.

Indeed, the Commission has relieved itself of the hassle of proving that self-preferencing was likely to exclude equally efficient competitor, by relying on the naked abuse test which if applied to conduct which can have both anti and pro-competitive effects - as self-preferencing does - lead to the prohibition of the conduct as such.[272] Indeed, if self-preferencing is assessed only in relation to its intrinsic capability to foreclose, it will always be prohibited.[273]

The problem that such reasoning pose goes even further when the Commission suggests that the implementation of an equal treatment remedy is technically feasible.[274] Indeed, and arguably until the General Court judgment, the extent of such duty of equal treatment remained nebulous to the extent that it could have been applied to all vertical integrated undertakings since that the Commission's decision is not limited to the digital sector.[275]

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[270] Renato Nazzini, *Standard of Foreclosure Under Article 102 TFEU And the Digital Economy* (2020) 3, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650837>.

[271] Court of Justice, *AstraZeneca AB and AstraZeneca plc* v. *European Commission* of 6 December 2012, case C-457/10 P, ECLI:EU:C:2012:770, para. 68.

[272] Nora Lampecco, *Self-favouring by a vertically integrated undertaking: from discrimination to self-preferencing* (2021) 11, available at <https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/cb8ed744-ac61-4edb-857a-d933fdba6a42/2021_02_NL.pdf?guest=true>.

[273] Renato Nazzini, *Standard of Foreclosure Under Article 102 TFEU And the Digital Economy* (2020) 28, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650837>.

[274] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, para. 671.

[275] Nora Lampecco, *Self-favouring by a vertically integrated undertaking: from discrimination to self-preferencing* (2021) 12, available at

Nevertheless, the extent of such duty of equal treatment arguably has been clarified by the General Court which has rightly pointed out that *"an infringement of competition rules must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case"*.[276] Arguably, by referring to the particular circumstances of the case, the General Court has limited the boundaries of the duty of equal treatment to ultradominant undertaking like Google.[277]

At this point, it is possible to make a comparison. If dominant undertakings are burden of a special responsibility not to impar the competitive process by (ab)using their market power, in the same way ultrdominant undertking like google, apart from the aforementioned responsibility, are burden of an additional responsibility not to impar equality of opportunities by (ab)using their market and regulatory powers. As a result, such ultradominant undertaking are burden of an 'enhanced' special responsibility which requires them to guarantee that their conducts do not 'harm' both consumer welfare and the duty of equal treatment.

Consequently, as will be explained in subchapter 3, the conduct in which ultradominat undertaking can engage into, without countervailing article 102 TFEU, are arguably less than other 'merely' dominant undertaking which does not benefit from the power associated to undertaking like google, i.e. the regulatory one.[278] Apart from establishing the limit of such principle, the General Court has further restricted the Commission's decision by implicitly rejecting its 'by object approach' ,which the naked abuse test leads to, towards self-preferencing. Indeed, the Court has pointed out that such principle is undermined by self-preferencing practice only when it is possible to show that the undertaking promoted its own services and demoted the rivals one and, most importantly, that such practice has been implemented with *"methods different from those governing normal competition"*.[279] As a result, it can be deduced that the principle of equal treatment,

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<https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/cb8ed744-ac61-4edb-857a-d933fdba6a42/2021_02_NL.pdf?guest=true>.

[276]General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, para. 674.

[277] Ibid., para. 180.

[278] The distinction between ultradominant and merely dominant undertaking will be touched in Chapter 2.

[279] European Commission, *Google Search (Shopping)*, decision of 27 June 2017, case AT. 39740, paras. 161 and 261.

which in the Google Shopping contex amount to requiring Google to treat its service and the ones of rivals with the same way, imposes a duty on ultradominant undertaking like google to guarantee that downstream competitors are able to "duel" on equal terms, i.e., without the 'interference' of regulatory powers.

2.3. Economic and legal theories behind EC and GC's assessment

A further aspect need to be taken into account before analyzing in depth the case. Namely the economic and legal theories which has been influencing competition law practice in recent years..

To this regard, it is worth noting that Lina Khan has criticized in her influential article, titled *'Amazon's Antitrust Paradox*", the current antitrust approach which is exclusively focused on maximizing consumer welfare through economic efficiency.[280] As a direct consequence of this, there has been a discussion regarding the objectives of competition law, particularly in regard to the importance of small businesses which has deep and 'ancient' roots. Indeed, Judge Brandeis served as an inspiration for the developing school of thought that is posing a challenge to the approach that is currently being taken, and that recognizes Khan as one of its influential figures.[281]

As a result, this school of thought is referred to as neobrandesians - also disparagingly labeled as hipsters by experts who argue that antitrust illegality should be reserved for conduct that harms consumer welfare- who identified the protection of 'small dealers and worthy men' as the guiding star of antitrust, already in 1897.[282] The alleged orthodox approach's limits expressed by neo-Brandesians have found fertile ground in Europe where the European Commissioner Vestager

[280] Lina M. Khan, *Amazon's Antitrust Paradox* 126 *The Yale Law Journal* 564 (2016-2017) available at <https://www.yalelawjournal.org/note/amazons-antitrust-paradox> accessed 27 June 2022.

[281] Eleanor Fox, *Platforms, Power, And the Antitrust Challenge: A Modest Proposal to Narrow The U.S.-Europe Divide* 98 *Nebraska Law Review* 297, 299 (2019) available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=3247&context=nlr> accessed 11 July 2022.

[282] Joshua Wright and Aurelien Portuese, *Antitrust Populism: Towards A Taxonomy* 21 *Stanford Journal of Law, Business and Finance* 131 (2020) 24, available at <https://awards.concurrences.com/en/awards/2020/academic-articles/antitrust-populism-towards-a-taxonomy> accessed 27 August 2022.

has begun a ‘crusade’ against the Big-giants, and the three aforementioned Google cases, are an example of such tendency. These Big Giants, acting as gatekeepers of digital markets, not only have the ability to establish rules (upstream), but they can also compete (downstream) in the markets for products and services with other competitors. In such circumstances, the risk of conflict of interest arises and there is need to o make sure Europe's companies have the chance to compete on a level playing field.[283]

In this context, a new anti-competitive behavior has emerged with the *Google Search (Shopping) case*. The practice is self-preferencing, and it has resulted in some companies, such as Google, being regarded as public utilities subject to an obligation of equal treatment aimed at ensuring a level playing field. Nonetheless, it should be noted that the General Court in the Google Shopping case has limited the case's scope of application by highlighting a series of profiles that appear specifically tailored to the case under investigation.[284] In fact, the court justifies the sanction by referring to the relevance of a search engine within the Internet, to the latter's business model, which is open, and to Google's dominant position.

Although, at first glance, the decision does not appear to favor broad application, it appears that the 'echo' of the Google Shopping case has reached the Italian Competition Authority (AGCM).[285] Indeed, the AGCM has made itself the bearer of a very broad interpretation of the case, given that the elements that distinguish Google Shopping cannot be identified in the *Amazon logistic case*.[286] In the latter case, the AGCM imposed an unprecedented penalty on Amazon for linking the use of its logistics service (FBA, i.e. Fulfillment by Amazon) to access to a set of benefits (particularly the Prime label) that allow sellers to gain greater visibility and, thus, sales prospects on their marketplace by increasing the likelihood that their

[283] European Commission, *Competition and Europe's digital future*, Brussels, 14 March 2019, Bundeskartellamt 19th Conference on Competition, 14 March 2019.

[284] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763

[285] Claudio Lombardi, *The Italian Competition Authority's Decision in The Amazon Logistics Case: Self-Preferencing and Beyond* (2022) available at <https://www.competitionpolicyinternational.com/the-italian-competition-authoritys-decision-in-the-amazon-logistics-case-self-preferencing-and-beyond/> accessed 1 August 2022.

[286] Italian Antitrust Authority, decision no. A528 of 30 November 2021 available at <https://www.agcm.it/dotcmsdoc/allegati-news/A528_chiusura%20istruttoria.pdf>.

offers are available in the Buy Box. According to the Authority, the preferential treatment granted to FBA harmed competing operators in the e-commerce logistics service, preventing them from proposing themselves to online sellers as suppliers of services of comparable quality to Amazon logistics.

To correct this imbalance by restoring a level playing field and encouraging the development of an alternative logistics offer to Fulfillment by Amazon, consistent behavioral measures were added to the fine of over one billion euros, requiring Amazon to grant Prime benefits to all sellers who comply with certain (fair and non-discriminatory) standards for order fulfillment, in embracing their adhesion to the Amazon logistics network. The significance of the Italian decision does not stop there. Indeed, it intervened just a few weeks after the European Court upheld the Commission's condemnation of Google Shopping, establishing itself as the first, significant national application of this ruling and potential future case law on the subject of self-preferencing.

Despite Google Shopping and Amazon logistics are different cases, the underlying concern is arguably the same. Indeed, they can abuse their regulatory power by choosing which players to save, or favor, and which to sacrifice, or to place at disadvantage. Such power allows these undertakings to determine *"the rules according to which their users, including consumers, business users and providers of complementary services, interact"*.[287] Although the contexts of the cases are dissimilar because Amazon does not give preferential treatment to its own products on its online platform, but rather to competitors who use its own shipping service, the underlying concern is the same: both threaten equal treatment on their platform by abusing their rule-setting power. Although different, they arguably share a common underlying 'open question': does ultradominant undertaking, like Google and Amazon, bear an 'enhanced' special responsibility that changes the competition on the merits paradigm in light of their duty to ensure equal treatment on their platform? And how do these changes relate to the EU's competition goal, namely consumer welfare?

[287] European Commission, Directorate-General for Competition, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, Publications Office, 2019, 5.

3. The "guiding star(s)" of Article 102 TFEU: the special responsibility concept

3.1. The special responsibility concept and its evolution

In assessing whether there has been an abuse of dominant position, the dominant undertaking's special responsibility is a guiding principle. The concept of special responsibility was established in *Michelin I,,* where the Court stated that holding a dominant position is not a recrimination in itself, but it creates *"a special responsibility not to allow its conduct to impair genuine undistorted competition on the [internal] market"*.[288] This requires dominant firms to exercise caution when deciding which conduct to engage in, by imposing a different risk assessment based on their market position. Indeed, while dominant undertakings are subject to specific responsibilities and are held accountable for them, non-dominant undertakings are not subject to this different risk assessment. This is due to their privileged market position, which allows them to harm or influence competition in that specific market. Indeed, as pointed out in *Hoffmann-La Roche*, *"the challenge to the existence of a dominant position does not in itself lead to any accusation against the undertaking concerned, but only means that the latter [...] is particularly obliged not to jeopardize the development of effective and undistorted competition in the common market by its conduct"*.[289] The burden of preserving the degree of residual competition in order to avoid completely eliminating free competition on the market offsets the undertaking's strong market power, which is entirely legitimate in and of itself. Consequently, legitimate behavior for companies operating in a competitive market can amount to an abuse of a dominant position if carried out by a dominant company and capable of further impeding already hampered competition.

Despite the fact that that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, the boundaries

[288] *Nederlandsche Banden Industrie Michelin* v. *Commission of the European Communities* of 9 November 1983, case 322/81 (1983 -03461) para. 10.
[289] *Hoffmann-La Roche & Co. AG* v. *Commission of the European Communities* of 13 February 1979, case C-85/76 (1979 00461).

of this concept are far from clear.[290] This is due to the strong contextuality that comes into play when assessing cases of abuse of dominant position, as confirmed by the non-exhaustive nature of paragraph 2 of article 102 TFEU. In fact, *"the actual scope of the special responsibility imposed on a dominant undertaking must be considered in light of the specific circumstances of each case"*.[291] Nonetheless, the conduct could be objectively justified if *"the exclusionary effect (...) is counterbalanced or outweighed by advantages in terms of efficiency, which also benefit the consumer"*.[292]

However, even if the Commision does not explicitly refers to the concept of super dominance in its Guidance on its Article 102 Enforcement Priorities, it refers to the fact that when the exclusionary conduct *"creates or strengthens a market position approaching that of a monopoly"* is unlikely to satisfy the conditions for an efficiency defence.[293] Arguably the Commission is implicitly referring to the notion of superdominance, which leaves open the possibility to question whether a 'reinforced' special responsibility can be identified.

On closer inspection, the envisage of such 'enhanced' special responsibility upon undertaking like Google is strictly linked to the lack of clear boundaries of the special responsibility concept which give rise o the possibility to identify a greater responsibility upon dominant undertaking which are in a 'peculiar' position. Such peculiar position can be seen in relation to superdominant undertakings, which, due to heir high market share, have a peculiar position in the market, compared to merely dominant ones.

Furthermore, and more importantly for the thesis, such peculiar position can be seen in relation to undertaking like Google, which, due to their rule-setting power, have a peculiar position in the market as superdominant ones. Such reinforced special responsibility can be envisaged because of the fact that the boundaries of the

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[290] *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities* of 14 February 1978, case 27/76 (1978 00207) para. 189.

[291] *Tetra Pak International SA* v. *Commission of the European Communities* of 14 November 1996, case C-333/94 (1996 I-05951), para. 24.

[292] *British Airways plc* v. *Commission of the European Communities* of 15 March 2007, case C-95/04 P (2007 I-02331), para. 86.

[293] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (2009) OJ C 45/02, para. 30.

concept are far from being clear, indeed, if there are not clear boundaries and it is not sufficiently defined in a clear way, it lends itself to be 'malleable' in nature, namely it is a concept which can be adapted to the different peculiar position of the case. In order to understand such 'malleable' nature, it is necessary to first refer to the 'enhanced' special responsibility upon superdominant undertaking, in order to put the basis for the discussion about the enhanced special responsability upon undertaking like google.

3.2. The 'enhanced' special responsibility upon superdominant undertaking

Super-dominant firms, i.e., *"firms with an extremely high, near monopolistic share of the relevant market"*, seems to bear a 'enhanced' special responsibility that requires them to 'pay more attention than other 'merely' dominant undertakings.[294] The concept of super-dominance first appeared in *Compagnie Maritime Belge (CMB)* and later reappeared in cases where it was recognized that superdominant firms may have particularly more onerous responsibilities than other dominant undertakings. [295]

If, prior to *CMB*, the 'basic' distinction was between dominant and non-dominant undertakings, these cases introduce a further distinction within dominant firms, namely between 'super-dominant' undertakings and 'regular' dominant ones. As for the special responsibility towards dominant undertakings, this distinction would imply an 'enhanced' special responsibility upon 'super-dominant' undertakings that does not burden regular dominant ones.

Consequently, it is possible that the same conduct carried out by a less dominant undertaking could not be condemned under Article 102 TFEU.[296] This has been

[294] OECD, *Evidentiary Issues In Proving Dominance* (2006) available at <https://www.oecd.org/competition/abuse/41651328.pdf> accessed 18 July 2022.

[295] *Compagnie maritime belge transports SA*, *Compagnie maritime belge SA* and *Dafra-Lines A/S* v. *Commission of the European Communities* of 16 March 2000, joined cases C-395/96 P and C-396/96 P (2000 I-01365) and *Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading* of 15 January 2002, case no. 1001/1/1/01 para. 219.

[296] Jochen Appeldoorn, *He Who Spareth His Rod, Hateth His Son? Microsoft, Super-Dominance and Article 82 EC*, (2005), 3 available at <https://research.rug.nl/en/publications/he-who-spareth-his-rod-hateth-his-son-microsoft-super-dominance-a> accessed 19 June 2022.

highlighted by Advocate General Fennelly who stated that Article 102 *"cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their super dominance confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking […] enjoys a position of such overwhelming dominance […] it would not be consonant with the particularly onerous special obligation affecting such a dominant undertaking not to impair further the structure of the feeble existing competition for them to react […] with a policy […] designed to eliminate"* competitors.[297] Consequently, if 'merely' dominant undertaking can engage into normal business practices without worrying of infringing article 102 TFEU, super dominant undertaking need to be careful in engaging even into these practices because of their position in the market.

As a result, the 'particularly onerous special obligation' entails a stricter special responsibility upon super-dominant undertakings which makes the chances of being found to be acting abusively higher. [298]

Although the concept of super dominance lend itself to an effect-based approach, i.e. more economic approach, by giving the chance to use the extent of dominance to assess the likely effect on competition and harm to consumer welfare, the Commission have shown a tendency to embrace this concept to establish a form-based presumption of harm against super dominant firms.[299]

Indeed, the Commission, in *Microsoft* have relied much more on the undertaking's size, by referring to its 'overwhelmingly dominant position' in the market, rather than on its behavior.[300] This approach has been strongly criticized since that, as pointed out in *TeliaSonera*, Article 102 *"does not envisage any variation in form*

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[297] Opinion of Advocate General Fennelly delivered on 29 October 1998 in *Compagnie maritime belge transports SA*, *Compagnie maritime belge SA* and *Dafra-Lines A/S* v. *Commission of the European Communities* of 16 March 2000, joined cases C-395/96 P and C-396/96 P (2000 I-01365), para. 137.

[298] Richard Whish and David Bailey, *Competition Law*, (Oxford: Oxford University Press, 2021).

[299] Alessia Sophia D'Amico and Baskaran Balasingham, *Super-dominant and super-problematic? The degree of dominance in the Google Shopping judgement* 18 *European Competition Journal* 11 (2022).

[300] *Microsoft Corp. v. Commission of the European Communities* of 17 September 2007, case T-201/04 (2007 II-03601); see Jochen Appeldoorn, *He Who Spareth His Rod, Hateth His Son? Microsoft, Super-Dominance and Article 82 EC*, (2005), 3 available at <https://research.rug.nl/en/publications/he-who-spareth-his-rod-hateth-his-son-microsoft-super-dominance-a> accessed 19 June 2022.

or degree in the concept of a dominant position" and that there is no obvious reason why companies with high market shares should have additional duties, which, on the other hand are not applicable to other dominant companies. [301]

Indeed, super dominant undertaking would be burden of a greater responsibility which would expand the conducts in which the undertaking cannot engage into, by including in that category normal competitive conducts, to the extent that the undertaking will have to steer away from competing vigorously.[302]

This tendency towards a formalistic approach in taking into account the super dominant position and the Commission's over-reliance on legal presumptions of legality or illegality was at odds with the more economic approach, i.e., effect-based approach, which is more focused on the effect that the dominant undertaking's practice have on the competitive process, rather than being focused on legal presumption.

The superdominance idea was strictly linked to use of legal presumption by the Commission, which, in several occasion, like in the aforementioned *Microsoft* case, the Commission found that the practice carried out by the dominant undertaking was abusive for the sole reason of the undertaking's size, rather than for the effect of the conduct on the competitive process. Such use of the concept of superdominance was in contrast with the effect-based approach, to which the Commission had to abide. Indeed, even if, at least in theory, the concept of superdominance lends itself to both a formalistc and effect-based approach, in practice the Commission tended to utilize such concept in a formalistic way. As a result, such use of the concept of superdominance and the formalistic approach to wich the Commission tended to adhere to, lead to the rejection by the Court of the concept of super dominance.[303] Indeed, the ECJ, in *TeliaSonera* stated that *"the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct […] rather than in relation to the question of whether*

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[301] *Konkurrensverket* v. *TeliaSonera Sverige AB* of 17 February 2011, case C-52/09 (2011 I-00527), para. 80, see Robert O'Donoghue KC and Jorge Padilla, *Law and Economics of Article 102 TFEU* (London: Bloomsbury Publishing 2020), 168.

[302] Jochen Appeldoorn, *He Who Spareth His Rod, Hateth His Son? Microsoft, Super-Dominance and Article 82 EC*, (2005), 3 available at <https://research.rug.nl/en/publications/he-who-spareth-his-rod-hateth-his-son-microsoft-super-dominance-a> accessed 19 June 2022.

[303] Anne C. Witt, *The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?* 65 *The Antitrust Bulletin* 172, 184 (2019).

the abuse as such exists".[304] This passage is particularly relevant in relation to two things. First, the Court stated unequivocally that, among other factors, market strength can be considered in determining the effects of anticompetitive behavior, but not in determining the existence of an abuse as such. Nonetheless, by specifying 'as a general rule,' the court implicitly left open the possibility of determining the existence of an abuse based on market strength. [305]

3.3. The 'enhanced' special responsibility upon Google

The *Google Shopping case* has reignited back the debate over the relevance of super-dominance or, in the words of the General Court, 'ultra-dominance'.[306] The Court refers to "its 'super dominant' position, its role as a gateway to the internet, and the very high barriers to entry on the market", implying that its responsibility is greater than that of 'regular' dominant firms.[307] This is because its dominant position and role as a market gateway allow it to influence the market in a much more profound way than other 'regular' dominant firms. As a result, the barriers to entry are so high that, even if the hypothetical possibility of competing exists, it is highly unlikely that anyone will be able to compete with Google.

In light of these characteristics, the General Court imposed a "stronger obligation" on Google, which appears to recall the stronger obligation that is typical of Article106 TFEU cases and quasi-106 TFEU cases, i.e., cases involving undertakings that had previously enjoyed a state guaranteed monopoly.[308]

Indeed, the General Court and the Commission, in order to find Google's behavior abusive, have used, for the first time outside of a historical operator case, the

[304] *Konkurrensverket* v. *TeliaSonera Sverige AB* of 17 February 2011, case C-52/09 (2011 I-00527), para. 81.
[305] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, And Materials* (Oxford: Oxford University Press 2019) p. 369.
[306] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, para. 180.
[307] Ibid., para. 183.
[308] Ibid., para. 183, see Giorgio Monti, *The General Court's Google Shopping Judgment and The Scope of Article 102 TFEU* (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963336>.

principle of equality of opportunity by stating that the abuse may take the form of an unjustified difference in treatment.[309]

In that regard, the general principle of equal treatment, as a general principle of EU law, requires 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 and that *"a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators "*.[310]

Such paragraphs are particularly important because they highlight what the General Court has 'borrowed' something from Article 106(1) in conjunction with Article 102 TFEU case law, namely the principle of equality of opportunity, and have recognized the same principle in a 'pure' Article 102 TFEU case. Indeed, if prior to Google Shopping this principle has been recognized only in relation to Article 102 cases involving historical operators, it sees that the principle's boundaries have been changed with Google Shopping, where a private dominant firm like google is, for the first time, subject to this standard of liability.[311]

Historical operators and undertakings which benefit from exclusive or special rights conferred by the State, have a distinct footprint in the competitive process. Indeed, their powers derives from the regulatory power of the States which has conferred them such 'special' position in the market. In the same way, digital platform, such as Google, does have competitive advantage due to the undertaking's own quasi-regulatory powers.

As a result, the undertaking, although private, is exercising public authorities' tasks which has the ability to influence other economic operators' behavior.[312] In the light of this parallelism, there is nothing that goes against in 'importing' such principle also when the regulatory powers are carried out by a non-state actor, but have the same consequences of when these powers are caried out by a State actor. Indeed, in

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[309] Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market Power* (Alphen aan den Rij: Kluwer Law International 2020) p. 97.

[310] General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763, paras. 155 and 180.

[311] *French Republic* v. *Commission of the European Communities* of 19 March 1991, case C-202/88 (1991 I-01223), see Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process And The Origins Of Market Power* (Alphen aan den Rij: Kluwer Law International 2020).

[312] Orla Lynskey, *Regulating 'Platform Power'* (2017) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921021> accessed 20 June 2022.

both cases, what counts and can constitute a problem is the regulatory power and which constitute the reason why of a major and 'reinforced' special responsibility upon them.

To this regard, it is useful to make a reference to the term 'incumbency'. Indeed, such concept has been introduced in order to replace the concept of monopoly to capture the strategies that the firm could use to either accommodate or deter market entry. [313] Therefore, this term refers to a company which is already established in the market and that faces potential competition, but benefit from 'peculiar' barrier to entry. In relation to historical operators, they can be considered a particular type of incumbent firm which benefit from their former legal monopoly and therefore benefit from an 'historical advantage' – also named 'legacy advantages' – which acts as barrier to entry. [314]

In the same vein, companies like Google can be considered to be a type of incumbent which benefit from their de facto regulator position and therefore benefit from a 'regulatory advantage' which act as a barrier to entry in the same way that historical advantage does. As a result, in both circumstances – of the previous legal monopoly and of the gatekeepers – the competitive advantage held by the undertakings makes the barriers to entry very high. In relation to this problem, it should be pointed out that these historical advantages have found place in the Commission's enforcement priorities when they act as barrier to entry. [315] Consequently, there is nothing that goes against recognizing the same priority to regulatory advantage held by companies like Google.

Furthermore, such parallelism between these two advantages would be in line with the Google Shopping outcome. Indeed, the Commission and the EU Courts have used the principle of equality of opportunity as a tool to counteract historical

[313] Jennifer F. Reinganum, *Uncertain Innovation and the Persistence of Monopoly* 73 *The American Economic Review* 741 (1983).

[314] Jorge Marcos Ramos Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process and The Origins of Market Power* (Alphen aan den Rij: Kluwer Law International 2020) 93.

[315] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Making the Internal Energy Market Work*, COM/2012/0663, 15 November 2012 available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0663:FIN:EN:PDF>.

advantages. Therefore, if the parallelism between historical advantages and regulatory ones is embraced, then there is nothing that goes against the recognition of the principle of equality of opportunity as a means to counterbalanced regulatory advantages, as done with historical ones.

On closer inspection, what gives Google a 'ultra' dominant position and brings the company closer to being a public entity or a quasi-public entity ,i.e. a firm with public participation, is a combination of two factors: its gatekeeper position, i.e. the ability to control access by a group of users to some goods, and its regulatory power i.e. the power set up the rules and institutions through which their users interact.[316]
In fact, the term 'ultra' comes from Latin and refers to a condition, position of superiority, or preeminence of an entity that has the ability to have a greater influence than another of its kind, i.e., 'regular' firms.[317] These two characteristics, along with, the concepts of dominant position and (ab)use of market power, are two sides of the same coin that give rise to competitive concerns.
As a result, a parallelism between the abuse of dominant position by 'regular' and ''ultra' dominant undertakings can be drawn. Neither 'regular' dominant undertakings nor ultra dominant undertakings are barred from acquiring that position in the market. In the same way, they are not barred from acquiring a gatekeeper position. In fact, there is no such thing as a prohibition on 'monopolization,' that is, the prohibition on acquiring that position in the market. Neither becoming a gatekeeper can be considered illegal per se. What is prohibited in both cases is the abuse of the powers that come with their position. In the case of 'merely' dominant undertakings, that is to say, without regulatory power, it is the (ab)use of their market power, whereas in the case of ultra dominant undertakings, which behave like a 'bottleneck,' it is the (ab)use of their regulatory power, which,

[316] See Marc Bourreau and Alexandre de Streel, Marc Bourreau and Alexandre de Streel, *Digital Conglomerates And EU Competition Policy* (2019) 17, available at<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512#references-widget> accessed 16 July 2022 and European Commission, Directorate-General for Competition, *Competition Policy for The Digital Era,* report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019) 60, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> .
[317] From <https://www.lexico.com/about>.

in addition to their market power, give rise to additional responsibilities upon them. [318]

The regulatory function of a search engine, for example, will largely coincide with the design of the ranking algorithm.[319] Indeed, the abusive conduct found in the Google Shopping case is the result of Google's ability to modify the algorithm, which is simply a reflection of its regulatory power. Therefore, Google's ability to influence the placement of comparison shopping services, through intervention on the algorithm's functioning, can be viewed as a moat, i.e., *"a key competitive advantage that sets a company apart from its competitors on a long-term basis"*.[320]

In this sense, having the ability to intervene in the placement of comparison shopping services provides Google Search Shopping with a 'priority lane' for achieving a better placement in the comparison shopping services market. Indeed, Google's comparison shopping services is prominent not because of its 'intrinsic' merits, but because of the competitive advantage held by Google and exploited to its advantage and the disadvantage of competitors.[321]

Consequently, its regulatory power can be viewed as a moat, allowing it to intervene on the competitive structure of the market by demoting third-party result services while promoting its own by giving a more prominent position in the search result.[322] As a result, given Google's ability to determine the outcome of the competition in the market, it should not set policies that best advantage its competitors but neither to disadvantage them. [323]

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[318] It should be noted that the concept of gatekeeper does not always go along with the concept of dominance, but for the purpose of article 102 TFEU is necessary that the gatekeeper is dominant too. To this regard see Orla Lynskey, *Regulating 'Platform Power'* (2017) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921021> accessed 20 June 2022.

[319] European Commission, Directorate-General for Competition, *Competition Policy for The Digital Era,* report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019) 60 available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

[320] Amelia Fletcher, *Digital Competition Policy: Are Ecosystems Different?,* (2020), p. 9, available at<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)96&docLanguage=En> accessed 8 June 2022.

[321] Pablo Ibáñez Colomo, *Self-Preferencing: Yet Another Epithet In Need Of Limiting Principles*, (2020) p. 6, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654083>.

[322] European Commission, Directorate-General for Competition, *Competition Policy for The Digital Era,* report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019) p.60, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

[323] Niamh Dunne, *Platforms as Regulators* 9 *Journal of Antitrust Enforcement* 244, (2021), p. 262.

Although this 'regulatory' advantage has been earned by the company because of its merits, it cannot be said that the (ab)use of that advantage in a 'competitive segments', i.e., comparison shopping service market, does not give rise to any concern. In fact, *"vertically integrated firm may leverage its monopoly power through different forms of discriminatory behavior, by giving its competitive arms, (i.e., comparison shopping service) interconnection benefits over potential rivals"*.[324] To that end, where platforms with regulatory powers hold a dominant position, their chosen rules must avoid discrimination, exclusion and must secure a level playing field for all users.[325]

This is a principle that has been recognized in cases where the dominant undertaking was entrusted by the state with regulatory power, but these are circumstances, such as the one in Google Shopping, where a private dominant undertaking is in a position that is analogous to that of an undertaking that benefits from state measures.[326] As a result, if public firm have been motivated to act in socially desirable ways, rather than simply following profit maximization, this appears to be expanding to private undertaking with regulatory power.[327]

Indeed, regulatory powers are typical of public entities and as such, it is desirable to extend the boundaries of these principles, as the one of ensuring a level playing field and granting equal opportunity, to private undertaking with such power. This is due to the fact that, when State's function to exercise regulatory power are carried out by undertaking which substitutes the former powers, there are specific threat to fundamental rights.[328] In the Google Shopping case, this threat would be to market participants' freedom to conduct a business, as recognized ex article 16 of the Charter of Fundamental Rights of the European Union. [329]

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[324] Francesco Ducci, *Natural Monopolies in Digital Platform Markets* (Cambridge: Cambridge University Press), (2020), p. 129.
[325] Niamh Dunne, *Platforms as Regulators* 9 *Journal of Antitrust Enforcement* 244, (2021), p. 250.
[326] Pablo Ibáñez Colomo, *Self-Preferencing: Yet Another Epithet In Need Of Limiting Principles*, (2020), p. 9, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654083>.
[327] Francesco Ducci, *Natural Monopolies in Digital Platform Markets* (Cambridge: Cambridge University Press), (2020), pp. 134-135.
[328] Johannes Persch, *The role of fundamental rights in antitrust law – a special responsibility for undertakings with regulatory power under Art. 102 TFEU?*, (2021), p. 555, available at <https://awards.concurrences.com/en/awards/2022/student-articles/the-role-of-fundamental-rights-in-antitrust-law-a-special-responsibility-for> accessed 18 July 2022.
[329] Charter of Fundamental Rights of the European Union (2012).

As a result, when a firm has regulatory power, the interpretation of competition law can and should take fundamental rights into account in order to 'halt' private regulatory power. Indeed, considering the underlying (possible) freedom in the case of regulatory power would justify restrictions on a dominant undertaking's choice of 'regulatory' rules to implement.[330]

In the aforementioned case, the freedom to conduct business and equality of opportunity will be protected as long as Google *"ensures that competition on the platform is fair, unbiased, and pro-users [...] (and that) the rules that they choose do not impede free, undistorted, and vigorous competition without objective justification"*.[331]

As a result, given Google's regulatory and market power, it appears reasonable to deduce the General Court 's intention to follow the motto 'with great power comes great responsibility' and impose a 'reinforced' special responsibility upon Google in order to, as stated in TeliaSonera, *"to prevent competition from being distorted to the detriment of the public interest, individual undertakings, and consumers, thereby ensuring the well-being of the European Union"*.[332]

Consequently, the difference between a 'merely' dominant undertaking, without regulatory power, and an ultradominant undertaking with regulatory power, as Google, is that the latter cannot engage in 'normal' business practices which would be allowed for the former category. This is because Google's position in the market along with its regulatory power changes what conduct the undertaking can engage into and therefore changes the idea of competition on the merits, which will be explored in the following subchapter.

[330] Niamh Dunne, *Platforms as Regulators* 9 *Journal of Antitrust Enforcement* 244, (2021), p. 257.
[331] European Commission, Directorate-General for Competition, *Competition Policy for The Digital Era,* report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019) pp.61-62, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.
[332] *Konkurrensverket* v. *TeliaSonera Sverige AB* of 17 February 2011, case C-52/09 (2011 I-00527).

4. The other side of the same 'star': the concept of competition on the merits

4.1. The competition on the merits paradigm and its evolution

The concept of competition on the merits, along with the special responsibility, is one of the guiding stars of article 102 TFEU cases. On closer inspection, the two concepts could be viewed as two sides of the same medal, rather than two distinct 'stars'.

If dominant undertakings bear the burden of a special responsibility to not impair the competitive process, competition on the merits delimits the boundaries of that responsibility by acting as a watershed between lawful and unlawful conduct. As a result, as argued by Judge Rantos, *"the reference to 'methods other than those which come within the scope of competition on the merits' serves to clarify the content of that 'special responsibility' incumbent on a dominant undertaking and to define the scope of action that is permitted"*.[333]

With the consequence that *"a dominant firm can lawfully engage in conduct that falls within the area circumscribed by that phase, even if the consequence of that conduct is that rivals are forced to exit the market, or their entry or expansion is discouraged"*.[334] This is also stated in the Guidance paper: *"the Commission's enforcement activity [...] is on [...] ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits"*.[335]

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[333] Court of Justice, *Servizio Elettrico Nazionale SpA and Others v. Autorità Garante della Concorrenza e del Mercato and Others* of 12 May 2022, case C-377/20, ECLI:EU:C:2022:379, Opinion of Advocate General Rantos para. 58 available at < https://curia.europa.eu/juris/document/document.jsf?text=&docid=250885&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=50695>.

[334] OECD, *What Is Competition on The Merits?* (2006) available at <https://www.oecd.org/competition/mergers/37082099.pdf> accessed 27 August 2022, 1; it should be noted that the concept of competition on the merits, together with the concept of special responsibility, can be considered to be the 'yin and yang' of competition law. Such term, although vague, plays a pivotal role in competition law cases and has undergone significant changes over the time. This is why this subchapter is intitled "competition on the merits "1.0" and the following one as "competition on the merits "2.0", in order to highlight the difference in which such term has undergone, especially after the Google shopping case.

[335] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (2009) OJ C 45/02 para. 6.

4.2. Competition on the merits "1.0": the status quo

The concept can be traced back to *Hoffman La Roche*, where the Commission, while stating the objective nature of abuse, made a reference to the *"recourse to methods different from those which condition normal competition in products or services on the basis of commercial operators' transactions, (which) has the effect of hindering the maintenance or growth of that competition"*.[336]

The Commission stated in *Michelin I* that *"methods different from those governing normal competition in products or services based on traders' performance have the effect of hindering the maintenance of development of the level of competition still existing on the market"*.[337] As a result, the concept of 'normal competition' has also been referred to as 'competition on the merits', as in the case of Deutsche Telekom, where the Court stated that a dominant undertaking cannot strengthen its dominance through *"methods other than those which come within the scope of competition on the merits"*. [338]

In other cases, the paradigm of 'competition on the merits' has been clarified in the sense that Article 102 TFEU *" prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the merits"*[339]; or, slightly differently phrased, *"Article 82 EC prohibits a dominant undertaking from among other things, adopting […] practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits"*.[340]

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[336] *Hoffmann-La Roche & Co. AG* v. *Commission of the European Communities* of 13 February 1979, case C-85/76 (1979 00461) para. 91.
[337] *Nederlandsche Banden Industrie Michelin* v. *Commission of the European Communities* of 9 November 1983, case 322/81 (1983 -03461) para. 70.
[338] *Deutsche Telekom AG* v. *European Commission* of 14 October 2010, case C-280/08 P (2010 I-09555) para. 177.
[339] Court of Justice, *AstraZeneca AB and AstraZeneca plc* v. *European Commission* of 6 December 2012, case C-457/10 P, ECLI:EU:C:2012:770, para. 75.
[340] Court of Justice, *Post Danmark A/S v. Konkurrencerådet* of 27 March 2012, case C-209/10, ECLI identifier: ECLI:EU:C:2012:172, para. 25.

With the consequence that "competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".[341]

Despite efforts to define this nebulous concept, the jurisprudence appears to be far from providing a well-defined definition, indeed, as noted by Renato Nazzini, *"the concept of competition on the merits is not, in itself, a sufficiently defined legal concept to enable clear boundaries to be drawn that allow behaviour to be placed within or outside them"*.[342]

Arguably, the reason for such a vague definition is the strong contextuality that comes into play when determining whether a behavior falls within the boundaries of this concept. Indeed, as argued by Advocate General Rantos, If *"the concept of 'competition on the merits' is […] abstract, since it does not correspond to a specific form of practices and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition"*, the context in which these practices are carried out play a pivotal role.[343]

As a result, the use of this vague concept creates legal uncertainty as it gives competition authorities significant discretionary power, who have 'carte blanche' to prosecute any action which is considered to be falling outside the concept of competition on the merits.[344] Therefore, it is safe to say that such concept acquires practical menaing as long as is analysed in the context of the specific evidence in an individual case. [345]

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[341] *Ibid*., para. 22.

[342] Renato Nazzini, *The Foundations of European Union Competition Law* (Oxford: Oxford University Press, 2011) 170.

[343] *Servizio Elettrico Nazionale SpA and Others* v. *Autorità Garante della Concorrenza e del Mercato and Others* of 12 May 2022, case C-377/20 (not yet published in Court Reports), Opinion of Advocate General Rantos para. 55 available at < https://curia.europa.eu/juris/document/document.jsf?text=&docid=250885&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=50695>.

[344] Damien Geradin, *The Uncertainties Created by Relying on The Vague 'Competition on The Merits' Standard In The Pharmaceutical Sector: The Italian Pfizer/Pharmacia Case* 5 *Journal of European Competition Law & Practice* 352 (2014).

[345] Joshua Wright and Aurelien Portuese, *Antitrust Populism: Towards A Taxonomy* 21 *Stanford Journal of Law, Business and Finance* 131, (2020), p.31, available at <https://awards.concurrences.com/en/awards/2020/academic-articles/antitrust-populism-towards-a-taxonomy>.

Notwithstanding, it is clear that practices based on competition on the merits, while improving a firm's performance, produce consumer's benefits in terms of lower prices, better quality of products or services and increase the rate of innovation. On the other hand, practices which do not fall within the concept are those which are carried out in order to hinder competitors or to enrich themselves unduly, without producing benefits towards consumers.[346]

Consequently, it can be argued that the concept of competition on the merits can be understood in the sense of not preventing or even annihilating the competitive ability of other undertakings except for the mere effect of the dominant undertaking's superior performance which benefit consumer welfare. As a result, "the only road to business success is through the narrow gate of better performance in service of the consumer".[347]

4.3. Competition on the merits "2.0": quid novi after Google Shopping

In the light of the link between the special responsibility doctrine and the concept of competition on the merits, as pointed out also by Judge Rantos who argued that *"competition on the merits' must be interpreted in close correlation with the equally settled principle of the […] 'special responsibility'"*, arguably if there is a shift towards a 'enhanced' special responsibility upon ultraundertakings such as Google, as discussed in 3.3., it is conceivable that there is also a change in the competition on merits paradigm.[348]

This would lead to the fact that practices which has always been 'normal' business practices, now can be seen as 'abnormal' ones when carried out by undertaking with regulatory powers. Indeed, the practice under scrutiny in the *Google Shopping* case is a common business practice, namely self-preferencing, which is legitimate - and logical - in and of itself but can become problematic when carried out by an ultradominant undertaking, such as Google, which acts as a de facto regulator.

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[346] Doris Hildebrand, *The Role of Economic Analysis in The EC Competition Law* ,(Alphen aan den Rij: Kluwer Law International), (2016), p.4.

[347] Wilhelm Röpke, *A Humane Economy: The Social Framework of The Free Market* ,(Wilmington: ISI Books), (1998), p. 31.

[348] *Court of Justice, Servizio Elettrico Nazionale SpA and Others v. Autorità Garante della Concorrenza e del Mercato and Others of 12 May 2022, case C-377/20, ECLI:EU:C:2022:379*

Indeed, if self-preferencing has always been considered to be a 'normal' act of competition, see for example *Tabacalera v Filtrona*, which nobody seems to view as problematic, now such a change in the competition on the merits paradigm is changing the assumption that self-preferencing is a normal business practice.[349]

Arguably, the change in the competition on the merits concept is strictly linked to the gatekeeper position and the regulatory power of ultradominant undertakings like Google which raise *"competition concerns, as (they) […] may have an incentive to use their de facto regulatory role to adopt policy changes that make everybody else worse off, while benefitting themselves"*,[350] Indeed, Google has (ab)used its position in the generic search market and leveraged it into the comparison shopping services market by changing the order in which the results on general pages appeared, solely to give its comparison shopping services an illegal advantage.[351]

This conduct was made possible by Google's de facto regulator position, which allowed it to change the ranking algorithm for indexing website pages, including price comparison websites, and thus to drive the positioning of the pages on the network. As the Commission claims, the digital company's conduct on the market for comparative shopping services cannot be considered to be based on its own merits.[352] Arguably, it is not the practice, i.e., self-preferencing, in and of itself that raises competitive concerns, but rather the method by which Google engages in this practice, i.e. by modifying the algorithm which is a conduct that is only possible due to Google's gateway position and its regulatory power.

As a result, if a 'merely' dominant undertaking can engage in normal business practices such as self-preferencing, the same practice carried out by an

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[349] *Filtrona Espanola SA* v. *Commission of the European Communities* of 10 July 1990, case T-125/89 (1990 II-00393); in this sense see Erik Hovenkamp, *Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?* (2022) 7, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127334> accessed 17 July 2022.

[350] Damien Geradin, *The Uncertainties Created by Relying on The Vague 'Competition on The Merits' Standard in The Pharmaceutical Sector: The Italian Pfizer/Pharmacia Case* 5 *Journal of European Competition Law & Practice* 352 (2014)

[351] Thomas Hoppner. *Symposium On Google Search (Shopping) Decision · Duty to Treat Downstream Rivals Equally:(Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse* 1 *European Competition and Regulatory Law Review* 206 (2017).

[352] Eduardo Aguilera Valdivia, *The Scope of The Special Responsibility Upon Vertically Integrated Dominant Firms After the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Rel* 41 *World Competition* ,(2018), p. 43.

ultradominant undertaking can raise competitive concerns and can be seen as falling outside the competition on the merits paradigm.

This is because the way in which *"Google favours its own specialised results over third-party results [...] cannot but involve a certain form of abnormality"* which can be linked to its regulatory power, a peculiar connotation of ultradominant undertaking, like google, which 'merely' dominant ones does not have.[353] Consequently, following the motto 'with great powers comes greater responsibilities', ultradominant undertakings should refrain from, apart from not abusing their market power, abusing their regulatory power, which is nothing else than, in the words of Ioannis Lianos and Bruno Carballa-Smichowski, one of the colors (or facets) of the same coat (or concept), i.e. the one of power of dominant undertaking.[354] According to these authors, the *"development of the digital economy has culminated in recent calls for a more multidimensional concept of [...] power"*.[355]

Therefore, if Article 102 TFEU has long been concerned with the abuse of market power, the 'birth' of new connotations of power, such as regulatory power, should be - and arguably appears to be - taken into account when assessing an abuse of dominant position under 102 TFEU. As a result, the competition on the merits paradigm seems to be expanding in the light of this new connotation of power which makes longstanding business practices such as self-preferencing prone to be found to be not based on competition on the merits.

Consequently, while competition authorities are concerned about all practices that are expressions of dominant undertaking's (abuse of) market power, when it comes to ultradominant undertakings, arguably they should also pay attention to practices that are expressions of dominant undertaking's (abuse of) regulatory power. As a result, practice which were normally be based on the merits can fall outside the paradigm of that concept when carried out by ultradominant undertaking (ab)using their regulatory power.

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[353] Judgment of the General Court of 10 November 2021, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission , Case T 612/17, ECLI:EU:T:2021:763, para. 179.

[354] Ioannis Lianos and Bruno Carballa-Smichowski, *A Coat of Many Colours-New Concepts and Metrics of Economic Power in Competition Law and Economics* 18 *Journal of Competition Law & Economics* 795 (2022).

[355] Ibid, page 2

Indeed, by changing the functioning of the ranking algorithm, Google is promoting its own comparison shopping services while demoting rivals' ones, a practice made possible by its position as a de facto regulator and which is difficult to reconcile with 'competition on the merits'. [356]Firstly, because its practice *"means more clicks on Google Shopping at the expense of its competitors given that users tend to choose the results near the top and rarely visit following pages.* (And secondly because) *[…] consumers have been deprived of the benefits of competition on the merits, namely genuine choice"*. [357]

As a result, given the peculiar connotation of power upon ultradominant undertaking, the range of practices that can fall outside the concept of competition on the merits seems to be expanding. Indeed it can be argued that, if, prior to the 'birth' of new connotations of power the range of practices that fell outside the meaning of competition on the merits mirrored the (ab)use of market power by dominant undertaking, with the rise of new connotations of powers, such as regulatory one, the range of these practices is broadening to the extent that also practices which are long standing business practice can be found to be contrary to competition on the merits paradigm.[358]

As a result, ultradominant undertakings are more likely than merely dominant undertakings to be found to have breached Article 102 TFEU because of their regulatory power, which gave rise to a new 'limb' of the special responsibility that reflects the regulatory power, and thus has arguably broadened the competition on the merits paradigm.[359]

5. Consumer welfare v. effective competition

[356] Cristina Caffarra, *Google Shopping: a shot in the arm for the EC's enforcement effort, but how much will it matter?,* 13 December 2021, in *e-Competitions Antitrust Case Laws e-Bulletin*, p. 3, available at <https://www.concurrences.com/en/bulletin/special-issues/big-tech-dominance/104053> accessed 4 July 2022.

[357] Eduardo Aguilera Valdivia, *The Scope of The Special Responsibility Upon Vertically Integrated Dominant Firms After the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Rel* 41 *World Competition* 43, (2018), p. 46.

[358] Ioannis Lianos and Bruno Carballa-Smichowski, *A Coat of Many Colours-New Concepts and Metrics of Economic Power in Competition Law and Economics* 18 *Journal of Competition Law & Economics* 795 (2022).

[359] Margrethe Vestager, *Competition and the digital economy*, speech of 3 June 2019, available at <https://ec.europa.eu/newsroom/comp/items/652653> accessed 12 July 2022.

While the boundaries of these two 'guiding stars' are, arguably, being widening and 'adapting' to this new connotation of power, i.e. regulatory one, the issue of how to distinguish conducts that are harmful to competition from procompetitive behaviour seems to be ubiquitous.[360] Indeed, none of the conducts which can be carried out by dominant undertaking - and ultradominat ones too - can be considered to be 'per se' abusive; in other words, there is not a type of conduct which is inherently anticompetitive as such.[361]

5.1. The As Efficient Competitor and the Consumer Welfare principles

In relation to this issue, the AEC principle shed a light on which practices reflects competition on the merits and which conduct are harmful to consumers. [362] This principle implies that, as stated in Intel, *"competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient"*.[363]

Consequently, the dividing line between conducts which can be considered to be competition on the merits comes down to assessing whether the competitor which has suffered from the exclusion, due to the dominant undertaking's conduct, is as efficient as the dominant undertaking or are less efficient. If the former is excluded, the conduct cannot be considered to be competition on the merits, whereas in the case of the exclusion of the latter, it is likely that the conduct is considered to be competition on the merits.[364] Indeed*," the objective of Article [102] is the protection of competition on the market as a means of enhancing consumer*

[360] Renato Nazzini, *The Foundations of European Union Competition Law* (Oxford: Oxford University Press), (2011), p. 51.
[361] *Court of Justice, AstraZeneca AB and AstraZeneca plc v. European Commission of 6 December 2012, case C-457/10 P, ECLI:EU:C:2012:770,* para. 106.
[362] Germain Gaudin and Despoina Mantzari, *Google Shopping and The As-Efficient-Competitor Test: Taking Stock and Looking Ahead* 13 *Journal of European Competition Law & Practice,* (2022), pp. 125-126.
[363] Court of Justice, *Intel Corp* v *European Commission* of 6 September 2017, case C-413/14 P, ECLI:EU:C:2017:632, para. 134.
[364] Renato Nazzini, *Standard of Foreclosure Under Article 102 TFEU And the Digital Economy* (2020) 22, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650837>.

welfare" and by contrasting the exclusion of as efficient rivals, the law is achieving this, since that such exclusion will arguably harm consumer welfare in the form of higher prices, worse quality or less innovation. [365]

Notwithstanding, the AEC principle does not imply that only conduct that would exclude as-efficient competitors is abusive, consequently also the exclusion of less efficient competitors - or from another point of view not yet as efficient ones - could be detrimental to competition in the measure that, as pointed out in *Post Danmark*, they *"might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking"*.[366]

In circumstance where as a result of the presence of *"large providers (who) […] enjoy an entrenched position in the market, meaning one that is stable over time, (where) it is […] very difficult for existing or new market operators to compete with or challenge them, regardless of their degree of efficiency"*, enforcers should *"consider intervening in order to protect "not as yet efficient" competitors […] (in the light of the fact that) smaller firms may have the potential to grow and therefore threaten dominant companies"*.[367]

Furthermore, there might be circumstances where *"competitors are foreclosed because they are less efficient. But they are less efficient precisely because of the dominant undertaking's conduct"*.[368] Consequently, in such cases competition law cannot escape to consider the exclusion of such competitors especially when competitors are excluded, not because they are less efficient, but rather because, as in the Google Shopping case, there is an ultra dominant undertaking which behave like a de facto regulator and exploit such position to give its own services competitive advantages over rivals. As a result, arguably the AEC principle is

[365] 'DG Competition Discussion Paper on the Application of Article 82 Of the Treaty to Exclusionary Abuses' (2005), p. 4, available at <https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 18 July 2022.

[366] Court of Justice, *Post Danmark A/S v. Konkurrenceråd*et of 27 March 2012, case C-209/10, ECLI identifier: ECLI:EU:C:2012:172, para. 60; in this sense see Germain Gaudin and Despoina Mantzari, *Google Shopping and The As-Efficient-Competitor Test: Taking Stock And Looking Ahead* 13 Journal of European Competition Law & Practice (2022), pp. 125-126.

[367] Christophe Samuel Hutchinson and Diana Treščáková, *Tackling Gatekeepers' Self-Preferencing Practices* 18 *European Competition Journal*, (2022), p. 567; Johannes Laitenberger, *Competition Enforcement in Digital Markets: Using Our Tools Well and A Look at the Future* ,(2019), p. 5, available at <https://ec.europa.eu/competition/speeches/text/sp2019_03_en.pdf> accessed 11 July 2022.

[368] Renato Nazzini, *Standard of Foreclosure Under Article 102 TFEU and the Digital Economy,* (2020),p. 23, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650837>.

malleable in nature since that it does not hinder to the inclusion of less efficient competitors in the analysis. Nevertheless, such malleable nature needs to deal with the rigidity of the consumer welfare standard.

5.2. Change of course: do we care about competitors?

It has been argued that the current emphasis in EU competition law on safeguarding as-efficient rivals as a means to achieve economic efficiency and maximize consumer welfare may no longer be in line with market realities, particularly in the online platform economy where a few numbers of companies - with regulatory powers - control several market segments.[369]

In such cases, *"less efficient competitors should be more proactively protected, giving them the room to grow into a stronger competitor"*.[370] In order to do so, competition analysis should arguably integrate *"more elements (than pure economic efficiency) into antitrust analysis, including […] the protection of small competitors against giant companies"* on the basis of the recognition of fundamental rights's role in competition law, as argued in subchapter 1. [371]

In relation to this approach, the Google Shopping case seems to be a giant leap forward. Indeed, the General Court have prohibited, ultra dominant undertaking to adopt a specific business practice, i.e, self-preferencing, with the aim to *"enhance the equality of opportunity of the small undertaking, in view of the fact that these undertakings […] ,whichever is the intensity of their competitive efforts, or their efficiency and merit, they will not be able to compete effectively"* because of the stronger position and powers of ultra dominant undertaking like Google.[372]

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[369] Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence* 38 *Yearbook of European Law* ,(2019), pp. 448 - 484.
[370] *Ibid*., 485.
[371] Thibault Schrepel, *Antitrust Conversations with Nobel Laureates*, (2018), p. 1, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132319> accessed 20 July 2022.
371 Ioannis Lianos, *Competition Law as a Form of Social Regulation* 65 *The Antitrust Bulletin* 3,(2020), p. 42.
[372] Ioannis Lianos, *Competition Law as a Form of Social Regulation* 65 *The Antitrust Bulletin* 3,(2020), p. 42.

Such view can be considered to be in tension with the general principle according to which competition law is about protecting the competitive process, as a mean to maximize consumer welfare, and not competitors. [373]

Despite this, arguably in the Google Shopping case the Commission and the General Court seems to have 'breached' this longstanding principle by protecting competitors, rather than the competitive process as such. Indeed, in spite of the Commission's attempt to justify the decision on consumer welfare grounds, by referring to the fact that users do not necessarly see the most relevant results and that they were restricted in the choice, it is arguably apparent that the leitmotiv which has guided the Commission was based on reasons other than the one to maximize consumer welfare.

This is even more apparent in the General Court judgment where it seems that the competition on the merits paradigm is seen as a way to promote equality of opportunity of competitors rather than consumer welfare.[374] As a result, *"ensuring equality in the competitive process (equality of opportunities or competition on the merits) is an indispensable precondition for"* economic freedom and freedom to conduct a business to exist. [375]

5.3. Consumer welfare standard v. effective competition standard

Such a shift in the Commission's and General Court concerns is hard to reconcile with the consumer welfare standard based on the Chicago School's axiom that market power needs to be detrimental to consumers. As a result, the Google Shopping case acquires meaning as long as EU recognize a shift from the consumer welfare standard, which *"arguably has further contributed to a decline in new business growth, resulting in reduced opportunities for entrepreneurs and a stagnant economy"*, towards an 'effective competition standard' which aims at *"the*

[373] John Taladay and Maureen Ohlhausen, Are Competition Officials Abandoning Competition Principles?, (2022), p. 3, available at <https://www.oecd.org/competition/abuse/35911017.pdf> accessed 13 July 2022; OECD, *Competition on The Merits* (2005) available at <https://www.oecd.org/competition/abuse/35911017.pdf>.

[374] Ioannis Lianos, *Competition Law as a Form of Social Regulation* 65 *The Antitrust Bulletin* 3, (2020), p. 42.

[375] Alfonso Lamadrid de Pablo, *Competition Law as Fairness* 8 *Journal of European Competition Law & Practice* (2017), pp. 147-148.

preservation of competitive market structures, that […] (among other things) preserve opportunities for competitors".[376]

After all – and arguably this seems to be the reasoning in the Google Shopping case - *"is much easier to promote competition at the point when a market risks becoming less competitive than it is at the point when a market is no longer competitive"*.[377]

On closer inspection, such a change in competition policy concern is arguably coherent with the regulatory power which characterize ultradominant undertakings like Google. Indeed, the (ab)use of this power, like in the Google Shopping case, is capable of excluding any competitor, not just less efficient ones.[378]

Therefore, regardless of the level of efficiency of a rival, the practice which is the result of the ultradominant undertking's regulatory power is capable of being anticompetitive since its implementation lead to the exclusion of both as efficient and less efficient rivals.

This reasoning comes with a repercussion on which standard to apply to distinguish between conducts which falls inside or outside the competition on the merits paradigm. If before such distinction was based on the conduct's ability to have effect towards consumer welfare, now the benchmark is arguably the conducts' effect towards competitive pressure on the market.

Indeed, if *"advocates of the Chicago School sought to shift the focus of inquiry from whether large firms had market power to whether the market power […] had been detrimental to consumers"*.[379]

In the same vein, now, with the Neobrandesian school, we are arguably seeing a shift from whether market power is detrimental to consumers to whether market and regulatory powers are detrimental to the competitive market.

Such a shift has a repercussion on the competition on the merits paradigm which reflects and adapts itself to the chosen standard which competition policy choose to follow.[380] Indeed, *"the line between behaviors seen as violating the law and those*

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[376] Lina M. Khan, *Amazon's Antitrust Paradox* 126 *The Yale Law Journal* (2016-2017) p. 739; Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* 87 *The University of Chicago Law Review*, (2020), pp. 595 - 596 - 602.
[377] Lina M. Khan, *Amazon's Antitrust Paradox* 126 *The Yale Law Journal*, (2016-2017), p. 738.
[378] *Ibid*.
[379] Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google* 33 *Journal of Economic Perspectives* ,(2019), pp. 93-95.
[380] *Ibid*.

viewed as legally acceptable (has always) shifted back and forth" adapting to the chosen standard.[381]

Therefore, if with the consumer welfare standard the behaviors that falls outside the competition on the merits paradigm reflected consumer harm as a consequence of the (ab)use of market power, with the 'effective competition standard' the practices which falls outside such paradigm is widening by encapsulating also practices which, apart from harming consumers, reduce the competitive pressure, for example by contravening to the equality of opportunity principle, and are the consequence of the (ab)use of both market power and regulatory one.

5.4. Where does EU stands?

The dual role of referees and players that dominant enterprises can play in digital markets is the key to understand why competition authorities are increasingly concerned about the Big-giants conducts. In the competitive race, such enterprises do not rely solely on 'good, old' market power, but also on their regulatory power, which is the result of the unique position in the market. They are different from dominant and superdominant undertakings which 'simply' rely on their market power. These ultradominant undertakings, such as Google, have a quid pluris, apart from their dominant position and market power, they held a gatekeeper position and have regulatory power which poses *"important challenge for competition policy today"*.[382]

As a result, if firms in dominant positions bear a special responsibility not to impair the competitive process by abusing their market power, ultradominant firms bear an even greater special responsibility not to impair the competitive process by abusing their market power and regulatory power.

Similarly, if special responsibility and competition on merits are two sides of the same coin, there may be a link between the additional 'limb' of special responsibility and the concept of competition on merits.

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[381] *Ibid*., 95.

[382] Jonathan B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust Law* 17 *Journal of Competition Law & Economics* (2021), pp. 491-501.

This 'enhanced' responsibility imply a new limb of the competition on merits paradigm which reflects the (abuse of) regulatory power of ultra dominant undertakings. As a result, if dominant firms must be vigilant in carrying out conducts that are the expression of their (ab)use of market power, ultra dominant firms must be extra vigilant in carrying out both conducts that are expression of their (ab)use of market power and those that are expression of their (ab)use of regulatory power.

As a result, all practices that are an expression of the ultra dominant undertaking's regulatory power, such as the Google Shopping case, should now be regarded as falling outside the competition on merits paradigm. Simply put, if the competition on merits paradigm had previously been viewed through the lens of dominant undertaking's market power, it should now be viewed through the lens of regulatory power and through the ‘fairness’ anthem.

Chapter III: Smoothing the path towards a better digital future: the Digital Market Act

1. The path towards the enactment of the DMA. Some background remarks.

Even if Article 101 and 102 TFEU, can be considered to be malleable tools, since that they have been applied to the conduct carried out by gatekeeper, as explained in Chapter II, such assortation does not imply that such tools can be considered to be 'up to the task'. Indeed, the scope of antitrust provisions is limited to certain instances of market power, which does not take into account the peculiar power held by gatekeepers, namely the regulatory one. To this regard, the three Google proceeding - Google Shopping, Google AsSense and Google Android – are one example, among others, which shows how the relevant EU authorities addressed the problems posed by such operators holistically as well as any serious issues that this, at the time, relatively new, form of markets and related structures raised.[383]
The European Commission released the first and possibly most well-known of the three Google-related decisions in 2017: Google Shopping.[384] It is still relevant today despite only being finally decided by the GC in December 2021, when the GC upheld the Commission's findings and fined Google with a penalty of EUR 2.4 billion. The Commission laid some important groundwork for the future evaluation of market power in the digital economy in its initial decision regarding Google Shopping. Additionally, it offered a framework that made it easier to evaluate market power in the following two Google Cases, namely Google AdSense and Google Android, respectively. The EC first noted that *"the existence of a dominant position derives in general from a combination of several factors which, taken separately, are not necessarily determinative"*.[385] This conclusion is supported by

[383] *Google Android*, decision of 18 July 2018, case AT.40099, available at <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf>; *Google Search (AdSense)*, decision of 20 March 2019, case AT.40411, available at <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf>; General Court, Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission of 10 November 2021, Case T 612/17, ECLI:EU:T:2021:763.
[384] *Google LLC, formerly Google Inc. and Alphabet, Inc.* v. *European Commission (Google Shopping)*.
[385] *Ibid.*, para. 265.

well-established case law, including United Brands, and is also mentioned in the two other Google decisions made by the EC, Google Android and Google AdSense.[386]This is especially intriguing when considering market shares, their significance, and their impact on how a undertaking's market power is determined during a proceeding under Article 102 TFEU.

Despite the fact that the Commission occasionally found market shares in excess of 90% (held by Google), market shares are not considered to be ultimately deciding in any of the three decisions it made.[387] A close to certain presumption that market power of the undertaking in question can generally be implied by such astounding market shares is indicated by settled EU case law, particularly in situations where drastically high market shares of one undertaking can be found. However, the EC continued to support a wide range of additional factors in each individual Google decision, such as entry barriers, to support the assumption of dominance made possible by Google's market share in the first place.[388] Once more, this does not set the Google decisions apart from earlier cases and reiterates that market shares are not always determinative. However, the Commission did enable a number of additional factors to support the assessment of market power in each of the three decisions that followed. The substantial length of related proceedings is one effect of the situation where a very wide range of factors are included in such assessment. The list of variables that the Commission has in the past made easier to consider when determining market power in digital markets has been expanded. Additionally, the "distinctiveness" of the digital economy is a factor in this change. The vast array of additional factors to demonstrate market power have been made to some extent visible in the Google proceedings. Market shares were becoming less significant and important as the digital economy grew, leaving the relevant authorities in need of suitable alternatives for the assessment of market power. Such alternatives were growing in value as a result of this development and its

[386] General Court*, Google and Alphabet* v. *Commission (Google Android)* of 14 September 2022, case T-604/18, ECLI:EU:T:2022:541; *Google and Alphabet* v. *Commission (Google AdSense for Search)*, case T-334/19.

[387] *Google LLC, formerly Google Inc. and Alphabet, Inc.* v. *European Commission (Google Shopping)*.

[388] See for example *Google and Alphabet* v. *Commission (Google AdSense for Search)*, case T-334/19.

corresponding effect, which was that the old framework was unable to promptly address anticompetitive harm. [389]

Market shares were consistently used in all three decisions as the first and most obvious factor that facilitated determining market power. In the context of digital markets, it is also evident that there has been a departure from long-standing practices with regard to this factor, for instance in terms of the significance of market shares. As stated above, the Commission's determination of Google's market share of 70%, 80%, or 90% was insufficient to ultimately confirm the tech giant's dominant position. To get a final assessment from the Commission, additional factors were required at the proper time. Consequently, the evaluation of entry barriers did become increasingly crucial and comprehensive over time.

The Commission used various factors, including so-called network effects, which are crucial for determining market power in digital markets, to support the assumptions made possible by the corresponding market shares.[390] Additional factors were disclosed and taken into consideration by the Commission, respectively, including those that may be pertinent at this time and those that were already mentioned. A course of action that, on the one hand, shows how little relevance market shares have in this context and, on the other hand, demonstrates the Commission's growing willingness and readiness to consider new ideas in its assessment of market power and, more specifically, barriers to entry, giving the latter assessment more weight. Furthermoremeore, apart from barrier to entry, as previously analysed, which cannot be considered to be a ‘new’ factor which the Commission take into consideration, since that their involvement in antiturst proceeding has always been considered, a ‘new’ concept has gained importance, namely the one of regulatory power held by gatekeeper. Indeed, it is undoubtedly that Google benefit from these ‘special’ powers which entails a greater responsibility when carrying out business conducts and pose new problems in terms of antitrust enforcement.

The three aforementioned Google proceedings in particular show how far the system has come while also showing where there are still significant flaws on

[389] *Ibid*.

[390] See *Google Android*, decision of 18 July 2018, case AT.40099; *Google LLC, formerly Google Inc. and Alphabet, Inc.* v. *European Commission (Google Shopping)*.

related grounds. Indeed, all three decisions did place a strong emphasis on supporting non-market-shares-based factors when assessing the undertaking in question's market power, supporting the notion that market shares are not the only factor that matters and moving further away from this component. On the other hand, these decisions also showed how using so many different factors inevitably results in lengthy processes. This not only results in calls for the need to introduce a corresponding regulation, as is the case with the EU's DMA, but also makes it appear the relevant authority is unable to address the current issues.[391]

1.1. The interplay between Google Shopping and the DMA

The practice of self-preferencing – the practice at the hearth of the *Google Shopping case* - defined as conduct in which digital companies favor their own products or services over competing ones that use the same space to sell competitive products, is relevant not only in terms of anti-competitive conduct, but also in terms of digital market regulation. Self-preferencing has always been a common business practice, carried out by every undertaking. However, when carried out by a company like Google, it can no longer be considered a normal business practice.

The digital age has introduced new challenges to market competitiveness, and the Google Shopping case is just one great example among others which shows such problems. Indeed, large digital platforms, like Google, with the ability to act as 'gatekeepers' can wield enormous power, which does not solely coincide with the market power's anthem held by dominant undertaking, but have a different and arguably more incisive power, namely the regulatory power which is 'typical 'of such undertaking. This 'new conception' of power 'escape' from Article 102 TFEU's lens which is solely focused on the abuse of market power.

As a result, EU has intervened with a specific 'instrument' to make sure that 'with great(er) power comes great responsibility'. In this regard, it should be noted that the Google case has left open issues, such as the possible identification of greater

[391] 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), from now on 'DMA'.

responsibility on the part of gatekeepers; or even the broadening of conduct that, because it cannot be considered on the merits, may well violate Article 102 TFEU; and finally, the European Union's possible different approach in relation to the benchmark to be taken into account in the analysis of gatekeeper conduct. All of these open questions – which have been explored throughout Chapter II - have sparked much debate among academics, but they remain unanswered.

On closer inspection, the European Union has arguably chosen the "path of silence," embarking on an evolution - or perhaps a revolution - of its tools to counter the actions of these economic operators. Indeed, rather than embracing a new benchmark in the evaluation of anticompetitive conduct, it seems that is trying to 'prevent' such conducts in the first place, with the consequence that it will be unnecessary to establish if the conduct have (negative) effect on consumer welfare.

In fact, rather than responding to these open issues once and for all, it has intervened with the introduction of a tool, the DMA, expanding its toolkit in order to prevent the problem posed by such actors and ensure that such operators meet their responsibilities and allow businesses to access their platforms on fair terms.[392] Indeed, if competition law rules has build the roads towards a competitive market, the DMA aims at keeping such roads free of barriers putted in place by gatekeeper who can stifle innovation and eliminate new competitors. Indeed, with the introduction of such instrument, the European Union will have a greater authority to ensure that large digital platforms do not disadvantage small businesses.[393]

[392] Speech/22/6203, EVP Vestager Remarks at the Schwarzkopf Foundation virtual event: *"Competition: The Rules of the Game"*, 13 October 2022, available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6203>.

[393] Speech/22/5763, EVP Vestager address to the 6th conference of the Technical University of Denmark "*The road to a better digital future*", 23 September 2022, available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5763>.

1.2. Towards an integrated digital single market?

Apart from the need to deal with the risks posed by such peculiar economic operator, one of the reasons that prompted the Commission to intervene with such ambitious toll, i.e. the DMA, is the risk of the single market fragmentation in the face of increasingly frequent interventions by Member States.[394]

Indeed, the European Single Market is a simple notion at the hearth of the European Union, but that is extremely difficult to implement, and it is based on four freedoms of movement for people, goods, services, and capital. In theory, it was established on January 1, 1993; in practice, it is a work still in progress that requires daily effort and is far from complete – also in the light of the ongoing digitalization.

The single market is a synthesis of two concepts: openness and competition. Openness, in terms of the four freedoms of movement mentioned above, and competition, because competition in isolated national markets would be pointless for the operation of the market on a continental scale, just as opening up national markets would be pointless if competitive conditions did not exist.

Article 3A of the Maastricht Treaty, for example, states that the action of the Member States and the Community shall include the adoption of an economic policy based on close coordination of the Member States' economic policies, the Internal Market, and the definition of common objectives of conduct in accordance with the principle of an open market economy with free competition.

The difficulty in realizing such a single market is linked to its dynamism, which causes the internal market to evolve constantly, and competition policy is one of the pillars ensuring its continuous adaptation. This policy, at both the Union and national levels, now has two fundamental tasks to perform in order for the market to function properly and consumers to be more satisfied: opening up previously monopolistic sectors to competition and ensuring that market regulation is even more effective and takes account of recent (digital) changes[395].

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[394] To this regard, see Marco Botta, *Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila* 12 *Journal of European Competition Law & Practice* 500 (2021).

[395] Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*,19 May 2022, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070310>.

In the face of these challenges, competition authorities must consider how to improve the effectiveness of their intervention, in order to ensure an integrated digital market, free of fragmentations. In this regard, the 'battle' against undertaking's anticompetitive conduct is now carried out not only ex post, through competition law enforcement under Articles 101 and 102 TFEU, but also ex ante, via the DMA, with the aim to 'clean' digital single market from the barriers to entry posed by gatekeepers.

1.3. The first steps towards the DMA

The Commission formalised a proposal for a regulation on fair and contestable markets in the digital sector, i.e. the Digital Markets Act, on 15 December 2020, which regulates platforms acting as access points (gateways) or access controllers (gatekeepers) between business users and end users. It specifically refers to all platforms that benefit from an established and enduring position, which is frequently the result of the formation of conglomerate ecosystems around their core platform services, which reinforce existing barriers to entry.[396]

Several articles and studies shows a definition of gatekeeper that can be summerised as platform operators that have a significant impact on the internal market, operate one or more important customer access points and have a well-established and long-term position in their operations or are expected to acquire one. Their status as gatekeepers can be established by referring to appropriate and clearly circumscribed quantitative indicators that can serve as rebuttable presumptions to determine whether a specific supplier is a gatekeeper, or gatekeeper, or it can be established on the basis of a qualitative assessment on a case-by-case basis through a market investigation.[397]

Given their position, gatekeepers have a huge impact on the digital markets in which they are entrenched and effectively control access to them, creating a strong

[396] Matthias Leistner, *The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act—a critical primer* 16 *Journal of Intellectual Property Law & Practice* ,(2021), p. 778.

[397] Filomena Chirico, *Digital Markets Act: A Regulatory Perspective* 12 *Journal of European Competition Law & Practice* ,(2021), p. 493.

dependency between them and many commercial users that sometimes results in unfair behavior towards such users.[398]

This situation has a negative impact on the contestability of the basic platform services in question. Recognizing that Member States' regulatory initiatives cannot fully address these effects and that, in the absence of EU action, individual initiatives may even fragment the internal market, the European Commission has proposed a specific regulation of digital markets.[399]

The European Commission refers to vertically integrated gatekeepers, such as Google, in Recital 48 of the regulation, who offer certain services through their own platforms over which they have control. As in the case of Google, such a situation may arise when a gatekeeper offers its price comparison services via a search engine that the company controls.[400] As a result, when offering such services on its own platform, gatekeepers may give their own offer a higher ranking in terms of positioning than third-party products that also operate on the gatekeeper's platform. *"In such situations, the gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls"*, continues Recital 49.[401]

In this view, digital market regulation occurs ex ante, with investigations conducted by the European Commission, tasked with identifying individual gatekeepers, having a prospective character, aiming to direct the future conduct of platforms through the imposition of behavioral obligations with the goal of promoting competition.[402]

In these terms, self-preferencing by a gatekeeper such as Google would be relevant not only in terms of an abuse of a dominant position, but also in light of the regulation of the Digital Markets Act. Indeed, the conduct under consideration

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[398] Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets* 16 *Virginia Law and Business Review* ,(2022), p. 217.

[399] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* ,(2021), p. 487.

[400] Filomena Chirico, *Digital Markets Act: A Regulatory Perspective* 12 *Journal of European Competition Law & Practice* ,(2021). P. 493.

[401] DMA, recital 49.

[402] Filomena Chirico, *Digital Markets Act: A Regulatory Perspective* 12 *Journal of European Competition Law & Practice* ,(2021), p. 493.

would be relevant in terms of imposing temporary and prospective obligations capable of ensuring a high level of competition within the individual digital market. As a result, the European Commission's regulation of digital markets have a prospective approach by attempting to predict the likely development of digital markets and would have a temporary temporary because, in any case, it would require periodic review depending on the objective market conditions and subjective conditions of the various operators.[403]

In June 2020, the Commission launched public consultations on legislation to regulate the largest companies in the digital sector, known as Big Tech. The structure originally envisioned consisted of two binding instruments, one dealing with competition and the other, more comprehensive, with consumer protection.[404] Both legislative instruments were founded on the principle of ex-ante intervention, that is, intervention before market damage occurs. Finally, the Commission rejected the first approach and presented a proposal for a regulation, the Digital Markets Act, on December 15, 2020. The Commission allegedly had to make last-minute changes to the DMA proposal due to the outrage that ensued after a leak concerning the draft of this proposal.[405]

Initially, the DMA planned to categorize Big Tech's competition-related activities, which are being scrutinized by the European Court of Justice and national courts, into white, grey, and black lists. Ex-ante intervention risks encroaching on the scope of existing competition law applicable to digital markets by applying a system of black and white lists to activities that are currently under judicial scrutiny but have not yet been condemned in the competition field.

As a result, the Commission changed its approach and renounced blacklisting the activities of companies in a black and white list in its final legislative proposal. This does not change the fact that the DMA's goal remains very similar to that of competition policy, namely to curb undesirable behavior by those with market

[403] Matthias Leistner, *The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act—a critical primer* 16 *Journal of Intellectual Property Law & Practice* ,(2021), p. 778.
[404] Zlatina Georgieva, *The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles* 6 *European Papers* ,(2021), p. 25.
[405] Filomena Chirico, *Digital Markets Act: A Regulatory Perspective* 12 *Journal of European Competition Law & Practice* ,(2021), p. 493.

power. As a result, the DMA's goal is difficult to distinguish from the application of competition law based on Article 102 TFEU, with the risk of overlapping norms on the same issue. This situation has arisen because, unlike in the United States, the EU accepts the simultaneous application of ex-ante and ex-post competition rules.[406] This means that if Big Tech companies' conduct carried out by the gatekeeper are already under the 'lens' of the to ex-ante instrument, i.e. the DMA, they could also be subject to antitrust investigations - ex-post remedies - if their activities turn out to violate competition rules. It is therefore critical that the Commission's proposed ex-ante regulations do not infringe on the inherent scope of Article 102 TFEU.[407]

The main aspects of the discipline will be illustrated in the following pages with regard to the prerequisites for applying the DMA, i.e. qualification as gatekeeper for one or more basic platform services listed in the regulation, and the content of the obligations/bans imposed on companies designated as gatekeepers.[408]

2. Gatekeeper figure in the DMA

The DMA identifies gatekeepers based on completely different parameters than those used by Article 102 TFEU to establish market dominance: the first relates to the type of services offered by the platform (qualitative parameter), the second to the platform's dimensional elements (quantitative parameter).

In doing so, the DMA is following in the footsteps of the Platform-to-Business (P2B) Regulation, which took a first step toward improving transparency in the online platform business environment. [409]

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[406] Pierre Larouche, *Contrasting Legal Solutions and the Comparability of EU and U.S. Experiences*, *TILEC Discussion Paper* n. 2006-028 (2008).

[407] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

[408] European Commission, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[409] Luis M. B. Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso M. Valletti and Marshall W. Van Alstyne, *The EU Digital Markets Act: A Report from a Panel of Economic Experts*, 9 February 2021, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436>.

Platforms are defined in the P2B regulation as online intermediary services that facilitate direct transactions between consumers and businesses based on an existing contractual relationship between the businesses and the platform. The DMA uses this definition as a starting point and adds new criteria to identify a subset comprised of large platforms.

The paragraph of the draft regulation dealing with the proportionality principle states that *"the proposal focuses only on those digital services that are most widely used by business users and end users"* implying that the regulation only applies to so-called "basic platform services".[410] These services, in fact, exhibit specific characteristics, as highlighted by the Commission, in terms of how the offer is constructed. Firstly, these are services provided in highly concentrated markets, where a few large companies dictate market rules. Secondly, one frequently encounters situations in which users (both end-users and businesses) develop a strong reliance on the platform's services. Finally, some providers with a dominant market position are able to engage in unfair behavior and practices that harm commercial users and end consumers.

As a result, the draft regulation only addresses a limited number of services, which are explicitly mentioned in Article 2; these are: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services and advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed before.[411] The identification of these services stems from the fact that they share characteristics that, in many cases, lead to high market concentration and undermine market competition, such as: strong network effects, economies of scale and scope, multisideness, user lock-in, lack of multihoming, vertical integration, and strong data advantages. [412]

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[410] DMA, p. 5.

[411] Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets* 16 *Virginia Law and Business Review* ,(2022), p. 217.

[412] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* (2021), p. 487.

It is also stated that *"The Commission may conduct a market investigation with the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services or to detect types of practices that may limit the contestability of core platform services or may be unfair and which are not effectively addressed by this Regulation"*.[413] As a result, at least every two years, a periodic review is planned to allow the Commission to update the list of basic platform services.

The fact that a platform offers one or more of the services listed in the preceding paragraph does not imply that it serves as a gatekeeper. In order to be designated as a gatekeeper, the platform must meet three quantitative parameter outlined in Article 3 which need to be met by the platform. The core platform service, in order to be designated as a gatekeeper, needs to satisfy – in a cumulative way - three conditions. It needs to have a significant impact on the internal market, operates a service that acts as a gateway, i.e. an access point, which is important for business users to reach consumers – in the wording of the Article, *"it need to operates a core platform service which serves as an important gateway for business users to reach end users"* - and have an established and durable position in the activities it performs or can be expected to acquire such a position in the near future – in the words of the Article *"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"*.[414]

There are also certain presumptions regarding the fulfillment of these three conditions. These three criteria are presumed to be met if a basic platform service provider in the European Union meets certain quantitative thresholds. These thresholds are indicators of market size, economic reliance on the platform and market persistence.[415] The first requirement is met if the undertaking to which the basic platform service provider belongs has an annual turnover in the EEA of EUR 6,5 billion or more in the previous three fiscal years, or if the average market capitalisation or equivalent fair market value of the undertaking to which it belongs

[413] DMA, Art. 17.
[414] *Ibid*., Art. 3 para. 1.
[415] *Ibid*., Art. 3 para. 2; Commission Staff Working Document Impact Assessment Report - Accompanying the document Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) {COM(2020) 842 final} - {SEC(2020) 437 final} - {SWD(2020) 364 final}, p.46 para. 135.

was at least EUR 65 billion in the previous fiscal year, and if it provides a basic platform service in at least three Member States. The second requirement is met if the provider provides a basic platform service to more than 45 million monthly active end-users established or located in the Union during the fiscal year and more than 10,000 annually active business users established in the Union. Finally, the third requirement requires that the established and durable holding of the position of access point be present if the previous requirement's thresholds have been met in each of the last three fiscal years. If all of the quantitative thresholds are met, there is a presumption that the company is subject to the Regulation, in which case the company must notify the Commission within two months of the thresholds being met. The Commission appoints the company as gatekeeper by issuing a designation decision indicating the basic platform services' for which the thresholds have been met within 45 working days.[416]

Regardless of the presence of these quantitative criteria, the Digital Markets Act states that a designated gatekeeper may rebut the Commission's decision by demonstrating that, even if it exceeds the quantitative thresholds (under Article 3(2)), it does not meet the three general criteria (under Article 3(1).[417] In this case, it is clear that the Commission's intention was not to reduce the identification of a gatekeeper to simple quantitative criteria, but to be able to weigh the decision on the gatekeeper's own application.

The Commission will consider not only the size of the basic platform service provider and the number of business and end-users, but also a number of structural market characteristics, such as: entry barriers caused by strong network effects and data-driven advantages, economies of scale, end-user and business lock-in, and other factors.[418] Furthermore, the Commission reserves the right to designate as gatekeeper any supplier who, while not meeting the quantitative criteria listed above, meets the three general principles (turnover, users and persistence on the market).

[416] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* (2021), p. 487.
[417] DMA, Art. 3 para. 4.
[418] *Ibid*., Art. 3 para. 6.

It is critical to emphasize that the designation as gatekeeper only applies to basic platform services that meet the three general criteria, not all platform services offered by the company in question. This means that the regulations' obligations do not apply to the company as a whole, but rather to one or more of its specific services.[419]

Returning to the three general criteria for gatekeeper designation, namely significant impact on the internal market, important gateway for users, and entrenched and durable position, it is useful to highlight the Commission's intention to make the Digital Markets Act a preventive instrument. In relation to the last criterion, it is envisaged that a platform provider who meets the first two criteria and is likely to meet the third one in the near future may be designated as an emerging gatekeeper and thus subject to a specific set of obligations.[420] This stems from the fear that, due to the unique structural characteristics of digital platforms, a platform could turn the market upside down at any time.

3. Gatekeeper's obligation in the DMA

The Digital Markets Act imposes several obligations on platforms designated as gatekeepers. These obligations take the form of various prohibitions and a set of practices that must be followed in order to achieve the DMA's objectives. The main provisions establish a rather diverse set of obligations (as many as eighteen in total), with no explicit common thread. The main distinction is between obligations that apply independently, ex Article 5 of the DMA, and those that apply following possible specification, which will be arranged on a case-by-case basis by the Commission, ex Article 6 of the DMA. As a result, the DMA is built around two models of obligations that apply to gatekeeper platforms.[421]

The first, named 'gatekeepers' obligations' in Article 5, is a quasi-automatic list of obligations. This article contains obligations that are self-executing in the sense that compliance with them does not necessitate any further specification. The DMA

[419] *Ibid*., Art. 3 para. 7.
[420] *Ibid*., Art. 15 para. 4.
[421] Pietro Manzini, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act* III *I Post di AISDUE Focus "Servizi e piattaforme digitali"* (2021), p. 30.

intends to achieve its goal of accelerating the implementation of remedies for anti-competitive behavior by gatekeeper platforms by imposing ex-ante obligations or behavioral restrictions on gatekeepers. These obligations apply without the need for further investigation by the Commission; additionally, neither the regulator nor the platform bears the burden of proof.[422]

The second model is based on a list of obligations that may be subject to further specifications (i.e. rules to be adapted to specific cases), covered by Article 6. This Article refers to a set of rules that allows the Commission to establish a direct regulatory dialogue with the gatekeeper in question in order to implement effective and proportionate measures to achieve results. As a result, such provision rise the issue of legal uncertainty- and arguably may deter innovation too - since that they leaves open the possibility of specifying some of the obligations at a later date.

Nevertheless, despite the provision's title, which appears to state that further elaboration is required for their application – obligations of gatekeepers that may be the subject of further elaboration - , certain provisions appear to be independently applicable, with no need for additional action.[423] Among these is the gatekeeper's obligation to refrain from giving preferential treatment in terms of positioning to services and products offered by the gatekeeper itself or by third parties belonging to the same undertaking in comparison to similar services or products offered by third parties, and to apply fair and non-discriminatory conditions to such positioning.

The idea of using ex-ante regulation to avoid slow and delayed intervention is a good tool to protect the competitive process, but special care must be taken to avoid an unfavorable trade-off between speed and judgment quality. A more concrete approach might include less ambitious proposals that provide greater legal certainty for gatekeepers, with the possibility of expanding the list of obligations later as more experience is gained. A different system could include creating a black list and a grey list of gatekeeper activities.[424] The blacklist clearly includes anti-

[422] DMA, Art. 5.

[423] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* ,(2021), p. 487.

[424] Luis M. B. Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso M. Valletti and Marshall W. Van Alstyne, *The EU Digital Markets Act: A Report from a Panel of Economic*

competitive and illegal activities. The grey list contains activities that are presumed to be anti-competitive and whose acceptance by regulators is contingent on stakeholders demonstrating that anti-competitive behavior does not exist in the specific case at hand.

For example tying, which consists of a tied purchase of two products, namely a main product and a secondary product whose purchase is determined by the use of the main product, and bundling, which consists of 'the explicit bundling of two or more products or services, allowing an undertaking to sell them in packages at a predetermined price', can be used to limit competition.[425] Despite numerous instances of abuse of dominance through tying and bundling, there are also instances where consumers benefit from the bundling of key services offered. The same reasoning applies to self-preferencing, i.e. arbitrarily favouring their own products on the platform to the detriment of those offered by other companies.[426] In spite of the fact that the conduct could have anticompetitive effect, for example by excluding as-efficient rivals or by exploiting consumers, it can also benefit consumers by offering them the best option. Nevertheless, despite the 'mixed' nature – intended as practices which can serve both procompetitive and anticompetitive effects - of tying, bundling and self-preferencing, the DMA includes such practices among the prohibited practices for gatekeepers that are subject to further definition, ex Article 6. As a result, such practices – when carried out by gatekeeper – will always be caught by the prohibition laid down in the regulation, despite the positive effect they may have on competition. Such strict stance could arguably be 'relaxed' by placing such conducts on a grey list which, although assumed to be anti-competitive, would put the burden on gatekeepers to prove otherwise.[427]

The aforementioned practices are just few of the ones the Commission refers to in the DMA. Analyzing the Commission's obligations individually is useful, first and

Experts, 9 February 2021, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436>.

[425] *Ibid*.

[426] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* ,(2021), p. 487.

[427] Penelope Bergkamp, *The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe* 18 *European Company Law* ,(2021), p. 152.

foremost, to understand, indirectly, which gatekeeper practices do not guarantee a fair and contestable environment, and are thus harmful to consumers, businesses, and innovation. Furthermore, as will be shown later, even if the Commission remains vague about the platforms to which these provisions apply (no company name is given), it is clear that the rules apply to certain big-tech companies. It will be seen that not all obligations apply uniformly to all gatekeepers, but that some appear to be directed specifically at certain platforms rather than others. This hypothesis is also supported by the fact that the European Commission based the DMA primarily on a number of ongoing or completed antitrust investigations, such as the Google Shopping one and the introduction of the practice at stuck in the case, namely self-preferencing, in the DMA. Furthermore, some of the hypotheses appear to be configured as specifications of obligations imposed on companies that can already be deduced from other general European regulations. From this point of view, it appears that the DMA has only identified as preventive obligations those that represent habitual violations of the data protection regulation. This connection is especially clear when it comes to obligations that are clearly derived from case law or European Commission practice, as has been highlighted by several commentators and will be shown in the following pages.[428]

3.1. Article 5 of the DMA: Gatekeeper's (self-executing) obligations

Article 5 addresses the common abuses committed by large digital platforms. These obligations can be divided into two categories. Article 5 contains two broad categories of obligations: one addressing exploitative practices towards user and

[428] Marco Botta, *Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila* 12 *Journal of European Competition Law & Practice* (2021), p. 500; Adam A. Ambroziak, *EU's perspective on the functioning of giant online platforms in the digital economy*, in Łukasz Dawid Dąbrowski and Magdalena Suska (eds), *The European Union Digital Single Market. Europe's Digital Transformation*, (London: Routledge, 2022), p.5; Gianluca Contaldi, *La proposta della Commissione europea di adozione del* "Digital Markets Act" 1 *Papers di diritto europeo* ,(2021), p. 73; Pietro Manzini, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act* III *I Post di AISDUE Focus "Servizi e piattaforme digitali"* ,(2021), p. 30.

economic operators, and the other addressing certain gatekeeper practices of excluding competitors, which can be defined as tying practices.[429]

The provisions in Article 5 (a), (b), (d), and (g) constitute the first category of obligations and which may be qualified as prohibition of unauthorised data combination, prohibition of parity clauses, right of appeal, and right of transparency on advertisement price. The second type, on the other hand, includes the so-called tying practices, which may include the clauses referred to in Article 5 (c), (e) and (f), concerning, respectively, the prohibition for the gatekeeper to compel commercial operators to use a service or an identifier of the basic platform (it is thus not possible to discriminate such operators based on whether or not they use the same gatekeeper's logistics to deliver goods to end users) or forcing traders or end-users to register or to make use of another service of the gatekeeper, as a prerequisite for being present on the basic platform. Aside from this distinction, it is worthwhile to examine the various obligations separately.

3.1.1. Article 5 DMA's exploitative practices

The regulation begins by addressing data misuse by a gatekeeper, who is required to *"refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data unless the end user has been presented with the specific choice and provided consent"*.[430]

The need for this obligation stems from a practice that has frequently drawn the attention of authorities as being harmful to consumers and competition.

Such obligation *"mirror the remedies of the Facebook case about protecting the of choice regarding the combination of collected personal data from different sources", i.e. in the Facebook-Whatsapp case*.[431] The German national competition

[429] Pietro Manzini, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act* III *I Post di AISDUE Focus "Servizi e piattaforme digitali"* ,(2021), p. 30.
[430] DMA, Art. 5 (a).
[431] Wolfgang Kerber and Karsten K. Zolna, *The German Facebook case: the law and economics of the relationship between competition and data protection law* 54 *European Journal of Law and Economics* (2022), p. 217.

authority, the Bundeskartellamt, prohibited Facebook from combining users' personal data collected on other apps, such as Whatsapp and Instagram, and from third-party sources, with users' Facebook accounts in 2019.[432] This was necessary because the social network in question's business model is based on the massive collection, processing, and combination of data, and this was the primary driver of Facebook's dominance. In fact, strong network effects, combined with a massive data base from various sources, raise high barriers to market entry, to the detriment of competitors.[433] The Bundeskartellamt stated that even if end-users do not pay a fee to use the platform's services, the 'cost' of the service for them is the loss of control over the information they provide, which can be disseminated and used, for example, in profiling algorithms. Indeed, according to the terms of service, Facebook was able to combine user data from other services that had been the subject of previous mergers, such as Instagram and WhatsApp. This practice, according to the German competition authority, was both a violation of privacy and a violation of competition law. That is, an infringement of antitrust rules that amounted, de facto, to an abuse of data protection rules.

Furthermore, the DMA forbids the envelopment strategy for both gatekeeper core services and third-party services. This reflects a so-called 'conflict of interest,' which has recently emerged as an antitrust issue. When a platform allows third-party vendors to sell on it but then sells related third-party products directly to end users, the platform serves as both a platform and a competitor reseller.

Private-label products would result from the platform's unfair dual role as a data collector and reseller if offered by digital gatekeepers. When the Commission launched its investigation into Amazon and its dual role as a platform and retailer, it argued that this practice violated Article 102 TFEU and argued that it should be ensured that *"that dual role platforms with market power, such as Amazon, do not*

[432] Bundeskartellamt, *Facebook Inc, Facebook Ireland Ltd., Facebook Deutschland GmbH*, Decision no B6–22/16 of 6 February 2019.

[433] Bundeskartellamt, Facebook FAQs – Background information on the Bundeskartellamt Facebook proceeding.

distort competition. The date on the activity of third-party sellers should not be used to the benefit of Amazon when it acts as a competitor to these sellers".[434]

The combination of data clearly has negative consequences for both consumers and competition, confirming the earlier point about the need for new regulatory intervention in the sector. Indeed, it is clear that competition rules in the digital sector must be designed in such a way that purely economic concerns are balanced against fundamental consumer rights, such as the right to privacy.[435]

The second obligation requires the gatekeeper to *"allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper"*.[436]

The article forbids gatekeepers from using so-called parity clauses or Most Favoured Nation clauses (MFN clauses), which are classified as 'wide' or 'narrow'.[437] A platform that provides a price comparison service through the former requires its commercial users to charge the best price and transaction conditions compared to any other sales channel. The latter, on the other hand, requires its business users to provide the same (or even better) contractual terms and conditions as they do on their website.

Article 5(b) of the DMA prohibits the gatekeeper from imposing broad equality clauses, which require the latter to allow commercial users to offer the same products or services to end users through third-party online intermediary services at prices or terms that differ from those offered through the gatekeeper's online intermediation services.

A clarifying example is the *E-book MFNs and related matters (Amazon)*, which has repeatedly raised complaints in the e-book sector, by imposing price parity or MFN

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[434] Press Release, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, 10 November 2020.

[435] Bundeskartellamt- Press release, Bundeskartellamt prohibits Facebook from combining user data from different sources.

[436] DMA, Art. 5 (b).

[437] On this distinction see: Ariel Ezsrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, Oxford Legal Studies Research Paper No. 55/2015, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672541>.

conditions.[438] Indeed, the e-dominant marketplace's position allows it to impose clauses prohibiting suppliers from offering their products at lower prices or on better terms in other channels.[439] Such clauses imply a high degree of price control by Amazon and severely undermine competition, because a publishing house, for example, will be unable to sell a book on another platform (including its own website) at a lower price than on Amazon. This also means that customers will be unable to use platforms other than Amazon, discouraging multihoming.[440]

Suppliers lose all control over the freedom of channel choice in such a context, especially since if they do not comply with Amazon's terms, they may face sanctions or penalties such as account suspension or the inability to access the buy-box (i.e. the white box that appears on the marketplace when searching for a product and allows the product itself to be added immediately to the shopping cart).[441]

Another example derives from the several European national competition authorities' investigation on the behavior of online travel agents, like Booking and Expedia, and hotel for imposing an obligation on hoteliers offering their rooms on the platform not to charge different prices and conditions (equality clauses or MFN-Most Favored Nation Clause).[442] Similar clauses and practices can be found in the area of booking platforms, with some requiring hotels not to undercut the prices provided by the platform.[443]

In a market with such gatekeepers, there is no possibility of price competition between platforms offering the same service, and given that any innovations in

[438] European Commission, *E-book MFNs and related matters*, case AT.40153, Decision of 4 May 2017.

[439] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[440] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

[441] *Ibid*.

[442] In April 2015, the Italian, French and Swedish NCA concluded parallel commitment decision with Booking.com: French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015; and Swedish Competition Authority Decision 596/2013 dated 15 April 2015.

[443] *Report on the monitoring exercise carried out in the online hotel booking sector by the EU competition authorities in 2016*, available at <https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf>.

terms of design or business models by new entrants in the sector are easily replicable, there is little room for contestability.[444]

The regulation goes on with a more general obligation, by requiring the gatekeeper to *"refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers"*.[445]
This is a guarantee for business users, who should be able to report unfair or harmful gatekeeper behavior to authorities without fear of repercussions. Indeed, situations may arise in situation in which business users want to report unfair gatekeeper practices but are hampered by contractual constraints. Furthermore it is to be expected that a provider will develop a strong dependency on the platform and thus prefer to submit to the current conditions rather than risk being kicked off the platform or losing visibility on it.[446]

Furthermore, the final obligation, which is generally applicable to all gatekeepers, requires them to *"provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper"*.[447]
Because of the increased use of digital platforms as online advertising channels, a few large platforms have emerged as important channels for advertisers and publishers to reach audiences. The automation of advertising services, as well as the use of technologies and algorithms to generate targeted offers, is unquestionably a valuable asset for businesses. However, it is not uncommon for some digital platforms to use their dominant position to impose specific terms and conditions on

[444] Jacques Crémer; Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the digital era* (Final report), 2019, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.
[445] DMA, Art. 5 (d).
[446] Penelope Bergkamp, *The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe* 18 *European Company Law* 152 (2021).
[447] DMA, Art. 5 (g).

advertisers and publishers, as well as to conceal information about costs, profits, and ad placement.[448]

This is also due to the fact that advertising management technology services are difficult to analyze by nature, as they are based on complex algorithms that process massive amounts of data. For these reasons, disagreements frequently arise regarding the lack of transparency in pricing by providers of such services. It is not always clear, for example, how the platform's fees are calculated.[449] Finally, it should be noted that the advertising industry has a high degree of concentration. Companies like Google and Facebook, for example, are well-entrenched and regarded as "must-have partners" by most advertisers, which is not a bad thing in the market. However, a lack of transparency in the provision of advertising services is frequently associated with an abuse of a dominant position to the detriment of consumers and competition.[450]

3.1.2. Article 5 DMA's tying practices

Article 5 (c) of the DMA requires a gatekeeper to *"allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper".*[451]

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[448] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at < https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[449] Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry - final report*, 26 July 2019, available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

[450] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[451] DMA, Art. 5 (c).

These provisions have a particular impact on the category of app stores. It is possible to concentrate on the Google Play Store and the Apple Store to demonstrate the importance of including this requirement. Both stores represent gates that provide access to applications or content for devices, which causes issues with the role of gatekeeper. The Android operating system (by Google), for example, allows users to download apps and content from sources other than the Play Store, but this practice is discouraged due to the numerous steps required to install apps from the web or alternative stores. The iOS operating system (by Apple) allows customers to install apps only through the Apple Store. In this regard, it should be noted that when a consumer purchases an app, the app developer pays a commission to the store owner (30% of the purchase price).[452] Furthermore, both the Apple Store and the Google Play Store employ a 'purchase-in-app' (IAP) system that allows users to make purchases (of content, additional services, subscriptions, etc.) directly within the app or, in some cases, from the general store; the platform owner receives a commission on these purchases.[453]

In connection with these issues, the European Commission announced in 2020 the launch of a series of antitrust investigations to determine whether Apple's practices meet competition criteria.[454] Following several complaints, the Commission intends to look into two specific phenomena: the mandatory use of the 'IAP' system for the distribution of paid digital content and limitations on developers' ability to inform users of alternative purchase options outside of apps.[455] Because the companies in question are highly vertically integrated and rely on a large user base, the possibility of imposing similar terms and conditions, such as extremely high fees, exists. Google, for example, can easily impose the use of its app store by providing the Android operating system. Apple, on the other hand, creates not only the operating system but also the devices, giving it complete control over the content and

[452] Adam A. Ambroziak, *EU's perspective on the functioning of giant online platforms in the digital economy*, in Łukasz Dawid Dąbrowski and Magdalena Suska (eds), *The European Union Digital Single Market. Europe's Digital Transformation*, 5 (London: Routledge, 2022).
[453] *Ibid*.
[454] Press release, *Antitrust: Commission opens investigations into Apple's App Store rules*, 16 June 2020.
[455] European Commission, *Apple - App Store Practices*, case AT 40716, Opening of proceedings, 16 June 2020; European Commission, *Apple - App Store Practices (music streaming)*, case AT 40437, Opening of proceedings, 16 June 2020.

applications that run on them. In such a context, the possibility of competing with established and well-established stores is almost non-existent, and there is also consumer and innovation damage. The imposition of purchase commissions causes developers to raise the prices of additional content and services, shifting the cost burden onto end users. App store fees, according to studies, discourage innovation and disincentivize app developers to produce.[456] Again, because of their dominant position, some platforms are able to impose market rules, effectively replacing sound and balanced regulation that protects consumers and competition in the sector.

Furthermore the Regulation requires the gatekeeper to *"refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper"*.[457]

This is the case, for example, of an app store owner who requires his app developers to use the gatekeeper's identification system within their applications.

It is important to remember that when a user creates an account on any digital platform, a digital identity is created, which includes a variety of data such as age, gender, address and so on. Once an account is created, the user must remember the credentials entered during registration in order to access the platform in the future. It goes without saying that the more platforms a user is registered on, the more credentials they must remember. As a result, some digital platform providers, such as Facebook or Google, allow websites and applications to authenticate users through their own login service (for example, 'Facebook Log-In' or 'Google Sign-In').[458] This means that a user can log in to a platform by using his Google account, Facebook account, or another provider that provides this option.

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[456] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[457] *Ibid*., 5 (e).

[458] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the

The Amazon Pay service, which allows users to pay on enabled websites and apps using the credentials and payment methods registered in their Amazon account, operates in a similar manner.[459]

From the standpoint of both users and platforms, the use of such identification systems has a significant impact. For users, the ability to use a single account to access multiple platforms eliminates the need to store separate credentials for each platform, which significantly speeds up the log-in process. Large platforms that provide such a service, on the other hand, can collect enormous amounts of data on the user, such as the type and manner in which apps and websites are used, and thus gain a significant competitive advantage. Additionally, consumers lose control over their own data and unknowingly provide new data.[460]

It has been repeatedly stated that the possession and control of data represents an enormous source of value, and the strategies for monetising it are numerous. In general, data enable platform improvement by acting as resources that allow algorithms to function. In fact, the influx of numerous personal data allows the platform to profile users and target the offer (not only of products and services, but also of advertisements) based on individuals' specific needs or preferences.

As a result, it is clear that the platform's performance is heavily reliant on the database on which it can rely. This is why the aforementioned obligation was introduced, with the goal of preventing the gatekeeper from imposing the use of a service that, while initially beneficial to users, has the ultimate goal of strengthening the gatekeeper's position and thus undermining competition. This brings us back to the main goals of the regulation, which are to protect consumers and to ensure a fair and competitive market.[461]

Moreover, at Article 5 (f) states that the gatekeeper should *"refrain from requiring business users or end users to subscribe to or register with any other core platform*

Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>

[459] *Ibid*.

[460] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

[461] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article".[462]

This prohibition is clearly stated in TFEU Articles 101(e) and 102(d) and refers to a practice used by certain digital platforms to impose conditions for access to a service with extremely positive returns by leveraging their dominant position in the market. This practice is extremely harmful to competition because it allows one of them, with strong market power in one segment, to foster its own growth in another, frequently adjacent, market segment.[463]

Two typical cases, in which precisely the practices prohibited by the regulation are observed, can be seen with Google's Android operating system and Amazon's Fulfillment service.

In relation to Google, the company was the subject of a European Commission antitrust investigation that began in 2015 and ended in 2018 with a decision against it.[464] The investigation was launched because it was claimed that Google was abusing its dominant position to force the installation of some of its services alongside the Android operating system. Google specifically required that the search app 'Google Search' and the search engine 'Chrome', as well as the Play Store, be pre-installed on all devices sold. Thus, by purchasing a device running the Android operating system, consumers were forced to use certain pre-installed Google apps, while providers of alternative apps were unable to compete fairly with Google's services. The Commission concluded that Google had a significant competitive advantage over its competitors in the browser sector; additionally, Google's practices discouraged competition, harmed consumers, and strengthened the company's already dominant position.[465] The situation just described demonstrates the dual harm to consumers and competition caused by Google's

[462] DMA, Art. 5 (f).

[463] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[464] General Court*, Google and Alphabet* v. *Commission (Google Android)* of 14 September 2022, case T-604/18, ECLI:EU:T:2022:54.

[465] *Ibid*.

strong integration of its products and services. Cases like this frequently occur in the context of digital platforms, both explicitly and implicitly.

The second case is Amazon's 'fulfillment by Amazon' (FBA) logistics service for business users.[466] Amazon offers a wide range of services linked to its marketplace to its users (both business and end users) (Amazon Business, Amazon Handmade, Amazon Vine, Kindle Direct Publishing ...). The Amazon Logistics by Amazon (FBA) service, for example, allows participating business users to entrust the e-marketplace with goods storage, product delivery, customer service, and returns management.

The ability to outsource logistics to Amazon, even if for a fee, appears to be a significant advantage for third-party vendors. According to Jeff Bezos, the FBA service is the greatest invention ever created on the marketplace for the benefit of sellers.[467] Indeed, Amazon's website lists all of the benefits of using Amazon logistics, such as increased consumer trust, lower company costs, rapid sales growth, and so on. What must be emphasized is that only by using the FBA service can a supplier's products be marked as 'Prime,' implying that they will be delivered in a very short time frame and free of charge. Consumers place a high value on speed and free delivery, which is why so many of them subscribe to the Prime service. For manufacturers, the 'Prime' label on their product is a significant source of competitive advantage. Furthermore, it has been proven that business users who subscribe to the FBA service are more likely to receive the 'buy-box,' increasing sales on the marketplace.[468] Complaints and grievances are common from business users who, unwilling or unable to entrust their logistics to Amazon, find themselves in a worse position than those who use the FBA service.

In connection with this situation, the Italian competition and market authority (AGCM) initiated preliminary proceedings against certain Amazon group companies in 2019. According to the authority, Amazon would provide more

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[466] Italian Antitrust Authority, decision no. A528 of 30 November 2021 available at <https://www.agcm.it/dotcmsdoc/allegati-news/A528_chiusura%20istruttoria.pdf>.

[467] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[468] *Ibid.*

favorable conditions and various benefits to manufacturers who use Amazon's logistics service in terms of promoting its offer to consumers. In this case, Amazon's dominant position clearly undermines normal competition within the platform's underlying market, to the detriment of businesses and end users. According to the AGCM, "such conduct does not appear to be appropriate to a competitive confrontation based on merits, but rather on Amazon's ability to discriminate based on whether or not Amazon's marketplace sellers subscribe to its FBA ("self-preferencing") logistics service".[469] Aside from the harm done to the various platform players, repeating similar practices means strengthening a company that already has a dominant position at the expense of alternative platforms or service providers.[470]

The latter case clarifies the nature of the obligation in question even further. In fact, even if Amazon does not explicitly provide for contractual clauses requiring a user to subscribe to an additional platform service as a condition for accessing it, the same result is achieved indirectly by leveraging the platform ecosystem's architecture. It is clear that for the majority of commercial users on Amazon, using the FBA service is not a choice, but a requirement for making their presence on the e-marketplace profitable.

3.2. Gatekeeper's specifiable obligation under Article 6 of the DMA

As previously stated, the list of obligations contained in Article 6 of the proposal includes a number of obligations for which a regulatory dialogue between the gatekeeper and the Commission is envisaged. In fact, the Digital Markets Act states that gatekeepers must implement all necessary measures to comply with each obligation outlined in the regulation; however, only with regard to the obligations outlined in this second list may the Commission *"it may by decision specify the measures that the gatekeeper concerned shall implement",* if those implemented do

[469] Claudio Lombardi, *The Italian Competition Authority's Decision in the Amazon Logistics Case: Self-referencing and Beyond*, 2 March 2022, available at < https://ssrn.com/abstract=4047969>.
[470] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

not ensure compliance with the aforementioned obligations.[471] The Commission clearly invests itself with a strong power of intervention by doing so, as it can directly influence the operation of a platform. Furthermore, unlike the hypotheses envisioned by Article 5 - which considers two categories of obligations, i.e. exploitative and tying practices - Article 6 only covers exclusionary conduct.[472] Although they are all aimed at reducing the risk of exclusionary behavior, a first group of them can be classified as non-discrimination prohibition. These three hypotheses are the prohibition of appropriation of competitors' data (data grabbing) (Article 6(a)), prohibition of self-preferencing (Article 6(d)) and the prohibition of discriminatory app store access conditions (Article 6(k)). A second group, on the other hand, contains the prohibition of bundling (Article 6 (b), (c), (e) and (f)), the right to data portability (Article 6 (h)) and the prohibition of unfair restrictions on access to data and information (Article 6 (g), (i) and (j)).

3.2.1. Article 6 DMA's non-discrimination obligations

In relation to the first obligation under Article 6, the gatekeeper is prohibited *"from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users".*[473]
In some circumstances, a gatekeeper may play the dual role of provider of basic platform services to commercial users, as well as a provider of services in competition with those offered by such commercial users. In these circumstances, a gatekeeper may use the data generated by the basic services – for example, collects a massive amount of business data on its e-marketplace, including the quantity and type of products sold, seller revenues, end-user visits to sellers' offers,

[471] DMA, Art. 7 para. 2.
[472] Penelope Bergkamp, *The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe* 18 *European Company Law* 152 (2021).
[473] DMA, Art. 6 (a); as pointed out in Art. 6 (2), "data that is not publicly available shall include any aggregated and non-aggregated data generated by business users that can be inferred from, or collected through, the commercial activities of business users or their customers on the core platform service of the gatekeeper".

data on shipments and returns, and so on - to gain an advantage in competing markets. In the case of Amazon, the data generated by the basic service, i.e. generate information about the user's personal information, can be translated into consumer preferences. As a result, Amazon is fully informed about the market trends underlying the platform. Consequently, the issue rise because its dual role as an e-marketplace and retailer of products in the same market allows it to exploit this data to the detriment of third-party suppliers.

In order to avoid such distortion of competition, the Article provides that the gatekeeper must refrain from using, in competition with commercial users commercial users, non-publicly accessible data generated through the activities of those users or provided by them or their users.

The practice already has a precedent under Article 102 TFEU. Indeed, the European Commission launched an antitrust investigation into Amazon, alleging that the company uses non-public seller data to promote its product offerings and define its commercial strategies.[474] Furthermore, Amazon appears to be using information gathered from sellers to create and promote private-label products, undermining third-party vendors on the e-marketplace.[475] For these reasons, it is clear that Amazon, as a product retailer, is not competing fairly with third-party vendors, taking advantage of its strong position and large amount of data to the detriment of the platform's internal competition.

Furthermore, Article 6 (d) obligation stems from a practice that has been brought to the attention of authorities on several occasions by commercial users and affects several digital platforms. In fact, the gatekeeper is prohibited from *"treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such*

[474] Press release, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, 10 November 2020.

[475] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

ranking".[476] Such obligation, which is at the hearth of the thesis, will be dealt separately in the following pages.

Moreover the final obligation requires the gatekeeper to *"apply fair and non-discriminatory general conditions of access for business users to its software application store designated pursuant to Article 3 of this Regulation".*[477]
Because some app stores provide one-stop access to specific operating systems, a store provider can freely impose conditions and constraints on app developers. This specific obligation also finds a reference in the framework of the application of Article 102. Indeed, in 2020, the Commission opened an investigation against Apple, following a complaint by a competitor in the music streaming market (Spotify), on the grounds that this company would impose in its agreements with companies wishing to distribute applications to users of Apple devices the compulsory use of the purchasing system belonging to Apple itself (in-app "IAP") for the distribution of paid digital content, with app developers being charged a commission (of 30%) on all subscription fees made through IAP; restrictions on the ability of developers to inform users about alternative purchase options outside the apps for example on the developer's website where they are usually found at a lower price.[478]

3.2.2. (More of) Article 6 DMA's (heterogeneous) obligation

Article 6 (b) obligation states that the gatekeeper shall *"allow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties".*[479]

[476] DMA, Art. 6 (d).
[477] DMA, Art. 6 (k).
[478] Press release, *Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*, 30 April 2021.
[479] DMA, Art. 6 (b).

This obligation is clearly inferred from the European Commission's decision in the Google-Android case, in which the European Commission deemed abusive Google's imposition on manufacturers of devices using Android as their operating system to pre-install Google Search and Google Chrome as a prerequisite for obtaining, at the same time, a licence to use Play Sore, which constitutes the portal through which users of that operating system can acquire the apps necessary to ensure the efficient use of their mobile devices.[480]

Microsoft, like Google, has previously been investigated by the Commission for the forced coupling of the Internet Explorer browser and the Windows operating system, both of which are owned by the company.[481] Another example is Apple, which did not allow users to use a search browser other than Safari until the release of iOS 14 in 2020.[482]

The strategy of pre-installing a series of applications on a device is detrimental to competition in and of itself, as it appears that users are unlikely to uninstall one application that they find already on the device for another, unless this represents a significant advantage in terms of quality and cost (a difficult evaluation for an end user). This practice corresponds to end user inertia, which has a strong preference for what is offered to them by default by a brand they trust.[483] When one considers the user's inability to uninstall applications or programs, the harm to competition becomes even clearer, resulting in less choice on the part of the end user.

Furthermore the gatekeeper should *"allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper. The gatekeeper shall not be prevented from taking proportionate measures to ensure that third party software applications or software*

[480] *Google Android*, decision of 18 July 2018, case AT.40099, available at <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf>.
[481] Pietro Manzini, *Prime riflessioni sulla decisione Google Android*, 11 September 2018, available at < https://rivista.eurojus.it/prime-riflessioni-sulla-decisione-google-android/>.
[482] *Ibid.*
[483] *Ibid.*

application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper". [484]

The significance of app stores as channels for installing applications on devices, as well as the difficulty, if not impossibility, of using app stores other than those owned by the gatekeeper, has already been discussed. Similarly, the strategy of in-app purchases (IAPs) and the restrictions on third-party providers' ability to conclude transactions with end-users without going through the gatekeeper's gate. Again, the Commission intends to ensure competition in the app store and app sector by mandating greater flexibility in how content and apps are accessed.[485]

The following obligation stipulates that the gatekeeper shall refrain "*from technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of Internet access provider for end users"*.[486]

Clearly, the Commission's intention in this case is to ensure multihoming, giving users the option and freedom to choose between different contents and applications for the same service.

Consider intelligent voice assistants in this regard. Apple severely restricts users' ability to install voice assistants other than its proprietary 'Siri' on the iOS operating system, and does not guarantee that its voice assistant will work on non-Apple operating systems. In this case, the company undermines interoperability in the voice assistant market by adopting a traditional 'walled garden' approach that eliminates end users' ability to choose between different applications.

Furthermore Article 6 (f) requires the gatekeeper to *"allow business users and providers of ancillary services access to and interoperability with the same*

[484] DMA, Art. 6 (c).
[485] Penelope Bergkamp, *The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe* 18 *European Company Law* 152 (2021).
[486] DMA, Art. 6 (e).

operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services".[487]

A digital platform is frequently not limited to providing one or more basic services to end users (e.g., social networks, marketplaces, etc.). It is obvious that a platform's role as gatekeeper allows it to develop and promote its own services rather than those of third parties. Apple, for example, has created its own payment app, Apple Pay, which allows users to use the Near Field Communication (NFC) technology embedded in iOS devices to make payments on the web, apps, and in physical stores, all with a single click (this system is known as 'tap and go'). There are currently several payment applications on the market that could potentially compete with the giant's if Apple did not prohibit third-party applications from accessing NFC functionality and thus technically operating on iOS devices.[488] As a result, the European Commission launched an antitrust investigation into Apple in 2020 to determine whether its payment app practices are anticompetitive.[489]

Another example of these practices is Enel X's antitrust case against Google before the Italian AGCM. The lawsuit was filed after Google refused to integrate the electric vehicle charging app "Enel X Recharge" into Google's proprietary Android Auto system.[490] As gatekeeper, Google allegedly limited the app provided by Enel X's interoperability with its proprietary Android Auto system in order to promote the use of its Google Maps app. The proceedings concluded in May 2021, with Google being found guilty of abusing its dominant position under Article 102

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[487] Art. 6 (f); "Ancillary services are defined as a set of services (such as payment services, identification services, technical services supporting the provision of payment services, logistics services and advertising services) that complement the core platform services provided by gatekeepers and together with these form a single integrated ecosystem".

[488] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[489] Press release, *Antitrust: Commission opens investigation into Apple practices regarding Apple Pay*, 16 June 2020, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075>.

[490] Italian Antitrust Authority, *Google/compatibilità app Enel X Italia con sistema Android Auto*, decision A529 of 8 May 2019, available at <https://agcm.it/dettaglio?db=41256297003874BD&uid=9B9C38241DBA0058C125840000581ADF&view=&title=A529-GOOGLE/COMPATIBILIT%C3%80%20APP%20ENEL%20X%20ITALIA%20CON%20SISTEMA%20ANDROID%20AUTO&fs=Abuso%20di%20posizione%20dominante>.

TFEU.[491] The distorting effects on competition and the power that a large tech company like Google can exert over another company, which is not necessarily a provider of digital platform services, are even more pronounced in the latter case.

Article 6 (g) obligation concerns online advertising and publishing, specifically a lack of transparency in the supply of online space to publishers and advertisers. It is stipulated that, upon the request of advertisers and publishers, the gatekeeper shall *"provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory"*.[492]

The 'forced' reliance of most advertisers and publishers on large digital platforms, as well as the lack of transparency in the supply of advertising space and the technical processes that guide the supply of advertising within platforms, has already been discussed. A publisher or advertiser must know the effectiveness of their offer and thus have all of the data on content placement, number of views, consumer behavior after being exposed to advertising, and so on. While some platforms allow advertisers to verify their activity data themselves or through third parties, platforms such as Google and Facebook limit this option, forcing providers to rely solely on data collected by the gatekeepers.[493] The lack of transparency and information asymmetry in the online advertising and publishing sector harms innovation and competition significantly. Advertisers may be hesitant to publish content because they lack adequate information to assess the true impact of an ad on the consumer sphere, in addition to being subject to direct control by gatekeepers.

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[491] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.
[492] DMA, Art. 6 (g).
[493] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

The eighth, ninth, and tenth obligations – Article 6 (h), (i) and (j) - are specifically about data, which has now become the subject of significant policy measures (think of GDPR).[494] As has been repeatedly stated, data is the core asset of all digital platforms, and the reason for the main platforms' dominance and gatekeeper role is also attributable to the strong control they exert over vast amounts and diverse types of data. Indeed, one measure of a platform's market power in the digital economy is its ability to collect and use data.[495] Personal data ownership, in particular, and the associated strong economies of scale and scope, can create significant barriers to market entry and discourage the entry of new competitors, undermining innovation. As a result, data reallocation is frequently discussed, which would entail ensuring that data are shared and disseminated, preventing them from representing an exclusive resource.

In relation to the eighth obligation, it requires the gatekeeper to "provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access".[496]

The issue of data portability is the focus of much research and debate in the economic doctrine studying digital platforms. The ability for a user to transfer his or her personal data from one platform to another has been repeatedly proven to be an effective solution for mitigating privacy concerns and leveraging data as a source of competitive advantage in data-driven markets. The obligation in question under the Digital Markets Act could thus be viewed as both an extension of this right to business users and a form of enforcement of the right to data portability, because, while platforms such as Google and Facebook already provide mechanisms for users to download their data, this is clearly insufficient. Rather than focusing on end-users and privacy concerns, this section will examine the effects of data

[494] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[495] Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet* 161 University of Pennsylvania Law Review 1663 (2013).

[496] DMA, Art. 6 (h).

portability on competition and the activity of digital platforms. To begin with, switching costs are negatively correlated with data portability, as Barbara Engels (2016) writes: the ability for users to move their data between different platforms leads to lower (direct and indirect) switching costs, which means more freedom of choice and less lock-in effect. As a result, there is a greater demand for alternatives, as well as a greater ability of competing platforms to compete against dominant ones. The final report of the Australian Competition and Consumer Rights Commission's (ACCC) inquiry into digital platforms specifically states that data portability could benefit market competition in two ways: by lowering barriers to market entry and by mitigating the competitive disadvantage of smaller platforms (by allowing them to easily find data available to dominant platforms).[497]

The ninth obligation requires the gatekeeper to *"provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679".*[498]
The disintermediation effect of gatekeeper platforms on business users is addressed in this intervention. The role of digital platform intermediaries and "disintermediaries" has already been discussed in the literature review chapter. In this case, however, we are referring to a specific issue, namely the fact that the platform collects a large amount of data and prevents commercial users and end-users from leaving the platform by interposing itself between them and managing their relationships. This means that business users who are intermediated or

[497] Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry - final report*, 26 July 2019, available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.
[498] DMA, Art. 6 (i).

disintermediated by the platform do not have access to the same data as consumers, despite the fact that consumers are the final recipients of the offer. To ensure fairness and transparency, this obligation incentivizes the sharing of certain data held by the gatekeeper platform with commercial users. According to the online platform economy observatory, commercial users are aware of the disparity between the amount and type of data in their possession and that held by the large digital platforms on which they operate.[499] However, not all data are created equal and lend themselves to easy sharing and dissemination. In terms of personal data, it is obvious that having information such as an end user's e-mail available to a business user represents an important opportunity to promote its offer even outside of the platform that acts as an intermediary. Personal data, on the other hand, are the type of data that is most discouraged from being shared, not only by large platforms in order to maintain a competitive advantage and avoid being bypassed, but also by regulations that tend to guarantee privacy and personal data protection. Other types of data, on the other hand, contain information about user behavior on the platform, such as the type and number of searches. The sharing of so-called depersonalised (i.e. not attributable to a specific individual), aggregated, and non-aggregated data could provide business users with access to information that is normally only available to the gatekeeper, ensuring the latter the exercise of strong market power.

The tenth obligation is limited to online search engines and requires the gatekeeper to "*provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data"*.[500]
Based on what has been said above about network effects and the difficulty of competing with an established platform, it is clear that a search engine like Google

[499] Vaida Gineikytė, Egidijus Barcevičius, Loreta Matulevič, *Platform data access and secondary data sources*, Observatory for the Online Platform Economy, *Analytical paper 1*, 10 April 2019 available at < https://platformobservatory.eu/app/uploads/2020/09/Analytical-paper-1-Platform-data-access-and-secondary-data-sources_final.pdf>.
[500] DMA, Art. 6 (j).

can rely on a massive accumulated database that is only going to grow over time.[501] According to an American survey on digital market competition, search engines use a large amount of click-and-query data in a variety of ways.[502] First, the more data the platform has, the better the algorithms work and the more relevant the search results are. Furthermore, by collecting data, it is possible to better define the preferences and types of content sought by users and make them more visible to them. Finally, query data can be used to improve the search engine's ad offering.

4. Focus on self-preferencing: Article 6 (d) DMA

As pointed out earlier, Article 6 (d) DMA prohibits gatekeeper engaging into practices which entails the undertaking's behavior of favoring its own products/services over the ones offered by competing undertakings.

The nature of this provision is dual. First, gatekeepers must not 'prefer' third-party providers over themselves, and second, the provision of content, products, and services must be on non-discriminatory but fair terms, i.e. no preferential treatment of certain users at the expense of others. Although the large platforms claim that product ranking is managed by algorithms that evaluate performance and compliance with a set of objective and pre-established criteria, a number of investigations call these claims into question.[503]

As pointed out in Recital 48 of the DMA, Gatekeepers are frequently vertically integrated, offering specific products or services to users through their own platform or through a business user over whom they exercise control. In the latter situation, it goes without saying that there is a conflict of interest since that the gatekeeper is in direct competition with the business users. Such conflict arise in several instances. Firstly, when the gatekeeper uses a search engine to offer its own online intermediation services, and when offering those products or services on the

[501] Penelope Bergkamp, *The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe* 18 *European Company Law* 152 (2021).
[502] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.
[503] Simona Rudohradska and Diana Trescakova, *Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms* 5 *ECLIC* 487 (2021).

core platform service, gatekeepers can reserve a better ranking position for their own offering, as opposed to third-party products also operating on that core platform service, as done in the Google Shopping case.

Furthermore, such conflict of interest arise when the gatekeeper serves as both an intermediary for third-party providers and a direct provider of the gatekeeper's products or services. Namely when *"software applications are distributed through software application stores, products or services given prominence and displayed in a social network's newsfeed and products or services ranked in search results or displayed on an online marketplace"*. As a result, "*these gatekeepers have the ability to undermine directly the contestability for those products or services on these core platform services, to the detriment of business users which are not controlled by the gatekeeper".*[504]

In such circumstances, as pointed out by the following Recital, the gatekeeper should refrain from using any sort of differential or preferential treatment in ranking – or any action that could have a similar impact to the differentiated or preferential treatment in ranking - on the core platform service, in favor of the goods or services it provides itself or through a business user that it controls. In order to fulfill such obligation, it should also be ensured that the requirements that apply to such ranking - intended as all aspects of relative prominence, such as display, rating, linking and voice results - are generally fair.[505]

4.1. Lesson learned from Article 102 TFEU case-law?

The practice of self-preferencing, defined as behavior in which digital companies - operators of virtual platforms - favor their own products or services over competing ones that use the same space to sell competitive products, is not only and exclusively relevant in terms of digital market regulation, but also in terms of anticompetitive conduct under Article 102 TFEU. Indeed, the practice laied down in Article 6(d) resembles the Google Shopping case in which this practice has been censured by the Commission on the basis of Article 102 TFEU.

[504] DMA, Recital 48.
[505] *Ibid*., Recital 49.

The Commission sanctioned Google for placing products offered by its own comparison shopping service at the top of the list, while competitors' products were only on the third and fourth pages. This obligation stems from the fact that most dominant platforms compete directly with one side of the platform, typically with business users, rather than merely bridging the gap between supply and demand. Indeed, the European Commission argued that "Google has systematically given prominent placement to its own comparison shopping service: Google's comparison shopping results are displayed, in a rich format, at the top of the search results, or sometimes in a reserved space on the right-hand side.

They are placed above the results that Google's generic search algorithms consider most relevant. This happens whenever a consumer types a product-related query into the Google general search engine, in relation to which Google wants to show comparison shopping results. This means that Google's comparison shopping service is not subject to Google's generic search algorithms".[506]

This has been considered to be anticompetitive since that *"evidence shows that even the most highly ranked rival comparison shopping service appears on average only on page four of Google's search results, and others appear even further down. In practice, this means consumers very rarely see rival comparison shopping services in Google's search results"*.[507]

Furthermore, this obligation's strategies can be found, for example, in app stores or e-marketplaces such as Amazon.

In relation to the latter, the European Commission filed a complaint against Amazon regarding self-preferencing in November 2020.[508] The conditions and requirements that *"govern the selection mechanism of the Buy Box that prominently shows the offer of one single seller for a chosen product on Amazon's websites, with the possibility for consumers to directly purchase that product"*, are a source of concern for the Commission.[509]

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[506] Press Corner, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, (2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784>:

[507] *Ibid*.

[508] https://ec.europa.eu/competition/antitrust/cases/dec_docs/40703/40703_67_4.pdf

[509] *Ibid*.

When using the "Fulfillment by Amazon" (FBA) service, third-party sellers or Amazon itself may receive preferential treatment. Amazon submitted a commitment proposal to the European Commission in July 2022 that, among other things, addressed the Commission's worry about self-preferencing when determining the buy box, or what Amazon refers to as a Featured Offer.

Amazon provide that *"if a Featured Offer is displayed, Amazon will apply nondiscriminatory conditions and criteria for the purposes of determining which Offer, whether from Amazon Retail or Sellers (including Sellers using FBA), will be displayed as the Featured Offer […] Amazon will remove Prime as a relevant criterion for the selections of the Featured Offer"*.[510] This case demonstrates that a commitment offer can be obtained as a remedy to address alleged self-preferencing in a typical antitrust proceeding.

Some issues, though, remain. Firstly, the efficacy of such a commitment is unknown. One could contend that the DMA provides better monitoring options in this situation. And second, it is also doubtful that Amazon would have been as forthcoming if the DMA hadn't already been put into effect.[511]

Moreover, in relation to the app stores realm, it worth noting that Google and Apple, which play the dual role of app store owners and providers of apps and content and represent channels that are difficult or impossible to replace, they can use their gatekeeper role to promote or preferentially offer their own apps.[512] Indeed, as argued by Vestager, if we have assisted to an 'an exponential growth of the number of apps', *"there are essentially two main app stores: Apple's App Store and the Google Play Store"*.[513]

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[510] European commission, *Amazon Marketplace*, case AT.40462 and *Amazon - Buy Box*, case AT 40703, Commitment Proposals of 14 July 2022.

[511] Martin Peitz, *The prohibition of self-preferencing in the DMA*, CERRE Issue Paper November 2022, available at <https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf>.

[512] Jerrold Nadler and David N. Cicilline, *Investigation of Competition in Digital Markets*, Report of the Subcommittee on Antitrust, Commercial, and Administrative Law of The Committee on the Judiciary of The House of Representatives, October 2020, available at <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

[513] Speech/21/2093, Statement by Executive Vice-President Margrethe Vestager on the Statement of Objections sent to Apple on App Store rules for music streaming providers, Brussels, 30 April 2021, available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_2093>.

As a result, the competitive process is threatened by the actions of these strong digital actors which frequently obstruct access to third-party services and, at the same time, favor their own, denying customers the benefits of undistorted competition and innovation.[514]

To this regard, the Commission has received numerous complaints alleging that large digital platforms makes difficult for customers to use competing services and prevent competitors from providing the best deals and direct customer contact.

One of these complaints has been made by Spotify against Apple for discrimination and Apple Music's unfair advantage over Spotify.[515]

In April 2021, The European Commission has sent a Statement of Objections to Apple, which takes a preliminary conclusion that "Apple abused its dominant position for the distribution of music streaming apps through its App Store and distorted competition in the music streaming market".[516] Indeed, as explained in the Statement of objection, Apple has significant market power - a monopoly - in the distribution of music streaming apps to Apple device owners.

The company not only has exclusive access to apps on Apple devices, but is also provides a music streaming service, Apple Music, which competes with other apps such as Spotify and Deezer. In order to purchase digital content, Apple's in-app purchase is necessary and which charges a 30% commission fee on all purchases made through its system. This means that music streaming services, like Spotify, will be unable to sell subscriptions in their apps unless they pay Apple a 30% monthly fee which, unavoidably, is passed on to end users by raising prices.

Furthermore, Apple not only establishes the rules for the App Store, but it also competes with many music streaming app providers with its own app, i.e. Apple Music, which is not subject to the 30% fee. It goes without saying that such rules have a negative impact on its competitors' costs, profit margins, and attractiveness on the Apple platform. As a result, it is highly likely that Apple distorts competition in the music streaming market to favor its own music streaming app, while placing third party providers at disadvantage.[517]

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[514] https://www.europarl.europa.eu/doceo/document/E-9-2019-002996_EN.html.
[515] *Ibid.*
[516] *Ibid.*
[517] *Ibid.*

In such circumstances, as argued by the CEO of Spotify, Daniel Ek, *"apps should be able to compete fairly on the merits, and not based on who owns the App Store"* and all the app should be subject to the same fair set of rules and restrictions—including Apple's ones.[518]

In the light of the above, it can be argued that adopting such practices not only harms competition and market contestability, but also has negative consequences for consumers. Indeed, there is no guarantee that the content, products, or services promoted by a platform are better or more responsive to the needs of end users than those provided by third parties. To this end, it is necessary that all the companies, whether young or old/large or small, are subject to the same fair rules and thus, the big giant's competing undertaking does not have the possibility to be favored over their competitors. After all *"consumers win and […] industry thrives when we're able to challenge each other on fair footing"*.[519]

4.2. Ex ante v. ex post remedies

In this context, the introduction of the DMA – and the self-preferencing ban - fits. Indeed, it has been observed that, over the years, antitrust has struggled to provide a timely and effective response to the problems associated with digital markets. As a result, *"given that competition law alone is unfit to tackle systemic problems posed by the platform economy, a regulatory intervention is enacted to introduce a set of ex ante obligations for digital gatekeepers dispensing enforcers from the standard antitrust analysis and restraining gatekeepers from even providing an efficiency defence"*.[520]

Competition law's inability to tackle problem posed by gatekeeprs is because their practices go beyond the abuse of a dominant position, as they have 'de facto

[518] Daniel Ek, *Consumers and Innovators Win on a Level Playing Field*, 13 March 2019, available at <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/>.
[519] *Ibid*.
[520] Giuseppe Colangelo, *DMA Begins*, 2 December 2022, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4292049>.

regulator' powers – as a public authority – which enables them to defines the rules of the markets in which they operate, as explained in Chapter II. Indeed, as pointed out in Recital 5 DMA, *"whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to certain instances of market power (e.g. dominance on specific markets) and of anti-competitive behaviour",* while the DMA aims at hitting gatekeeper's regulatory powers.[521]

Furthermore, another issue with applying classic antitrust rules appears to be the narrow definition of the relevant market, which is difficult to apply to large platforms with cross-market presence. Unlike competition law, the DMA does not impose regulatory obligations based on an examination of the conduct of undertakings with a dominant position in relevant markets.

The DMA establishes an ex-ante regulatory framework for certain markets/services (which are not necessarily defined as relevant markets under competition law), the core platform services, where being a gatekeeper is a necessary and sufficient precondition for being subject to behavioral constraints.

Furthermore, in antitrust, tools used to assess a firm's market power, such as the SSNIP test, which takes into account price variation over a given period of time, do not lend themselves to being applied to multisided markets dominated by strong network effects.

Moreover, another limitation in antitrust enforcement is the slowness with which issues are dealt with. Indeed, several digital-related cases have highlighted the need for new and targeted intervention.[522] Among them, the Google shopping case was probably the most striking, as the Commission's response came after seven years of investigation, during which time market competition gradually declined and the proposed interventions ultimately failed to satisfactorily resolve the identified problems and to rebuild a fair and contestable environment.[523]

The main reason why of such length is due to the necessity to carry out an effect assessment of the conduct under Article 102 TFEU. Indeed, to determine an abuse of dominant position, the European Commission conducted a 120-page assessment

[521] DMA, Recital 5.

[522] All the cases mentioned earlier while dealing with the DMA's obligations upon gatekeepers.

[523] *Timeline - Google's antitrust cases in Europe*, 18 July 2018, available at <https://www.reuters.com/article/uk-eu-google-antitrust-timeline-idUKKBN1K81CB>.

of the effects of Google's self-preferencing on competition and consumer welfare.[524] The DMA is aware of this, indeed, Recital 5 points out that "*enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis"*.[525] Strengthened by this knowledge, the DMA has introduced a set of ex ante obligation which apply directly to undertaking designated as gatekeeper and therefore does not require enforcers to carry, among other things such as the proof of dominance or the definition of the relevant market, an effect analysis.[526] Indeed, such analysis lacks in in the application of Article 6 (d) DMA and will arguably lead to a faster finding of an abusive conduct upon gatekeeper.

Indeed, as pointed out in Recital 10 DMA, the regulation *"pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper"*.[527]

As a result, DMA's obligation laid down in Article 5 and 6, can be compared to the US antitrust law's per se restriction, recalled in Chapter I, which entails a conclusive presumption of illegality of the conduct which cannot be "excused" for any reason. Once the conduct is identified and falls within the per se restriction, 'res ipsa loquitor' and there is no room for devolving into an effect analysis. Such mechanism can be found also in the aforementioned provision of the DMA. Indeed, once the conduct falls within one of the obligations listed in Article 5 or 6 DMA, there is a conclusive presumption of illegality as done under the per se restriction in US antitrust law.[528]

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[524] Anne C. Witt, *Platform regulation in Europe – per se rules to the rescue?* 18 *Journal of Competition Law & Economics* 670 (2022).

[525] DMA, recital 5.

[526] Giuseppe Colangelo, *DMA Begins*, 2 December 2022, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4292049>.

[527] DMA, Recital 10.

[528] To this regard, it is worth noting that a presumption of per-se illegality is a conclusive presumption and as such is in contrast with the presumption of innocence which, as pointed out by Cyril Ritter in *Presumptions in EU competition law* 6 *Journal of Antitrust Enforcement* 189 (2018), "constitutes a general principle of EU law […] (and is) applicable in EU competition law proceedings". In fact, the only presumption that in EU competition case are allowed are the ones

Indeed, once an undertaking is designted as a gatekeeper it should comply with the obligations listed in Article 5 and 6 DMA. In this sense, if the undertaking is designated as a gatekeeper and has engaged into self-preferencing, Article 6 (d) is applicable and therefore its actions will be considered unlawful simply based on the fact that it gives its own services a higher ranking than other services.[529] Indeed, as pointed out in Recital 23, *"any justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded"*.[530] As a result, the gatekeeper does not have the possibility to use the efficiency defence, based on economic grounds. Indeed, the only circumstances in which the Commission may exempt the gatekeeper from an obligation laid down in Article 5 and 6 DMA, is for public morality, health and security grounds.[531]

If, on one hand, such mechanism enables the Commission to not be burden of the responsibility to prove which effects – positive or negative – the conduct may have and therefore enables it to conclude such proceeding in a faster way, on the other hand, such mechanism will not be able to consider the pro-competitve effect which a practice – which falls within the prohibition of the DMA – may have.

According to Dr. Thibault Schrepel, it is worthwhile to think about a possible scenario in this regard. Apple creates a new search engine, i.e. iSearch, that competes with Google Search. Due to Article 6(d) DMA, Apple would be unable to position its new search engine at the top of the App Store. Because of this, regardless of iSearch's inherent qualities, Apple cannot fully utilize its existing digital infrastructure to leverage iSearch. The DMA creates legal barriers that shield Google's dominance in online search from competition from other large companies, such as Apple, by concentrating only on the rivalry between Google and start-ups. The same is true for all of the tech giants' core digital services. The DMA is making it harder for these giants to compete against one another, but that does not mean that their positions will never be challenged. In this sense, the DMA rather than

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that allow undertakings to exercise the right of defense and give the possibility to refute them i.e. rebuttable presumption.

[529] Anne C. Witt, *Platofrom regulation in Europe – per se rules to the rescue?* 18 *Journal of Competition Law & Economics* 670 (2022).

[530] DMA, Recital 23.

[531] DMA, Article 9.

encouraging market dynamism, it merely (re)arranges the distribution of results and preserves current market positions.[532]

4.3. Where does the Commission stand?

In light of the foregoing, the DMA may represent a watershed moment in the digital economy. On closer inspection, such a watershed moment can be traced back to several antitrust cases, including those involving Google, known as the "Google cases", which paved the way for the adoption of this instrument. Indeed, as stated in Chapter II, there are several open questions that remain unanswered for the time being, leaving open the possibility of envisioning a new conception of Article 102 TFEU that would be inspired to the jurisprudence of Article 106 TFEU. The step of recognizing a new 'interpretation' of Article 102 TFEU, however, appears to have been dispelled by the Commission, which, rather than attempting to fill this gap, has preferred to adopt a different instrument, i.e. the DMA, that leaves the 'traditional' conception of Article 102 TFEU unchanged. At the same time, it attempts to achieve the desired outcome of the antitrust proceedings brought against these specific economic operators, namely that of ensuring a level playing field that *"requires not only 'careers to be open to talents', but also that those with the same talents and ability and willingness to use these talents should have equal chance of success"*, by using a different instrument, i.e. the DMA. [533]

This goal, due to its importance in ensuring a digital single market, while theoretically achievable with "traditional" antitrust instruments, has been assigned to a new tool, the DMA. The main reason for this choice is to resolve issues raised by these operators more quickly and easily. To the extent that some have claimed that this shift away from competition law is simply *"aimed at getting rid of the "more economic approach" in order to shorten the process, avoid time-consuming*

[532] Thibault Schrepel, *Digital Markets Act: A Conservative Piece of Regulation*, 20 May 2021, available at < https://www.networklawreview.org/digital-markets-act-is-conservative/>.
[533] Andrew Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Applications* (New York: Oxford University Press, 2006).

assessments, and secure the result of prohibiting certain practices"[534] and rather than reflecting the unique characteristics of digital markets, the revival of regulation appears to be motivated solely by the desire for a faster and easier resolution of the problem posed by gatekeepers. While antitrust enforcement requires in-depth case-by-case investigations, the DMA is *"moving away from the more economics-based approach, thus lowering annoying legal standards and evidentiary burdens, will definitely make the job easier"*.[535]

To this regard, it seems that that, what the Commission is trying to do is a tacit revolution which see at its hearth ideologizing competition law - or in the words of Dr. Thibault Shrepel, "romanticizing" competition law – by driving away from the consumer welfare standard and nearer to moralization of the law.[536] Indeed, it seems that Europe have exasperated the link between democracy and competition law, to the extent to which it seems that is going back to its pluralist approach, which apart from consumer welfare – the primary objective of competition policy -, promotes fairness and democracy.

Indeed, there are concerns about the impact that these gatekeeper platforms can have on the functioning of democratic societies. For example, the concentration of power in the hands of a few dominant digital players can lead to the suppression of free speech, freedom to conduct a business and the manipulation of public opinion, which are key elements of democratic societies. This has prompted regulators to consider how competition law and consumer protection measures can be used to promote a more democratic and equitable digital environment. The DMA seeks to address these concerns by setting out clear and consistent rules for gatekeeper platforms, including obligations to maintain fair and transparent market practices, to provide equal treatment to all users and businesses, and to respect the privacy and personal data of users. To the extent that it has been argued that Commissioner Margrethe Vestager is implementing a *"policy guided by neither law nor the*

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[534] Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, 19 May 2022, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070310>.

[535] Giuseppe Colangelo, *DMA Begins*, 2 December 2022, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4292049>.

[536] Thibault Schrepel, *Antitrust Without Romance* 13 *New York University Journal of Law & Liberty* 326 (2020).

economic sciences but by the "moral conviction" and "values" of the European people", making competition law ideological in nature.[537] However, it remains to be seen how effective the DMA will be in achieving these goals, and it is likely that the intersection of the digital economy and democracy will continue to be a subject of ongoing discussion and debate.

Furthermore, the introduction of democratic values in competition enforcement, in reality, is deceptive. In fact, the logic pursued by populist ideas is the one according to which "big is bad" has been carried out by highlighting the power of the "big" over democratic values, but in reality, the real threat to democracy lies in the choices of enforces which are driven by "personal interests" rather than the ones of consumers.[538]

[537] Thibault Schrepel, *Antitrust Without Romance* 13 *New York University Journal of Law & Liberty* 326 (2020).

[538] Carl Shapiro, *Antitrust in a Time of Populism*, 24 October 2017, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345>.

CONCLUSIONS

The 'digital revolution' in which Europe is undergoing, has highlighted several problems that were already present in the system but had been overlooked for a long time. One of these problems is the regulatory power held by digital platform, but, on closer inspection, platforms – and, in turn, their regulatory powers- existed before such digital revolution. The relevance of digital platform came to light with the ongoing digitalization process which have highlighted the critical role played by such peculiar economic operators in digital markets.

Furthermore, the restrictions imposed by the pandemic emergency brought to the fore the importance of a competitive development of digital markets, as well as the challenges posed by the conduct putted in placed by the world's leading Big Techs (so-called GAFAM - Google, Apple, Facebook, Amazon, Microsoft) as gatekeeper operators. During the 2020s, the restrictions on trade and movement of people caused by the health emergency highlighted the critical role of the digital economy and highlighted the barriers posed by gatekeeper operators to the detriment of other companies. Such position held by such gatekeeper enables them to exercise a rule-setting power which gives them the ability to choose the rules that should be followed on their platforms and, therefore, enables them to act as 'regulators'.

In the light of this position, and especially when such undertaking plays a dual role in the market, *"the operators of dominant platforms have a responsibility to ensure that competition on their platforms is fair, unbiased, and pro-users"*.[539] Indeed, as in the case of a dominant position held by undertaking, the problem is not the dominant position per se, but rather it's the abuse of the powers that derives from that position, in the same vein, in the case of the undertaking's gatekeeper position, the problem is not its position per se, but rather the abuse of the powers, i.e. regulatory powers, which comes from the gatekeeper's position. Indeed, even if *"the fact that platforms choose rules is not a problem per se […], this might not always be the case. For instance, one cannot exclude the possibility that a dominant*

[539] Niamh Dunne, *Platforms as Regulators* 9 *Journal of Antitrust Enforcement* 244, (2021).

platform could have incentives to sell "monopoly positions" to sellers by showing buyers alternatives which do not meet their needs."[540]

On closer inspection such position held by the gatekeeper makes them resemble "nation-state", to the extent that are enabled to *"serve as the unofficial and unelected regulator of million of lives"*.[541] Indeed, as pointed out by Parker, Van Alstyne and Choudary *"with more than 1.5 bill ion users, Facebook oversees a 'population' larger than China's. Google handles 64 percent of the online searches in the U.S. and 90 percent of those in Europe, while Alibaba handles more than 1 trillion-yuan (162 billion US dollar) worth of transactions a year and accounts for 70 percent of all commercial shipments in China. Platform businesses at this scale control economic systems that are bigger than all but the biggest national economies"*.[542]

Considering such aspect, is useful in order to understand how to conceive Article 102 TFEU in these circumstances and explain the reason why in the Google Shopping case, it has been recognized a principle, i.e. the one of equal treatment, which is typical of Article 106 TFEU case-law. The undertaking under the 'lens' of antitrust authorities, are not anymore only the conduct carried out by dominant undertaking, but, most importantly, the conduct carried out by undertaking which benefit from their gatekeeper position which enables them to (ab)use their regulatory power, which resembles the power exercised by a State-actor. Such situation, makes clear the difficult relationship between these peculiar undertaking and National States, considering that these companies tend to empower the States in which they operate, so much so that the very concept of State has become obsolete.[543]

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[540] European Commission, Directorate-General for Competition, *Competition Policy for The Digital Era,* report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019) 60, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

[541] Geoffrey G. Parker, Marshall W. Van Alstyne, Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy—and How to Make Them Work for You*, (New York: W. W. Norton & Company, 2016).

[542] Ibid.

[543] Ruggiero Cafari Panico, *Le imprese multinazionali, la protezione dei dati nello spazio cibernetico e l'efficacia extraterritoriale del diritto dell'Unione europea* 1 *Papers di diritto europeo* 7 (2021).

With specific reference to the digital world, a new ecosystem has developed in which we are witnessing a gradual erosion of the sovereignty - especially digital sovereignty - of states in favour, on the one hand, of international organisations, including the European Union, and, on the other, of the so-called 'barons' of the web, the GAFAM, who, in some cases, act, or at least aspire to act, as State actors. The ‘battle’ between the giants of interent and the European union, i.e. of two 'sovereignisms', one economic and the other of values, becomes one over the rules to be imposed and they end up clashing, and the prize is the democratic legitimisation of one over the other, which would allow value-based sovereignty to prevail – the one of the European Union - over that driven by purely economic considerations (of the gatekeepers).

One consideration can be drawn from the sustained parallelism between gatekeepers and sovereign States. If States have ceded some of their sovereignty to the EU, gatekeepers, on the other hand, are resisting this 'concession'. In this regard, it is important to remember what is meant by a sovereign state, which is an independent state that is "recognized within its borders by the international community" and has "power of administration and jurisdiction" over its own people. Similarly, the gatekeeper wields administrative and juridical power over its ‘people,' i.e. all the economic and user operators on its platform, in the same way that an independent State does. In relation to this issue, the European Union is trying to limit the gatekeeper’s sovereignty, as it did with the States.
Nevertheless, if digital sovereignty globally refers to the ability of a State or organization to assert its authority in order to exercise its prerogatives within cyberspace, States' sovereignty has been challenged as a result of the development of a digital globalisation that bypasses borders and laws and allows gatekeeper to impose their own rules, to the extent that can be seen as 'dematerialised nations'.
In relation to this issue, the antitrust authorities have intervened not only by 'activating' proceedings against such gatekeepers under Articles 101 and 102 TFEU, but also by broadening the tools available to limit such power by introducing instruments aimed at 'curbing' the advancement of such economic operators, who may well go on to impose themselves as veritable sovereign states in the markets

in which they operate. Indeed, the introduction of such tools, such as the DMA, is tailored for *"online platforms (which) are practically becoming more effective then public institutions in organizing and structuring our public and private lives".*[544] In the light of the position held by such economic operator, the 'fil rouge' which links the introduction of such regulatory instruments – the DMA - and the repercussion which the Google shopping case has posed to Article 102 TFEU, can be connected to a common root, namely the rise of a new type of economic power held by these specific operators, i.e. regulatory powers.

In the light of the preeminent importance gained by such economic operator, there have been repercussion on the application of antitrust rules and a different connotation of such provisions has come out. Indeed, in relation to the application of Article 101 and 102 TFEU, it is worth noting that these gatekeepers have changed the idea in which such Article are conceived. In particular, the thesis has shed a light on the implication that a particular gatekeeper, i.e., Google, and the most discussed case in recent times, i.e., Google Shopping, has had on Article 102 TFEU. At the hearth of the case at outset, there is a conduct, i.e., self-preferencing, which has been considered to be anticompetitive when carried out by an undertaking which benefit from its gatekeeper position in the market that seems to have influenced Article 102 TFEU's 'lodestars': the special responsibility and competition on the merits paradigm and the consumer welfare benchmark.
The (first) guiding 'star' which has been always taken into consideration in the application of Article 102 TFEU has always been the special responsibility concept, which entails that a dominant undertaking should pay attention to the conducts in which it engages to, because they could be considered to be an abuse of dominant position under Article 102 TFEU. As a result, a dominant undertaking has a special responsibility, compared to non-dominant ones, to not engage into potentially anticompetitive conducts which, on the other hand, can be carried out by non-dominant undertaking which are not burden of such responsibility.

[544] José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society: Public Values in a Connective World* 3 *Markets, Globalization & Development Review* (2018).

In this context, the finding in the Google Shopping case has led to questioning whether such gatekeeper are burden of an ‘enhanced’ special responsibility, in the light of the peculiar position which have in (or, more precisely, between) the market(s), i.e. the one of bottlenecks.

Such recognition can be traced back to the debate of superdominance and its implication in terms of responsibility upon superdominant undertaking. Even if the burden of an enhanced special responsibility upon superdominant undertaking has been rejected, as in the theory of the “eternal return”, the concept of the enhanced special responsability has come to the light again, but with a different connotation. Indeed, with the Google Shopping case, it has been highlighted the fact that an undertaking, apart from being dominant or superdominant, can have a more profound impact on the market because of its gatekeeper status and its regulatory powers.

As a result, rather than deriving greater special responsibility from the position of super-dominance held by a company, it is recognized that greater responsibility is held by companies with this special role in the market that allows them to use regulatory powers that justify the increase in responsibility. Indeed, even though Google can be considered to be on a par with a superdominant undertaking, due to its high market shares, what justifies such an increase in its special liability can be connected to its 'quid pluris', i.e., its gatekeeper role, rather than for its high market shares.

The concept of the special responsibility is strictly linked with the competition on the merits paradigm – the other guiding ‘star’ of Article 102 TFEU. To the extent that the two concepts can be considered to be the ‘Ying and the Yang’ of Article 102 TFEU. As a result, if the concept of the special responsibility is experiencing an increase in terms of intensity, in the same way the concept of competition on the merits needs to be adapted to such increase in responsibility. As a result, due to Google’s regulatory power, which give rise to an ‘enhanced’ special responsibility, the competition on the merits paradigm is arguably changing.

Indeed, the (ab)use of its peculiar power gives to normal business practices, as self-preferencing, the ability to be considered to not be based on the merits and as a result can be considered to countervail Article 102 TFEU. To this regard, the special

responsibility concept can be compared to *"wie ein irrender Körper seine Seele sucht"* (like an erring body that seeks its soul), which is filled by the competition on the merits paradigm. As a result, a change in intensity in the special responsibility can be seen as long as the competition on the merits paradigm embrace conduct which has always been considered to be based on the merits, even when carried out by dominant undertaking.

In this context, the regulatory power discussions fits. Indeed, if there is such a thing as an enhanced special responsibility upon gatekeeper, then it comes without saying that all those conducts which derives from the gatekeeper position, i.e. regulatory powers, are arguably widening the conducts in which gatekeeper cannot engage into in the light of their peculiar position in the market. Simply put, if, before the birth of such powers, the special responsibility concept was filled with conducts – considered to be not based on the merits – which were expression of the market power held by dominant undertaking, now such concept is filled with conducts – considered to be not based on the merits – which are the expression of the regulatory power detained by gatekeepers.

Nevertheless, if the two guiding 'stars' of Article 102 TFEU are changing and adapting to this new connotation of power, their boundaries are far from being clear. Indeed, both the concepts are interdependent between one and other and they mutually fill each other with significance, but neither one of them – despite the importance played in Article 102 TFEU enforcement - have a clear definition.

In relation to this, the third guiding 'stars' need to be taken into consideration, which can be considered to be the 'common denominator' which is mutual to both the concepts and play a significant role in 'filling' the concepts with significance. Indeed, the special responsibility held the undertaking and the conduct in which it can engage into or not because they fall inside/outside the competition on the merits paradigm, acquires meaning as long as the consumer welfare benchmark is taken into consideration. Indeed, the difference between a conduct 'based on the merits' and a conduct which cannot be considered to be based on the merits, mainly lies in the benchmark which is taken into account.

As a result, in order to assess whether there is a violation of Article 102 TFEU, it is not enough to prove that the conduct at stuck falls outside the competition on the

merits paradigm, but it is necessary to assess whether the conduct is harmful to the consumer welfare benchmark. Otherwise, a conduct should be considered to be in violation of Article 102 TFEU based on the fact that cannot be considered to be based on the merits, without assessing its effect in relation to a given benchmark.
If dominant undertaking's conduct have always been considered to be based on the merits or not, depending on the effect which such practices had on the consumer welfare standard, now, in the light of the changes which the two 'guiding stars' are being experiencing due to gatekeeper's regulatory power, it is reasonable to question whether the consumer welfare benchmark is still suitable, or, on the other hand, such changes are having repercussion over it as well, by giving rise to a new possible benchmark, i.e. the effective competition standard which goes beyond the mere consumer welfare 'lens'. Indeed, it can be argued that the changes in the special responsibility and competition on the merits paradigm stands as long as the consumer welfare standard is replaced with an effective competition standard which, apart from consumer welfare, take into account the equality of opportunity principle to which ultradominant undertaking should inspire to in order to create a 'level playing field' for all the undertakings.

Furthermore, it should be pointed out that competition law can be considered as an 'instrument' which accomplish two objectives. In a 'micro' perspective, it can be said that competition law is a means to protect consumer welfare, even tough it seems that competition law is shifting from a consumer welfare benchmark to a broader one which does not solely take into account consumer welfare effects, as explained in Chapter II. In a 'macro' perspective, competition law does not only serve as a means to protect consumer welfare but serves as a means to accomplish a much broader goal, which is at the heart of the European Union's integration process, namely the single market, as explained in Chapter III. In this regard, it is worth noting that such process seems to be continuing, since that the digital single market can be considered to be a possible new frontier of European integration.
Indeed, the digital market is a species of the genus of the internal market, it is a specification of that integration process that concerns all sectors of the economy. Thus, given the framing of the digital single market within the single market, there

is no doubt that there is a fundamental feature of European Union law in the digital market: progressive realization. This market, too, as in the case of the single market, is realized in stages and see as its core objective the abolition of all the internal frontiers that hampered free trade and free movement of goods, persons, services and capital.

Even in a common market, economic activities cannot develop in a balanced manner if, despite the removal of barriers to free movement, distortions in the conditions of free competition occur. Indeed, since the establishment of the European Union, competition policy has been used to integrate the internal market. The priority given by the Commission to the application of competition law to practices that disintegrate the internal market, and thus as a means to achieve market integration, reflects the importance of competition law for creating or maintaining a single market.[545]

However, in the digital context, such ambitious goal appears to be difficult to achieve. Indeed, the European Commission, *"acknowledging the critical role of the digital developments in the single market and the need to remove barriers that hinder the functioning of the digital single market",* has introduced two legislative instruments, a Regulation on a Single Market for Digital Services (Digital Service Act - DSA) and a Regulation on Fair and Contestable Markets in the Digital Sector (Digital Market Act - DMA), both of which design a new regulatory framework for the sector.[546]

The first Regulation seeks to define the obligations of platforms in the provision of digital services, with a focus on content dissemination (e.g., social networks), as well as user rights in the use of these services. The second aims to impose prohibitions and behavioral obligations on providers of basic platform services - known as "gatekeepers" - in order to protect users of such platforms and market contestability.

In relation to the latter, the European Commission focuses on online platforms, with the goal of opening up the market to new operators and making the markets

[545] Girolamo Strozzi and Roberto Mastroianni, *Diritto dell'Unione Europea*, (Torino: Giappichelli, 2020); Giorgio Monti, *EC Competition Law*, (Cambridge: Cambridge University Press, 2007).

[546] European Parliament, The internal market: General principles, available at <https://www.europarl.europa.eu/factsheets/en/sheet/33/il-mercato-interno-principi-fondamentali>.

governed by such companies more contestable. This is done with the Commission's new and expanded intervention powers, because competition rules - the "traditional" instruments - have proven unsuitable for the problems posed by the development of the digital market and the birth of such peculiar operators. As a result, it can be argued that the leitmotiv of this intervention is the role of 'gatekeepers' played by technology titans: that is, 'gatekeepers' who control the internet's 'gates' and can decide whether and how to filter information on search engines, trading platforms, and social networks, influencing rules and market prices.

In the light of the foregoing it can be said that the European Union has been moving toward the creation of a new society project, including a digital economy. In this regard, Jean Monnet's words in his autobiography ring true: "It was always thought that Europe would be made in crises that would be the sum of the solutions that would be found for these crises".[547]

Retracing the steps of the previous analyses and considerations, one realizes that the world of the Internet has its own set of rules, of which digital platforms are both constituents and recipients. They are the true interlocutors with whom States must deal as a result of de facto self-legitimization obtained on the transnational market. Unfortunately, the balance of power between states and the large platforms that populate the Internet has shifted, with the former ending up in the private management of cyberspace by the latter.

As a result, real power has shifted away from the state and then the Union, with a weakening of the very concept of "sovereignty" in a system of transnational interrelationships in which centers of power that do not possess state form play an important role, and the democratic principles upon which the Union is founded have been gradually eroded.[548]

Given that the virtual world is becoming increasingly real and crowded, and that the real void is, if anything, the regulatory one in which digital platforms were developing their own distinct legal system, the Union chose to introduce an ex-ante

[547] Jean Monnet, *Cittadino d'Europa. 75 anni di storia mondiale*, (Milano: Rusconi, 1978) 311.
[548] Ennio Triggiani, *Rilegittimare il processo d'integrazione europea*, in E. Triggiani, F. Cherubini, I, Ingravallo, E. Nalin (eds), *Dialoghi con Ugo Villani*, II, (Bari: Cacucci, 2017), 677, 683.

instrument limiting the power of digital platforms, effectively ceding some of their sovereignty to the European Union.

This 'cession of sovereignty', however, will be 'completed' if the gatekeepers follow these rules. This outcome will not only highlight the so-called 'Brussels effect', but – most importantly - will also allow Europe to reaffirm its 'technological sovereignty' in the digital sphere, i.e. its ability "*to make its own choices, based on its own values, respecting its own rules"* and not the one imposed by gatekeepers.[549]

[549] *Shaping Europe's digital future: op-ed by Ursula von der Leyen, President of the European Commission*, 19 February 2020, available at <https://ec.europa.eu/commission/presscorner/detail/en/AC_20_260>; the term 'Brussels effect' reflects the European Union ability to establish itself as the primary global rule-maker by influencing legislationin other countries and actually inducing non-European companies to take it into account not only for products and services sold on the old continent but also elsewhere.

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