KONKURRENSVERKET
Swedish Competition Authority

The regulation of platform business practices under general competition law and in related legal systems – a Swedish perspective

Björn Lundqvist på uppdrag av Konkurrensverket

UPPDRAGSFORSKNINGSRAPPORT 2022:6

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Förord

I Konkurrensverkets uppdrag ingår att främja forskning på konkurrens- och upphandlingsområdet. Konkurrensverket har gett Björn Lundqvist, professor i europarätt med inriktning mot konkurrensrätt vid Stockholms universitet, i uppdrag att inom ramen för Konkurrensverkets uppdragsforskning belysa oskäliga affärsmetoder på digitala plattformsmarknader och dess framtida reglering under konkurrensrätten eller i anslutande legala system.

För närvarande förs en intensiv akademisk diskussion om konsumenter och företag utsätts för oskäliga affärsstrategier vid användning av dominerande plattformar. Ledande plattformar som Google och Facebook har till exempel ansetts missbruka sin dominerande ställning genom att exkludera konkurrenter och gynna sina egna alternativ. Dessa mål är dock inte slutgiltigt avgjorda ännu. Det finns även ledande plattformar inom fordonsindustrin som redan i dag hamstrar data och utformar dataarkitekturen så att de blir systemledare i vertikala värdekedjor och genom detta skapar ett beroende ekosystem av underleverantörer. Dessa systemledare kan få varaktiga monopol och erhålla en maktställning i de ekosystem som byggs upp runt de digitala plattformarna.

Författaren menar att unionsrättslig och nationell konkurrenslagstiftning kan träda in och vara användbar mot de internationella och nationella plattformar som är verksamma i de olika EU-länderna. Det kan dock finnas specifika branscher, marknader eller strategier som behöver åtgärdas utifrån en helhetssynpunkt, som eventuellt inte kan åtgärdas med hjälp av det nuvarande regelverket. Författaren pekar därmed på att ett svenskt flexibelt regelverk eller ”konkurrensverktyg” skulle vara att föredra. Det skulle ge Konkurrensverket nya verktyg för att implementera sektors- eller individuella skyldigheter och villkor.

Till projektet har det knutits en referensgrupp bestående av Stefan Larsson (Lunds universitet), Jonas Andersson Schwarz (Södertörns högskola), Sten Nyberg (Stockholms universitet), Per Karlsson (Advokatfirma Per Karlsson & Co), Erling Hjelmeng (Norwegian School of Economics), Lars Henriksson (Handelshögskolan i Stockholm) samt Christian Bergqvist (University of Copenhagen). Från Konkurrensverket har Staffan Martinsson, Johan Holmqvist och Joakim Wallenklint deltagit.

Författaren ansvarar själv för bedömningarna och slutsatserna i rapporten.

Stockholm, december 2022

Rikard Jermsten
Generaldirektör

Innehåll

Sammanfattning

Rapporten inleds med en diskussion om grundläggande koncept och egenskaper hos den digitala ekonomin. Den identifierar att vissa aspekter, såsom begränsning av tillgång till data, kan utgöra problem för att etablera konkurrenskraftiga marknader och industrier i den digitala ekonomin och i sakernas internet.

EU-kommissionen och de nationella konkurrensmyndigheterna har adresserat företags affärsstrategier verksamma i den digitala ekonomin. Utredningar genomförs och beslut fattas som sedan överklagas och prövas i domstol. Ekosystemet av konkurrensmyndigheter är verksamt och doktrin baserad på rättspraxis håller på att utvecklas. Icke desto mindre verkar den allmänna uppfattningen vara att konkurrensrätten saknar vissa aspekter när det gäller den tid som behövs för att utveckla användbara rättsdoktriner. Dessutom anses att de tester som tas fram ibland är alltför komplicerade och att de inte skapar klara och transparenta regler för företag att lätt följa och anpassa sig efter.

Rättsakten om digitala marknader (EN: Digital Markets Act) är antagen för att adressera konkurrensbegränsande aktiviteter på internet. Den vänder sig dock bara till så kallade grindvakter och är centrerad kring Europeiska kommissionen. Det finns en risk att rättsakten inte kommer att bli ett effektivt verktyg för att reglera dynamiska marknadsstrukturer och konkurrens i mindre ekonomier. Dessutom är rättsakten om digitala marknader komplicerad. Den är ett intrikat juridiskt verktyg till förmån för kommissionen och komplexiteten i förhandsreglerna kan leda till rättstvister, något som rättsakten var tänkt att förhindra.

Mot bakgrund av att konkurrensrättsdoktrinen genom de pågående utredningarna och beslut av Europeiska kommissionen och nationella konkurrensmyndigheter håller på att utvecklas, kan det antas att en nationell motsvarighet till den nyligen antagna rättsakten om digitala marknader inte är nödvändig. Unionsrättslig och nationell konkurrenslagstiftning kan träda in och vara användbar mot de internationella och nationella plattformar som är verksamma i de olika medlemsstaterna. Det kan dock finnas specifika branscher, marknader eller strategier som behöver åtgärdas utifrån en helhetssynpunkt, som eventuellt inte kan åtgärdas av till exempel Konkurrensverket med hänvisning till det nuvarande regelverket. Ett svenskt flexibelt regelverk eller ”konkurrensverktyg” skulle därmed vara att föredra. Ett flexibelt regelverk skulle ge Konkurrensverket ett verktyg för att implementera sektors- eller individuella skyldigheter och villkor. Dessa kan användas gentemot speciella branscher eller marknader såsom datadrivna marknader, mediemarknader, eller för att generellt reglera dataåtkomst och portabilitet inom en industri. Dessutom skulle konkurrensverktyget bli en tillgång för framtida konkurrensproblem inom sakernas internet. Rapporten konkluderar att konkurrensen skulle gynnas av ett ”konkurrensverktyg” och att lagstiftaren bör utreda och överväga att komplettera den svenska konkurrenslagen i enlighet med detta. Ett sådant lagstiftningsinitiativ bör hämta inspiration från de nordiska länder som har eller överväger att implementera liknande verktyg.

Summary

The report starts with discussing basic concept and characteristics of the digital economy. It identifies certain aspects, such as restriction on access to data, may constitute a problem for establishing competitive markets and industries in the digital economy and in the upcoming Internet of Things paradigm.

When discussing applicability of competition law to the digital economy, the ecosystem consisting of the European Commission and the national competition authorities has gained momentum. Investigations are being started, pursued and concluded. Decisions are being appealed and litigated in court. The system seems thus to be up and running. Principles, tests and case law based doctrine are being developed. Nonetheless, the general consensus seems to be that the Competition legal system lacks certain aspects in reference to the time needed to develop useful legal doctrines and is too complex to enable clear and transparent rules to develop.

In response, the newly enacted Digital Markets Act opens an avenue for a new, interoperable Internet, where leveraging (including self-preferencing) and other forms of abuse are restricted ex ante in a sector or industry specific regulation. However, the Digital Markets Act caters to gatekeepers only and is centred around the European Commission. There is a risk that it cannot become an effective tool to regulate dynamic market structures and competition in smaller economies. Moreover, the Digital Markets Act became after the trialogue very complicated. It is an intricate legal tool semi-exclusive for the benefit of the Commission and the complexity of the ex ante rules may lead to lengthy litigations, something which the Digital Markets Act was supposed to mitigate in the first place. Indeed, it is a tool for the EU Commission addressing the very largest platforms.

A national equivalent to the newly enacted Digital Markets Act is not necessary. National and EU competition law may step in and be useful against the international and national platforms active in the various Member States. However, there may be specific industries, markets or conduct that needs to be addressed from a holistic point of view, that possible cannot be addressed by the Swedish Competition Authority under the current competition rules.

A Swedish ”competition tool” could therefore be useful. It can provide a basis for creating sector conditions and individual obligations that can be used vis-a-vis special industries, markets such as the data-driven markets, media markets, or to employ a specific remedy, such as data access and portability, broadly, i.e. erga omnes, or against an individual data holder. Moreover, a competition tool is flexible also to address upcoming competition concerns in reference to Internet of Things. The report therefore concludes that the economy would benefit from a “competition tool” and that the legislator should consider amending the Swedish Competition Act accordingly and that such legislative initiative should take inspiration from the Nordic countries that have or are considering implementing similar tools.

1. Introduction

The purpose of the report is to shed light on platforms' business practices and their future regulation under competition law or in related legal systems. The two research questions are as follows.

Question A: Based on the reports published by national and regional competition authorities in this area and the Swedish Competition Authority's sector survey, identifying platforms' suspected business practices and investigate the applicability of competition law and the proposed sector-specific regulation for platform, i.e. the new Digital Markets Act.

Question B: investigate what a member state and competition authority can use to address the platforms' business practices according to point A above. The focus here will be on alternative methods rather than court proceedings to develop new rules and doctrine.

The Report uses both a normative and a policy oriented approach, while the methodology used is interdisciplinary, legal dogmatic and legal analytical. I make use of result from research conducted by economists,[1] however, the main trust of my arguments is in essence legal.

The answer to question A, provided in chapters 2-4, will mainly be based on what has emerged in the Swedish Competition Authority's (SCA) sector survey[2] and in the report from the EU (Crémer et al[3]) and in similar reports from the UK (CMA final report from 2020[4] and Furman Report United Kingdom HM Treasury 2019[5]), the German reports (e.g. Federal Ministry of Economic Affairs and Energy 2019[6]), the Australian Competition and Consumer Commission report from 2019[7], different US reports (for example the Stigler Report 2019, the

[1] See, in particular, the writing of Iain M. Cockburn, Rebecca Henderson, Scott Stern, The Impact of Artificial Intelligence on Innovation: An Exploratory Analysis, in Joshua Gans, Ajay Agrawal and Avi Goldfarb (eds) The Economics of Artificial Intelligence: An Agenda (*University of Chicago Press* 2019); Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (*CentER Discussion Paper*; Vol. 2017-007), Tilburg: CentER, Center for Economic Research; Parker, Geoffrey and Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust (May 22, 2020). Available at SSRN: https://ssrn.com/abstract=3608397 or http://dx.doi.org/10.2139/ssrn.3608397. Kerber arguing against an exclusive data property right: Wolfgang Kerber, A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis, GRURInt. 2016, 989, Kerber, 'Rights on Data: The EU Communication "Building a European Data Economy" from an Economic Perspective' in Sebastian Lohsse, Reiner Schulze, Dirk Staudenmayer (eds), Trading Data in the Digital Economy: Legal Concepts and Tools (Baden-Baden: Nomos, 2017) 109; See also, in particular, the study by the European Commission Joint Research Centre (JRC): Nestor Duch-Brown, Bertin Martens and Frank Mueller-Langer, 'The economics of ownership, access and trade in digital data', JRC Digital Economy Working Paper 2017-01 (Seville: European Commission, 2017), available at: https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf.

[2] The Swedish Competition Authority´s report *Konkurrensen på digitala plattformsmarknader i Sverige* (EN: The competition on digital platform markets in Sweden) 2021:1.

[3] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), *Competition policy for the digital era*, Publications Office of the European Union.

[4] The UK Competition and Markets Authority ("CMA") (2020) *Online platforms and digital advertising Market study final report.*

[5] Furman Report: HM Treasury (2019), *Unlocking digital competition, Report of the Digital Competition Expert Panel.*

[6] Federal Ministry for Economic Affairs and Energy (2019), *A new competition framework for the digital economy*. Report by the Commission Competition Law 4.0.

[7] Australian Competition and Consumer Commission (2019), *Digital Platforms Inquiry. Final Report.*

Committee for the Study of Digital Platforms 2019[8] also the results from Federal Trade Commission "Hearings on Competition and Consumer Protection in the 21st Century" and hearing from Congress[9]) the Canadian report[10] and BRICS countries (BRICS Competition Law and Policy Center 2019[11])(collectively referred to as the reports). I will furthermore draw on the research I have previously conducted in this area, research which I have developed in this Report.[12] Articles from academia will be used when appropriate.

Answer to question B will be addressed in chapter 5, where appropriate conclusion from chapters 2-4 will be drawn.

[8] See for example George J. Stigler Center for the Study of the Economy and the State, *Sub-committee on Market Structure and Antitrust Report* (2019), Final Report by the Market Structure and Antitrust Subcommittee.

[9] U.S. House of Representatives, 116th Congress (2020), Report on Investigation of Competition in Digital Markets: Majority Staff Report and Recommendation.

[10] Competition Bureau Canada (2018) Big Data and Innovation: Key Themes for Competition Policy in Canada

[11] BRICS Competition Law and Policy Centre (2019), *Digital Era Competition: A BRICS View Committee for the Study of Digital Platforms* (2019). BRICS Competition Law and Policy Centre (2019), Digital Era Competition: A BRICS View.

[12] See for example, Björn Lundqvist, Regulating the Data-Driven Economy under EU Law - Access and Portability of Data' (forthcoming *Cambridge University Press* 2022); Björn Lundqvist, An Access and Transfer Right to Data – from a Competition Law Perspective in *Journal of Antitrust Enforcement* 2022; Björn Lundqvist How Does the EU Protect Competition in the Digital Platform Economy? in Bakardjieva Engelbrekt, A., Leijon, K., Michalski, A., Oxelheim, L. (eds.), *The European Union and the Technology Shift*, Palgrave, Springer Berlin, Heidelberg (2021); Sten Nyberg, Richard Friberg, Björn Lundqvist and Robin Teigland Konjunkturrådets rapport 2021: *Digitalisering och konkurrens*, 2021 SNS Förlag; Björn Lundqvist with Michal Gal (ed) 'Competition Law for the Digital Economy' (*ASCOLA Competition Law series Edward Elgar* 2019); Björn Lundqvist, Data Collaboration, Pooling and Hoarding under Competition Law in Rosa Maria Ballardini, Petri Kuoppamäki, and Olli Pitkänen (eds) *'Regulating Industrial Internet Through IPR, Data Protection and Competition Law*' (Hart 2019); Björn Lundqvist 'Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet-of- Things World: The Issue of Accessing Data' in Bakhoum M. et al (red) 'Personal Data in Competition, Consumer Protection and Intellectual Property Law' (*MPI Studies on Intellectual Property and Competition Law*, vol 28. Springer, Berlin, Heidelberg 2018).

2. Basic concepts and issues and current problems with The Digital Economy as depicted in Reports and Doctrine

2.1 The Digital Economy and Platforms

The reports do not converge on a single, exact definition of digital markets or of digital platforms, yet these relevant identified undertakings in the digital economy can generally be understood as intermediaries that connect two or more groups of users and, in doing so, benefit from *direct and indirect network effects*.[13] The connection created by these intermediaries often on platforms leads to the creation of the so-called *two-sided* or *multi-sided markets*, which may be viewed as a requirement for the establishment of a platform.[14]

When describing the overall structure of competition in digital markets the reports tend to discuss similar characteristics for identifying the digital markets. They all agree that digital markets do not have a single characteristic that differentiates them from traditional markets. Yet, it is the combination of a few specific characteristics usually found in isolation in other markets that, according to the majority of the reports, justifies a specific focus. In particular, markets with dominant digital platforms are normally characterized by strong direct and indirect network effects, economies of scale, economies of scope connected to the role of data as an input, low marginal costs, zero prices and global scope.[15]

The digital markets that share these characteristics tend to *tip* – that is, these factors push these markets to concentrate around one service provider or platform. Markets with tipping effects normally witness strong competition *for* the market. In other words, competition to become the leading provider in that market is strong in the beginning, while the competition may quickly deteriorate when the market has tipped in the favour of the platform that has acquired all or most demand. The market then transforms into a long period of weak competition where the winner/monopolist extracts rents associated with its market power. The platforms market position and the supra competitive rents are, according to several reports, protected by high entry barriers.[16] The barriers are connected with the direct and indirect network effects, important economies of scale and scope (often related to an advantage in data), the personalization of the services/products offered and the importance of ecosystems competition. These barriers also hinder the entrance and expansion of competing services, even when these services are theoretically superior.[17]

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[13] See e.g. Australian Competition and Consumer Commission, *Digital Platforms Inquiry–Final Report* (2019) 41. The Stigler report (2019) 34 et seq.

[14] EU report (2019) 19-21; Bundeskartellamt, Market Power of Platforms and Networks (Bundeskartellamt, Working Paper No. B6 113/15, 2016), 2-4. For a useful analysis, see Lancieri, Filippo and Sakowski, Patricia, *Competition in Digital Markets: A Review of Expert Reports* 26 Stan. J.L. Bus. & Fin. 65 (2021).

[15] The Stigler report, 34 et seq.; Bundeskartellamt, Market Power of Platforms and Networks (Bundeskartellamt, Working Paper No. B6 113/15, 2016), 3 et seq.; Federal Ministry for Economic Affairs and Energy (2019), *A new competition framework for the digital economy*. Report by the Commission Competition Law 4.0, 16; U.S. House of Representatives, 116th Congress (2020), Report on Investigation of Competition in Digital Markets: Majority Staff Report and Recommendation, 40-41. See also Lancieri, Filippo and Sakowski, Patricia, *Competition in Digital Markets: A Review of Expert Reports* 26 Stan. J.L. Bus. & Fin. 65 (2021).

[16] The EU report, 23; Furman report, 38-39; BKart's Working Paper, 12-15.

[17] The Furman Report, at 8; The Stigler report, 35.

Notwithstanding the above, multi-homing, where consumers utilize different competing services on the net may increase competition and restrict the high entry barriers. The EU report states that the entry of new competitors might be facilitated by multihoming and interoperability.[18] If users can use several platforms at the same time, i.e. multihome, it will be easier for a new entrant to convince some users to switch to their platform while still being able to conserve the benefits of using the incumbent platform to interact with others. The new entrant might be able to offer a niche product which appeals to a relatively small group of the entrants. Similarly, interoperability allows new entrants to offer services complementary to those offered by one or several platforms, thereby facilitating multihoming and allowing new entrants to grow and potentially challenge the dominance of a platform. It is important for competition policy to ensure that dominant platforms do not impair multi-homing with new entrants, while multi-homing between large platforms could limit competition.[19]

Both multihoming and interoperability may lessen the likelihood and effect of tipping. The risk of tipping and market concentration is different in different digital platform markets. Frictions between user groups that weaken network effects, the presence of multi-homing and the limited value of collected customer data are all factors that contribute to reducing the risks.[20]

2.2 Data-driven Business Models

As indicated above, the reports identifies returns to scale, network effects, privileged access to capital sources and economies of scope as helpful to explaining the growth of digital platforms and online ecosystems. Yet, the key role to create or trigger these characteristics is data. For example, the EU Report and the Furman Report argues that the accumulation of data on consumer and business users behaviour all help drive concentration in these markets.[21] Data is vital to the Internet-based economy and will become even more important in the old economy as the Internet of Things (IoT) gains ground. The competitiveness of firms will increasingly depend on timely access to relevant data and the ability to use that data to develop new, innovative applications and products. In consumer-oriented businesses, the relevant data is often personal information; although this data is becoming increasingly collectable, only a few firms have access to larger amounts of it.

Consumers access to digital services is offered to a significant degree in exchange for the sharing of personal data. This applies to about 30 percent of antivirus and navigation software and cloud storage services, 77 percent of streaming services and more than 50 percent of movies, video, TV content, e-books and games.[22] However, this data-for-service concept applies most of to the large platforms, which collect personal and non-personal data from individuals and firms that are compelled to provide data when they want to be active on the internet.

[18] EU Report, 37 et seq.

[19] Ibid.

[20] SCA report, at 88.

[21] EU Report at 2-3, 15.

[22] Stefan Larsson på uppdrag av Konkurrensverket, *Dataekonomier – Om plattformar, tredjepartsaktörer och behovet av transparens på digitala marknader*, Uppdragforskningsrapport 2020:4, p. 34.

The notion of the walled garden[23] is often used to describe ecosystems, such as Google's and Facebook's respective systems, which exclusively collect the data and where individual-level data remains under the control of these platforms and is generally not shared with other market participants.[24]

It should be acknowledged that platforms – specifically Google and Facebook – do not collect data solely from their own respective ecosystems or walled gardens. Data is also provided by third parties: the business users of platforms, e.g. advertisers and publishers, including news and other content providers. They provide data voluntarily to the platforms, while also indirectly giving access to their websites so that Google and Facebook can collect data. As stated in a final report from July 2020, CMA claims that for platforms in reference to digital advertisement there are two broad sources to use for collecting data: (i) data gathered from the platforms' own walled garden (or, as CMA defines it, their 'consumer-facing services and products'), and (ii) data collected from third parties, notably those that use the platforms' services and technology on their own websites.[25]

In reference to their own ecosystems, platforms collect data regarding each individual user when that user browses or logs on to a platform. Everything is collected, from web and search history, the hardware used, uploaded or written information on the web and clicks to information that the user's mouse have hovered over. Generally, information regarding all individual activities in the ecosystems and background information regarding the users is collected, categorized and stored as data. It should also be noted that while Google has an unprecedented 53 consumer facing-services where data may be harvested directly, Google and Facebook's substantial ability to collect data from third-party websites and apps sets them apart from other platforms.

CMA has found that Google is the leader in terms of coverage of third-party websites and holds even more of a lead if one takes into account the platform's popularity. Google tags that collect data are found on over 80 per cent of the UK's 1000 most popular websites, and Google has provided software development kits that collect observed and volunteered data to 85 per cent of the most popular apps in the Play Store.[26] Google also collects data from its publishing service and ad exchange. Oracle Moat claims that it is impossible to use the Internet without providing data to Google and that approximately 75 per cent of the top 100,000 websites on the Internet use Google Analytics.[27] This is also supported by earlier research. Engelhardt and Narayanan's detailed measurement of online tracking in 2016, based on a

[23] 'Walled gardens' are a closed ecosystem in which a platform provides a complete end-to-end technical solution for advertisers and publishers, and advertisers and publishers are restricted in their ability to choose other technical solutions. These ecosystems can be very large; Google's system includes Android and Chrome operating systems, YouTube, Gmail and Google Maps. Facebook's ecosystem includes WhatsApp, Instagram, Messenger and Marketplace. CMA Final Report, 4.24. fn. 225.

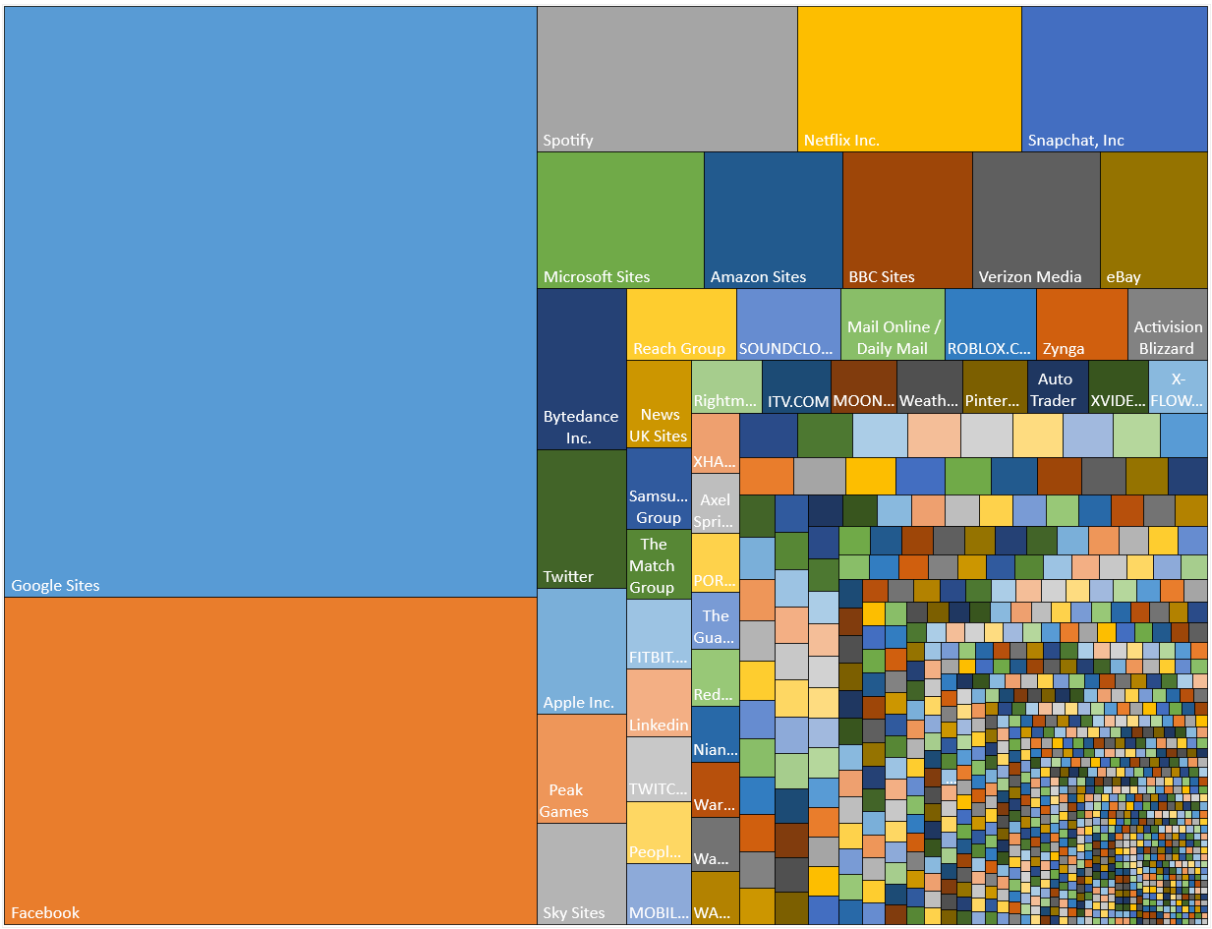
[24] See CMA Final Report, 4.24. Platforms share to some extent aggregate-level data with other market participants.

[25] CMA Final report Appendix F.

[26] Ibid.

[27] CMA Final report Appendix F. European Commission, *Enter the data Economy: EU Policies for a Thriving Data Ecosystem*, 21 EPSC Strategic Notes, 1 (11 January 2017).

crawl of the top one million websites, shows that Google tracked activities on 85 per cent of the sites.[28] All of the top five third-party trackers belonged to the Google ecosystem, and 12 of the top 20 were Google-owned domains.[29]



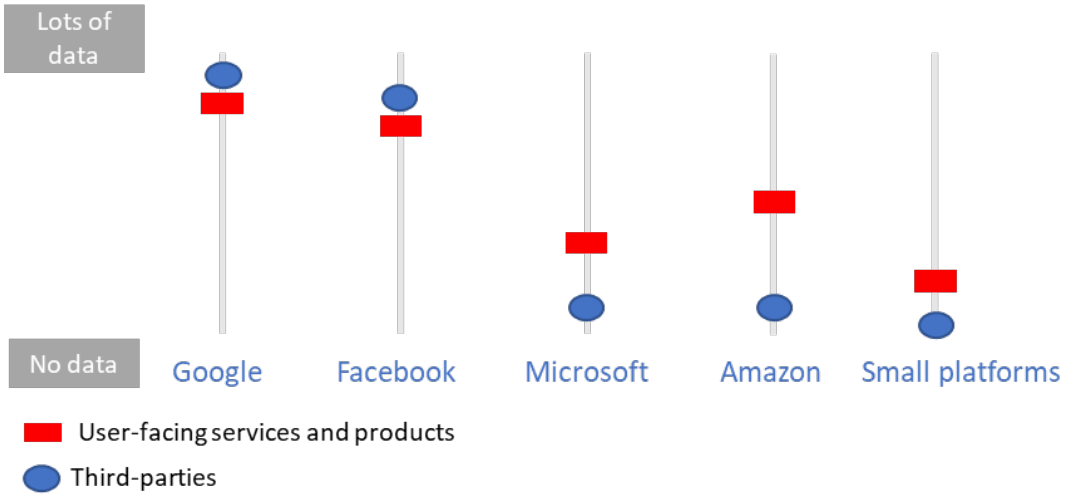
Source: Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, February 2020, UK.
Notes: Top 1000 properties account for 83% of total user time spent online.
* Where 'Google Sites' includes all Google owned properties e.g. YouTube and Google Search.
†Where 'Facebook' includes Facebook, Instagram and WhatsApp.

Facebook holds second place regarding the prevalence of tags, covering 40 to 50 per cent of the most popular websites, and providing software development kits that collect observed and volunteered data to 40 per cent of the most popular apps on the Play Store. Facebook is thus tracking users on websites without advertisements. Such tracking can provide additional insights into individuals' habits, and online advertising companies such as Facebook and Google offer web developers a range of "free" non-advertising services that are subsidized when developers allow Facebook and Google to track users. For example, a developer may

[28] Steven Englehardt, Arvind Narayanan, Online tracking: A 1-million-site measurement and analysis, section 5, ACM Conference on Computer and Communications Security, 2016. FPF Privacy Papers for Policy Makers Award. See also T. Libert. Exposing the invisible web: An analysis of third-party http requests on 1 million websites. *International Journal of Communication*, 9(0), 2015.

[29] Ibid.

include the Facebook "Like" button on a website to facilitate sharing content, which allows Facebook to track the activities of all visitors – irrespective of whether these visitors are Facebook users.[30]



Source: Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, February 2020, UK.
Notes: Top 1000 properties account for 83% of total user time spent online.
* Where 'Google Sites' includes all Google owned properties e.g. YouTube and Google Search.
†Where 'Facebook' includes Facebook, Instagram and WhatsApp.

The Australian Competition Authority (ACCC) reached similar findings in its Digital Platforms Inquiry.[31] According to the ACCC, the breadth and depth of user data collected by the incumbent digital platforms provide them with a strong competitive advantage, creating barriers to rivals' entry and expansion in relevant markets, and allowing the incumbent digital platforms to move into adjacent markets. Although there is no shortage of user data, and a large number of businesses track consumers' digital footprints, no other businesses come close to achieving the level of tracking undertaken by Google and Facebook. The ACCC estimates that more than 70 per cent of websites have a Google tracker and more than 20 per cent of websites have a Facebook tracker. It is also estimated that of the apps available on the Google Play Store, 88 per cent send user data back to Google and 43 per cent send user data back to Facebook. The multiple touch points that Google and Facebook each have with their users enable them to collect more user data, improve their services and attract more users and advertisers, creating a virtuous feedback loop.[32]

Given the business strategy of data-driven businesses and the reach of Google and Facebook, individuals as well as firms using these and other services on the Internet are *de facto* forced to yield data.[33] Several of the services provided on the Internet are indispensable to proper

[30] Elena Maris, Timothy Libert and Jennifer R Henrichsen in *New media & society* 2020, Vol. 22(11) 2018–2038.

[31] ACCC, Digital platforms Inquiry, final report, at 11 et seq.

[32] ACCC, Digital platforms Inquiry, final report, part 1, p. 11.

[33] It seems very difficult to de facto refuse or withdraw consent to access data, see discussion infra section 6. Compare Eugenia Politou, Efthimios Alepis, Constantinos Patsakis, Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions, *Journal of Cybersecurity*, Volume 4, Issue 1, 2018, tyy001, https://doi.org/10.1093/cybsec/tyy001.

and normal function in society, and accessing these services requires the user's consent under GDPR for platforms to collect data. Even if the provider of the specific internet-based service in question does not collect the data, this data can still be generated – and may benefit the large platforms because they provide third-party technology and services to the website in question and have acquired broad consents from users. Moreover, several of the necessary services provided on the Internet today also force users to agree to allow the provider to store and analyse the data created by user activities on the platform.[34]

The US House Antitrust Subcommittee is also looking into Amazon's behaviour. In response to questions for the record from House Antitrust Subcommittee Chairman David Cicilline, D-R.I., Amazon claimed not using individual data, it only uses aggregated data to develop with its own line of products. Amazon's use of private data to shape and promote its own branded goods seems to be a key question for lawmakers and regulators probing the company's competitive practices.[35] Nevertheless, Amazon still seems be the leading transaction platform globally, collecting data about customers, the business users of its marketplace and the products and services being purchased. The company has an exclusive, birdseye view of several markets, including the data representing the sales and purchasing activities of possibly all firms and customers active in these markets – on an individual level – and may thus understand purchasing and supply patterns that enable Amazon to enter the market vertically and successfully with its private label. As will be discussed infra, the EU Commission currently is investigation Amazon in reference to said business strategy.

However, in terms of advertising business, Google and Facebook are the clear leaders. These firms are vertically integrated in the sense that they sell their own public ad inventory, i.e. ads on their platforms and websites[36] to publishers, while also providing their own respective ad exchanges or platforms where they sell publishers' ad inventory to third parties. Interestingly, these companies also are active on the other side of the ad market, where they both offer demand-side platforms providing purchasers of advertising inventory.[37] According to CMA, Google is market leading in both the respective ad exchanges or platforms and the demand-side platforms.[38] A CMA report also notes that Google has been able to use its

[34] Ibid. For an early reference regarding data, see Ezrachi, Ariel. - Virtual competition: the promise and perils of the algorithm-driven economy [Elektronisk resurs]. – 2016.

[35] Lauren Feiner, Amazon admits to Congress that it uses 'aggregated' data from third-party sellers to come up with its own products, *CNBC*, NOV 19 2019, https://www.cnbc.com/2019/11/19/amazon-uses-aggregated-data-from-sellers-to-build-its-own-products.html.

[36] Google controls websites such YouTube; Facebook controls Instagram and WhatsApp.

[37] CMA Final Report, p. 19 et seq.

[38] Their analysis of 22,484 pornography websites indicated that 93 % leak user data to a third party. Tracking on these sites is highly concentrated to a handful of major companies, which were identify. We successfully extracted privacy policies for 3,856 sites, 17 % of the total. The policies were written so that one would likely need at least a 2-year college education to understand them. Our content analysis of the sample's domains indicated 44.97 % of them expose or suggest a specific gender/sexual identity or interest likely to be linked to the user. We identify three core implications of the quantitative results: (1) the unique/elevated risks of porn data leakage versus other types of data, (2) the particular risks/impact for "vulnerable" populations, and (3) the complications of providing consent for porn-site users and the need for affirmative consent in these online sexual interactions.

market power in search technology and its wider ecosystem to build its ad inventory business and, in addition, its position as a demand-side platform.[39] To do so, Google has leveraged its user data and large base of advertisers (from Google Ads, its ad inventory business) to favour its demand-side platform, and by tying access to YouTube to use of its demand-side platform services.[40] Google, Facebook and Amazon thus collect huge amounts of information horizontally regarding individuals and who they are, while also collecting data vertically regarding the products and firms utilizing the platforms' services.

It should be mentioned that platforms also try to restrict other firms from acquiring the muscle needed to monitor and attribute. In 2018, Google restricted access to its User IDs (the DoubleClick ID) by removing it from its Campaign Manager and DSPs log files, and curtailed the availability of user-level exposure data from ad campaigns. This meant that ad buyers could no longer extract data from the DoubleClick Campaign Manager for reporting on ad performance and ad attribution. Google indicated that the DoubleClick ID could be tied to sensitive information such as user search histories and could thus violate the strict data privacy requirements of GDPR.[41] However, it seems clear that Google could still access individual data – or at least extract the same information from other parts of its ecosystem.

Stakeholders on the buyer side suggested that stripping out the DoubleClick ID removed visibility about user activity within the DoubleClick ecosystem, making it almost impossible to compare the performance of ads purchased through the Google AdTech stack to ads purchased through other intermediaries. It was also suggested that the change made independent ad attribution much more difficult.[42]

The strategy of restricting data access for competitors and potential competitors is particularly relevant, for example, to understanding the impact of Google's recent announcement that Chrome browsers will stop support for third-party cookies in the future, thus restricting the ability of publishers to sell personalized advertising.[43] On 8 January 2021 the UK CMA announced its probe into Google's proposed 'Privacy Sandbox' project (i.e. Google's proposed removal of third-party cookies and other functionalities from Google's Chrome and Chromium browser engines and replacement with a new set of tools by the end of 2022). The formal investigation was prompted by complaints of alleged anticompetitive behaviour and user data privacy concerns. Complainants include Marketers for an Open Web Limited, a

[39] This is also supported by research conducted on the behalf of the Swedish Competition Authority, where out of the media website analysed, all news media and 28/39 websites used Google ad works, and Google was tracking 90 of 116 sites analysed. See Stefan Larsson på uppdrag av Konkurrensverket, *Dataekonomier – Om plattformar, tredjepartsaktörer och behovet av transparens på digitala marknader*, Uppdragsforskningsrapport 2020:4, p. 67.

[40] Ibid.

[41] CMA Final report Appendix F.

[42] CMA Final report Appendix F. Geradin, Damien, Online Platforms and Digital Advertising Market Study: Observations on the Statement of Scope (February 13, 2020). Available at SSRN: https://ssrn.com/abstract=3537856 or http://dx.doi.org/10.2139/ssrn.3537856.

[43] CMA Final report Appendix F. Geradin, Damien and Katsifis, Dimitrios and Karanikioti, Theano, Google as a de facto privacy regulator: Analyzing Chrome's removal of third-party cookies from an antitrust perspective (November 26, 2020). Available at SSRN: https://ssrn.com/abstract; Geradin, Damien and Katsifis, Dimitrios, Taking a Dive Into Google's Chrome Cookie Ban (February 19, 2020). Available at SSRN: https://ssrn.com/abstract=3541170 or http://dx.doi.org/10.2139/ssrn.3541170 Geradin, Damien and Katsifis, Dimitrios, 'Trust Me, I'm Fair': Analysing Google's Latest Practices in Ad Tech from the Perspective of EU Competition Law (October 7, 2019). TILEC Discussion Paper No. DP 2019-029, Available at SSRN: https://ssrn.com/abstract=3465780 or http://dx.doi.org/10.2139/ssrn.3465780.

group of newspaper publishers and technology companies, which allege that Google is abusing its dominant position. The investigation will cover both competition law and implications for data privacy. In its announcement, the CMA emphasised that it has an "open mind" and has not concluded at this stage as to whether competition law has been infringed.[44] It should also be mentioned that in December 2020, the Commission reportedly sent wide-ranging questionnaires seeking views on the rollout of AMP (a standardised webpage template for sites to load quicker) and on Google's plans to block cookies from its Chrome browser. The Commission's questionnaires will feed into two preliminary antitrust inquiries focused on Google's data gathering and online advertising technology. Recipients had until the end of January 2021 to respond.[45]

It seems clear the platform providers can become the masters of their respective data ecosystems, or walled gardens, and inside these gardens they can indeed hoard data. Generally, they do not trade or share the individual-based data originating from the platform, or more precisely, the walled garden.[46] It seems much more profitable to provide sophisticated and refined services based on collected data than to sell the raw data as a commodity.[47] Other platforms have more limited access to data in terms of quantity and/or quality of analytics data coming from Google and Facebook's walled gardens; on the other hand, these platforms have a general reach that allows them to mine data across the entire Internet, and this constitutes a barrier to entry and expansion.[48] The advantage held by Google, Facebook and (to some extent) Amazon is that they are vertically integrated in the digital advertising business.

CMA claims in its report that publishers in particular complain about the extent of vertical integration that has taken place in the open display market. While vertical integration can allow intermediaries to realize technical efficiencies, it can also give rise to conflicts of interest and allow companies with market power at one stage of the value chain to use that power to undermine competition at other stages. The concerns that CMA noted focus on the role of Google, which has a very strong position in advertising intermediation in the UK, controlling a share of [90-100] per cent of the publisher ad server segment, [80-90] per cent of the advertiser ad server segment and shares of [50-60] per cent in supply-side platforms (SSPs) and [50-60] per cent in demand-side platforms (DSPs).[49] In their joint complaint from December 2020, a number of Republican state attorneys in the USA claim that Google has monopoly positions in the US on the ad server market, ad exchange market, and display ad exchange and network markets.[50]

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[44] https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes

[45] https://www.bloomberg.com/news/articles/2021-01-20/google-questionnaires-target-data-use-collection-eu-says

[46] As mentioned supra, neither Google nor Facebook is trading personal data to third parties. Cf. https://safety.google/privacy/ads-and-data/ and Kurt Wagner, This is how Facebook uses your data for ad targeting You've got questions. We've got answers, *Vox*. See also Björn Lundqvist, Cloud Service as the ultimate Gate(keeper) *The Journal of Antitrust Enforcement*, Vol 7, Issue 2, July 2019, Pages 220–248. See also CMA Final report Appendix F.

[47] Regarding value chains, see Porter ME. Clusters and the new economics of competition. *Harv Bus Rev*. 1998;76(6): 77–90. See generally regarding profit margins for data-driven value chains: Moro Visconti, Roberto and Larocca, Alberto and Marconi, Michele, Big Data-Driven Value Chains and Digital Platforms: From Value Co-Creation to Monetization (January 18, 2017). Available at SSRN: https://ssrn.com/abstract=2903799 or http://dx.doi.org/10.2139/ssrn.2903799.

[48] Ibid.

[49] CMA Final report, 20 et seq.

[50] Russell Brandom, Texas attorney general announces ad tech antitrust probe against Google 'This goliath of a company is using its power to manipulate the market', Dec 16, 2020, *The Verge*, https://www.theverge.com/2020/12/16/22178988/google-antitrust-ad-tech-lawsuit-texas-attorney-general-paxton.

It seems that Facebook and Amazon have similar vertical set-ups connected to their walled garden and ecosystem as Google, although these two platforms have not gained the same leading market position – or as much data – as Google. In reference to vertical integration, it should also be mentioned that Amazon, as discussed above, is being investigated regarding use of business customers' data to promote its own private label. Facebook, Google and Amazon have a data advantage and do not trade in data, but there are data brokers that can provide the information but not the services provided by the platforms.[51]

The above presentations of Google, Facebook and Amazon show that several of the reports identify that platforms are 'walled gardens' and networks for collecting data, where the centre of gravity is the hubs – the platforms. Receiving all data from the ecosystems, these platforms have technical and legal systems that allow them to prevent sharing the data and limit interoperability of data. The business strategy is based on the notion of collecting, analysing and using services based on data, while not giving access to data. Data is the key to this setup, and the data comes from other sources than the actions of the platforms. Instead, the data is generated by the parties on either side of the platforms – either consumers or business users.

Finally, it is worth noting that although widespread, this view that data recurrently supply incumbents with a key competitive advantage is not unanimous. The Canadian CBC's Report indicates that undertakings in different industries have been using data as an input for years and that it is not clear that we are undergoing a data revolution.[52] The French-German report acknowledges the importance of databases but observes that in many situations/markets, data maintain their public good nature and are not relevant for competitive dynamics.[53]

2.3 Zero Pricing and Leveraging

From an economic point of view, the network effect works in the digital economy because as the numbers of platform users increase, the more data that is generated; the more data, the better the service, implying that even more users are drawn to the platform. When it comes to data, 'the bigger the better' is obvious.[54]

[51] Federal Trade Commission. (2014). *Data Brokers: A Call for Transparency and Accountability: A Report of the Federal Trade Commission* (May 2014). https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014.

[52] Competition Bureau Canada (2018) Big Data and Innovation: Key Themes for Competition Policy in Canada.

[53] The French Autorité de la concurrence and the German Bundeskartellamt (2019) *Algorithms and Competition*.

[54] See Shapiro Carl, and Hal R. Varian. Information rules: a strategic guide to the network economy. *Harvard Business Press*, 1998, for an early research pointing to the importance of network effect in the digital economy.

While the precise characteristics of each platform vary from market to market, they tend to share a set of general features that collectively support a 'winner takes most' dynamic:[55]

- Online platforms typically have very low marginal costs and significant economies of scale in delivering the core service.
- Network effects mean that the value of a service to existing users of a platform increases as the total number of users increases. The nature of network effects can vary significantly between platforms.
- The fact that consumers do not pay directly for the platform's services limits consumers' incentives to switch, and means that new entrants must attract users through demonstrably better quality or innovative features, rather than being able to undercut on price.
- The data-driven business strategies employed by these platforms feed on data and require a constant influx of fresh, nowcasted data.

Online platforms typically seek to attract consumers by offering their core services for free. Once they have attracted a critical mass of consumers, they seek to make money from business users on another side of the platform. Several reports observe that platform often provide their services to the price of zero, while consumers pay for the digital services by bartering data and attention in exchange for services and ads.[56] Indeed, not only does this combination of data and attention have a market price, but the high profit margins of digital platforms indicate that this value is not zero.

The Special Advisers Report argues that there is a discontinuity in the demand curve when prices reach zero, which makes this a focal value. The Furman Report adds that platforms like Facebook have deliberately changed policies around data collection, processing, third-party sharing, and data access in general while maintaining zero prices—showcasing this trade-off. The Stigler Report describes how zero prices increase the importance of behavioural economics in the competitive dynamics of digital markets.

In transaction-based platforms, such as Amazon Marketplace or Apple's App Store, zero pricing is done predominantly through the commission that is charged to retailers or app developers, respectively. For other platform services, such as search engines and social media services, monetization results predominantly from serving ads. Google and Facebook are by far the largest two companies operating according to this business model.[57]

Although consumers do not pay money for these services, they can be considered to pay for them by giving the platform their attention, as well as data about themselves.[58] Advertising-funded platforms are able to combine the attention of their users with contextual or personal information they have about them to serve highly targeted adverts, for which advertisers

[55] See CMA Interim Report (2019), Furman Review (2019), *Unlocking digital competition*. Stigler Center (2019), Committee on Digital Platforms Final Report.

[56] EU report 44; The Furman report 22-23, 42; Australian report 61; The Stigler report 55.

[57] CMA 2020 Final report.

[58] Wu, T. (2017). Blind spot: The attention economy and the law. *Antitrust Law Journal*, 82. See also Evans, D. S. (2019). Attention Platforms, the Value of Content, and Public Policy. *Review of Industrial Organization*, 54(4), 775-792.

have high demand. Research published in 2018 demonstrated that consumers place great value on a range of online services, and that values of multiple thousands of dollars are assigned to search engines and digital maps. Generally, video streaming services such as YouTube and social media received lower valuations, but these valuations by far exceed the price that is paid by the consumers, which is normally zero.[59]

Search engines give us instant access to information, news, directions to destinations, and other websites with minimal effort. Social media services let us connect with friends and family around the world, make new friends, keep up with news or current trends, and share creative content with one another.[60]

By limiting price competition, zero prices force companies to contend on quality characteristics that are hard to compare and that disproportionately favour incumbents. When combined with other market characteristics, such as low marginal costs, economies of scope, and network externalities, these zero price markets tend to be dominated by the product offering the best quality, as opposed to more traditional markets where users can opt for different layers in a quality/price curve. This reinforces the potential dominance of established incumbents.

The economists Prüfer and Schottmüller have identified in a recent well-received paper[61] that data-driven markets tend to tip as a result of even slight differences in the amount and quality of data, and when such a market tips, there is no remedy to re-establish competition except by granting access to data. Moreover, the economists also showed that superiority in data on one market may be leveraged to create market dominance on neighbouring markets, should a data-driven business model be implemented.[62]

Several economists point to the fact that direct and indirect network effects have become relevant because of recent progress in data storage and data analytics technologies.[63] In contrast to direct network effects and dynamic economies of scale (learning curve effects), data-driven indirect network effects cannot be easily copied by competitors or eliminated by

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[59] Brynjolfsson, Eggers, and Gannamaneni (2018), Using massive online choice experiments to measure changes in well-being, *National Bureau of Economic Research*, Working Paper 24514.

[60] According to the CMA Report, in terms of reach, around 95 % of UK Internet users access at least one Google site each month. Facebook's reach is around 85 %. Of the total time spent by users online, just over a third of this time is spent on sites owned by either Google (including YouTube) or Facebook (including Instagram and WhatsApp). The success of Google and Facebook in attracting consumers' attention is illustrated when consumer time spent on the top 1,000 properties is measured. Consumers spend around 86 % of their total time online on these top 1,000 properties, with the remaining 14 % split between an extremely long "tail" in excess of 16,000 websites.

[61] Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (CentER Discussion Paper; Vol. 2017-007), Tilburg: CentER, Center for Economic Research. See also the CASE AT.39740 Google Search (Shopping), 27/06/2017 and European Commission, Commission Staff Working Document Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, SWD/2017/0304 final - 2017/0228 (COD), Brussels, 13 September 2017 (Impact Assessment); Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, COM(2017) 9 Final, 10 January 2017.

[62] Ibid.

[63] See ibid, but also for example Parker, Geoffrey and Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust (May 22, 2020). Available at SSRN: https://ssrn.com/abstract=3608397 or http://dx.doi.org/10.2139/ssrn.3608397. See also Monopolkommission (2015), *Competition policy: The challenge of digital markets*, Special Report No. 68. Ioannis Lianos and Evgenia Motchenkova, Market Dominance and Search Quality in Search Engine Market (2013), 9 (2) *Journal of Competition Law & Economics*, 419-455, 419, 451.

innovation or new technology.[64] With initial differences in amount and quality of data, a market plagued by indirect network effects will eventually tip, and one firm will dominate the market. An important feature of a tipped market is that there are very few incentives for either the dominant firm or the ousted firms to invest further in innovation. The reason is that, in the stable, steady state where one firm has virtually no demand and the other firm has virtually full demand, the ousted firm knows that the dominant firm both offers consumers a significantly higher quality level and has significantly lower marginal costs of innovation.[65] When a market has tipped due to data-driven indirect network effects, new firms are deterred from entry, even if they have developed revolutionary technology, i.e., a disruptive innovation.[66] Indeed, when this has occurred and a firm holds a monopoly or quasi-monopoly position, it could be declared that the market or the industry is failing.[67] The market itself cannot create competition. This, in turn, according to several economists, could imply that competition law should be applicable and used to facilitate a functional market.[68]

The reports often argue that there is growing evidence that platforms have been entering adjacent markets to expand their market dominance. In addition, their privileged access to data and to consumers enables these companies to identify major threats and pre-emptively remove them through acquisitions and exclusionary behaviour, or by copying products/-functionalities and leveraging their control over the ecosystem to favour their own versions.[69]

In addition, Padilla and Condorelli agree that a strategy whereby large platforms request consumers to grant their consent to combining consumers' data in both origin and target markets could cause anticompetitive effects. This may allow the large platforms to fund the services offered to all sides of the target market by monetizing data in the origin market, monopolizing the target market, and entrenching its dominant position in the origin market.[70] Indeed, other economists also argue that value creation is reinforced through a recursive data-capture and data-deployment feedback loop enabled by machine learning technologies, and suggest a regulatory intervention that facilitates data sharing mechanisms.[71] According to these scholars, the notion that data will provide value not only to market leaders but also to their competitors, to the benefit of consumers, is crucial for creating more competitive and innovative digital markets.[72] However, this would imply using legal tools early in the competitive process, before the market has tipped, to create competitive functional markets.

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[64] Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (CentER Discussion Paper; Vol. 2017-007), Tilburg: CentER, Center for Economic Research.

[65] Ibid.

[66] Ibid.

[67] Wolfgang Kerber and Jonas Frank, 'Data Governance Regimes in the Digital Economy: The Example of Connected Cars' (3 November 2017). Available at SSRN: https://ssrn.com/abstract=3064794 or http://dx.doi.org/10.2139/ssrn.3064794.

[68] Ibid.

[69] See for example Stigler report, at 74.

[70] Daniele Condorelli and Jorge Padilla, Data-Driven Predatory Entry with Privacy-Policy Tying (May 13, 2020). Available at SSRN: https://ssrn.com/abstract=3600725 or http://dx.doi.org/10.2139/ssrn.3600725 and Daniele Condorelli and Jorge Padilla, Harnessing Platform Envelopment in the Digital World (December 14, 2019). Available at SSRN: https://ssrn.com/abstract=3504025 or http://dx.doi.org/10.2139/ssrn.3504025.

[71] Parker, Geoffrey and Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust (May 22, 2020). Available at SSRN: https://ssrn.com/abstract=3608397 or http://dx.doi.org/10.2139/ssrn.3608397.

[72] Ibid.

Going a step further, economists also argue that a dominant position in one data-driven market could be used to gain a dominant position in another market that was not (initially) data-driven. If market entry costs are not prohibitive, a firm that manages to find a "data-driven" business model can dominate virtually any market in the long term. Consequently, if Internet intermediates realize that the data they hold constitutes a key input to the production of quality on a market, they will most likely enter that market and continue to enter neighbouring markets, even if these are old economy device markets.[73] The IoT and the infusion of data-driven business models will transform such markets into network-driven ones that are likely to tip in favour of one firm. This suggests a domino effect: a first mover in data can leverage its competitive edge to a dominant position in the market. This can lead to tipping of connected markets, even when these markets are already served by traditional brick-and-mortar firms. Indeed, it shows that in the end, the platform with the most data can – in theory – take over any market as long as a data-driven business strategy can be utilized. This is clearly a paradigm shift, and should be viewed as something even more transformative that a market failure, indeed, this is the essence of a new industry revolution.

2.4 Multi-homing on multisided or double-sided platforms

According to the sector inquiry conducted by the SCA, multi-homing is relatively widespread, both among business users and customers. However, this does not apply to app stores and subscription services, where consumers typically use only one platform and hence app store. One factor that contributes to multi-homing is interoperability. Tools that enable connectivity between several services and marketplaces through a single service, increases interoperability and, presumably, multi-homing.[74]

For publishers, that means increased competitive exposure of its advertising space and for traders this means that those with a single profile can list themselves in several marketplaces. Another factor that can contribute to multi-homing is if users on the other side only use a platform (single-homing). Consumers of subscription services use typically only one service at a time, which contributes to the app producers and business users being listed on all of them or most services. The app stores are linked to different operating systems and mobile phones, resulting in consumers typically not using Apple and Google stores in parallel. The app providers therefore have incentives to be on both, which is noticeable by the fact that all ten app developers that the SCA has been in contact are present on both. Google and Apple also distribute a selection of their own apps in each other's stores.[75]

The existence of multi-homing reduces the risks of network effects and market concentration. When customers (or business users) can use multiple platforms in parallel, the risks of individual platforms getting a lead over competitors is less likely. Interoperability and multi-homing facilitate the coexistence of multiple platforms in the market. Enabling of multi-homing is therefore often highlighted as an "antidote" to strong network effects and the key to the effective supervision of digital markets by competition authorities. When multi-homing occurs on one user page, it can lead to intense competition for the other side, where each platform tries to persuade users to trade exclusively with it (that is, single-homing).[76]

[73] Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (CentER Discussion Paper; Vol. 2017-007), Tilburg: CentER, Center for Economic Research.

[74] SCA report 84.

[75] Ibid.

[76] Ibid.

Digital platforms are not only aware of this threat but also sometimes hinder multi-homing and limit interoperability whenever the platforms reach a minimum level of critical mass that ensures them some market power. Specific strategies that platforms can adopt to restrict multi-homing include: (i) lessening access to personal data; (ii) the lessening access to lists reflecting reputation/reviews; (iii) anti-competitive terms of use; (iv) technical barriers; (v) tying services; and (vi) exploring user inertia. As competition moves from services to eco-systems, an integration of multiple hardware and software, multi-homing becomes harder – a competing ecosystem might need to offer all the incumbent's services to be competitive. Dominant platforms use this control over ecosystems to protect their most profitable services from competition, and they may harm competition when, they diminish multi-homing as a way to solidify their market control. They also use this influence over adjacent markets to control entry points and protect their core markets from present and future competition.[77]

[77] CMA final report 18, 56. Adjacent markets are those that are closely connected but not equal to a given core market (e.g., the market for travel search can be adjacent to the broader market of general online search). Lancieri, Filippo and Sakowski, Patricia, Competition in Digital Markets: A Review of Expert Reports 26 *Stan. J.L. Bus. & Fin.* 65 (2021).

3. Competition Law

3.1 General Competition Law

Generally, it might seem that the problem of a few system leaders hoarding data should be addressed by competition law. Market power and monopolizations generally trigger competition law remedies. The old case-law of the CJEU makes it however difficult to succeed in arguing that a refusal to grant access to data or a zero pricing strategy is an abuse of market dominance under Article 102 TFEU. To prove market dominance in data-related markets is moreover a challenging undertaking and highly case-specific. Similarly, the stringent requirements defining abuse were developed for different situations and may need to be adapted to circumstances of the data-driven economy. More importantly, only undertakings would be able to rely on a right to access data under Article 102 TFEU, which would generally exclude access claims of consumers. Finally, several of the reports claim that the enforcement system of competition law does not seem to be sufficiently effective to guarantee competitive markets for the mass phenomenon of data business strategies.[78]

With the IoT and Industrial Internet, data will be collected and stored with the leading firm in the relevant ecosystem; the systems leader will have designed the data architecture, and de jure or de facto entered into vertical agreements with business providers in their respective ecosystems. The ecosystems are thus made up of agreements that can be addressed under Article 101 TFEU. The aim of these vertical agreements may vary, but is generally benign, while an ancillary restraint may be out in place: the data and traffic produced by the business providers (or their products or parts) in the system are shared or even exclusively belong to the system leader.[79] Moreover, it seems that the system leader often gives access to the data, but only to a few firms in the ecosystem, thus granting user-data access arbitrarily to affiliated firms or third parties.[80] However, the Article 101 TFEU route is difficult. Few, if any, cases have or will be successfully argued in court, and it is very difficult to develop a coherent doctrine that could compel firms to conduct themselves accordingly.

Interestingly, in this scenario, the system leader then becomes the hub for data in its ecosystem – a very advantageous position in an IoT or Industrial Internet setting.[81] The system leader will have instant access to the generated data and can control the flow of data. Indeed, as discussed above, nowcasted data,[82] a term which implies that data needs to be very fresh and crisp, is the privilege of the system leader; the system leader has the prerogative to decide how to get access. Therefore, multihoming (where the same data can be managed by various sources) generally will not preserve competition, because the time needed to access data from a second source may cause the data to become obsolete.

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[78] Josef Drexl. in "Data Access and Control in the Era of Connected Devices", Study on behalf of the European Consumer Association BEUC, Brussels 2018, 34 et seq.

[79] Bertin Martens, Frank Mueller-Langer, *Access to digital car data and competition in aftersales services*, EUR - Scientific and Technical Research Reports, September 2018, https://ec.europa.eu/jrc/sites/jrcsh/files/jrc112634.pdf

[80] Björn Lundqvist, Cloud Service as the ultimate Gate(keeper) *The Journal of Antitrust Enforcement*, Volume 7, Issue 2, July 2019, Pages 220–248.

[81] EU Commission A European strategy for data, Brussels, 19.2.2020 COM(2020) 66 final, 8.

[82] Nowcasting is the capacity of a company to use the velocity at which a dataset grows to discern trends before others do. Nowcasting enables a firm not only to track trends in users' conduct in real time, but also to monitor trends in (potential) competitors' conduct, and to respond more quickly, which helps the company push or nudge the market. Daniel L. Rubinfeld and Michal Gal, 'Access Barriers to Big Data' (2017). 59 *Arizona Law Review 339*. Available at SSRN: https://ssrn.com/abstract=2830586 or http://dx.doi.org/10.2139/ssrn.2830586.

Being the hub implies market power inside the ecosystem because the platform has instant access to the data created in the ecosystem – data to which the business providers of the platforms are generally denied access. The ability to collect and control vast amounts of data implies both private (market) and public (political) power. It also enables the dominant firm to conduct self-preferencing, i.e. to allow only themselves the benefits of accessing the data.

Moreover, the conduct of platform providers regarding data should be analysed. "Tipping" platform markets into monopoly is not necessarily a "natural" market outcome; instead, it can be actively promoted or induced by certain practices of relevant market actors. These practices include unilateral behaviour, such as strategic obstruction of multihoming, access to data, or the data porting, or preventing business providers from switching ecosystems. Under existing competition law, such unilateral behaviour can be addressed only if the respective undertaking possesses a degree of market power that is relevant under competition law (i.e. a dominant position under Article 102 TFEU). We are not yet sure what test to use for these forms of conduct. Do these behaviours of abuse reflect a refusal to deal? Moreover, it is uncertain that such conduct would fall outside the notion of competition on the merits as such or trigger the as efficient competitor test.[83]

Several of the reports were published during 2019, in which the anticompetitive effects of platforms and the digital economy were analysed. [84] The boundaries for the prohibition on abuse of dominance were explored in quite detail. Interestingly, the reports seem to reach a consensus: competition law in general, and the prohibition on abuse of dominance specifically, should be adapted to become more readily available to the digital economy, especially in cases of leveraging or self-preferencing through data use. The reports, in varying scope, also focus on providing sector-specific regulations in certain areas, with particular focus on the regulation of data.

The EU has already recognized the problems of platforms in the platform to business regulation (P2B). This regulation stipulates that a platform provider must be transparent regarding the data it collects from its business providers, and if the platform provider intends to limit access to business providers and give access to that data to its business providers in a discriminating fashion, it needs to inform its business providers, and be transparent, about its business intentions.[85]

What the Commission seemed to allude to when proposing the P2B regulation was that through their positions as ecosystem hubs, system leaders may hold the knowledge of entire markets and industries, and with this advantage in data, these system leaders could eventually dominate their ecosystem or customers' markets, even by entering these markets and

[83] Heike Schweitzer, Justus Haucap, Wolfgang Kerber, December 18, 2019, Modernizing the Law on Abuse of Market Power in the Digital Age: A Summary of the Report for the German Ministry for Economic Affairs and Energy, https://www.competitionpolicyinternational.com/modernizing-the-law-on-abuse-of-market-power-in-the-digital-age-a-summary-of-the-report-for-the-german-ministry-for-economic-affairs-and-energy/.

[84] Australian Competition and Consumer Commission (2019), *Digital Platforms Inquiry. Final Report*; BRICS Competition Law and Policy Centre (2019), *Digital Era Competition: A BRICS View Committee for the Study of Digital Platforms* (2019), Final Report by the Market Structure and Antitrust Subcommittee, George J. Stigler Center for the Study of the Economy and the State; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), *Competition policy for the digital era*, Publications Office of the European Union. Federal Ministry for Economic Affairs and Energy (2019*), A new competition framework for the digital economy.* Report by the Commission 'Competition Law 4.0'; Furman Report: HM Treasury (2019), *Unlocking digital competition*, Report of the Digital Competition Expert Panel.

[85] European Commission, Fairness in platform-to-business relations, Ref. Ares(2017)5222469 - 25/10/2017.

integrating downstream.[86] Indeed, we see platforms such as Google, Netflix, HBO and Amazon that use their data advantage to leverage to neighbouring markets. However, the P2B regulation sets out rules regarding only transparency, and does not assure rights for business providers or prohibitions for platforms.

It was anticipated that the European Commission would soon propose a specific European (unfair) competition regulation for platforms that offer infrastructure-type services or that can be deemed as having "strategic market status"[87] or "undertakings with paramount significance for competition across markets".[88] In December 2020, this platform regulation – the Digital Markets Act – was proposed under 114 TFEU, and does indeed address both classical antitrust harm situations and new forms of unfair conduct. Issues such as self-preferencing or leveraging, data interoperability and porting data are addressed, ex ante. Under the Digital Markets Act, the EU Commission would also be allowed to decide whether certain platforms would benefit from undergoing heightened scrutiny.

Given the above, the consensus seems to be that there is a need for sector-specific regulation or general legislation to address inter alia the issue of data and the collection and aggregation of data to specific hubs or platforms, so that the data exclusively reaches only the system leaders in ecosystems. Regular competition law is not sufficient for addressing these problems. However, is that really an accurate conclusion? Below, the application of general competition law will be discussed, while the sector-specific route will be analysed subsequently.

3.2 Competition Law violations

3.2.1 Market Power

In relation to the New Economy and the IT sector, the relevant markets have been established in, for example the *Microsoft* case[89], where Microsoft was considered (super) dominant on both the client PC operating systems market and the workgroup server operating systems (WGOS) market, and used that dominant position to exclude competitors. Microsoft did not give access to the interface to its PC client operating system, which, according to the EU Courts, excluded competition on the WGOS market. The definition of the relevant markets was rather straightforward, even though Microsoft objected to the definition of the relevant markets. In cases like the Microsoft case, the usual tests, such as the SSNIP-test, can be utilized. However, in reference to current cases of providing certain services and information on the Internet, the Commission is currently scrutinizing several industries, and is struggling with how to establish the relevant market.

[86] Bertin Martens, Frank Mueller-Langer, *Access to digital car data and competition in aftersales services*, EUR - Scientific and Technical Research Reports, September 2018, https://ec.europa.eu/jrc/sites/jrcsh/files/jrc112634.pdf.

[87] Furman Report: HM Treasury (2019), *Unlocking digital competition*, Report of the Digital Competition Expert Panel.

[88] The German Commission of Experts on Competition Law 4.0 presents final report to Minister Altmaier: *A New Competition Framework for the Digital Economy* seems to propose a European Platform Regulation cf. https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190909-commission-of-experts-on-competition-law-40-presents-final-report-to-minister-altmaier.html.

[89] T-201/04 Microsoft v. EU Commission ECLI:EU:T:2007:289.

The reason for the difficulties is mainly due to the fact that several of the markets on the Internet are two-sided, or even multisided, meaning that the undertakings need to take two or several customer groups into consideration simultaneously. Market share data are not an ideal proxy of market power in multi-sided markets, in particular when one side charges zero price.[90] The EU Report argues that specific characteristics such as growing returns to scale, network externalities, and the key role of data as an input enable the existence of market power even in apparently fragmented markets. That is because consumer/client lock-in grants the platform both the market power over this group of users and the associated intermediation power that comes from being an unavoidable trading partner. This power is more relevant whenever companies control the data necessary to develop new goods/ services. The same characteristics also enable platforms to enter adjacent markets, potentially in an abusive manner.[91]

These markets also existed before, as e.g. media always had to deal with both a reader market and an advertising market, in which increasing prices in one market could lead to a drop in demand in the other. For several of the services on the web this may be multiplied because search engines for example are working with users, advertisers and content providers, and are in commercial relationships with all these groups. When working multisided markets, it may make sense to offer a very low price (or even to provide free access) in one market so to attract users. A high number of users may attract advertisers or content providers to pay higher prices, and they constitute the main source of revenue. However, utilizing the SSNIP test on the user market for such a business may be very difficult and can lead to erroneous results.

In the Google "shopping" case, which will be discussed below, the Commission found that Europeans used Google for general searches on the Internet in more than 90 per cent of the cases, and, according to the Commission, a 90 per cent plus share for the market of general web search services in the EU (or the EEA) amounted to a dominant position. The abuse revolved around the issue whether Google used this market power so to gain an advantage in the market for comparative shopping, where sites provide users different alternative outlets for purchasing goods. Google was also running several other so-called vertical web search services, which are search engines focusing on specific products or services, e.g. flights, hotels, books, finance etc., but the Commission brought forward one pilot case, price comparison service.

In the "android" case, the Commission found that Google was dominant in the market for licensable smart mobile operating systems and app stores for the Android mobile operating system. 80 per cent of smart mobile devices run on Android. The Commission and later the General Court found that Apple and the iOS ecosystem was not in position to exercise competitive restraints on Google and the Android system. The android case, which is also discussed below, deal with the issue of whether Google abused in dominance vis-a-vis the smart phone producers by *inter alia* requiring these manufacturers to pre-install the Google Search app and browser app (Chrome) on all the phones they produced and as a condition for licensing Google's app store (the Play Store).

[90] EU Report at 49-50. See also Lancieri, Filippo and Sakowski, Patricia, Competition in Digital Markets: A Review of Expert Reports 26 *Stan. J.L. Bus. & Fin.* 65 (2021).

[91] Ibid.

The Commission in the above Google decisions did not make use of the notion of double sided market, or equivalent test.[92] Instead it seems to have focused on the number of users or purchasers. So, is Google then dominant on the market for web searches? Does it have the power to start charging users of it services? These are difficult questions to answer and which have yet to be addressed by the Courts.

It should be pointed out that in other cases high market share has not been proof for dominant position. The Microsoft purchase of Skype in 2011 for instance, which the EU Commission cleared in Phase I but was later appealed by a competitor, high market share was not of significant importance.[93]

The Commission did not arrive to a conclusive relevant market, but indicated that on certain Internet based communication market/segments, the parties after a merger would possibly have an 80-90 per cent market share. Regarding conglomerate effects, the Commission assessed the possibility for Microsoft (i) to degrade Skype's interoperability with competing services and/or (ii) to tie its own products, in particular its leading Windows operating system, with Skype, thereby limiting other players' ability to compete.

With regard to consumer communications services, the Commission found that Microsoft would not have an incentive to degrade Skype's current interoperability, as it is essential for Microsoft that Skype's services are available on as many platforms as possible in order to maintain and enhance the Skype brand. About the risk of tying or bundling, the Commission noted that the vast majority of consumers who acquire a PC with Skype already installed are registered Skype users and that most of them subsequently download a version different from the pre-installed one. Therefore, the proposed transaction will not change the current situation.

Regarding enterprise communications services, the Commission found that Skype is currently not an enterprise product Therefore, its interoperability is not decisive for competitors, and a bundle or a tie between Skype and Microsoft's products will not be a must-have product for enterprises. Furthermore, Lync (Microsoft's service) faces competition from other strong players in enterprise communications, such as Cisco.

Cisco appealed the decision and implied that Microsoft together with Skype would gain too much market power in the messenger/communication service markets, but the General Court agreed with the Commission. The GC confirmed that the Commission was correct in finding that even on the narrow market for consumer video communications on Windows-based PCs, Microsoft/Skype's high combined market share of 80 to 90 % was not indicative of market power given the particular characteristics of the market in question, which is marked by short innovation cycles and products which are free. Therefore, if Microsoft started to make PC users pay for such a service, this would only encourage them to switch to other providers offering their services free of charge. Furthermore, in that type of quickly-evolving and fast-growing market dominated by strong competition, account should also be taken of the increasing use of mobile phones and tablets, an area in which Microsoft was a relatively small player.[94]

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[92] It should be stressed that General Court in Cartes bancaires identified two relevant markets and the ECJ did not define the relevant market while in n. 77 took the two-sidedness into consideration under the 'by object' definition.

[93] See Case No COMP M.6281 Microsoft/Skype, 7 October 2011. See also press release: http://europa.eu/rapid/press-release_IP-11-1164_en.htm.

[94] T-79/12 - Cisco Systems and Messagenet v Commission ECLI:EU:T:2013:635.

The Commission arrived to the conclusion that the parties would not become dominant in the consumer video communications on Windows-based PCs (i.e. skype-to-skype video talks), since if they would start charging for skype-to-skype video conversations, they would lose almost all users to competing services. According to the Commission, this implied that the merged entity cannot be considered holding market power in reference to this service. It is interesting to see that the Commission has started to understand the Internet business and that high market shares do not always imply market power.

Also the Swedish *Hemnet* merger saga shows the importance of the platforms.

> ***Case I***[95]
>
> Hemnet is the largest property website in Sweden, with 1.7 million unique visitors per week (2016 figures). Hemnet was founded by two realtor trade associations and two larger realtor firms. The website only lists properties sold through realtors. It has been involved in two unsuccessful merger cases.
>
> The first merger including the hemnet website concerned Sweden's first court judgment blocking a merger. It concerned a merger between two of Sweden's leading property agent franchises, Swedbank Franchise and Svensk Fastighetsförmedling ("SFF"). The Stockholm District Court (now Patent and Market Court) ruled in favour of the Swedish Competition Authority (Konkurrensverket – "SCA") and blocked the transaction, in a detailed judgment of 150 pages.[96] Swedbank Franchise appealed the decision before the Market Court and the judgment was due in April 2015. However, in mid-March of 2015, Swedbank Franchise withdrew its appeal meaning the District Court decision became final.[97]
>
> The merger case revolved around the issue of franchise and what the transaction entailed (only the franchise concept or was it a combination of individual, local property agent businesses). However, a big issue was also the control of the Hemnet website.
>
> SCA's concerns in this regard focused on the fact that through the merger Swedbank had gained a 50% voting share in "Hemnet", a strongly established Swedish property search website co-owned by different property agent franchises. SCA was further concerned by the consolidated voting share (33%) Swedbank Franchise now enjoyed in the Swedish property agents' society (Fastighetsmäklaresförbund) – the society itself also a major shareholder in Hemnet.
>
> On the national market for electronic property searches, the Court found Hemnet to have a very high market share and to be an unavoidable trading partner. Notably, Hemnet was the only property search portal (digital property listing market) in Sweden (the relevant market) that was able to charge for its services (600 SEK – then around EUR 70) and has not lost business since moving from a free-to-advertise to a

[95] Summary of the case provided by Grant McKelvey, Historic Court Victory For Swedish Competition Authority, https://www.nordiccompetitionblog.com/?p=346; Peter Forsberg, Xandra Carlsson & Sebastian Wiik, Sweden, Overview of merger control activity during the last 12 months, https://www.hannessnellman.com/sites/default/files/gli-mc5_sweden.pdf.

[96] The Stockholm District Court (now Patent and Market Court), T 3629-14, decided 16 December 2014.

[97] Summary of the case provided by Grant McKelvey, Historic Court Victory For Swedish Competition Authority, https://www.nordiccompetitionblog.com/?p=346; Peter Forsberg, Xandra Carlsson & Sebastian Wiik, Sweden, Overview of merger control activity during the last 12 months, https://www.hannessnellman.com/sites/default/files/gli-mc5_sweden.pdf.

paying model. As for potential new entry in the search market, the Court dismissed this as very unlikely to constrain Hemnet, which was owned by the property agents themselves, giving them no incentive to support a new entrant (indeed, SFF franchisees were bound under their franchise agreements to use only Hemnet, and not competing sites, for marketing purposes).[98]

The Court concluded that the deal would allow Swedbank Franchise to alter Hemnet's business model to extract monopoly profits and, for example, price differentiate to favour its own property agencies against competitors. The Court found that the transaction would restrict competition for property search services throughout the whole of Sweden.

Dissenting opinion

A final interesting aspect of the judgment is a partly dissenting opinion by one of the economic experts that heard the case in the district court, Professor Johan Stennek. While Professor Stennek agreed that the transaction should be blocked, his views differed from the majority in several respects. Professor Stennek's main point of dissent concerned market definition where he suggested defining a "package market", including both search services (i.e. the hemnet page) and property agent services, to better reflect how consumers purchase these services. There would be increased concentration on such a market as a result of the transaction and this would reduce competition, notably by increasing the parties' incentive to raise Hemnet's prices.[99]

Case II[100]

The second unsuccessful case concerning Hemnet was a case involving proposed remedies. Again the market was defined as the market for digital property listings where the second largest player (Blocket) wanted to buy the largest player (Hemnet). The case was reviewed in 2016.

Blocket.se is the largest overall online marketplace in Sweden and the country's third largest website. Blocket is also active on the digital property listings market, and is the second largest player with 700 000 unique visitors to its property website per week. The website includes property listings both from realtors and the public. In order to remove the overlap between Blocket and Hemnet, Blocket had already agreed with a third party, a small player called Bovision, to provide an exclusive license, whereby visitors to Blocket's website for properties sold through realtors would automatically be transferred to Bovision's website instead. The idea behind the license was that after a stipulated period of time, Bovision would have established itself as a competitor to Hemnet, and the traffic from visitors to Blocket would be cut off. The license would be offered provided the merger between Blocket and Hemnet was cleared by the SCA. Hence, according to Blocket, the acquisition of Hemnet would not result in any horizontal overlap between the merging parties. The acquisition of Hemnet would also, according Blocket, remove the present loyalty between Hemnet and the real estate agents, in particular the two larger realtor firms that were direct owners and only advertised on Hemnet. This would lower the barriers to entry and expansion for Bovision.

[98] Ibid.

[99] Ibid.

[100] Summary of the case provided by OECD, Agency decision – making in merger cases - Note by Sweden - 28-29 November 2016, http://www.konkurrensverket.se/globalassets/om-oss/2016_agency-decision-making-in-merger-cases-prohibition-and-conditional-clearances_daf-comp-wp3-wd-201670.pdf.

However, the SCA's investigation of the merger raised several matters of concern. Firstly, Hemnet already held a dominant position in digital property listings, seemingly constrained only by Blocket. Blocket was a resourceful competitor, part of a media group with wide presence in the online market. The intended licensee Bovision, on the other hand, was a marginal player with limited resources. Other property websites displayed only indexed material from Hemnet and Blocket. There was therefore a clear risk that Hemnet's only competitor would be eliminated as a consequence of the acquisition. Hemnet had already been able to raise its prices and with the elimination of the competitive strain from Blocket, the risk for more price rises increased.

Secondly, there was risk for increased lock-in effects for real estate agents to Hemnet. Blocket's and Hemnet's sellers had agreed that, for a certain period of time after the merger, the sellers would continue to publish non-exclusively a large majority of their objects on the Hemnet website. In addition, real estate agents, when advertising on Hemnet's website, already receive a compensation or kick-back on the invoiced value of the advertisement. This kick-back would remain, and most likely increase, if Hemnet raised its prices on advertisements.

Therefore, there was a clear risk that the acquisition would lead to unilateral anticompetitive effects, manifesting primarily as an increase in price on digital property listings but also as a decrease in quality of the products and services provided. The barriers to entry and expansion would increase as well. The SCA thus sent a statement of objections to Blocket and Hemnet.

After receiving the statement of objections from the SCA, Blocket offered remedies to alleviate the potential anticompetitive effects identified by the SCA. The remedies included certain limitations of the sellers' commitments to future advertising on Hemnet. Further, the remedies addressed the level and extent of the kick back to the real estate agents when advertising on Hemnet. The remedies also opened up the possibility for the real estate agents to choose to be invoiced for the advertisement instead of the seller of the property. Finally, the remedies included a time-limited price cap for consumers/sellers of property on advertisements.

The market test was sent to the ten largest realtor firms in Sweden, representing a large share of the advertisements on Hemnet, and to other suppliers of property websites. The result of the market test was on the whole negative. Already during the investigation, few believed that the license model would enable a player to become a viable alternative to Hemnet. The answers to the market test confirmed that the proposed remedies were not expected to make any substantial difference in the real estate agents' choice of website for their advertisement. The lock-in effects of the sellers' advertisement obligation and the kickback model would remain. In addition, the time-limited price cap was seen as negative for potential competitors.

The SCA found that the proposed remedies could not be expected to prevent the negative effects of the merger or restore competition. When the SCA declared its intent to submit a summons application to court in order to prohibit the proposed acquisition, the parties withdraw the merger notification and abandoned the transaction.

Interestingly, the main reason to conduct a SSNIP-test is to establish the alleged dominant undertaking's market share, and (in the Old Economy) a market share above 50 per cent is an indication of dominance.[101] Of course, as discussed above, the Commission also take other circumstances into consideration, such as barriers to the relevant market, business strengths etc, but a 50 per cent market share was some kind of decamaration line between presumed dominance and not. In the New Economy, the 50 %-rule does not always hold. It has been claimed that the information economy is populated with temporary monopolies. Hardware and software firms hold monopolies today knowing that a new technology or internet service will emerge that will topple their technology, and with that take over their monopoly position. In comparison, the industrial economy was, and still is, populated by stable oligopolies. The central difference between these two economies is that they have different approaches to what constitutes successful: the driver in industrial economics is economy of scale, while the driver in the information economy is the network effect, i.e. the notion of 'tipping' and that markets are multisided.[102]

Tipping implies that network industries can and will 'tip', so that when a service of product starts to get a lot of users, which will in turn attract even more users. Social network sites provide the most current example of situations in which the number of users becomes the selling point, while the quality of the service or products perhaps is of lesser importance. The reports seem to reflect a consensus that CA and the Courts should not be as focused on market share when establishing market power on the Internet as for industrial markets, and that a high market share does not always imply power of price, since firms with very high market share may also have to provide free access on some sides of their multisided markets, while still price competitively on others. Moreover, when analysing in detail tipping does not always occur.

The SCA sector inquiry shows that the existence of platforms and their power as intermediary is not binary, rather it is a sliding scale, where platforms may have a weaker or stronger degree of intermediary power. Actual or potential competition for the market limits platform's intermediary power. The clearest example of this is when the platform is in principle the only possible alternative to reach a large number of customers. In such situations, business users find it difficult to reach the individual customer in other ways than through the platform it currently has uses, which increases the mediating power of the platform. If the platform is also one part of a larger ecosystem, it can create a lock-in of customers who do so more difficult and costly to switch to a competing platform if possible would exist. Lock-in effects, for example in the form of ecosystems, can thus further strengthen the platform's communicative power to business users, and also undertaking with low market share may exercise power or dominance.[103]

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[101] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18, para. 17.

[102] Several researchers have discussed this. See Carl Shapiro and Hal R. Varian, Information Rules (*Harvard Business School Press* 1999), 173 et seq. See also Neil Gandal, 'Compatibility, Standardization, and Network Effects: Some Policy Implications', (2002) 18 *Oxford Review of Economic Policy*, 80; Michael Katz and Carl Shapiro, 'Systems Competition and Network Effects', (1994) 8 *Journal of Economic Perspective*, 93; Mark Lemley and David McGowan, 'Legal Implications of Network Economic Effects', (1998) 86 *California Law Review*, 479; Michael Schallop, 'The IPR Paradox: Leveraging Intellectual Property Rights to Encourage Interoperability in the Network Computing Age', (2000) 28 *AIPLY Quarterly Journal*, 195.

[103] SCA report 113.

3.2.2 Exclusionary abuses

The use of general competition law doctrines, such as refusal to provide access to datasets, may be somewhat problematic.[104] Is the data holder dominant on a relevant market? How should the relevant market be identified? Are there double or multisided markets, and would such definitions of the relevant market facilitate the competition law analysis?[105] Moreover, in reference to the exceptional circumstance doctrine, is accessing data an exception that requires the application of competition law? If so, is there a second (downstream) market that the undertaking is reserving for itself? Is there an elimination of competition and prevention of the appearance of a new product according to the case-law of *Magill*, *IMS Health* and *Microsoft*? Finally, is the data an indispensable input or even an essential facility under the same and similar line of case-law? In a scenario where a competitor wants access to specific, unique datasets, which are indispensable for conducting business, competition law has an applicability; however, perhaps that scenario is not very common. Indeed, the essential facility or exceptional circumstance doctrine is difficult to apply, and is very case specific, making it difficult to develop a general doctrine for the data-driven economy.

Notwithstanding the above, the *Magill*[106] "logic" – at first glance – works well in a data scenario: entities (in the *Magill* case, the publicly owned BBC and RTE *et al*), engaging in their primary market or (public) task (producing and distributing TV programmes), create information (in the form of TV listings) that might be copyright protected. Under the rules of abuse of dominance, and due to the information's indispensability and the fact that a refusal would be unjust, these entities are required to give access to this information (the TV listings) to an undertaking that will create a new product (TV guides). Thus, in the *Magill* case, the appellants were not allowed to reserve a secondary market for themselves. However, this is a very special case, because it is not generally applicable to creation of general doctrine.[107] The *Magill* case dealt with unique data in the sense that the TV listings could not be obtained from any other sources. *Magill* may be used to argue for access to certain, specific kinds of datasets under the exceptional circumstance doctrine; however, perhaps – and especially after the introduction of IoT – general data that users generate and voluntarily

[104] In reference to Public Sector Bodies, the issue has been whether they can be regarded as undertakings. See e.g. C-138/11 - Compass-Datenbank ECLI:EU:C:2012:449 discussed in Björn Lundqvist, 'Turning Government Data into Gold: The Interface Between EU Competition Law and the Public Sector Information Directive - With Some Comments on the Compass Case' in *I I C - International Review of Intellectual Property and Competition Law*, Vol. 44, Nr. 1, 2013, pp. 79-95.

[105] For an interesting analysis of how e-platforms are not multisided markets, see Nathan Newman, Search, Antitrust and the Economics of the Control of User Data (September 24, 2013). *Yale Journal on Regulation*, Vol. 30, No. 3, 2014. Available at SSRN: http://ssrn.com/abstract=2309547 or http://dx.doi.org/10.2139/ssrn.2309547.

[106] Joined cases C-241/91 and C-242/91, RTE, ITP & BBC v. Commission ECLI:EU:C:1995:98.

[107] Moreover, as Drexl points out, the *Magill* case can no longer arise as a matter of harmonized copyright law. According to the case-law of the CJEU on the concept of a copyrightable work, the mere listings of TV programs, which are defined by the programming schedule, can no longer be considered as protected by copyright. See Josef Drexl. in "Data Access and Control in the Era of Connected Devices", Study on behalf of the European Consumer Association BEUC, Brussels 2018, p 32 referring to inter alia Joined Cases C-403/08 and C-428/08 Football Association Premier League and Murphy ECLI:EU:C:2011:631, paras 96-98 (holding that football matches are not protected by copyright).

provide will not be indispensable. This will trigger application of the doctrine. Indeed, in the future, certain device, (e.g. cars, refrigerators, mobile phones etc.) may be able to collect the same or similar personal data from us.[108]

In reference to the EU doctrine, the European Court found in *Télémarketing* that the dominant firm's practices on neighbouring markets may constitute a standalone abuse of competition law that could fall under Article 102 TFEU.[109] The CJEU concluded that, notwithstanding the presence of a refusal to deal, an abuse of a dominant position was committed, where[110]

> *without any objective necessity an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.*[111]

The broad approach of the CJEU may be explained by the specificities of the case. The dominant position of the undertaking in question, RTL, was not due to the activities of the undertaking itself, but because provisions laid down by law stipulate that no competition or only very limited competition can be present on the market.[112]

Interestingly, there are two Swedish investigations regarding refusal to access, which may be importance: the *Nasdaq* case[113] and Swedish Railway investigation.

On 15 January 2018, the Swedish Patent and Market Court (the "Court") delivered its judgement in the *Nasdaq* case, which is interesting in several aspects. It concerns the digital economy, where the use of the traditional market definition tools and presumptions was challenging. In addition, the alleged abuse, namely interference with third-party contacts to exclude access, is extraordinary.[114]

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[108] An issue discussed infra is whether general competition law (and more specifically, the exceptional circumstance doctrine) will be applicable to access of general personal data, i.e. the personal information that people generate when using the Internet; this matter has not yet been conclusively scrutinized by any competition law court. Nonetheless, one can question whether a court would find the exceptional circumstance doctrine applicable in these circumstances. The doctrine may be applicable in a few cases, depending on the dataset that is collected. Applicability will also depend on the actual size and magnitude of the data collected. No one really knows the extent of the personal data that is collected by current e-platforms and e-ecosystems.

[109] Case C-311/84 Centre belge d'études de marché – Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion SA (CLT) & Information publicité Benelux SA [1985] ECR 3261.

[110] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[111] Case C-311/84 Centre belge d'études de marché – Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion SA (CLT) & Information publicité Benelux SA [1985] ECR 3261, para 27.

[112] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[113] The Patent and Market Court, PMT 7000-15, decided 15 January 2015.

[114] Ibid.

The matter – recognised throughout Europe as the first competition case relating to financial markets opened up by the 2007 MiFID Directive – revolved around a data centre in Lunda on the outskirts of Stockholm, where Nasdaq's so-called "matching engine" (i.e. the computer operating the exchange) was located in 2010. Nasdaq leased one designated area in the data centre from a company called Verizon, and offered its customers the chance to rent space in the same area. Such co-location with Nasdaq – resulting in a fast connection to Nasdaq's trading systems – is important for certain customers, such as high frequency traders. Speed sensitive "market-makers" are particularly attractive customers for market places, since they generate a large volume of transactions and thereby provide liquidity.[115]

The Swedish Competition Authority (the "SCA") alleged that in 2010 Nasdaq had abused its dominant position by preventing trading platform Burgundy from gaining access to a data centre, a services of which were provided by a third party, Verizon. Burgundy wanted to install its matching equipment in physical proximity to the trading equipment of trading customers (banks, etc.), which were located in the same data centre as the matching equipment of Nasdaq OMX's Nordic marketplace (while still in different "rooms"). Amongst other things, Nasdaq had informed Verizon that it would move its equipment to another data centre if Verizon allowed Burgundy to place its equipment in the data centre. Burgundy's rationale for wanting to locate its matching equipment in the same data centre as Nasdaq's equipment was that, put simply, this enabled customers' automated trading programs to interact with Bugundy´s equipment and well as Nasdaq's co-location service, with minimal loss of time on the trades. Forcing Burgundy to place its equipment in a data centre located elsewhere, the SCA concluded, placed it at a competitive disadvantage.[116]

As regards the allegation that Nasdaq had abused its dominant position, the Court concluded that Nasdaq's conduct did not constitute an abuse for which no analysis of effects is necessary. The Court making reference to the ECJ's *Intel* judgment, required a detailed examination of effects in the contentious abuse matters, the Court questioned (at page 155-156) whether the concept of a naked restriction (Sw. "*uppenbar konkurrensbegränsning*") even exists. Irrespectively, the Court held that Nasdaq's reaction was a normal exercise of contractual rights and competition on the merits. In reaching this conclusion, the Court assessed two alternative counterfactuals put forward by the Swedish Competition Authority. The SCA had assessed the effects of Nasdaq's conduct in light of two counterfactuals (i.e. but for the conduct); namely that, after Burgundy had placed its equipment in the data centre, i) it would make cross-connections through Nasdaq's co-location service, or ii) the customers would connect to Burgundy through a network provider present in the data centre.[117]

[115] Sarah Hoskins, No such thing as a Naked Restriction? Nasdaq aquitted in Swedish Abuse case, https://www.nordiccompetitionblog.com/?p=993.

[116] Måns Gottfries, Judgment after Swedish Competition Authority's long-running investigation – Nasdaq did not abuse its dominant position, *Roschier*, https://www.roschier.com/newsroom/judgment-after-swedish-competition-authoritys-long-running-investigation-nasdaq-did-not-abuse-its-dominant-position-30-january-2018/.

[117] Sarah Hoskins, No such thing as a Naked Restriction? Nasdaq acquitted in Swedish Abuse case, https://www.nordiccompetitionblog.com/?p=993. Måns Gottfries, Judgment after Swedish Competition Authority's long-running investigation – Nasdaq did not abuse its dominant position, *Roschier*, https://www.roschier.com/newsroom/judgment-after-swedish-competition-authoritys-long-running-investigation-nasdaq-did-not-abuse-its-dominant-position-30-january-2018/.

In respect of the first scenario, the Court assessed the agreements entered into between Nasdaq and its customers, and the agreement between Nasdaq and Verizon, and concluded that, even if Burgundy would have placed its equipment in the data centre where Nasdaq's equipment was located, Nasdaq would have been entitled to prevent its co-location service being used to connect to Burgundy. Consequently, being allowed to place its equipment in the same data centre, yet in different rooms, would not have placed Burgundy in a better position. As regards the second scenario, the Court stated that the evidence presented in the case did not show that Burgundy had any intention of connecting to its customers through a network provider present in the data centre and thus that scenario was purely hypothetical and unlikely. Indeed, the second counterfactual presented by the Swedish Competition Authority was rejected by the Court as being an "exceptionally hypothetical scenario" and therefore irrelevant.[118]

It had not been argued that the agreements entered by Nasdaq, with its customers on the one hand, and with Verizon as the data centre owner on the other, were as such anti-competitive. As the Court found that Nasdaq had acted within its contractual rights, the court dismissed the SCA's claims.

The SCA appealed the case, however the Patent and Market Court of Appeal, affirming the judgment of the Patent and Market Court, that measures taken by Nasdaq did not restrict competition. The court found that Nasdaq's actions did not limit competition since Burgundy was not regarded as an effective competitor to Nasdaq at the time of the alleged anticompetitive conduct, nor did Nasdaq's action raises barrier to entry. Indeed, there was no causal effect between the alleged abuse and the alleged specific victim in this case.[119]

Interestingly, the SCA has recently, in an interim decision[120], identified circumstances that indicate it is likely that Nasdaq has breached the prohibition of abuse of a dominant position. It was Nasdaq's intention of offering trading of shares in undertakings listed on a competing platform, NGM Nordic SME, without first getting consent from the listed undertakings, which triggered the interim decision.

According to the SCA, due to the functioning of the market (i.e. network effects), such action might have immediate and serious effects on the market structure by causing NGM, one of Nasdaq's few competitors to lose in competitiveness. Given that Nasdaq's action does not take into account the desires and opinions of the listed companies, there is also an element of Nasdaq using its position at the direct cost of companies that have consciously and for various reasons elected to be listed on a stock exchange other than Nasdaq's growth market. The SCA assessed that it was likely that Nasdaq's action can have a serious and negative impact on competition.[121]

The early *Nasdaq* case does not concern access to a digital platform, more access to a physical data center, while the second on-going Nasdaq investigation concern forced access to a platform.

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[118] Ibid.

[119] See Vladimir Bastidas Venegas *Kontrafaktiska tester och Missbruksbedömning,* Uppdragsforskningsrapport 2019:6. See also The Patent and Market Court of Appeal, PMT 1443-18, decided 28 June 2019, http://www.patentochmarknadsoverdomstolen.se/Domstolar/pmod/2019/1443-18.pdf.

[120] https://www.konkurrensverket.se/en/news/to-protect-competition-the-swedish-competition-authority-temporarily-bans-nasdaq-from-offering-certain-shares-for-trade/.

[121] Ibid.

The second case deal with the leading public train operator Swedish Railway ("SJ"), former national monopoly, has twice been investigated by the Swedish Competition Authority (SCA). The investigations concerned the possibility that SJ had abused its dominant position by refusing to sell the other operators train tickets on sj.se (the SJ online sales platform).

The first investigation in 2014, the SCA did not find that it was essential for other operators to have access to sj.se (i.e. the online sales platform was not considered to be a so-called essential facility) in order to enter and operate trains on the railways in question. The SCA therefore decided to drop the investigation.

In the second probe, initiated in 2018, the SCA was more inclined to understand the complaint by the competing operators, yet decided again to close the investigation. Before dropping the investigation, the SCA recognised that SJ's online sales platform (sj.se) has a "strong" market presence and that SJ strategy in reference to the platform and more generally was not 'business neutral'. Indeed, the SCA was suggesting that SJ had a strategy for excluding competitors. The SCA however noted that the difficulties faced by the private operators were "part of a larger structural problem" and that the main issue was SJ's strong position on the train market in combination with its position controlling the central sales platform. The SCA stated that the remedies in the Swedish Competition Act were insufficient to solve the problem because even though SJ might be forced to give other operators access to its website through a competition law court action, it would not solve the basic problem of SJ's market strength. The SCA therefore indicated it will make the central government aware of the structural problem and ask for the government to step in. Perhaps the solution would be the creation of a competition-neutral train booking website or forcing all operators to sell all other operators' tickets and make their own tickets available through the websites of their competitors.

An ongoing saga with the SCA is the investigation whether Svensk Mäklarstatistik abused its dominant position by not giving access to Swedish residential transactions statistics. In the spring of 2020, Svensk Mäklarstatistik served notice to terminate the current agreement with Valueguard. In connection with this, the company announced its decision to no longer supply data with publishing rights to Valueguard in accordance with previous agreements.

The Swedish Competition Authority, which has been investigating the matter since the beginning of June 2021, considers it likely that Svensk Mäklarstatistik's refusal to (continue) deliver data constitutes abuse of a dominant position. In order to protect competition in the markets that depend on data and the right to publish statistics, the SCA decided, in an interim decision, that Svensk Mäklarstatistik must therefore continue to deliver data on residential transactions while the Swedish Competition Authority's investigation is ongoing.[122]

[122] Dnr 348/2021, https://www.konkurrensverket.se/en/news/svensk-maklarstatistik-must-continue-to-deliver-data-on-the-housing-market/.

3.2.3 Leveraging including Tying

However, more recently, the leverage theory has also inspired the recent *Google Search* (Shopping) case regarding practices of self-referencing.[123] A system leader may not generally give better access to its own service, while leveraging the power of the platform downstream onto the market for the service provided in competition with other service providers. The EU *Google shopping* case presents an example of this conduct. Discrimination on behalf of the system leaders, in relation to the platform or the data collected, enables a system leader to leverage onto the market of a business user.[124]

The dual role of Google, as a digital platform but also a competitor of vertical websites may also be addressed by applying principles deriving out of network neutrality regulation. Network neutrality is an important principle of Internet technology operation, that is, the network provider does not treat the content it transmits differently, and its application in the big data environment is reflected collectively as "search neutrality" and "algorithmic neutrality".[125]

It is worth noting, notwithstanding the fact that the Commission relied on the argument that the loss of traffic from Google's general search results pages represents a large proportion of competing comparison shopping services' traffic that could not effectively be replaced, that the Commission framed this case under a leverage theory of harm in combination with discrimination, rather than the more challenging refusal to supply access to an essential facility. Indeed, the Commission relied on *TeliaSonera* to argue that it is sufficient to establish that Google's conduct could make it more difficult (i.e., just short of impossible) for competing comparison shopping services to access their separate but adjacent markets. This bar is clearly lower than a requirement to prove that access to Google's general search pages is indispensable; this would have been necessary, had Google's conduct qualified as a vertical foreclosure case akin to a refusal to supply (the *Oscar Bronner* conditions).[126]

[123] Case AT.39740 Google Search (Shopping) Commission Decision, C(2017) 4444 final (27 June 2017), para 339.

[124] There are some similar French cases: the French Competition Authority imposed an interim measures to GDF, ordering the gas supplier to grant its competitors an access to some of the consumer data, in particular consumption data, it collected as a provider of regulated offers (on the gas market). French Competition Authority, Decision 14-MC-02 of 09.09.2014. Due to privacy laws, the transmission of GDF data to competitors was conditional to an approval by consumers. A significant share of the consumers did refuse that their data be transferred from GDF to competing operators. The case is discussed in The German and French Competition Authorities joint paper, 'Competition Law and Data' (n 1), 20. French Competition Authority, Decision n°13-D-20 of 17.12.2013, confirmed on that points by the court of appeal on 21.05.2015; A similar reasoning has also been used in some merger cases. For instance, in its EDF-Dalkia merger decision. European Commission, "EDF/Dalkia en France", COMP/M.7137, dated 25.06.2014. 68 French Competition Authority, Decision n° 14-D-06, dated 08.07.2014, relative à des pratiques mises en œuvre par la société Cegedim dans le secteur des bases de données d'informations médicales. This decision has been confirmed on appeal but is still pending in front of the Cour de Cassation (the French Supreme Court).

[125] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[126] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

In the appeal, the General Court agreed with the Commission that, by favouring its own comparison shopping service on its general results pages through more favourable display and positioning, while relegating the results from competing comparison services in those pages by means of ranking algorithms, Google departed from competition on the merits. On account of three specific circumstances, namely (i) the importance of the traffic generated by Google's general search engine for comparison shopping services; (ii) the behaviour of users, who typically concentrate on the first few results; and (iii) the large proportion of 'diverted' traffic in the traffic of comparison shopping services and the fact that it cannot be effectively replaced, the practice at issue was liable to lead to a weakening of competition on the market.[127]

The current probe by the EU Commission of Amazon should also be mentioned as an example of the development of a new form of abuse in reference to self-preferencing utilizing data catering to the digital economy. DG Comp opened 2019 a probe into Amazon's use of data generated by its third-party merchants. The idea was to assess the dual role of Amazon, given that it hosts but also competes against these other merchants. There are concerns that Amazon could be using data about its competitors' products to its own advantage.[128] It seems that Amazon is using data it collects from its competitors business transaction on Amazon, and use that for setting-up or intensify its own service or product line, in competition with the business users of its marketplace.[129]

Moreover, business users seem to be disadvantage in the Amazon ecosystem. The Commission will look into especially issues regarding the use of marketplace data and Buy Box. The subject of examinations conducted by the European Commission will be the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition. Moreover, the role of data in the selection of the winners of the "Buy Box" and the impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. The "Buy Box" is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. Winning the "Buy Box" seems key for marketplace sellers as a vast majority of transactions are done through it.[130]

On Amazon Marketplace customers can also find many reviews of sellers by other customers (so-called seller ratings) and of products (so-called product reviews or customer reviews). Business users (sellers) consider themselves at a disadvantage in respect of seller ratings because Amazon is not rated as a seller itself. They complain that they face disadvantageous consequences from negative seller ratings (in the presentation of their offers on the website and in the ranking list and the Buy Box) whereas no seller rating is requested after a

[127] Case T 617/17 Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763, paras. 169-185.

[128] Ibid. See the German Competition Authorities press release: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html?nn=3591568.

[129] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[130] European Commission, Press release17 July 2019 Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291.

purchase transaction from Amazon Retail. However, Amazon has asserted that it does not prioritise its own retail business over third-party sellers. The question as to whether reviews can influence the ranking of sellers, including the Buy Box, may possibly also be addressed by the EU Commission's current inquiry against Amazon.[131]

The European Commission has informed Amazon of its preliminary view in its Statement of Objection, charging that the company has breached EU antitrust rules by distorting competition in online retail markets. The Commission takes issue with Amazon's systematic reliance on non-public business data from independent suppliers who sell in Amazon's marketplace, to the benefit of Amazon's own retail business, which directly competes with those third-party sellers.[132] The Commission's preliminary findings show that very large quantities of non-public seller data are available to employees of Amazon's retail business; this data flows directly into the automated systems of that business, and these systems aggregate the data and use it to calibrate Amazon's retail offers and strategic business decisions – to the detriment of the other marketplace sellers. For example, the data allows Amazon to focus its offers for the best-selling products across product categories and to adjust its offers based on non-public data of competing sellers. The Commission's preliminary view, outlined in its Statement of Objections, is that the use of non-public marketplace seller data allows Amazon to avoid the normal risks of retail competition and leverage its dominance in the market for the provision of marketplace services in France and Germany – Amazon's biggest EU markets.[133]

Interestingly, to address the Commission's competition concerns in relation to the investigations, Amazon shortly after the final text of the Digital Markets Act was decided offered the following commitments:

- With respect to the marketplace seller data, Amazon commits to refrain from using non-public data relating to, or derived from, the activities of independent sellers on its marketplace, for its retail business that competes with those sellers. This would apply to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for the purposes of retail decisions. The relevant data would cover both individual and aggregate data, such as sales terms, revenues, shipments, inventory related information, consumer visit data or seller performance on the platform. Amazon commits not to use such data for the purposes of selling branded goods as well as its private label products.

[131] Ibid. German Competition Authority, Case summery, Amazon amends its terms of business worldwide for sellers on its marketplaces – Bundeskartellamt closes abuse proceedings Sector: Online sales Ref: B2 - 88/18 Date of Decision: 17 July 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4.

[132] The EU Commission is looking into the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition. The EU Commission will also examine the role of data in the selection of the winners of the "Buy Box" and the impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. The "Buy Box" is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. Winning the "Buy Box" seems key for marketplace sellers as a vast majority of transactions are conducted through it. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

[133] European Commission, Press release 10 November 2020 Brussels, 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. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

- In relation to the Buy Box Amazon commits: to apply equal treatment to all sellers when ranking their offers for the purposes of the selection of the winner of the Buy Box; and in addition, to display a second competing offer to the Buy Box winner if there is a second offer that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide for the same purchasing experience. This will enhance consumer choice.
- Lastly, regarding Prime Amazon commits: to set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime; to allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice; not to use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services. This is to ensure that carriers' data is not flowing directly to Amazon's competing logistics services.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments related to Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority which already imposed remedies on Amazon with regard to the Italian market.

The commitments would remain in force for five years. Their implementation would be monitored by a monitoring trustee who would report regularly to the Commission.

The Commission invites all interested parties to submit their views on Amazon's proposed commitments before 9 September 2022.

From the above, the requirements for finding abuse under the monopoly-leveraging – self-preferencing – concept would then need a finding for two separate markets (the data market and device market). The dominant intermediate must adopt a business strategy outside the notion of competition on the merits, for example, lock-in, non-access to data, non-assert requirement, discrimination in access to data, or other forms of self-favouring, on the primary data market. It must subsequently cause an exclusionary effect on the (competitive) secondary market. Lastly, the dominant intermediate must have no objective justification for not giving access to the data.[134]

The Google Android case seems to have been somewhat different, with rather more straightforward theory of tying as the antitrust harm compared to the *Google shopping* case. The Commission stated in its decision, which was upheld by the General Court:

> *"When Google develops a new version of Android it publishes the source code online. This in principle allows third parties to download and modify this code to create Android forks. The openly accessible Android source code covers basic features of a smart mobile operating system but not Google's proprietary Android apps and services. Device manufacturers who wish to obtain Google's proprietary Android apps and services need to enter into contracts with Google, as part of which Google imposes a number of restrictions. Google also entered into contracts and applied some of these restrictions to certain large mobile network operators, who can also determine which apps and services are installed on devices sold to end users."*[135]

[134] Ibid.
[135] Press release regarding the Commission decision of 18 July 2018 in Case AT.40099 – Google Android. http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

The Commission Android decision concerned specific types of contractual restrictions that Google has imposed on device manufacturers and mobile network operators which seem to show a general exclusionary business strategy amounting to an exclusionary tying abuse. The restrictions have enabled, according to the Commission, Google to use Android as a vehicle to cement the dominance of its search engine. Thus, the Android operating system was provided with the requirement to install Google search app (and Chrome browser app). In other words, the decision does not question the open source model of the Android operating system as such, however, the contractual restrictions Google imposed. The Commission decision also addressed that Google made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices (so-called revenue sharing agreement); and that Google made it very difficult for manufacturers wishing to pre-install certain Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called "Android forks").[136] The EU Google *Android* case seems to resemble the classical tying and exclusionary covenants cases such as the *Microsoft* case.[137]

The General Court largely confirmed the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine. In essence, it confirmed the Commission in reference to the tying allegation and the restrictions on Android forks, while the General Court did not agree that the evidence supported the finding of an abuse in reference to the revenue-sharing agreement under the as-efficient competitor test.[138]

3.2.4 Unfair and exclusionary terms

The EU commission's *Google AdSense* case should also be mentioned here. According to the Commission, Google used exclusivity or relaxed exclusivity clauses to exclude competitors such as Microsoft or Yahoo from third party platforms. Websites such as newspaper websites, blogs or travel sites aggregators often have a search function embedded. When a user searches using this search function, the website delivers both search results and search adverts, which appear alongside the search result. Through AdSense for Search, Google provides these search adverts to owners of "publisher" websites. Google is thus an intermediary, like an advertising broker, between advertisers and website owners that want to

[136] OEMs that wanted to get licences for Play Store and Google Search for some of their devices, had to comply with strict technical requirements for all of their other devices as well. An OEM would therefore not have been able to offer one device with Play Store and Google Search pre-installed on a compatible fork and another one without those apps on a non-compatible fork (See Case T-604/18 Google and Alphabet v Commission ECLI:EU:T:2022:541 (Google Android) para 810). See also Commission decision of 18 July 2018 in Case AT.40099 – Google Android.

[137] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[138] Case T-604/18 Google and Alphabet v Commission ECLI:EU:T:2022:541 (Google Android).

profit from the space around their search results pages. Therefore, AdSense, which by far is the largest firm on the relevant market, works as an online search advertising intermediation platform.[139]

The German probe into Google shopping supplemented the EU Commission probe, and the German Competition Authority analysed Amazon's terms of business and related practices. The Authority looked into several terms and covenants: liability provisions to the disadvantage of business users, the combination with choice of law and jurisdiction clauses that restricted business users to file complaints against Amazon only in court of law in Luxembourg, the rules on product reviews discriminated business users vis-a-vis Amazon retail business, rule giving Amazon the right to withhold or delay making payment etc.[140] Amazon seemed to have contractually limited its liability vis-a-vis business users in reference to intellectual property infringements, and the standard contract also stipulated far reaching right to terminate business users accounts.[141] Moreover, the standard contract included clauses assigning rights to use the information material which a seller has to provide with regard to the products offered to an extent that business users may not provide a qualitatively better package of product information on their own websites, "quality parity clause". This will enable manufacturers and sellers to make their own websites more attractive in terms of quality (e.g. images, content) and prevent a potentially stronger pull effect to Amazon Marketplace due to a standardised product description across sales channels. In particular, possibilities to enter into effective competition with large internet platforms on price and quality are to be kept open. The German Competition Authority also made reference to its 2013 proceedings to abolish price parity on Amazon Marketplace in and against the best price clauses of hotel portals (see HRS and booking.com cases) already served this purpose.[142]

Amazon agreed however to change the terms and condition and the German Competition Authority closed the investigation, making reference to the upcoming platform to business regulation (cf. Chapter 4 *infra*) and that the standard contract by Amazon would need to get amended due to the implementation of said regulation. Indeed, the decision by the German Competition Authority lies in the interface between competition rules and the regulation of unfair contract terms, in reference to business to platform relations, and the Authority seems to be using both interchangeable.[143]

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[139] Google was by far the strongest player in online search advertising intermediation in the European Economic Area (EEA), with a market share above 70% from 2006 to 2016. In 2016 Google also held market shares generally above 90% in the national markets for general search and above 75% in most of the national markets for online search advertising, where it is present with its flagship product, the Google search engine, which provides search results to consumers.

[140] German Competition Authority's press release Bundeskartellamt initiates abuse proceeding against Amazon, 29.11.2018, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html?nn=3591568.

[141] In 2018 Amazon permanently blocked more than 250,000 seller accounts on its German Marketplace and temporarily blocked over 30,000 accounts. German Competition Authority, Case summery, Amazon amends its terms of business worldwide for sellers on its marketplaces – Bundeskartellamt closes abuse proceedings Sector: Online sales Ref: B2 - 88/18 Date of Decision: 17 July 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4.

[142] Ibid, 4.

[143] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

The SCA recently decided on an interim injunction vis-à-vis Bruce, a company that sells training services from various gyms via an app to consumers.[144] According to the SCA, Bruce shall cease applying exclusive agreements with its fitness studio partners until the SCA has reached a final decision on whether these agreements are prohibited under the Swedish Competition Act as anticompetitive agreements (Swedish equivalent to Article 101 TFEU). The decision has been upheld in the courts.[145]

It is unusual for the SCA to make interim decisions that prohibit action before the investigative work has been completed. This measure highlights the importance of urgent intervention in this case, as well as other cases in reference to the digital economy. As with the recent Nasdaq and Svensk Mäklarstatistik decisions, the SCA must have concluded that the conduct is likely to constitute a violation of the competition rules. In reference to the Bruce case, the SCA believed that if a company ties up important suppliers through exclusive agreements and shuts out competitors from buying the suppliers' goods/services, this can have lasting consequences for competition and the development of a new market that is in an initial stage. At the same time, the Competition Authority launched parallel investigations into whether similar exclusive agreements used by other companies in the industry may be in violation of the Competition Act. In 2020, in a settlement with the SCA, Bruce voluntarily undertook to stop applying the said agreements. The company also undertook to limit the number of exclusive agreements it will use over the next two years.[146] It seems clear that the SCA took a much firmer stand against exclusive agreements in the Bruce investigation, than the court did in the early Nasdaq case (see supra).

3.2.5 Pricing violations and connected activities

App store contracts, platform agreements, in general, and cloud service agreements may contain potentially anticompetitive clauses. Moreover, several jurisdictions have legal systems that include rules addressing unfair competition. French, German, Japanese competition law, and even the US with Section 5 of the FTC Act, may be used to address unfair commercial terms. One advantage from the viewpoint of the enforcer, is that often unfair competition law stipulates less stringent rules regarding the need to establish dominance, and also in reference to what clauses violate competition law.

In reference to app stores, there are court cases and investigations regarding Apple charging a 30 % commission on app purchases, both in the US and in the EU.[147] The cases in the US currently deal mainly with the issue of standing for purchasers of Apps, while the main trust in the cases is whether Apple can require all apps to be downloaded in the iTunes App Store, with a thereto connected fee of 30 %. App Store Providers beneficial treat their app stores vis-à-vis potential rivals by requiring phone manufacturer to exclusively use their app stores, or by requiring the phone manufacturers to use a package of apps, which neither the

[144] SCA decision 572/2019, 5 December 2019.

[145] The Patent and Market Court of Appeal, PMT 1691-20, decided 20 February 2020.

[146] https://www.konkurrensverket.se/en/news/swedish-competition-authority-accepts-commitments-from-training-company/

[147] The EU investigation concerning Spotify, and whether Apple is not granting access to the Spotify app/service on certain platforms and whether they charge exorbitant fees to gain access to the Apple Store. See Spotify complaint to the European Commission regarding "the Apple tax", https://techcrunch.com/2019/03/13/spotify-files-a-complaint-against-apple-with-the-european-commission-over-apple-tax-and-restrictive-rules.

manufacturer nor the purchaser of the phone can or allowed to eliminate from the phone.[148] In the EU Apple has been accused by Spotify and other app or content providers to discriminate against their apps vis-à-vis competing services or apps that Apple produce by themselves. Moreover, the app stores agreements may contain clauses that restrict the possibility to make apps dependable of other apps. I seems that apple store holders like to prevent that apps develop to platforms for other apps since all apps should be (at least in theory) standalone. This prevents the possibility for app producers to create their own ecosystems of apps, connected to a platform app, being the hub of the new ecosystem. Moreover, Spotify was not granted access to consumers on services such as Siri, Homepod and Apple Watch. Several other companies claim to have been subjected to the same treatment by Apple, such as Epic Games, which produces the game Fortnite.

In EU there has also been a focus on price parity clauses or so-called MFN clauses. The SCA was one of several European Competition Authorities that investigated Booking.com's practice[149] of using MFN or price parity clauses.[150] In its agreements with hotels, Booking.com applies terms on price parity. These terms essentially require the hotels to offer the same or better price for a room via Booking.com as the hotels offer via other channels. Thus, a hotel may not offer a lower price via its own sales channel or a competing online travel agent than via Booking.com. The price parity clauses in Booking.com's agreements, according to which Booking.com was to be offered the same or better room prices as offered to its competitors, could according to the SCA infringe the prohibition against restrictive agreements set out in Chapter 2, Section 1 of the Swedish Competition Act (2008:579) and Article 101 of the Treaty of the Functioning of the European Union.

Booking.com offered commitments to the SCA eliminating the so-called wide vertical price parity clauses, while accepting that Booking.com could utilize so-called narrow vertical price parity clauses. After having analysed the commitments, the Swedish Competition Authority found that they resolved the identified competition concerns, i.e. they restore competition on the Online Travel Agents ("OTAs") market. The Swedish Competition Authority has therefore decided to accept the commitments.

Interestingly, the issue of price parity has also recently been before in the Courts in a private enforcement action.[151] On 20 July 2018, the Swedish Patent and Market Court ("Court") found that so-called narrow vertical price parity clauses in contracts between Booking.com and hotels in Sweden, which prevented the hotels from setting lower prices on their own websites than those advertised on Booking.com's platform, infringed Article 101 TFEU and its Swedish equivalent.[152]

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[148] Commission decision of 18 July 2018 in Case AT.40099 – Google Android.

[149] SCA decision, 596/2013, 15 April 2015, http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf.

[150] By way of background, it should be recalled that since 2010 several national competition authorities ('NCAs') have investigated OTA parity clauses, and that these NCAs have adopted differing approaches. Germany's Bundeskartellamt has pursued a prohibition approach, whereas the French, Italian and Swedish NCAs pursued a commitments approach. The Bundeskartellamt prohibited the parity clause used by HRS (a major German OTA) in December 2013. In April 2015, Booking.com committed to the French, Italian and Swedish competition authorities to change its 'wide' parity clause to a 'narrow' parity clause.

[151] Andrzej Kmiecik, Sweden: Swedish Court Finds That Booking.Com's Narrow Vertical Price Parity Clauses Infringe Article 101 TFEU Monaq, http://www.mondaq.com/x/738816/Hotels+Hospitality/Swedish+Court+Finds+That+BookingComs+Narrow+Vertical+Price+Parity+Clauses+Infringe+Article+101+TFEU.

[152] Ibid. See also http://www.patentochmarknadsoverdomstolen.se/Nyheter--pressmeddelanden/Hotellbranschen-forlorar-konkurrensmal-mot-Booking/.

In its ruling addressing an action brought by the Swedish tourism industry organisation Visita, the Court acknowledged that the Swedish Competition Authority, after an investigation coordinated with several other European competition authorities, had not objected to these contractual restraints (and had only objected to restrictions on the hotels' right to set lower prices on other booking platforms, i.e., so-called wide price parity clauses). Nevertheless, the majority of judges found that Visita had demonstrated that the narrow vertical price parity clauses had the effect of restricting competition both on the market for hotel booking services as well as on the market for hotel rooms. In particular, the Court held that the narrow vertical price parity clauses not only prevented hotels from offering lower prices on their own websites, which they would have done absent the challenged restraints, but also reduced the incentives of hotels to offer prices on rival booking platforms lower than the prices offered on Booking.com's platform (because the narrow price parity clauses would prevent the hotels from matching those lower prices on their own websites, thereby damaging their own competitiveness). The majority also found that Booking.com had not met the burden of proving that the narrow vertical price parity clauses fell outside the scope of Article 101 TFEU because they should be considered an ancillary restraint, or that they benefitted from an Article 101(3) exemption.[153]

On 9 May 2019, the Patent and Market Court of Appeal overturned a ruling of the first instance Swedish Patent and Market Court which had required Booking.com to remove 'narrow' price parity clauses from its contract terms with hotels.[154] The second instance court ruled that Booking.com was not in breach of competition rules, finding that Visita had failed to sufficiently substantiate its case that the 'narrow' price parity obligations in question negatively affected the online travel agency market or the market for hotel rooms.[155]

3.2.6 Interface between Competition Law and GDPR including Privacy

The German Facebook case deals with Facebook's use of personal data.[156] According to Facebook's terms of use, Facebook in Germany can also collect user data outside of Facebook's website. Facebook thus collects data from services owned by Facebook such as WhatsApp and Instagram, but also from other websites that use Facebook's technology or services, and this data can be combined and assigned to the Facebook user account. Third-party websites refer to websites that contain interfaces where the "like" or "share" Facebook buttons can be used. Where such visible interfaces are embedded in websites and applications, the data flow to Facebook will start when these pages are addressed or installed. For example, it is not necessary to scroll or click a like button for Facebook to receive data. If you open a website with an embedded like button, the data flow starts immediately. Millions of such interfaces are available on German websites and apps, according to the German competition authority. Even if no Facebook symbol is visible to users of a website, user data will be

[153] Andrzej Kmiecik, Sweden: Swedish Court Finds That Booking.Com's Narrow Vertical Price Parity Clauses Infringe Article 101 TFEU Monaq, http://www.mondaq.com/x/738816/Hotels+Hospitality/Swedish+Court+Finds+That+BookingComs+Narrow+Vertical+Price+Parity+Clauses+Infringe+Article+101+TFEU.

[154] The Patent and Market Court of Appeal, PMT 7779-18, http://www.patentochmarknadsoverdomstolen.se/Domstolar/pmod/2019/PMT%207779-18.pdf.

[155] Bryan Cave, Price parity clauses and Booking.com - a more unified approach or a reminder of diverging opinions?, https://www.lexology.com/library/detail.aspx?g=025134c4-b7b7-4275-aee8-6256d54894cc.

[156] See German Competition Authority, 'Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive', 19 December 2017, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html.

transferred from those websites to Facebook, according to the competition authority. This happens, for example, if the website operator uses the Facebook Analytics service in the background to perform user analyses. According to the German competition authority, this constituted an abuse of a dominant position, as the collection constituted a breach of the Data Protection Regulation. Facebook's behaviour represented a so-called exploitative abuse. Dominant companies must not use exploitative methods to the detriment of consumers.[157]

The decision has been appealed and Facebook won a partial victory when the German appeal court inhibited the competition authority's decision until it took a final position in the case. The Court provisionally did not accept the Competition Authority's conclusion that collecting too much personal data in breach of the GDPR would automatically be to the detriment of competition. The competition authority appealed and won in a higher instance, German Federal Court. The German Federal Court did take into consideration competition law objects, such as protection of choice, implying that there was elements of exclusionary abuse, while the decisions from lower courts, however, show that the competition authority's decision was controversial both from a practical perspective and from a principled point of view.[158] The case was thereafter remanded to the appeal court. The Higher Regional Court (the appeal court) has asked for a preliminary ruling from the ECJ.

According to Advocate General Rantos, in the Meta opinion, confirmed that a competition authority may, in exercising its powers, may take account of the compatibility of a commercial practice with the GDPR. However, the Advocate General points out that a competition authority can only assess compliance with the GDPR as an incidental question, without prejudice to the powers of the competent supervisory authority under that regulation. Therefore, the competition authority must take account of any decision or investigation by the competent supervisory authority, inform the latter of any relevant details and, where appropriate, consult it. The Advocate General was moreover of the opinion that the mere fact that the undertaking operating a social network enjoys a dominant position on the national market for online social networks for private users does not call into question the validity of the consent of the user of that network to the processing of his personal data. Such a circumstance does, however, play a role in the assessment of the freedom of consent, which it is up to the data controller to demonstrate.[159]

The data protection rules, whether they should be used as a benchmark for finding competition law violation as in the German Facebook case,[160] or whether they should be considered, and altered, to something of a (intellectual) property right (that competition law can 'trump') is an issue up for grasp to be solved by researchers and practitioners in the 21st Century. Indeed, the current position by the Commission that competition law and GDPR are two different autonomies legal systems may not work for the future, since GDPR may be used to exclude competitors to the detriment of competition and consumer welfare. Possible, data protection rules and the interface between data protection rules and competition law may become topics for sector specific regulations in the future.[161]

[157] Sten Nyberg, Richard Friberg, Björn Lundqvist and Robin Teigland Konjunkturrådets rapport 2021: *Digitalisering och konkurrens*, 2021 SNS Förlag, pp 168.

[158] Ibid.

[159] C-252/21 - Meta Platforms and Others ECLI:EU:C:2022:704.

[160] Press release: Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules, Date of issue: 02.03.2016, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

[161] Cf. for example, CASE AT.40511 - Insurance Ireland: Insurance claims database and conditions of access.

When re-users or Data brokers are interviewed, the data protection rules are considered the grand "show stopper" and the issue for these firms are whether competition law can be used to override data protection rules. Can competition law trump Data Protection Rules? From the case law of the EU Commission, it seems difficult, but not impossible.[162]

3.2.7 Will the new abuses for the digital economy imply change in the methodology of finding antitrust harm and violations?

The discrimination or leveraging abuse following the steps above, cf. especially the Google shopping case, implies that certain features need to be present or, for that matter, identified. The dominant service provided, e.g., the cloud or platform service, does not need to be indispensable, and dominance on the secondary market or elimination of competition on that market does not need to be proven. Yet, exclusionary effect must at least be likely to occur, while to prove that innovation as an objective justification or as a showing of lack of anti-competitive effect is difficult.

An example of a more cautious approach vis-a-vis discrimination in access on equal term is the Brazilian Google shopping cases. The Brazilian authorities have looked into the conduct of Google. Regarding tying, CADE investigated if Google would be unduly favouring its own specific services, with similar facts as in *Google Shopping*. The issue was whether the conduct was to the detriment of price comparison sites, such as Buscapé, positioning itself in a more privileged area of the webpage (among the sponsored links). The analysis did not lead to a finding of violation. Indeed, after an extensive analysis, CADE did not identify a causal relationship between Google's conduct and any harm to competition. CADE also identified that *Google Shopping*'s evolution throughout time showed some genuine features of innovation directed to full consumers' and retailers' needs. In this context, CADE's GS dismissed the case.[163]

Indeed, despite having investigated Google and other tech firms, CADE in Brazil has adopted a cautious approach in digital markets. Practice and case law have shown that in very dynamic markets CADE is more concerned about intervening in a market when it should not have intervened (false positive error – over enforcement) than about not intervening in a market when it should have done so (false negative error – under enforcement). Interestingly, the EU and the Brazilian Google shopping cases show many similarities, while the competition authorities reach different conclusions. The European Commission found that Google when upgrading the algorithm demoted rival comparison shopping services. According to the European Commission, Google upgraded an algorithm (known as *Panda*) pushed its rival services to at least page four of the results, while Google's own comparison service was not subject to demoting and had a privileged position in the search result. Inter alia, the demotion of competing services, coupled with the promotion of Google Shopping, led to foreclosure of rivals, and the European Commission found evidence of traffic diversion and alleged causal nexus with Google's conduct.[164]

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[162] See for example ECJ, "Asnef-Equifax", C-238/05, "Asnef-Equifax" ECLI:EU:C:2006:734, para. 63.

[163] Bjorn Lundqvist, Ioannis Lianos, Wang Xianlin, Matt Strader with Igor Nikolic, and the BRICS teams, Chapter 7. Exclusionary and unfair unilateral practices in reference to Platforms, in *Digital Era Competition BRICS Report*, http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[164] Ibid.

In comparison, CADE in Brazil was unable to prove that the decrease in traffic of competing service providers was caused by Google's conduct. There was a lack of causal nexus. Moreover, the use of algorithms to demote rivals was considered scarce in Brazil.[165]

However, on a deeper level, when creating a framework or methodology for the self-preferencing abuse, further questions may be approached. It seems that CADE and the European Commission (and the General Court) applied different standards for an effects-based analysis. CADE required more evidence of (i) competitive harm and (ii) causal relation with the conduct (closer to an actual effects standard for specific alleged victims of the abuse), while the European Commission applied a standard of 'potential effects' (but still going through some important analysis of actual effects) vis-à-vis a general group of potential victims.[166] Finally, more weight was given by CADE to (i) innovation and (ii) potential efficiencies/justifications in the analysis. The European Commission seems more sceptical of these effects, and weigh them against potential anticompetitive effects.[167]

The above investigations shows that even though it takes time, doctrines can be developed under competition law dealing with new forms of abuses and anticompetitive conducts. Given time, new legal equilibriums will be developed under competition law.[168]

However, while obstruction of interoperability, data collection and subsequent data use by gatekeepers to enter their customers' markets could be addressed as leveraging, self-preferencing or even obstruction under Article 102 TFEU, it should be stressed that access to data *erga omnes* is not the natural remedy in these cases. For access to data as a remedy, the exceptional circumstance doctrine is exclusively available (se Article 7 of Regulation 1/2003), and as discussed above, is not an effective path to creating markets for liberal economies. Indeed, for access to data, sector specific rules need to be implemented.

[165] Ibid.

[166] There is currently a discussion in reference to 'as efficient competitor' test, whether that imply greater need to show causality between the conduct of the dominant firm and the anticompetitive exclusionary effects. See PD I, para 22 et seq. and *Intel* compare with PD II, para 47 et seq, 441 et seq. Also see the discussion regarding SV: 'orsakssamband' in the Nasdaq case (discussed supra). See also Vladimir Bastidas Venegas *Kontrafaktiska tester och Missbruksbedömning* Uppdragsforskning 2019:6.

[167] Ibid.

[168] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), *Competition policy for the digital era*, Publications Office of the European Union; Federal Ministry for Economic Affairs and Energy (2019), *A new competition framework for the digital economy*. Report by the Commission 'Competition Law 4.0'; Furman Report: HM Treasury (2019), *Unlocking digital competition*, Report of the Digital Competition Expert Panel. Various authors, *Digital Era Competition BRICS Report,* http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf; Australian Competition and Consumer Commission (2019), *Digital Platforms Inquiry. Final Report;* BRICS Competition Law and Policy Centre (2019), *Digital Era Competition: A BRICS View* Committee for the Study of Digital Platforms (2019), Final Report by the Market Structure and Antitrust Subcommittee, George J. Stigler Center for the Study of the Economy and the State.

3.3 Procedural Problems with Competition Law

It seems clear that it is difficult to extract an access and porting right under substantive competition law, but major institutional or procedural difficulties exist with a competition-law solution to the problem of accessing and porting data. The tests, e.g. the exceptional circumstance doctrine, are difficult to apply, and obtaining relevant judgements can take considerable time. *Microsoft*, *Google Shopping* and even the *Apple* case now being investigated by the EU Commission are examples of where the business case for obtaining a judgement is lost long before the judgement is finally rendered.[169] When the judgement is finally received, the relevant market or industry has often fallen into the hands of the dominant firm that committed the abuse.

The established doctrines, such as the exceptional circumstances doctrine or the essential facility doctrine, took decades to develop, and *de facto* similar cases in the business community are few and far between – even after the implementation of these doctrines on an EU level. Dominant firms use litigation to slow and hamper access to facilities (or to intellectual property rights or technology, for that matter).

To imagine that business providers, under the doctrines mentioned here, would be able to get access and port data on a real-time basis could be naïve. Yet, interim injunction was granted in the Swedish *Bruce* case, and now we see several cases being investigated and brought by the European Commission as well as national competition authorities. Indeed, many cases are brought and the share magnitude will cause a new guiding principles and doctrines. We see 'instant' EU Competition Law for the digital markets being created.

Competition law may have several benefits and uses in the data-driven economy. It is a flexible legal system that encompasses the demand and possibility to use both pro- and anticompetitive potential effects in consideration. The anticompetitive issues raised in reference to platforms should be judged under competition law, such as self-favouring – when platforms treat the offers of competitors differently from their own offers; leveraging market power – directly or indirectly impeding competitors on a market in which the respective undertaking can rapidly expand its position even without being dominant, provided that the impediment is likely to significantly obstruct the competitive process; and hindering interoperability and data portability – making the interoperability of products or services, or data portability, more difficult and thereby impeding competition. When such breaches have been identified, competition law also include a range of suitable remedies that can be used on a case-by-case basis.

However, as stated above, competition law has its limitations, and cannot be used to create general rights schemes (*erga omnes*). To create access and portability rights to data do require the implementation of something akin to a property system. Or, perhaps sector-specific regulation.

[169] It took the EU Commission seven years to render a decision in the Google shopping case, and the case is still lingering in the courts. The *Microsoft* case saga was also long. Few, if any, believe that in the end, Google (or Microsoft, for that matter) will lose their market power as a result of the EU Commission's decision.

4. Sector-specific regulations

4.1 Introduction

Sector-specific regulations apply in several network industries. The telecom sector and infrastructures such as utilities have been regulated based on the notion that they are natural monopolies and need to be regulated to prevent facilitation of monopolies. However, in the beginning of the Internet era, large tech escaped regulation.[170]

According to Andrej Savin, the fact that the Internet content layer was not subject to heavy regulation should invite curiosity.[171] Even though there is an emerging consensus today that big tech firms must be tamed, that has not always been the case. The policy choice in both the US and the EU throughout the 20th century was to treat the Internet not as a telecoms network or a regulatory service, subject to sector-specific regulation, but as an information society service.[172] As such, the Internet was subject to significantly less regulation than either telecommunications networks and services or broadcasting media with editorial control.[173] The enormity of this policy choice should not escape us because according to Savin, it created a curious pattern: while cables and radio waves used to convey the Internet were regulated, the content largely remained free.[174]

The US non-intervenistic approach was copied in Europe.[175] This hands-off attitude with the aim to promote a "free", market-driven and unregulated Internet at least partially mirrors the original Internet dream for a borderless and radically democratic space. While some regulation was implemented – for example, the Internet was not lawless in terms of privacy, copyright, consumer protection, civil law and jurisdiction– Internet content in this early period escaped special (sector-specific) regulation requiring authorization or determining the conditions for providing the services, their extent, their content or their reach. Moreover, the free Internet implied that as a rule, intermediaries were not required to have editorial control; this implied that intermediaries were not generally liable for the illegality of the

[170] Jonathan Nuechterlein and Philip Weiser, Digital Crossroads, 2nd ed., MIT 2013, 1 et seq. Brett Ryder, What if large tech firms were regulated like sewage companies? – Being treated as utilities is Big Tech's biggest long-term threat, *The Economist*, 23 September 2017.

[171] Andrej Savin, New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387.

[172] Ibid.

[173] Jonathan Nuechterlein and Philip Weiser, Digital Crossroads, 2nd ed., MIT 2013.

[174] Cf. Andrej Savin, New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387. See also Ira C. Magaziner, "Creating a Framework for Global Electronic Commerce", *Future Insight*, Release 6.1 n, July 1999; and J. Neuchterlein and P. Weiser, Digital Crossroads, *MIT* 2013. http://www.pff.org/issues-pubs/futureinsights/fi6.1globaleconomiccommerce.html.

[175] See John M. Broder Ira Magaziner Argues for Minimal Internet Regulation, 30 June 1997, *the New York Times*, https://www.nytimes.com/1997/06/30/business/ira-magaziner-argues-for-minimal-internet-regulation.html

content they conveyed unless they produced that content themselves or did not take action when alerted to its illegality.[176] Generally, the EU's early Internet policy was based on four principles[177]: (i) no regulation for regulation's sake; (ii) all regulation based on Single Market freedoms; (iii) all regulation to take account of business realities; and (iv) all interests to be reached effectively and objectively.[178]

The burning issue of net neutrality as a principle can be added to this sprawling, yet ideology[179]-driven, approach to the regulation of the digital economy. Net neutrality implies that content providers and applications should be granted access by Internet Service Providers to broadband transmission platforms, generally, to the Internet in a non-discriminatory and free fashion.[180] The EU net neutrality principle can be identified in 2009 telecom package and the 2015 Open Internet Regulation. Article 22 of the Universal Service Directive allows Member States to introduce minimum quality-of-service requirements for undertakings that provide public communication networks. The Open Internet Regulation further grants end-users the directly applicable right to access and distribute the lawful content and services of their choice via their Internet access service. According to the Commission, the regulation enshrines the principle of net neutrality: Internet traffic shall be treated without discrimination, blocking, throttling or prioritization.[181] The EU Net neutrality principle is a mild protection, yet implies that in principle, Internet Service Providers cannot discriminate regarding access to the Internet. They may not charge certain platforms higher fees by giving certain platforms higher quality service.

Interestingly, it is possible that the generally non-interventionist approach to information service providers, such as platform service providers like Google, compared to the regulatory approach vis-à-vis the providers of the underlying layers of technology and Internet infrastructure services, benefited the Internet service platforms and the providers of infrastructure hardware such as telecom technologies. The platforms provide their services on the basis of infrastructure and service, provided in turn by undertakings that are more or less prevented from charging market prices or discriminating in price for the content services provided. The platforms can compete, without regulatory "strings", based on infrastructure that charges end-users and not content providers. This can also be reflected in real numbers. The online services segment is considerably larger than the other segments in the value chain, and are also growing more rapidly. In addition, firms active in the other telecom

[176] Andrej Savin New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387.

[177] Communication on a "European Initiative on Electronic Commerce", 16.4.1997, COM(97) 157 final.

[178] Andrej Savin New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387.

[179] It should be noted that the ideology was not laisse-affair economics rather based on the notion of open access, free end-to-end Internet, Open Internet Order. See J. Neuchterlein and P. Weiser, Digital Crossroads, *MIT* 2013, 196 et seq. See also in reference to net neutrality, Tim Wu, Network Neutrality, Broadband Discrimination, 2 *J. Telecom & High Tech*, L. 141, 149 (2003).

[180] Jonathan Nuechterlein and Philip Weiser, Digital Crossroads, *MIT* 2013, 196 et seq. See also in reference to net neutrality, Tim Wu, Network Neutrality, Broadband Discrimination, 2 *J. Telecom & High Tech*, L. 141, 149 (2003).

[181] EU Commission, Commission report on open internet, https://ec.europa.eu/digital-single-market/en/news/commission-report-open-internet.

technology segments have a smaller EBIT margin.[182] Indeed, the value in the value chain(s) making up the Internet seems to flow to the platforms, while other layers of the value chain receive less supracompetitive profits.[183]

The policy skew in the regulation of Internet hardware technology and telecom providers and the stark contrast of non-regulated Internet information services has decreased since 2015, and the goal of a level playing field now seems more of a priority for the legislator.[184] The EU Commission is working hard to provide policy recommendations and regulations for the data-driven economy. The ECJ has also struck down the very pro-internal market goal for e-commerce in *Coty*, implying that holder of well-known trademarks can now prevent their goods from being sold by distributors on third-party platforms, e.g. Amazon.[185] The Commission's strategy here is rather coherent, yet the legislation that the EU has delivered is less so. Indeed, several of the sector-specific regulations seem to be at odds with each other. Primarily viewed as a bundle of regulations, they tend to fortify the dominance of certain platforms rather than creating a level playing field. Indeed, they reflect a policy at war with itself.

4.2 General sector-specific regulation targeting platforms

To grant access to data, the EU Commission seems keen on using sector-specific regulations in reference to e-platforms[186] and the free flow of data.[187] Indeed, it seems that rules regarding certain conduct by platform providers, regarding use and access of data (*ex ante* regulations) are currently seeping in as sector- or industry-specific regulations, implying an obligation either to share data or grant open and somewhat non-discriminatory access to platforms and devices that collect the data.[188]

Firstly, the EU Commission did introduce a platform-to-business (P2B) regulation in 2019, which targets the platform-business interface.[189]

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[182] GSMA, the Internet Value Chain, a study on the economics of the internet, May 2016, https://www.gsma.com/publicpolicy/wp-content/uploads/2016/05/GSMA_The-internet-Value-Chain_WEB.pdf.

[183] In reference to the doctrine of one monopoly profit, see Farrell, Joseph and Weiser, Phil, Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age. *Harvard Journal of Law and Technology*, Vol. 17, No. 1, Fall 2003. Available at SSRN: https://ssrn.com/abstract=452220 or http://dx.doi.org/10.2139/ssrn.452220.

[184] Savin, Andrej, New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387.

[185] C-230/16 - Coty Germany ECLI:EU:C:2017:941.

[186] The proposed P2B regulation: Brussels, 26.4.2018 COM(2018) 238 final 2018/0112 (COD) Proposal for a regulation on promoting fairness and transparency for business providers of online intermediation services.

[187] There are French national initiatives to open e-platforms for third party competitors. See e.g. French Senate Report (March 20, 2013), available at http://www.senat.fr/rap/r12-443/r12-443.html.

[188] Chisholm, A. and Jung, N., (Spring-Autumn 2015), Platform Regulation— Ex-Ante versus Ex-Post intervention: evolving our antitrust tools and practices to meet the challenges of a digital economy. *Competition Policy Int'l.* Vol. 11, No. 1, 7-21.

[189] European Commission, Fairness in platform-to-business relations, Ref. Ares(2017)5222469 - 25/10/2017, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en.

4.2.1 Platform-to-Business (P2B) Regulation and the Data Free Flow Regulation

The P2B regulation from 2019 focuses mostly on rules regarding transparency, and it seems clear that this regulation will not directly address access issues. The Commission was somewhat reluctant to regulate P2B activities in detail.[190]

The P2B regulation covers online platform intermediaries and general online search engines that provide their services to businesses established in the EU and that offer goods or services to consumers located in the EU. The definition of platforms covers app stores (e.g. Google Play, Apple App Store, Microsoft Store etc.), as well as websites that locate a nearby restaurant or shop. Online platform intermediaries also include third-party e-commerce marketplaces (e.g. Amazon Marketplace), social media for business (e.g. Facebook pages, Instagram used by makers/artists etc.) and price comparison tools (e.g. Skyscanner, Google Shopping etc.).[191]

The regulation excludes online advertising, payment services, search engine optimization, services that connect hardware and applications that do not mediate direct transactions between businesses and consumers; nor does it cover intermediaries that operate only between businesses (e.g. Google and Facebook online advertising exchanges as discussed above). It also excludes online retailers such as grocery stores (supermarkets) and retailers of brands (e.g. Nike.com), to the extent that such online retailers directly sell only their own products, without relying on third-party sellers or involvement in facilitating direct transactions between those third-party sellers and consumers.

The regulation's definition of platforms is wide, however; as discussed below; the definition of platforms in the Digital Markets Act is even broader, including operating systems, cloud services and advertising exchanges.

The EU has taken a co-regulatory approach, requiring online platform intermediaries and online search engines to comply with legal obligations and encouraging them to take voluntary complementary steps. The p2B regulation stipulates the possibility of creating guidelines that further specifies and clarifies the rules. Guidelines has been provided for rankings.[192] According to which platforms and search engines will have to inform businesses about how they treat and rank goods or services offered by the platforms and search engines or by businesses that they control, compared to their treatment and ranking of goods and services from third-party businesses. Businesses must also be informed about how online platforms can influence their ranking position, for example through the payment of additional commissions. Online search engines will also need to inform consumers if the ranking result has been influenced by agreements with the website user.

Generally, the regulation shall ensure that businesses using online intermediation services, e.g. marketplaces and general online search engines, will have greater legal certainty and clarity regarding the rules governing their relationships with these platforms and how to

[190] Cf. The proposed P2B regulation: Brussels, 26.4.2018 COM(2018) 238 final 2018/0112 (COD) Proposal for a regulation on promoting fairness and transparency for business providers of online intermediation services.

[191] 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 (Text with EEA relevance) PE/56/2019/REV/1, OJ L 186, 11.7.2019, p. 57–79.

[192] Commission Notice Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01 C/2020/8579, OJ C 424, 8.12.2020, p. 1–26.

resolve potential disputes. Platforms should not prevent the business user from making its identity visible, and a platform intermediary that restricts, suspends or terminates a firm's account (including the delisting of individual goods or services or effectively removing them from search results) is required to give the company in question a statement of reasons for the action. The P2B Regulation also provides hard rules regarding access to court, and stipulates that business users of platforms shall have easy access to resolve disputes with online platform intermediaries.

Moreover, the standard terms and conditions must be presented in a transparent manner and readily available, and platforms must announce changes in the standard terms and conditions well in advance. The terms and conditions must state the reasons for suspending or terminating a firm's account and include a description of:

- the supplementary goods and services that online platform intermediaries propose to consumers alongside a business user's offer and the supplementary goods and services that a business user can offer,
- additional distribution channels through which an online platform intermediary will offer a business user's goods or services, and
- reasons why the online intermediation platform may restrict business users from offering goods and services under different conditions through other intermediation platforms (so-called 'most favoured nation' clauses).

In the P2B Regulation, the Commission did grasp to some degree the problem with Internet intermediates having access to more data than their customers. The regulation obligates providers of online intermediation services to furnish business providers with a clear description of the scope, nature and conditions of business users' access to and use of certain categories of data.

According to the regulation, the description should be proportionate, and can refer to general access conditions rather than supplying an exhaustive list of actual data, or categories of data, so that business providers can determine whether or not they are allowed to use the data they have created with the provider of the online intermediation service. Indeed, the online intermediation service provider is not obligated to give the customer (the business provider) access to the data that users create through their activities on the platform. The data belongs to the Internet intermediate. Moreover, according to the draft P2B regulation and as derived from the GDPR, business providers must also be informed as to whether they have access to personal data, other data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services from all of the business providers and consumers thereof, and if so, the data categories and conditions for this access.

Moreover, the P2B regulation states that providers need to be transparent if they intend to discriminate in access by giving better access to affiliated firms than to business providers. Online search engines and platforms must be transparent about any preferential treatment they give to their own products and services offered through their sites. The P2B regulation thus addresses the issue of data and who has access, while only providing rules regarding transparency.

Second, in the Data Free Flow Regulation, the European Commission has specifically addressed the issue that firms should be given the right to port non-personal data – especially vis-à-vis cloud providers. The regulation states that, through self-regulation, the industry should develop a procedure and standard technology so that data can be ported. The proposed regulation contains a call for self-regulation of the right to port data.[193] It should be acknowledged that a standards organization has now produced a code of conduct for porting data from cloud to cloud. The code is very detailed and applicable for members of the organization; it can be difficult for firms to penetrate.[194] Whether the code will actually create a right (*erga omnes*) to port data between clouds seems unclear, to say the least.

The result of the Data Free Flow initiative is somewhat surprising, given the enthusiasm the Commission showed in early policy papers towards implementing a mandatory right to port data for business providers vis-à-vis cloud providers,[195] and begs the question whether the right to port should be included in some other legislative effort by the Commission, such as the modernization of the database directive.[196]

However, these regulations do not stipulate any hard rules that would enable a more equal playing field. Access and portability are not rights, but rather topics for discussion. Indeed, the transaction and contracts will presumably still be skewed to the benefit of platform providers.

[193] European Commission, Commission Staff Working Document Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, SWD/2017/0304 final - 2017/0228 (COD), Brussels, 13 September 2017 (Impact Assessment); Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, COM(2017) 9 Final, 10 January 2017.

[194] See the SWIPO Code of Conduct.

[195] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions SWD (2017) 2 Final, COM(2017) 9 Final, 13; European Commission, Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, COM(2017) 9 Final, 10 January 2017, 33, making reference to the works of Zech, who claimed that the right way forward is the creation of a property right to non-personal goods. Cf. Herbert Zech, 'Information as a tradable commodity', in Alberto De Franceschi Ferrara (ed), *European Contract Law and the Digital Single Market*, 2016, 51-79.

[196] It should be mentioned that there is a right for person under certain circumstances to port data according to Article 20 GDPR. Cf. Björn Lundqvist, 'Regulating Competition and Property in the Digital Economy – The Interface Between Data, Privacy, Intellectual Property, Fairness and Competition Law' (17 January 2018). *Faculty of Law*, Stockholm University Research Paper No. 55. Available at SSRN: https://ssrn.com/abstract=3103870.

4.2.2 The proposed Digital Markets Act

The P2B Regulation entered into force in July 2019, but soon thereafter, the EU Commission realized that the P2B Regulation did not go far enough and that a more comprehensive regulation of platforms was needed. The Commission therefore floated proposals during the summer of 2020, seeking to enhance and broaden the regulation's powers and discretions in terms of regulating platforms. Firstly, ex ante rules were proposed, where the EU Commission should be allowed to decide whether certain platforms should benefit from a greater unfair competition law exposure. Secondly, an idea was launched to give the Commission a new regulator competition tool. The tool would enable the Commission to impose behavioral and, where appropriate, structural remedies.[197]

In December 2020 the EU Commission published a proposal for a Digital Markets Act, which includes ex ante rules and gives the Commission a more lightweight regulatory tool to address certain platforms directly with decisions, including platform-specific rules. It was finally enacted in July 2022. The Digital Markets Act is comprehensive, addressing several of the issues discussed in Chapter 2. It is something just short of a revolution that ex ante rules, i.e., a sector-specific regulation, are now proposed in reference to certain gatekeeping platforms. The Digital Markets Act could be compared to the sector-specific regulation for the telecom sector. Sector-specific ex ante rules are a hybrid form of competition law, whereby designated authorities (normally national telecoms authorities) identify actors with significant market power that are in danger of violating competition rules and imposes remedies on these actors in advance. By their very nature, such rules are asymmetric (as they do not apply equally to all providers) and sector-specific (as they apply only to telecoms).[198]

The Digital Markets Act will be a valuable tool for the Commission. However, whether it fulfil its goals and create a levelled playing field is still uncertain. Unlike telecommunications law, which charges national regulatory agencies with enforcement, the Commission will be the regulatory agency for all of the EU – creating centralization and uniformity but decreasing flexibility of the system and potentially raising questions about subsidiarity. This may prevent what sociology researchers call 'capture' and 'agency' dilemmas.[199]

The Digital Markets Act will be applicable only to large platforms that will be identified as 'gatekeepers' according to objective criteria set out in the Regulation. These gatekeepers are companies which, owing to their size and their importance as gateways for business users to reach their customers, play a particularly important role in the internal market.

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[197] The Commission could also recommend legislative action to improve the functioning of the market concerned. As under the previous options, there would be no finding of an infringement, no fines, and no damage claims. See Commission, 'Inception Impact Assessments for New Competition Tool' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

[198] Andrej Savin, 'The EU Digital Markets Act: A Possible Game Changer in Efforts to Regulate Platforms' EU Internet Law & Policy Blog Understanding EU Cyberlaw (20 December 2020) <https://euinternetpolicy.wordpress.com/2020/12/20/the-eu-digital-markets-act-a-possible-game-changer-in-efforts-to-regulate-platforms/.

[199] For discussion of regulator capture and 'agency' dilemmas from a legal point of view, see for example, Ernesto Dal Bó, 'Regulatory Capture: A Review' 22 *Oxford Review of Economic Policy* 2, Summer 203–225 https://doi.org/10.1093/oxrep/grj013 and Jean-Jacques Jean Tirole Laffont, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture'(1991) 106 *The Quarterly Journal of Economics* 4 1089–1127 https://doi.org/10.2307/2937958.

Gatekeepers control at least one so-called 'core platform service' and have a lasting, large user base in multiple EU countries. These core platform services include: (i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors, such as mobility, transport or energy); (ii) online search engines; (iii) social networking; (iv) video-sharing platform services; (v) number-independent, interpersonal, electronic communication services;[200] (vi) operating systems;[201] (vii) cloud services; and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are related to one or more of the other core platform services mentioned above. In addition, during the negotiations with the Parliament and the Council, two more services were added to the list, virtual assistants and web browsers. Some services, such as cloud services, operating systems and advertising services connected to platforms are included in the Digital Markets Act, but are not encompassed by the P2B regulation. Moreover, by including cloud computer services, the Digital Markets Act becomes complementary to the Data Free Flow Regulation. Hence, the Digital Markets Act has a wider definition of platforms, and this broad definition is both a blessing and a curse. It implies that several forms of platforms are covered, creating legal certainty and equality before the law, but it also paves the way for more gatekeepers to become business users of other gatekeepers – thus enabling these business users to extract, for example, data from their actions on other platforms. In the Digital Markets Act, the Commission has not been able to address the issue of gatekeepers that are also business users. Indeed, this can become a big problem, if gatekeepers utilize the Digital Markets Act as a way to distribute data between each other.

Some services seem still to be excluded from the definition. ISP and other network providers seem to be excluded, even though they collect significant amounts of data. In addition, online retailers or distributors that sell products, such as grocery stores (supermarkets) and retailers of brands (e.g., hm.com or ikea.com) still seem to be excluded from application of the Digital Markets Act.[202]

According to Article 2, point 17, 'business user' means any natural or legal person acting in a commercial or professional capacity, who uses core platform services for the purpose of or while providing goods or services to end users. The definition should be more stringent, and possibly should exclude other platforms with gatekeeper capabilities, at least for the benefit of their respective core platform service. In addition, the interface between services and ancillary services is not entirely clear. Is an ancillary service included in the notion of service? This was probably the intention of the legislator when drafting the Digital Markets Act, but this is not entirely clear.

[200] For a definition, see para 7 of Article 2 of Directive (EU) 2018/1972: ''number-independent interpersonal communications service' means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans.' (Most OTT services will fall within this category.) For these, at least one natural person must be involved, and the recipients must be taken from a finite number of recipients chosen by the sender. This includes services where the remuneration is data instead of money and excludes broadcast-style services. There is still confusion as to whether services such as Facebook/Twitter fall within this definition.

[201] According to Article 2 para 10, 'Operating system' means a system software which controls the basic functions of the hardware or software and enables software applications to run on it.

[202] There issue is not entirely sorted, see the concern of Zalando: https://www.reuters.com/article/eu-digital-enduser-idUSL8N2RN59L.

Specifically, three main cumulative criteria determine whether a company falls within the scope of the Digital Markets Act:

(i) A size that impacts the internal market: this is presumed to be the case if the company achieves an annual turnover in the European Economic Area (EEA) equal to or exceeding € 7.5 billion in the three preceding financial years, or where its average market capitalization or equivalent fair market value amounted to at least € 75 billion in the most recent financial year, and it provides a core platform service in at least three Member States;

(ii) The control of an important gateway for business users towards final consumers: this is presumed to be the case if the company operates a core platform service with more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU in the most recent financial year;

(iii) An (expected) entrenched and durable position: this is presumed to be the case if the company fulfilled the other two criteria in each of the past three financial years.

If these quantitative thresholds are met, the specific company is presumed to be a gatekeeper, unless it submits substantiated arguments to demonstrate the contrary. If all these thresholds are not met, the Commission – in the context of a market investigation for designating gatekeepers – may evaluate the specific situation of a given company and decide to identify it as a gatekeeper based on a qualitative assessment. Under the Digital Markets Act, companies identified as gatekeepers will need to implement certain behaviors proactively and will need to refrain from engaging in unfair practices, which is defined in the legislation in the light of market experience to date.[203]

The consequences of being identified as a gatekeeper under the proposed Digital Markets Act are identified mainly under Articles 5 and 6. Article 5 of the Digital Markets Act stipulates stringent rules with which gatekeepers must comply. A gatekeeper shall

1. not (a) process for the purpose of providing advertising services personal data from end users using services of third-parties that make use of core platform services of the gatekeeper, (b) combine personal data from the relevant core platform service with personal data from any further core platform services or other services offered by the gatekeeper or with personal data from third-party services, (c) cross-use personal data from the relevant core platform service in other services offered separately by the gatekeeper, including other core platform services, and vice-versa and (d) sign in end users to other services of the gatekeeper in order to combine personal data.

Should the end user have been presented with a specific choice and provided a specific consent in the sense of Article 4(11) and Article 7 of GDPR the obligation in Article 5(2) is not applicable.[204]

[203] When a company does not yet enjoy an entrenched and durable position, but it is foreseeable that it will do so in the near future, a proportionate subset of obligations will apply to ensure that the gatekeeper concerned does not achieve by unfair means an entrenched and durable position in its operations.

[204] Whether this is an accurate interpretation is still in doubt and the text may change (see eg. preamble 36) Where that consent has been refused or withdrawn by the end user, the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year. This is without prejudice to the possibility of the gatekeeper to rely on Article 6(1) points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable.

Prohibition to combine personal data from the gatekeeper's platform services with personal data from other services mirrors in several aspects the German Competition Authorities Facebook investigation.[205] The prohibition was broadened to capture several interfaces between the core platform service and affiliated services in reference to the use and combination of data. The advantage in data may originate from a right to access and use customers' data, and such a clause may be considered anticompetitive in certain situations, for example if done in conjunction with violating a data privacy rule (German Facebook case[206]). According to the Digital Markets Act, combining data can be a violation *per se* against Article 5(2)(b), while still the end user may specifically provide consent which would allow the gatekeeper combining personal data in the manner described in Article 5(2)(b).

2. refrain from applying obligations that prevent business users from offering the same products or services to end users through third party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;

Article 5(3.) seems to be inspired by the Amazon e-book MFN case from 2017, the German Amazon investigation[207], and also the investigation and decision of national competition authorities in bookingdotcom (price parity clauses) (Sweden, France, Germany and Italy) from 2015. Interesting, it seems to prohibit not only wide price parity clauses but also so-called narrow price parity clauses.

3. allow business users free of charge to communicate and promote offers including under different conditions to end users acquired via the core platform service or through other channels, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper.

4. 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, including where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper;

5. refrain from requiring business users or end users to use, and in the case of business users also to offer, or interoperate with, an identification service, web browser engine, payment services or technical services which support the provision of payment services such as payment systems for in-app purchases, of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper;

Article 5(4.) stipulates a prohibition of steering, exclusivity clauses as well as requiring some form of interoperability between the platform and the business user's software. At least Article 5(5.) in combination with certain prohibitions under Article 6 require not only portability but interoperability. Article 5(4.) read in combination with Article 5(e) moreover

[205] Cf. Chapter 3.2.

[206] See German Competition Authority, 'Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive' (19 December 2017), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html.

[207] Cf. Chapter 3.2.

seems to draw inspiration from Apple App store investigation in reference to not granting access to certain platforms. The Google AdSense case could also have been used, as well as national cases such as the Swedish decision regarding the Bruce app having exclusive agreements with gym facilities.

6. refrain from directly or indirectly preventing or restricting business users or end users from raising any issue of noncompliance with the relevant Union or national law by the gatekeeper with any relevant public authority, including national courts, relating to any practice of gatekeepers. This is without prejudice to the right of business users and gatekeepers to lay down in their agreements the terms of use of lawful complaint handling mechanisms;

7. refrain from requiring business users or end users to subscribe to or register with any further core platform services identified pursuant to Article 3(7) or which meets the thresholds in Article 3(2) point (b) as a condition for being able to use, access, sign up for or registering with any of their core platform services identified pursuant to that Article;

The prohibition against bundling and combination offers in Article 5(8) seems to be derived from the Google Android case and the German Amazon investigation (discussed in Chapter 3.2).

8. provide each advertiser to which it supplies digital advertising services, or third parties authorised by advertisers, upon the advertiser's request, with free of charge information on a daily basis, concerning each advertisement placed by the advertiser, regarding (i) the price and fees paid by that advertiser, including any deductions and surcharges, for each of the relevant advertising services provided by the gatekeeper, (ii) the remuneration received by the publisher, including any deductions and surcharges, with the publisher's consent; and (iii) the measure on which each of the prices and remunerations are calculated. In case some publishers do not provide their consent to the sharing of information, provide each advertiser with free of charge information concerning the daily average remuneration received by those publishers, including any deductions and surcharges, for the relevant advertisements.

9. Provide each publisher to which it supplies digital advertising services, or third parties authorised by publishers, upon the publisher's request, with free of charge information on a daily basis, concerning each advertisement displayed on the publisher's inventory, regarding (i) the remuneration received and fees paid by that publisher, including any deductions and surcharges, for each of the relevant advertising services provided by the gatekeeper, (ii) the price paid by the advertiser, including any deductions and surcharges, with the advertiser's consent; and (iii) the measure on which each of the prices and remunerations are calculated. In case some advertisers do not provide their consent to the sharing of information, provide each publisher with free of charge information concerning the daily average price paid by those advertisers, including any deductions and surcharges, for the relevant advertisements.

In essence, Articles 5(9.) and 5(10.) stipulate a price and cost transparency requirement regarding online advertising. The articles were extensively rewritten and extended during the negotiations with the Parliament and the Council. The original covenant seems to be derived of the Google AdSense investigation, yet lobbying efforts by European media houses have extended the reach and width of the obligations. Yet, it can also be inspired by the UK Digital Markets Act Final Report and the Australian Competition Authority (ACCC) report on the same subject.

Article 6 of the Digital Markets Act provides a list of requirements that platforms acting as gatekeepers must comply with, while the Commission should still be able to specify the requirements in individual decisions.

Article 6(1) states that gatekeepers should refrain from using, in competition with business users, any data not publicly available, which is generated or provided by those business users in the context of their use of the relevant core platform services or of the services offered together with or in support of the relevant core platform services, including data generated or provided by the end users of those business users.[208]

Article 6(1.) stipulates a prohibition for gatekeepers to use business users' data in competition with said business users on downstream markets. The prohibition seems to be derived from the Amazon marketplace investigation (cf. discussion above). Data that is not publicly available shall according to Article 6(2) 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, including click, search, view and voice data, on the relevant core platform service or on services offered together with or in support of the relevant core platform service of the gatekeeper. As mentioned above, this is in stark contrast with the Data Act, where the user is only able to gain access to the raw data generated by the same.

Article 6(3) requires gatekeepers to allow and technically enable end users to easily uninstall any software applications on the operating system of the gatekeeper, 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;

The gatekeeper shall allow and technically enable end users to easily change default settings on the operating system, virtual assistant and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper, including prompting end users, at the moment of the end users' first use of an online search engine, virtual assistant or web browser of the gatekeeper identified pursuant to Article 3(7), to choose, from a list of the main available service providers, the online search engine, virtual assistant or web browser to which the operating system of the gatekeeper directs or steers users by default, and the online search engine to which the virtual assistant and the web browser of the gatekeeper directs or steers users by default.

[208] Moreover, the preamble (43) states that to prevent gatekeepers from unfairly benefiting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymized and personal data that is not publicly available to offer similar services to those of their business users. This obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service.

The prohibition in Article 6(3) against technical hinders to uninstalling software application was investigated in the Google Android case (discussed above), while it has been broadened to also cover virtual assistants and web browsers more specifically.

1. allow and technically enable the installation and effective use of third party software applications or software application stores using, or interoperating with, the operating system of the gatekeeper and allow these software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper shall, where applicable, not prevent the downloaded third party software applications or software application stores from prompting end users to decide whether they want to set that downloaded software application or software application store as their default and technically enable that change to be carried out easily. The gatekeeper shall not be prevented from taking to the extent strictly necessary and proportionate measures to ensure that third party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper.

The gatekeeper shall furthermore not be prevented from applying to the extent strictly necessary and proportionate measures and settings other than default settings enabling end users to effectively protect security in relation to third party software applications or software application stores, provided that such measures are duly justified by the gatekeeper.

Rules regarding side-loading, i.e. the end customers' ability to access, install, download, and use apps from business users, Article 6(4) requires open access and interoperability on OS systems, also outside the platform. Here we can also see signs of the Apple App store investigation, as well as *Google AdSense*. Interestingly, the prohibition also seems to target the use of third-party proxies implementing the abuse.

2. refrain from treating more favorably in ranking, and related indexing and crawling, services and products offered by the gatekeeper itself compared to similar services or products of third party and apply transparent, fair and non-discriminatory conditions to such ranking;

Prohibition of self-favoring or discrimination in rankings, clearly derived from the *Google shopping* case and the lengthy Google investigation. The Amazon Buy Box and Marketplace investigation also seems to have inspired the rule.

3. refrain from technically or otherwise restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users;

4. allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant of the gatekeeper identified pursuant to Article 3(7), that are available to services or hardware provided by the gatekeeper. Furthermore, allow business users and alternative providers of services offered together with or in support of core platform services free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features regardless of whether those features are part of the operating system, that are available to or

used by the gatekeeper when providing such services. The gatekeeper shall not be prevented from taking strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity of the operating system, virtual assistant, hardware or software features provided by the gatekeeper provided that such strictly necessary and proportionate measures are duly justified by the gatekeeper.

Obligation to allow third parties to offer support services including software on platforms, i.e. it requires interoperability. The rule seems to be derived from Apple Store/Mobile Payment investigation.

5. provide advertisers and publishers, and third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the data necessary for advertisers and publishers to carry out their own independent verification of the ad inventory including aggregated and non-aggregated data. This data shall be provided in a manner that would allow advertisers and publishers to run their own verification and measurement tools to assess performance of the core services provided for by the gatekeepers;

Access to the gatekeeper's performance measurement tools. This issue in reference to the media and advertisement markets is discussed in the UK CMA report as well as in the Australian report regarding competition on the media market.

6. provide end users and third parties authorised by an end user, upon their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service including by providing free of charge tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access;

The obligation to facilitate data portability for end users as well as to give third parties authorised by an end user continuous access to data seems clearly to be derived from the Amazon Marketplace investigation (see above). Interestingly, different from the Commission proposal, the business user as a benefiter of the portability requirement has been erased, and Article 6(9.) now only mimic and extend portability right for end users (often individuals) under Article 20 GDPR (see also recital 54). It should also be read in light of the proposed Data Act (see below), which as a de fault propose that negotiations between data holder and third party should take place, in the similar situation where a user of an IoT device would like to transfer data to third party.

7. provide business users and third parties authorised by a business user, upon their request, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated and nonaggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services offered together with or in support 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 the data are 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 by giving their consent;

Similarly, the access for business users to data generated on the platform is also inspired by the Google Marketplace investigation. It should however be noted that Article 6(10) does not include a right to port the data for the benefit of the business user.

8. provide to any third party undertaking providing 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 anonymization for the query, click and view data that constitutes personal data.

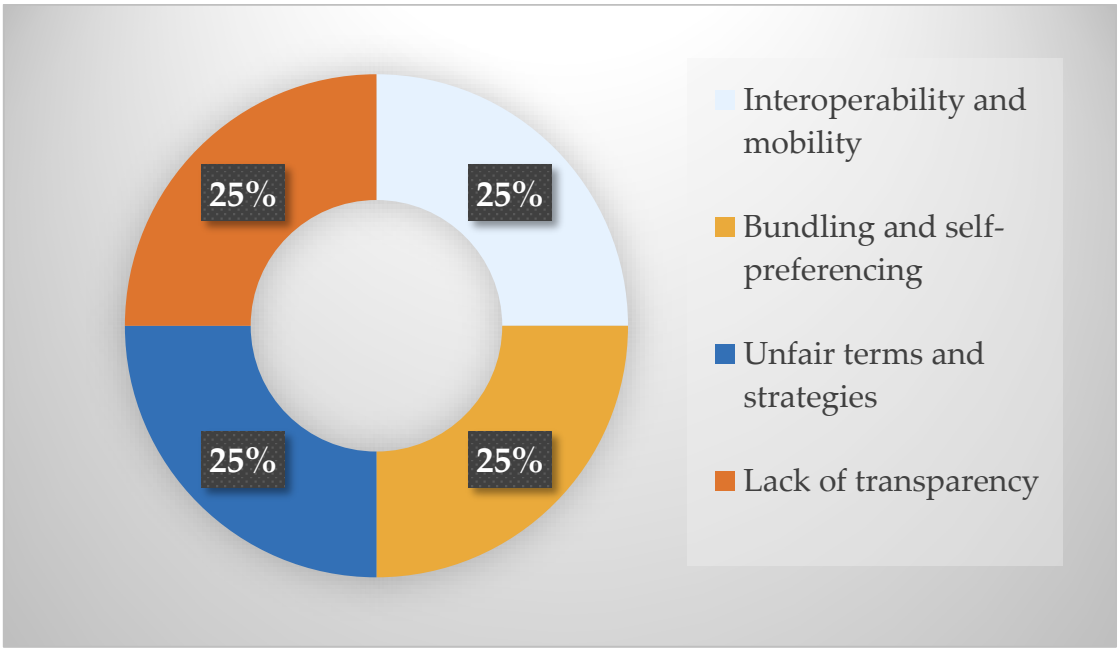
The requirement to share search data is the only requirement directly focusing to boost horizontal competition in the Digital Markets Act. To require Google to share search data with competitors could be derived from the Google shopping case, while also from the early investigation regarding Google search originating from Microsoft complain in the 2010s.

9. The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9). For that purpose, the gatekeeper shall publish general conditions of access, including an alternative dispute settlement mechanism. The Commission shall assess whether the published general conditions of access comply with this paragraph.
10. The gatekeeper shall not have general conditions for terminating the provision of a core platform service that are disproportionate. The gatekeeper shall ensure that such conditions of termination can be exercised without undue difficulty.

It seems that Article 6(12) generally requires access to app stores and the like on something similar to FRAND terms. The rule could be inspired by Apple App store investigation but also the US FTC investigation of Google in 2013.

There is an Article 7 addressing gatekeepers providing number independent interpersonal communications services. Generally, the quite long article requires the gatekeeper to make basic functionalities of its number independent interpersonal communications services interoperable with another provider by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge.

Generally, these requirements are extensive, far-reaching and detailed in their requirements on interoperability, price-parity restriction, self-preferencing and access to platforms on equal terms. It represents a Digital Markets regulation for the Internet of today. Indeed, the obligations are in several instances derived from current investigations conducted by the European Commission or national competition authority, implying that competition law could notwithstanding the enactment of the Digital Markets Act be applicable.



The obligations in the Digital Markets Act can generally be placed in four different categories, interoperability and mobility, bundling and self-preference, unfair terms and strategies and transparency. Moreover, it seems possible that gatekeeper platforms also need to open core platform services for third-party (ancillary) service providers. What does this imply? For example, could a competing messaging service (WhatsApp) require access to Facebook on the same terms as Messenger? Can Twitter claim access as be an application of Google or on Facebook? Indeed, the requirements stipulated above pave the way for interoperability on a much broader scale than we have experienced thus far. Gatekeepers will bear an extra responsibility to conduct themselves in a manner that ensures an open online environment that is fair for businesses and consumers, and open to innovation by all, by complying with specific obligations laid down in the draft legislation.

It should be noted that the Digital Markets Act empowers the Commission to grant an exemption from Articles 5 and 6, but also to extend the list of requirements under Articles 5 and 6 (cf. Article 10), after carrying out a sector inquiry. Inquiries and the regular reports that gatekeepers must provide to the Commission should also include all relevant M&A activities. In the case of systematic gatekeeper infringements of their obligations, additional remedies may be imposed on the gatekeepers after a market investigation. Such remedies will need to be proportionate to the offence committed. If necessary and as a last-resort option, non-financial remedies can be imposed. These can include behavioral and structural remedies, e.g. the divestiture of (parts of) a business. The Digital Markets Act opens paths for a new, interoperable Internet, where leveraging (including self-preferencing) is restricted. However, the Digital Markets Act became after the trialogue negotiations very detailed, and there is clearly room for litigations to carve out the fine details of the obligations. This is unfortunate and it is not certain that the Digital Markets Act would imply less or less lengthy

litigations vis-à-vis general competition law. Moreover, with respect to create a level playing field in relation to access and use of data, there are possibly some hidden limitations to a genuine interoperable use of services and flow of data. It seems that the Digital Markets Act does not address the interface or limitation set by intellectual property law in reference to accessing intellectual property-protected services, software, interfaces or data in a comprehensive way.

It should be stressed that interfaces (e.g. APIs and websites) and software can be encompassed by copyright protection and possibly other intellectual property rights. Indeed, the question is whether the platforms can use rights to circumvent the implementation obligations set out in Articles 5 and 6. As mentioned above, access to data can be restricted by TPMs, third-party copyright, trade secret rules and *sui generis* database rights; however, the Digital Markets Act does not adequately address the intellectual property-law dimension.[209] In the new recital 70, the Digital Markets Act stipulates that the gatekeeper should not be allowed to engage in any behavior undermining interoperability as required, such as for example by using unjustified technical protection measures, or unlawfully claiming a copyright on APIs. Whether the breath of copyright may be restricted by the text in a recital, can only be interpreted in light of the property protection reflected in the EU Charter.

Moreover, as concluded in Chapter 3, competition law does not suffice to create a right to data access and portability, neither in practice, nor in theory. In practice, it is very difficult to create a workable collaboration for gaining access to the flow of data, and in theory it is difficult to create rights under competition law, available erga omnes.

Interestingly, even though the trialogue led to the increased breadth and depth of several of the obligations stipulated in Articles 5 and 6, the portability obligation in Article 6 (9) was limited during the negotiation.

It should still be clear that paragraphs (1.), (9.) and (10.) of Article 6, when read in combination, may – with the help of end-users - provide an access and portability obligation for gatekeepers. However, the Digital Markets Act does not stipulate a stand-alone portability right for the benefit of business users vis-à-vis gatekeepers.[210] The end-user may bring the data from the gatekeeper to the business user and by doing so eliminate the gatekeeper's access to the same data. The use of the notion portability should imply that the gatekeeper cannot keep a copy of said data. The provisions state that the platform provider is *de facto* not allowed to use the data generated by the business user on the platform, in competition with the business user (see also Article 5 (1.) in the Regulation). Interestingly, the obligation in Article 6 (1.) compared to the obligations in (9) and (10) does reflect that business users have some sort of preferential "right" to the data generated, vis-à-vis the platform provider. However, the Digital Markets Act stipulates obligations for gatekeepers rather than rights for the business users. This is unfortunate, and possibly the ECJ could interpret the obligations as corresponding rights for business users. Indeed, into bilateral, preferential rights to each data point, which at first glance seems to override the gatekeeper's general database right.[211]

[209] Moreover, it should be stressed that the matter of having gatekeepers using each other's services is quite complex, and it is not clear whether an obligation to give access and port data should also be given in these circumstances.

[210] This is also reflected in the updated recital 54, which do not contain the notion of portability.

[211] The obligation stipulated in Article 6(10) of the proposal almost mirrors the right held in Article 7 of the Database Directive.

The gatekeeper still retains the prerogative to make all data available for all users (cf. Article 6(1) Digital Markets Act. Yet, in parallel, business users have been granted a data advantage vis-à-vis the platforms. Indeed, the combination of Article 6 paragraphs (1) and (10) implicitly creates some form of compulsory access obligation. Access should also be given to third parties contracted by the business user, who are acting as processors of this data for the business user. The question is whether the obligation prevents gatekeepers from using their intellectual property rights to prevent access. Inferred data should also be accessible, but drawing the line between data that originates from the business users and data that originates from the business (model) of the platform can be very difficult. Indeed, the preamble claims that data generated by business users and end-users, as well as data inferred from that data, should be encompassed by the obligation, but in the case at hand, it can be difficult to identify the boundaries for that dataset.[212]

The preamble continues by stating: '[i]n order to ensure that business users have access to the relevant data thus generated, the gatekeeper should, upon their request, provide effective access, free of charge, to such data. Such access should also be given to third parties contracted by the business user, who are acting as processors of this data for the business user. Data provided or generated by the same business users and the same end users of these business users in the context of other services provided by the same gatekeeper may be concerned where this is inextricably linked to the relevant request. To this end, a gatekeeper should not use any contractual or *other restrictions* to prevent business users from accessing relevant data and should enable business users to obtain consent of their end users for such data access and retrieval, where such consent is required under Regulation (EU) 2016/679 and Directive 2002/58/EC. Gatekeepers should also facilitate access to these data in real time by means of appropriate technical measures, such as for example putting in place high quality application programming interfaces or integrated tools for small volume business users.[213]

The text above indicates that the model for data access imagined by the Commission is that the gatekeeper makes a data-access API available to business users. The gatekeeper is not allowed to use contractual or other restrictions to prevent such access. Is this an overriding obligation to any and all intellectual property rights held by the gatekeeper? The major issue is whether this gateway to access and portability of data is in fact such a revolutionary tool for creating interoperability, or whether, in the end, lack of a global technical API standard, intellectual property legal systems or the GDPR will de facto prevent data access and portability.

As stated above, the new recital 70 stipulates that the gatekeeper should not be allowed to use" unjustified technical protection measures", or "unlawfully claiming" a copyright on APIs. Whether the breath of copyright may be restricted by the text in a recital, can only be interpreted in light of the property protection reflected in the EU Charter. Notwithstanding the text in the new recital 70, Gatekeepers may try to prevent access to their platforms, and foremost their data by claiming that it is walled in by intellectual property rights. As discussed above, copyright owners regularly resort to technical protection measures (TPMs), cf. Art 6 InfoSoc, to prevent access to copyright-protected content. 'Hacking', or breaching technical measures to gain access to data, can be a violation of Art. 6 InfoSoc. Thus, Art. 6 InfoSoc also protects the platforms from being 'hacked' to gain access to unprotected data. APIs *can*

[212] One possible means of addressing this is to require the use of blockchain, with rights for the business users to access the blocks reflecting the definition in the Article 6 (2), (9) and (10).

[213] The proposal for Digital Markets Act preamble 56.

be copyright protected. Platforms can also claim that the datasets they collect are trade secrets as defined under the new EU directive,[214] or in the case of personal data, might be off-limits under the GDPR. For the data generated on the platforms, the gatekeepers would most likely acquire some intellectual property rights when storing the data in databases or in a public centralized blockchains, such as sui generis database protection, which may also limit or even prevent the porting of whole datasets. On the other hand, do the obligations stipulated in Article 6(9) and (10) override these rights in order to uphold interoperability? It seems that Article 6(9) and (10) restrict the property rights held by the platforms.

Yet another major problem is that the Digital Markets Act is unclear as to which data is in fact encompassed by the access and transfer obligation under the regulation; the Digital Markets Act contains only an obligation for gatekeepers to give access. This could be a matter for litigation, and indeed data can originate from both the business users' activities and the platform providers' activities, especially in the case of inferred data.

[214] Cf. Article 3 of the Trade Secret Directive and preamble 16, stating that 'Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed. The freedom to enter into such contractual arrangements can, however, be limited by law.

5. Swedish Perspective

5.1 Competition Law or Sector-specific Regulation?

When discussing applicability of competition law to the digital economy, the ecosystem consisting of the European Commission and the national competition authorities has gained momentum. Investigations are being started, pursued and concluded. Decisions are being appealed and litigated in court. The system seems thus to be up and running. Principles, tests and case law based doctrine are being developed.

New abuses are being developed under umbrella notions, such as 'leveraging', 'self-preferencing' and 'discrimination'. So far they lack clear underpinning and structure regarding what needs to be proven; however, the courts will hopefully be up for the task to provide much needed guidance. It seems that several of the potentially problematic situations that arise in relation to data-driven business strategies could be handled with the legal tools already available for the SCA. SCA has tools at its disposal. It will be a challenge addressing the complexity of investigating data-driven business strategies, still new cases regarding the digital economy can be investigated with successful results.

New procedures are emerging for establishing dominance for digital platforms and how other conduct should be viewed and analysed. This development can take place partly through academic research and partly through practical application of competition law. The broad wording of the competition rules provides, in principle, the opportunity to exercise supervision even in cases where such development has not yet taken place. Competition law also has several advantages vis-à-vis sector specific rules. It is more flexible and all encompassing. Moreover, developed doctrine under competition law works as *ex ante* rules for the future. Injunctions could also be used more frequently. Indeed, EU competition law may, given a couple of years, provide much guidance and make several of the ex ante rules in the proposed Digital Markets Act superfluous. We may even have a problem with double jeopardy (ne bis idem).

Given the above, a national equivalent to the Digital Markets Act may not be necessary. National competition law may step in and be useful against the international and national platforms active in the various Member States. However, there may be specific markets or conduct that need to be addressed from a holistic point of view that possible cannot be addressed by the SCA under the current rules.

5.2 A Swedish Competition Tool?

As discussed above, the Digital Markets Act only caters to gatekeepers, which include the very largest digital/tech firms. Indeed, few companies will today fall under the definition.[215] Moreover, Competition law may possibly not be able address some of the situations where the ex ante rules presented in the Digital Markets Act will be applicable, while it can be used for addressing others. Some recent investigations conducted by the Commission and NCAs under competition law are addressing business conduct which is now encompassed by ex ante rules under the Digital Markets Act. This may strike as odd and can complicate the application of competition law and Digital Markets Act alike.

As a reminder, the European Commission proposal of creating a 'Competition Tool'[216], which would be a legal system giving power to the relevant authorities to produce sector specific regulations or platforms specific regulations, should be mentioned. The discussed tool creates a hybrid form of guidance in-between legislation and guidelines. The Commission was playing with the idea of addressing structural competitive problems with such a special legal 'tool'.

According to the Commission the tool should have addressed: "structural competition problems and structural market characteristics that have adverse consequences on competition and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation. While structural competition problems can arise in a broad range of different scenarios, they can be generally grouped into two categories depending on whether harm is about to affect or has already affected the market:

- Structural risks for competition refer to scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the markets concerned create a threat for competition. This applies notably to tipping markets. The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolize a market through anti-competitive means.

[215] However, when Internet of Things has been implemented several Swedish companies may fall under the definition.

[216] It should be mentioned that the proposal had been inspired by the UK Market Investigation powers. In the Online Platforms and Digital Advertising market study, the UK Competition and Markets Authority made recommendations regarding interoperability. The study was being conducted in the context of recent reforms establishing a Digital Markets Unit (DMU) within the Authority, which will have powers to enforce a code of conduct for large digital platforms. The study recommended that the DMU be granted powers to mandate interoperability for digital platforms, noting that "the case for interoperability is greater in respect of functionality which is: directly helpful in overcoming identified network effects; not highly innovative; and in respect of which privacy concerns can be managed effectively".

- Structural lack of competition refers to a scenario where a market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure). These include (i) markets displaying systemic failures going beyond the conduct of a particular company with market power due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions (which are becoming increasingly prevalent across sectors)."[217]

The remedies to address such situations were to be included in a legislative tool that *inter alia:* allow the relevant authority to identify and remedy structural competition and market problems that cannot be addressed (at all or as effectively) under the EU competition rules. Thus, it would not be limited only to companies that are already dominant. The tool would be based on a test allowing the relevant authority to intervene when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly. The tool would enable the authority to impose behavioral and, where appropriate, structural remedies. The authority could also recommend legislative action to improve the functioning of the market concerned. As under the previous options, there would be no finding of an infringement, no fines and no damage claims. Similar to the existing EU competition rules, the tool would be generally applicable across all sectors of the economy. These could include certain digital or digitally-enabled markets and/or other sectors identified as being especially prone to such concerns due to entrenched dominance, high entry barriers etc.[218]

[217] Commission (2020), Impact assessment. Schweitzer, H., European Commission, Directorate-General for Competition, The new competition tool: its institutional set up and procedural design: expert study, Publications Office, 2020, https://data.europa.eu/doi/10.2763/060011. Motta, M., Peitz, M., European Commission, Directorate-General for Competition, Intervention triggers and underlying theories of harm: expert advice for the impact assessment of a new competition tool: expert study, Publications Office, 2020, https://data.europa.eu/doi/10.2763/487824. Whish, R., European Commission, Directorate-General for Competition, New competition tool: legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool: expert study, Publications Office, 2020, https://data.europa.eu/doi/10.2763/528171. Larouche, P., Streel, A., European Commission, Directorate-General for Competition, Interplay between the new competition tool and sector-specific regulation in the EU: expert study, Publications Office, 2020, https://data.europa.eu/doi/10.2763/521287. Crawford, G., Rey, P., Schnitzer, M., European Commission, Directorate-General for Competition, An economic evaluation of the EC's proposed "new competition tool", Publications Office, 2020, https://data.europa.eu/doi/10.2763/329087.

[218] Ibid. This is a hybrid of the different proposals in the Impact assessment. It should be mentioned that a package of reforms in Germany have provided the German Bundeskartellamt with the ability to declare a firm to be "of paramount significance for competition across markets" (Bundeskartellamt, 2020, p. 12[73]) These reforms supplement abuse of dominance tools by giving the Bundeskartellamt the ability to address potential competition problems in markets not yet dominated by a firm. Once the *Bundeskartellamt* has identified a platform with 'paramount cross-market relevance' for five years, the authority can issue an order prohibiting this undertaking from several listed (exhaustive) practices. See Thomas Höppner, Digital Upgrade of German Antitrust Law - Blueprint for Regulating Systemic Platforms in Europe and Beyond?, at https://www.hausfeld.com/news-press/digital-upgrade-of-german-antitrust-law-blueprint-for-regulating-systemic-platforms-in-europe-and-beyond. Nonetheless, the German legislator is now considering amend in the German Competition law with a competition tool similar to the UK version. https://www.cms-lawnow.com/ealerts/2022/10/germany-proposes-law-on-competition-that-strengthens-the-federal-cartel-office

The Digital Markets Act does indeed open avenues for a new, interoperable Internet, where leveraging (including self-preferencing) and other forms of abuse are restricted. However, it only caters to gatekeepers and is centered around the European Commission. There is a risk that it cannot an effective tool to regulate dynamic market structures and competition in smaller economies. Moreover, the Digital Markets Act became after the trialogue very complicated. It is an intricate legal tool semi-exclusive for the benefit of the Commission and the complexity of the ex ante rules may lead to lengthy litigations, something which the Digital Markets Act was supposed to fix in the first place. Indeed, it is a tool for the EU Commission addressing the very largest platforms.

It does not address, and was not meant to address, the conduct of platforms that do not meet the requirements of the notion of gatekeeper. As indicated above, given the fact that Digital Markets Act equivalent ex ante rules were being developed under competition law doctrine through the ongoing investigations by the European commission and national competition authorities, the full set of rules in the Digital Markets Act may not be needed from a competition law perspective. However, a competition tool could still be useful. It can provide a basis for creating sector conditions and individual obligations that can be used vis-à-vis special industries or markets such as the data-driven markets, media markets, or to employ a specific remedy, such as data access and portability, more broadly.[219] Moreover, a competition tool is flexible also to address upcoming competition concerns in reference to Internet of Things. Indeed, addressing issues of network effect, tipping, access to data and the dissolvement for structural hinders for leveling the playing field where firms can compete on the merits in essential in the upcoming Internet of Things era and essential to create competition.[220]

According to a joint statement, the Nordic competition authorities consider in 2020 the current competition law framework capable of handling most anti-competitive behaviour in the digital economy. The competition law framework has proven to be resilient and flexible in the face of technological growth and disruptive innovation, making it highly relevant for tackling competition issues in digital markets.[221]

The complexity and variety of business models adopted by digital platforms, together with the high pace of innovation that characterises this dynamic sector, make the establishment of clear-cut ex ante criteria a challenging task according to the authorities. A lack of clarity on

[219] The Nordic Competition Authorities made a joint statement in 2020 seem to be preferring a competition tool rather than an ex ante regulation. Cf., Digital platforms and the potential changes to competition law at the European level – The view of the Nordic competition authorities, 2020 *Nordiska konkurrensmyndigheternas memorandum*, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf.

[220] Discussion above, under chapter 2.

[221] The Nordic Competition Authorities made a joint statement in 2020 seem to be preferring a competition tool rather than an ex ante regulation. Cf., Digital platforms and the potential changes to competition law at the European level – The view of the Nordic competition authorities, 2020 *Nordiska konkurrensmyndigheternas memorandum*, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf.

these points may not only impact the rights of the companies involved but also diminish trust from companies and hamper incentives to invest and innovate.[222] Indeed, the Nordic competition authorities did not endorse an ex ante regulation.

The Nordic Competition Authorities pointed instead to Iceland and Norway and the use of so-called competition tools. In May of 2022, a proposal was initiated with the Norwegian government to introduce a market investigation tool in Norway. The Norwegian Competition Authority is already provided with tools that enables it to intervene indirectly against anticompetitive behaviour in a market. Firstly, the merger rules enable the NCA to address certain industries in particular. Secondly, the Norwegian Competition Authority has the ability to recommend to the Ministry of Trade, Industry and Fisheries that regulations should be imposed in a market. This stems from Section 14 of the Norwegian Competition Act ('Measures to promote competition'), according to which regulations can be introduced to intervene against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act, if this is necessary to promote competition in the market. For example, this section was applied to ban airlines' frequent flyer programs on domestic flights in Norway. However, the proposal is that section 14 is to be supplemented with a more general Competition tool for the Competition Authority and the preparatory works states that "[d]epartementet mener på denne bakgrunn at det kan være behov for en forskriftshjemmel som åpner for regulering av de generelle rammebetingelsene for aktørene i et marked med mangelfull konkurranse, hvis dette skulle vise seg nødvendig ut fra lovens formål. Departementet mener også, i likhet med mindretallet, at en generell regulering gjennom forskrift vil være mest hensiktsmessig i slike tilfeller, fordi den sikrer like rammebetingelser for alle aktører i vedkommende bransje".[223]

A competition tool has, according to the authorities, the potential to bring certain advantages, including the possibility to develop a more holistic approach that tackles different aspects of the market(s) concerned. Furthermore, the new tool would allow for structural issues to be addressed, such as oligopolistic markets that may facilitate anti-competitive behaviour which cannot adequately be addressed under the current competition laws.[224]

[222] The Nordic competition authorities welcomed the ongoing focus on the trading practices of digital platforms, they wish to stress that such platforms have also played an important and positive role in our economies, not only fostering innovation and underpinning economic growth, but also creating opportunities for companies and consumers. They therefore found it doubtful that it would be beneficial to introduce a detailed list of obligations and prohibitions within an ex ante regulatory framework. This is because the same type of conduct can have both pro and anticompetitive effects depending on the market and/or the specific gatekeepers. Ibid.

[223] EN: On this basis, the Ministry believes that there may be a need for a regulatory authority that allows for regulation of the general framework conditions for the players in a market with insufficient competition, should this prove necessary from the purpose of the law. The ministry also believes, like the minority, that a general regulation through regulations would be most appropriate in such cases, because it ensures equal framework conditions for all players in the relevant industry. For the prepatory works, see https://www.regjeringen.no/no/dokumenter/nou-2012-7/id672264/?ch=12.

[224] The Nordic Competition Authorities made a joint statement in 2020 seem to be preferring a competition tool rather than an ex ante regulation. Cf., Digital platforms and the potential changes to competition law at the European level – The view of the Nordic competition authorities, 2020 *Nordiska konkurrensmyndigheternas memorandum*, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf.

While competition law provisions are primarily focused on preventing competition from becoming worsened, for example through mergers, collusion or abuse of dominance. A competition tool can play a more proactive role in promoting increased competition. So, for example, it can be used to introduce market opening measures that are intended to shift the whole nature of competition.[225] The tool enables authorities, at least in theory, to examine subtle complexities in the nature of strategic interdependence between firms, including the potential for tacit coordination, with a firm focus on identifying anti-competitive effects. The ability to examine 'tight oligopolies' is a key benefit of the regime.

The Icelandic competition tool was modelled after the UK market investigation tool. It allows the competition authority to investigate market failures or conduct that *prevent, limit or affect competition to the detriment of the public interest*, and to impose necessary and proportionate remedies when finding *serious impediment* to competition.[226]

In the jurisdictions that employ competition tools, the tools are designed for economists, while characterised by certain safe guards and highly transparent and participative procedures. Firstly, often the group conducting the market investigation is independent from the group making the reference to investigate a market or industry in the first place.[227] The group making the reference should have identified that competition may be distorted on a market or there is a market failure and the market needs to be investigated.[228] Secondly, the investigation is transparent and with a statutory time frame, where all interested parties have the possibility to comment on the preliminary findings of the investigation, which are made publicly available on the competition authority's website. This, in turn, enables the development of an open dialogue with the undertakings that may have an interest in the investigation. Furthermore, the imposition of remedies is triggered by a clearly identified legal standard yet with a clear connection to economics, e.g. the presence of *adverse* or *sufficient effect on competition* or even *serious impediment to competition*, which needs to be substantiated with sufficient evidence. The decisions of the authority are then often subject to review by Committees staffed by academics as well as by Courts.[229]

[225] The Open Banking measures which arose from the UK Retail Banking Market Investigation are a good example according to Fletcher, in that they were designed to open up the potential for disruptive and innovative competition from new technologies and business models. See Fletcher, Amelia, Market Investigations for Digital Platforms: Panacea or Complement? (August 6, 2020). Available at SSRN: https://ssrn.com/abstract=3668289.

[226] The Nordic Competition Authorities made a joint statement in 2020 seem to be preferring a competition tool rather than an ex ante regulation. Cf., Digital platforms and the potential changes to competition law at the European level – The view of the Nordic competition authorities, 2020 *Nordiska konkurrensmyndigheternas memorandum*, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf.

[227] In the UK system, there is a clear split of decision making between the decision to refer a market for investigation, which is taken by the CMA Board, and the final Market Investigation decision, which are made by a Group of independent decision-makers, drawn from the CMA Panel. CMA Panel members are all highly experienced, non-political, and bring a diversity of expertise and viewpoints. They are not CMA staff. The Group members for each Market Investigation are named publicly. Ibid.

[228] In the UK, sector-specific authorities and the government may make references to the CMA.

[229] Digital platforms and the potential changes to competition law at the European level – The view of the Nordic competition authorities, 2020 *Nordiska konkurrensmyndigheternas memorandum*, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf.

In reference to remedies, an effective competition tool often are boosted with broad and effective behavioural and structural remedies, while still only imposing remedies that are being proportionate to the identified concerns.[230] The breadth of potential remedies also brings clear benefits. While standard competition law remedies tend to be narrow and backward-looking, competition tool remedies can be forward-looking and frequently applying across the market, irrespective of individual firm market power.[231] Moreover, the competent competition authority may also make recommendation to other authorities to take action. For example should the competition authority not have efficient remedies to apply, while a need for a remedy is still identified, the authority can recommend for example the consumer authority or other authority to take action.

For example, at the completion of the Google Shopping case, even though being a pilot case, DG Competition was only able to impose a remedy relating to Google Shopping. It could not extrapolate from its findings and impose rules relating to analogous behaviour by Google in other vertical search markets such as job search, hotel search or local search. By contrast, a competition tool remedy could potentially restricted Google from engaging in this sort of behaviour more generally, beyond the specific example of Google Shopping; or even more broadly imposing the remedy on search engines in general.[232]

The breadth of opportunity could be viewed negatively, as allowing excessive scope for intervention. Indeed, the sorts of interventions imposed through a Competition tool could be considered similar to those more typically imposed through legislation, but without any process of parliamentary review. This notwithstanding, it also reflects a wider focus on enabling competition-focused interventions, free of political consideration, and requires a rigid review process and check and balances.[233]

Indeed, the tool is potentially both powerful and flexible and merits strong procedural checks and balances, to guard against confirmation bias or politicisation. The tool also has important limitations and thus should not be viewed as a full solution to the issues raised by digital platforms, but rather as a valuable complementary tool alongside the regular competition law prohibition and the EU centred sector-specific Digital Markets Act.

Given the above, a competition tool, inspired by the UK and Icelandic experience could be an interesting way forward for the Swedish Competition Authority. It could become a new tool in the toolbox and could address issues and markets where lack of competition is a concern. As stated above, the increased use of interimistic decisions by the SCA indicates a need for competition tool, while generally the development of the digital economy would be the

[230] The main limitations under the UK system are the requirement to target Orders at identified firms, which limits the potential to introduce non-firm-specific horizontal regulation. Ibid.

[231] See Fletcher, Amelia, Market Investigations for Digital Platforms: Panacea or Complement? (August 6, 2020). Available at SSRN: https://ssrn.com/abstract=3668289 or http://dx.doi.org/10.2139/ssrn.3668289. Ibid.

[232] The example is presented by Fletcher, cf. Fletcher, Amelia, Market Investigations for Digital Platforms: Panacea or Complement? (August 6, 2020). Available at SSRN: https://ssrn.com/abstract=3668289 or http://dx.doi.org/10.2139/ssrn.3668289.

[233] It should be mentioned that wide intervention for whole markets or industries may not trigger the right to defence for individual firms to the degree that the regular competition law investigations do. Nonetheless, the rights and freedoms of the undertakings involved need to be upheld.

main focus. The digital economy reflects such a paradigm shift that possibly call for a general tool to become available for the competition authority. Moreover, a new economy – the Internet of Things is soon upon us and it needs innovative rules and regulations. Yet, a series of procedural and substantive issues have to be carefully considered, including the legal standard to be adopted and the level of engagement of the undertakings involved before a competition tool is granted to the SCA.

There need to be a threshold test for initiating an investigation and a clear legal test based on anticompetitive effect for triggering the implementation of a remedy. Moreover, a framework capable of mitigating potential uncertainty on the part of undertakings need to be put in place. This holds particularly true in relation to a market structure-based competition tool, which would be applicable in the case of structural problems that cannot be addressed at all, or cannot be addressed effectively, under the EU or national competition rules. In order to avoid negative effects, transparent and predictable rules or guidelines with regard to the new competition tool need to be invented. The new competition tool should afford parties appropriate procedural safeguards including the right to judicial review. This should include clarity about the power to impose remedies. Clear legal standard reflecting the potential effects of the remedies imposed. In addition, a set of criteria or circumstances that justify the imposition of structural (e.g. forced divestitures) rather than behavioural remedies (e.g. transparency obligations or codes of conduct) would be necessary. However, can the above problem be mitigated, then a Swedish Competition Tool could be a valuable asset to increase and protect competition in Sweden, not only in reference to the digital economy, but also in other areas of the industry. Of course, such an amendment to the Swedish Competition Act need to be researched properly, before it is enacted.

5.3 The Media Industry

It should be clear that this report cannot reflect on the whole competitive structure of the Swedish media market, nor give justice to competition problem present on the market. As stated above the online advertisement business and media is the most analysed industry in the international reports. Especially, the UK, Australian and Stigler reports focus on online media and advertisement. The reason being that market specific rules for the media or online advertisement industry may be needed, both from a competition and a democratic point of view. The platforms and the news media do not compete on the same terms. Platforms have an advantage when not being as regulated as the news media industry.[234] The issue of fake news and that individuals being nudged can pose a problem to competition as well as democracy. Indeed, we see broader problems being created due to competition problems.

The rules in in 5(9), 6(8) and 6(11) of the Digital Markets Act are an effort to try to boost both sides of the advertisement platforms, i.e. both the publishers and advertisers competitive status, vis-a-vis large gatekeeper, e.g. Google and Facebook. The aim is to help the printed medias' online platforms. The proposed ex ante rules should be viewed as sector-specific rules with the aim to create a 'fair' industry, where competition is conducted on a somewhat levelled playing field. They are indeed not competition rules nor competition law remedies. However, perhaps the need to regulate the online advertisement market is greater than this, especially for smaller Member States.

[234] See Björn Lundqvist, EU:s reglering av den digitala mediamarknaden, vol 2 2022 *Europarättslig tidskrift*.

A tool with some sector specific competition rules together with a general obligation for social media to take some responsibility for what is published on the platforms (cf. the proposed DSA) and sector or industry specific rules in reference to data protection, consumer protection and access to data could be implemented. The relevant authorities making use of the tool being the SCA together with data and consumer protection agencies. A general competition tool chaperoned by the authorities regulating markets could be of use in reference to the Swedish media market. Indeed, such a tool could be used the level the playing field between the platforms (gatekeepers) and the news media players, by employing rules about mandatory access and use of platforms for the media players, right to obtain remuneration when platform use media content or even deciding that the use of fake news is not competition on the merits.[235]

5.4 Access to Data

Both the Commission's expert panel, the UK reports panel and academia draw attention to the issue of access to data in their respective reports.

In the event of a lack of access to data causing competition problems, it may be necessary to consider measures to eliminate these problems. The economists teach us that data is a non-rival resource, that is, the use of data in an activity does not displace the ability to simultaneously use it in one other. A data holder can thus both keep his data and share it at the same time its competitors, and others.

As regards EU law, only competition law provided a means to limit the availability of intellectual property remedies outside the intellectual property legal system. To be able to grant injunction for accessing data vis-a-vis a holder of a database imply that Competition law may trump the right based on for example the database directive.[236] However, the Competition law generally can only grant access to data in reference to a specific platform for the benefit of a specific group customers.

However, an access and portability right could be imagined under the competition tool, as it would be part of the competition legal system.

As in the proposed Digital Markets Act, business users should have access to the data that the business users and its end users generate on the platform. Whether the proposal actually includes an overriding right, and its general interface with intellectual property legal system, needs to be clarified. The rules granting access to data to business users and limiting the gatekeepers control of data in the Digital Markets Act could be interpreted as a bilateral overriding right benefitting the business users vis-à-vis gatekeepers. However, probably, a gatekeeper may successfully restrict access referring to for example a sui generis database right under the Digital Markets Act. Moreover, the Digital Markets Act only stipulates obligations for gatekeepers, not rights for business users.

[235] For further reading cf. Björn Lundqvist, EU:s reglering av den digitala mediamarknaden, vol 2 2022 *Europarättslig tidskrift*.

[236] Josef Drexl et al, Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act), 37. A very similar provision can be found in both the Data Governance Act, which in Article 5(7) states that the right of the maker of a database as provided for in Article 7(1) of Directive 96/9/EC shall not be exercised by public sector bodies in order to prevent the re-use of data or to restrict re-use beyond the limits set by this Regulation and in Article 1(6) of the 2019 Open Data Directive which contains the same language as the Data Governance Act proposal.

Moreover, the business users may also be limited of GDPR. The need for a levelled playing field calls for equal access under GDPR for platforms as well as business users using the same platform services. However, the Digital Markets Act does not require this. Indeed, the GDPR may be used by gatekeepers and other platforms or data holders to prevent access to data.

The platforms should be obliged to either provide similar access to business users through consent provisions or limit their own access under GDPR to personal data, should the individual in question refuse to encompass business users in the consent given to the platform.

A general access and portability right to data, complimenting the Digital Markets Act route, could be granted under a national competition tool. In reference to the competition tool, implementing an access and portability right generally vis-a-vis platforms in an industry would be enabled by a hybrid form of intervention under the competition tool (a mix between ex post competition enforcement and ex ante regulation), allowing a competition authority to impose remedies, including data access remedies, to address structural competition problems in a market without the need to establish a violation of the competition rules.[237]

Indeed, a Swedish "competition tool" could be useful. It can provide a basis for creating sector or individual obligations and conditions that can be used vis-a-vis special industries or markets such as the data-driven markets, media markets, or to employ a specific remedy, such as data access and portability, more broadly, i.e. *erga omnes*. Moreover, a competition tool is flexible also to address upcoming competition concerns in reference to Internet of Things. The economy would benefit from a "competition tool" and the legislator should consider amending the Swedish Competition Act accordingly and that such legislative initiative should take inspiration from the Nordic countries that have or are considering implementing similar tools.

[237] Martens, Bertin and de Streel, Alexandre and Graef, Inge and Tombal, Thomas and Duch-Brown, Néstor, Business-to-Business Data Sharing: An Economic and Legal Analysis (July 22, 2020). *EU Science Hub*, 2020, Available at SSRN: https://ssrn.com/abstract=3658100.

6. Conclusion

The purpose of the report is to shed light on platforms' business practices and their future regulation under competition law or in related legal systems. It starts with discussing basic concept and characteristics of the digital economy. It identifies certain aspects may constitute a problem for establishing competitive markets and industries in the digital economy and in the upcoming Internet of Things paradigm. One such aspect is access to data, where the report identifies that dissemination of data is of great importance to create competition and support innovation, while restricting access to certain data may constitute a market failure.

When discussing applicability of competition law to the digital economy, the ecosystem consisting of the European Commission and the national competition authorities has gained momentum. Nonetheless, the general consensus seems to be that the Competition legal system lacks certain aspects in reference to the time needed to develop useful legal doctrines and is too complex to enable clear and transparent rules to develop.

In response, the newly enacted Digital Markets Act opens an avenue for a new, interoperable Internet, where leveraging (including self-preferencing) and other forms of abuse are restricted ex ante in a sector or industry specific regulation. However, the Digital Markets Act caters to gatekeepers only and is centered around the European Commission. There is a risk that it cannot become an effective tool to regulate dynamic market structures and competition in smaller economies. Moreover, the Digital Markets Act became after the trialogue very complicated. It is an intricate legal tool semi-exclusive for the benefit of the Commission and the complexity of the ex ante rules may lead to lengthy litigations, something which the Digital Markets Act was supposed to mitigate in the first place. Indeed, it is a tool for the EU Commission addressing the very largest platforms.

The report stipulates that a national equivalent to the newly enacted Digital Markets Act is not necessary. National and EU competition law may step in and be useful against the international and national platforms active in the various Member States. However, there may be specific industries, markets or conduct that needs to be addressed from a holistic point of view, that possible cannot be addressed by the Swedish Competition Authority under the current competition rules.

A Swedish so-called "competition tool" could therefore be useful. A "competition tool" is a regulatory right for a competition authority to regulate markets more broadly. It can provide a basis for creating sector conditions and individual obligations that can be used vis-a-vis special industries, markets such as the data-driven markets, media markets, or to employ a specific remedy, such as data access and portability, broadly, i.e. *erga omnes,* or against individual data holders. Moreover, a competition tool is flexible also to address upcoming competition concerns in reference to Internet of Things. The report therefore concludes that the economy would benefit from a "competition tool" and that the legislator should consider and conduct an analysis whether to amend the Swedish Competition Act accordingly and that such legislative initiative should take inspiration from the Nordic countries that have or are considering implementing similar tools.

References

In order of appearance

Iain M. Cockburn, Rebecca Henderson, Scott Stern, The Impact of Artificial Intelligence on Innovation: An Exploratory Analysis, in Joshua Gans, Ajay Agrawal and Avi Goldfarb (eds) *The Economics of Artificial Intelligence: An Agenda* (University of Chicago Press 2019)

Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (CentER Discussion Paper; Vol. 2017-007), Tilburg: CentER, Center for Economic Research

Parker, Geoffrey Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust (May 22, 2020). Available at SSRN: https://ssrn.com/abstract=3608397

Wolfgang Kerber, A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis, GRURInt. 2016, 989

Wolfgang Kerber, 'Rights on Data: The EU Communication "Building a European Data Economy" from an Economic Perspective' in Sebastian Lohsse, Reiner Schulze, Dirk Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools* (Baden-Baden: Nomos, 2017)

European Commission Joint Research Centre (JRC): Nestor Duch-Brown, Bertin Martens and Frank Mueller-Langer, 'The economics of ownership, access and trade in digital data', JRC Digital Economy Working Paper 2017-01 (Seville: European Commission, 2017), available at: https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf.

The Swedish Competition Authority´s report *Konkurrensen på digitala plattformsmarknader i* Sverige (EN: The competition on digital platform markets in Sweden) 2021:1

Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), *Competition policy for the digital era*, Publications Office of the European Union.

The UK Competition and Markets Authority ("CMA") (2020) *Online platforms and digital advertising Market study final report*.

Furman Report: HM Treasury (2019), *Unlocking digital competition, Report of the Digital Competition Expert Panel.*

Federal Ministry for Economic Affairs and Energy (2019), *A new competition framework for the digital economy.* Report by the Commission Competition Law 4.0.

Australian Competition and Consumer Commission (2019), *Digital Platforms Inquiry. Final Report.*

George J. Stigler Center for the Study of the Economy and the State, *Sub-committee on Market Structure and Antitrust Report* (2019), Final Report by the Market Structure and Antitrust Subcommittee.

U.S. House of Representatives, 116th Congress (2020), Report on Investigation of Competition in Digital Markets: Majority Staff Report and Recommendation.

Competition Bureau Canada (2018) Big Data and Innovation: Key Themes for Competition Policy in Canada

BRICS Competition Law and Policy Centre (2019), *Digital Era Competition: A BRICS View Committee for the Study of Digital Platforms* (2019). BRICS Competition Law and Policy Centre (2019), Digital Era Competition: A BRICS View.

Bundeskartellamt, Market Power of Platforms and Networks (*Bundeskartellamt*, Working Paper No. B6 113/15, 2016)

Björn Lundqvist, Regulating the Data-Driven Economy under EU Law - Access and Portability of Data' (forthcoming *Cambridge University Press* 2022); Björn Lundqvist, An Access and Transfer Right to Data – from a Competition Law Perspective in J*ournal of Antitrust Enforcement* 2022

Björn Lundqvist How Does the EU Protect Competition in the Digital Platform Economy? in Bakardjieva Engelbrekt, A., Leijon, K., Michalski, A., Oxelheim, L. (eds.), *The European Union and the Technology Shift*, Palgrave, Springer Berlin, Heidelberg (2021)

Sten Nyberg, Richard Friberg, Björn Lundqvist and Robin Teigland *Konjunkturrådets rapport 2021: Digitalisering och konkurrens*, 2021 SNS Förlag

Björn Lundqvist with Michal Gal (ed) 'Competition Law for the Digital Economy' (*ASCOLA Competition Law series Edward* Elgar 2019)

Björn Lundqvist, Data Collaboration, Pooling and Hoarding under Competition Law in Rosa Maria Ballardini, Petri Kuoppamäki, and Olli Pitkänen (eds) 'Regulating Industrial Internet Through IPR, Data Protection and Competition Law' (*Hart* 2019)

Björn Lundqvist 'Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet-of- Things World: The Issue of Accessing Data' in Bakhoum M. et al (red) 'Personal Data in Competition, Consumer Protection and Intellectual Property Law' (*MPI Studies on Intellectual Property and Competition Law,* vol 28. Springer, Berlin, Heidelberg 2018).

Filippo Lancieri and Sakowski, Patricia, Competition in Digital Markets: A Review of Expert Reports 26 *Stan. J.L. Bus. & Fin.* 65 (2021).

Stefan Larsson på uppdrag av Konkurrensverket, *Dataekonomier – Om plattformar, tredje-partsaktörer och behovet av transparens på digitala marknader*, Uppdragforskningsrapport 2020:4

Elena Maris, Timothy Libert and Jennifer R Henrichsen in *New media & society* 2020, Vol. 22(11) 2018–2038

Steven Englehardt, Arvind Narayanan, Online tracking: A 1-million-site measurement and analysis, section 5, ACM Conference on Computer and Communications Security, 2016. FPF Privacy Papers for Policy Makers Award.

T. Libert. Exposing the invisible web: An analysis of third-party http requests on 1 million websites. *International Journal of Communication*, 9(0), 2015.

CMA Final report Appendix F. European Commission, Enter the data Economy: EU Policies for a Thriving Data Ecosystem, 21 EPSC Strategic Notes, 1

Eugenia Politou, Efthimios Alepis, Constantinos Patsakis, Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions, *Journal of Cybersecurity*, Volume 4, Issue 1, 2018, tyy001, https://doi.org/10.1093/cybsec/tyy001

Lauren Feiner, Amazon admits to Congress that it uses 'aggregated' data from third-party sellers to come up with its own products, *CNBC*, NOV 19 2019

Damien Geradin, Online Platforms and Digital Advertising Market Study: Observations on the Statement of Scope (February 13, 2020). Available at SSRN: https://ssrn.com/abstract=3537856

Damien Geradin, and Katsifis, Dimitrios and Karanikioti, Theano, Google as a de facto privacy regulator: Analyzing Chrome's removal of third-party cookies from an antitrust perspective (November 26, 2020). Available at SSRN: https://ssrn.com/abstract

Damien Geradin and Katsifis, Dimitrios, Taking a Dive Into Google's Chrome Cookie Ban (February 19, 2020). Available at SSRN: https://ssrn.com/abstract=3541170

Damien Geradin and Katsifis, Dimitrios, 'Trust Me, I'm Fair': Analysing Google's Latest Practices in Ad Tech from the Perspective of EU Competition Law (October 7, 2019). *TILEC* Discussion Paper No. DP 2019-029, Available at SSRN: https://ssrn.com/abstract=3465780

Björn Lundqvist, Cloud Service as the ultimate Gate(keeper) *The Journal of Antitrust Enforcement*, Volume 7, Issue 2, July 2019, Pages 220–248.

Porter ME. Clusters and the new economics of competition. *Harv Bus Rev*. 1998;76(6):77–90.

Moro Visconti, Roberto and Larocca, Alberto and Marconi, Michele, Big Data-Driven Value Chains and Digital Platforms: From Value Co-Creation to Monetization (January 18, 2017). Available at SSRN: https://ssrn.com/abstract=2903799 or http://dx.doi.org/10.2139/ssrn.2903799

Russell Brandom, Texas attorney general announces ad tech antitrust probe against Google 'This goliath of a company is using its power to manipulate the market', Dec 16, 2020, *The Verge*, https://www.theverge.com/2020/12/16/22178988/google-antitrust-ad-tech-lawsuit-texas-attorney-general-paxton

Federal Trade Commission. (2014). *Data Brokers: A Call for Transparency and Accountability: A Report of the Federal Trade Commission* (May 2014). https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014

Competition Bureau Canada (2018) Big Data and Innovation: Key Themes for Competition Policy in Canada.

The French Autorité de la concurrence and the German Bundeskartellamt (2019) *Algorithms and Competition.*

Carl Shapiro and Hal R. Varian. Information rules: a strategic guide to the network economy. *Harvard Business Press*, 1998, for an early research pointing to the importance of network effect in the digital economy.

Tim Wu (2017). Blind spot: The attention economy and the law. *Antitrust Law Journal*, 82.

Josef Drexl. in "Data Access and Control in the Era of Connected Devices", Study on behalf of the European Consumer Association BEUC, Brussels 2018, 34 et seq.

Bertin Martens, Frank Mueller-Langer, Access to digital car data and competition in after-sales services, EUR - Scientific and Technical Research Reports, September 2018, https://ec.europa.eu/jrc/sites/jrcsh/files/jrc112634.pdf

Evans, D. S. (2019). Attention Platforms, the Value of Content, and Public Policy. *Review of Industrial Organization*, 54(4), 775-792.

Eggers Brynjolfsson and Gannamaneni (2018), Using massive online choice experiments to measure changes in well-being, *National Bureau of Economic Research*, Working Paper 24514.

Jens Prüfer and C. Schottmüller, 'Competing with Big Data' (*CentER Discussion Paper*; Vol. 2017-007), Tilburg: CentER, Center for Economic Research.

CASE AT.39740 Google Search (Shopping), 27/06/2017

European Commission, Commission Staff Working Document Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, SWD/2017/0304 final - 2017/0228 (COD), Brussels, 13 September 2017 (Impact Assessment)

Schweitzer, H., European Commission, Directorate-General for Competition, The new competition tool: its institutional set up and procedural design: expert study, *Publications Office*, 2020, https://data.europa.eu/doi/10.2763/060011.

Motta, M., Peitz, M., European Commission, Directorate-General for Competition, Intervention triggers and underlying theories of harm: expert advice for the impact assessment of a new competition tool: expert study, *Publications Office*, 2020, https://data.europa.eu/doi/10.2763/487824.

Whish, R., European Commission, Directorate-General for Competition, New competition tool : legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool : expert study, *Publications Office*, 2020, https://data.europa.eu/doi/10.2763/528171.

Larouche, P., Streel, A., European Commission, Directorate-General for Competition, Interplay between the new competition tool and sector-specific regulation in the EU: expert study, *Publications Office*, 2020, https://data.europa.eu/doi/10.2763/521287.

Crawford, G., Rey, P., Schnitzer, M., European Commission, Directorate-General for Competition, An economic evaluation of the EC's proposed "new competition tool", *Publications Office*, 2020, https://data.europa.eu/doi/10.2763/329087

Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, COM(2017) 9 Final, 10 January 2017.

Geoffrey Parker and Petropoulos, Georgios and Van Alstyne, Marshall W., Digital Platforms and Antitrust (May 22, 2020). Available at SSRN: https://ssrn.com/abstract=3608397

Monopolkommission (2015), *Competition policy: The challenge of digital markets*, Special Report No. 68

Ioannis Lianos and Evgenia Motchenkova, Market Dominance and Search Quality in Search Engine Market (2013), 9 (2) *Journal of Competition Law & Economics*, 419-455, 419, 451.

Wolfgang Kerber and Jonas Frank, 'Data Governance Regimes in the Digital Economy: The Example of Connected Cars' (3 November 2017). Available at SSRN: https://ssrn.com/abstract=3064794

Daniele Condorelli and Jorge Padilla, Data-Driven Predatory Entry with Privacy-Policy Tying (May 13, 2020). Available at SSRN: https://ssrn.com/abstract=3600725

Daniele Condorelli and Jorge Padilla, Harnessing Platform Envelopment in the Digital World (December 14, 2019). Available at SSRN: https://ssrn.com/abstract=3504025

EU Commission A European strategy for data, Brussels, 19.2.2020 COM(2020) 66 final, 8.

Daniel L. Rubinfeld and Michal Gal, 'Access Barriers to Big Data' (2017). 59 *Arizona Law Review* 339. Available at SSRN: https://ssrn.com/abstract=2830586

Heike Schweitzer, Justus Haucap, Wolfgang Kerber, December 18, 2019, Modernizing the Law on Abuse of Market Power in the Digital Age: A Summary of the Report for the German Ministry for Economic Affairs and Energy, https://www.competitionpolicyinternational.com/modernizing-the-law-on-abuse-of-market-power-in-the-digital-age-a-summary-of-the-report-for-the-german-ministry-for-economic-affairs-and-energy/

European Commission, Fairness in platform-to-business relations, Ref. Ares(2017)5222469 - 25/10/2017.

The German Commission of Experts on Competition Law 4.0 presents final report to Minister Altmaier: *A New Competition Framework for the Digital Economy* seems to propose a European Platform Regulation cf. https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190909-commission-of-experts-on-competition-law-40-presents-final-report-to-minister-altmaier.html

Thomas Höppner, Digital Upgrade of German Antitrust Law - Blueprint for Regulating Systemic Platforms in Europe and Beyond?, at https://www.hausfeld.com/news-press/digital-upgrade-of-german-antitrust-law-blueprint-for-regulating-systemic-platforms-in-europe-and-beyond.

T-201/04 Microsoft v. EU Commission ECLI:EU:T:2007:289

Case No COMP M.6281 Microsoft/Skype, 7 October 2011. See also press release: http://europa.eu/rapid/press-release_IP-11-1164_en.htm.

T-79/12 - Cisco Systems and Messagenet v Commission ECLI:EU:T:2013:635

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18, para. 17.

Carl Shapiro and Hal R. Varian, *Information Rules* (Harvard Business School Press 1999)

Neil Gandal, 'Compatibility, Standardization, and Network Effects: Some Policy Implications', (2002) 18 *Oxford Review of Economic Policy*, 80

Michael Katz and Carl Shapiro, 'Systems Competition and Network Effects', (1994) 8 *Journal of Economic Perspective*, 93

Mark Lemley and David McGowan, 'Legal Implications of Network Economic Effects', (1998) 86 *California Law Review*, 479

Michael Schallop, 'The IPR Paradox: Leveraging Intellectual Property Rights to Encourage Interoperability in the Network Computing Age', (2000) 28 *AIPLY Quarterly Journal*, 195

C-138/11 - Compass-Datenbank ECLI:EU:C:2012:449

Björn Lundqvist, 'Turning Government Data into Gold: The Interface Between EU Competition Law and the Public Sector Information Directive - With Some Comments on the Compass Case' in *I I C - International Review of Intellectual Property and Competition Law,* Vol. 44, Nr. 1, 2013, pp. 79-95.

Nathan Newman, Search, Antitrust and the Economics of the Control of User Data (September 24, 2013). *Yale Journal on Regulation, Vol. 30, No. 3*, 2014. Available at SSRN: http://ssrn.com/abstract=2309547

Josef Drexl. in "Data Access and Control in the Era of Connected Devices", Study on behalf of the European Consumer Association BEUC, Brussels 2018

Joined Cases C-403/08 and C-428/08 Football Association Premier League and Murphy ECLI:EU:C:2011:631

Joined cases C-241/91 and C-242/91, RTE, ITP & BBC v. Commission ECLI:EU:C:1995:98

C-311/84 Centre belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion SA (CLT) & Information publicité Benelux SA ECLI:EU:C:1985:394

The Patent and Market Court, PMT 7000-15, decided 15 January 2015.

Sarah Hoskins, No such thing as a Naked Restriction? Nasdaq acquitted in Swedish Abuse case, https://www.nordiccompetitionblog.com/?p=993

Måns Gottfries, Judgment after Swedish Competition Authority's long-running investigation – Nasdaq did not abuse its dominant position, *Roschier*, https://www.roschier.com/newsroom/judgment-after-swedish-competition-authoritys-long-running-investigation-nasdaq-did-not-abuse-its-dominant-position-30-january-2018/.

Vladimir Bastidas Venegas *Kontrafaktiska tester och Missbruksbedömning* Uppdragsforskningsrapport 2019:6.

The Patent and Market Court of Appeal, PMT 1443-18, decided 28 June 2019, http://www.patentochmarknadsoverdomstolen.se/Domstolar/pmod/2019/1443-18.pdf

Case AT.39740 Google Search (Shopping) Commission Decision, C(2017) 4444 final (27 June 2017), para 339

EDF-Dalkia merger decision. European Commission, "EDF/Dalkia en France", COMP/M.7137, dated 25.06.2014. 68 French Competition Authority, Decision n° 14-D-06, dated 08.07.2014, relative à des pratiques mises en œuvre par la société Cegedim dans le secteur des bases de données d'informations médicales. This decision has been confirmed on appeal but is still pending in front of the Cour de Cassation (the French Supreme Court).

Case T 617/17 Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763

European Commission, Press release 10 November 2020 Brussels, 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. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077

Case AT.40099 – Google Android. http://europa.eu/rapid/press-release_IP-18-4581_en.htm

Andrzej Kmiecik, Sweden: Swedish Court Finds That Booking.Com's Narrow Vertical Price Parity Clauses Infringe Article 101 TFEU Monaq, http://www.mondaq.com/x/738816/Hotels+Hospitality/Swedish+Court+Finds+That+Booking Coms+Narrow+Vertical+Price+Parity+Clauses+Infringe+Article+101+TFEU

Bryan Cave, Price parity clauses and Booking.com - a more unified approach or a reminder of diverging opinions?, https://www.lexology.com/library/detail.aspx?g=025134c4-b7b7-4275-aee8-6256d54894cc

Sten Nyberg, Richard Friberg, Björn Lundqvist and Robin Teigland *Konjunkturrådets rapport 2021: Digitalisering och konkurrens*, 2021 SNS Förlag, pp 168.

C-252/21 - Meta Platforms and Others ECLI:EU:C:2022:704

C-238/05, "Asnef-Equifax" ECLI:EU:C:2006:734

Case C-67/13 P. Groupement des cartes bancaires (CB) v European Commission ECLI:EU:C:2014:2204

Jonathan Nuechterlein and Philip Weiser, Digital Crossroads, 2nd ed., *MIT* 2013

Brett Ryder, What if large tech firms were regulated like sewage companies? – Being treated as utilities is Big Tech's biggest long-term threat, *The Economist*, 23 September 2017.

Andrej Savin, New Directions in EU Policymaking on the Content Layer: Disruption and Law (April 29, 2020). *Copenhagen Business School*, CBS LAW Research Paper No. 20-05. Available at SSRN: https://ssrn.com/abstract=3588387

John M. Broder Ira Magaziner Argues for Minimal Internet Regulation, 30 June 1997, *the New York Times*, https://www.nytimes.com/1997/06/30/business/ira-magaziner-argues-for-minimal-internet-regulation.html

Tim Wu, Network Neutrality, Broadband Discrimination, 2 *J. Telecom & High Tech*, L. 141, 149 (2003).

GSMA, the Internet Value Chain, a study on the economics of the internet, May 2016, https://www.gsma.com/publicpolicy/wp-content/uploads/2016/05/GSMA_The-internet-Value-Chain_WEB.pdf

Joseph Farrell and Weiser, Phil, Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age. *Harvard Journal of Law and Technology*, Vol. 17, No. 1, Fall 2003. Available at SSRN: https://ssrn.com/abstract=452220

A Chisholm and Jung, N., (Spring-Autumn 2015), Platform Regulation— Ex-Ante versus Ex-Post intervention: evolving our antitrust tools and practices to meet the challenges of a digital economy. *Competition Policy Int'l*. Vol. 11, No. 1, 7-21.

Björn Lundqvist, 'Regulating Competition and Property in the Digital Economy – The Interface Between Data, Privacy, Intellectual Property, Fairness and Competition Law' (17 January 2018). *Faculty of Law*, Stockholm University Research Paper No. 55. Available at SSRN: https://ssrn.com/abstract=3103870.

Herbert Zech, 'Information as a tradable commodity', in Alberto De Franceschi Ferrara (ed), *European Contract Law and the Digital Single Market*, 2016, 51-79.

SWIPO Code of Conduct, available at https://valtioneuvosto.fi/en/project?tunnus=LVM019:00/2019.

Ernesto Dal Bó, 'Regulatory Capture: A Review' 22 *Oxford Review of Economic Policy* 2, Summer 203–225 https://doi.org/10.1093/oxrep/grj013

Jean-Jacques Jean Tirole Laffont, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture'(1991) 106 *The Quarterly Journal of Economics* 4 1089–1127 https://doi.org/10.2307/2937958

German Competition Authority, 'Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive' (19 December 2017),https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html

Thomas Höppner, Digital Upgrade of German Antitrust Law - Blueprint for Regulating Systemic Platforms in Europe and Beyond?, at https://www.hausfeld.com/news-press/digital-upgrade-of-german-antitrust-law-blueprint-for-regulating-systemic-platforms-in-europe-and-beyond.

Nordiska konkurrensmyndigheternas memorandum, available at: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf

Amelia Fletcher, Market Investigations for Digital Platforms: Panacea or Complement? (August 6, 2020). Available at SSRN: https://ssrn.com/abstract=3668289

Björn Lundqvist EU:s reglering av den digitala mediamarknaden vol 2 2022 *Europarättslig tidskrift*.

Bertin Martens and de Streel, Alexandre and Graef, Inge and Tombal, Thomas and Duch-Brown, Néstor, Business-to-Business Data Sharing: An Economic and Legal Analysis (July 22, 2020). *EU Science Hub*, 2020, Available at SSRN: https://ssrn.com/abstract=3658100

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