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Defining Dominant Market Position for Digital Platforms in EU's Internal Market

Bachelor's thesis
Programme HAJB 08/17, specialisation European Union and International law

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Tallinn 2020

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ABSTRACT /ONLY IN GARDUATION THEeSIS/

The thesis aims to determine which are the prevailing factors that determine digital online platforms dominant position in the European Union's single digital market in order to be consistent with the established meaning of dominant position under Article 102 of the TFEU and whether and how the specificities of the digital online platform market affect the verification of dominance.

The author will examine what would be the most appropriate approach for defining dominant market position for digital online platform operators in the single market with theoretical and qualitative research methods and which are the most significant problems of the current legislation and how could the problems be solved with existing legal means.

The research hypothesis is that the current European Union competition legislation is not effectively applicable to digital online platforms as it is to traditional businesses, thus generating a need to improve Union's competition law regulations concerning digital online platforms further. Additional approach is that, does the uniqueness of digital online platform market influence or affect the verification of dominance in establishing dominant position. Primary sources are the EU legislation including EU case law. Secondary sources consist of academic literature concerning the topic, and the recent political interaction along with Commission's decisions and guidelines.

Keywords: Digital Online Platforms, Competition, Dominant Market Position

LIST OF ABBREVIATIONS

Court of Justice of the European Union	CJEU
The Commission	The European Commission
EC	European Community (preceded European Union)
EEA	European Economic Area
EU	the European Union
SSNDQ	”Small but Significant Non-Transitory Decrease in Quality”
SSNIP	”Small but Significant Non-Transitory Increase in Price”
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

The subject is topical because digital online platform operators are rapidly gaining dominance in European single digital market and various actors for example: European Commission and European National Competition and Consumer Authorities (e.g. Finland)[1] have expressed their woes about the safety of the consumers and competition in the single digital market. Since, digital online platforms as market operators are more dynamic than conventional businesses, they can adapt to changing environment more faster and growing themselves exponentially compared to the more traditional business models.

Online platform market is constantly evolving line of business. According to the information provided by the European Commission "Today, 1 million EU businesses are already selling goods and services via online platforms, and more than 50% of small and medium enterprises selling through online marketplaces sell cross-border. For 2017, the European Business-to-Consumer (B2C) e-commerce turnover was forecasted to reach around €602 billion, at a growth rate of nearly 14%.".[2] According to the European Commission's report EU's official policy for the digital single market legislation is to ensure fair competition on the market as well as protection of consumer interests.[3] There are multiple legislative initiatives pending in the European Union that are directed towards the digital platform economy and as one of the Juncker Commissions objectives was to achieve a Digital Single Market. The purpose of the Digital Single Market initiative is to extend the scope of Article 26 (2) TFEU to the internet and to ensure the protection of the four fundamental freedoms of European Union, the free movement of goods, people, services and capital along with the use and access to these digital online platform services under the conditions of fair competition. The development of the digital platform economy needs to be supported by political action and thus currently regulatory

[1] Kilpailu- ja kuluttajavirasto, Alustat kilpailu- ja kuluttajaoikeudellisessa tarkastelussa, Kilpailu- ja kuluttajaviraston selvityksiä 4/2017, p. 36-44. accessible: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2017/kkv-selvityksia-4-2017-alustat.pdf

[2] European Commission, Online Platforms, 2019 available at https://ec.europa.eu/digital-single-market/en/policies/online-platforms

[3] Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2018 https://ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf

compliance entails significant costs for European businesses' which is harmful for the economic objectives that European Union is trying to reach. In this thesis the approach is to review the prevailing legislation within the borders of the European Union and its Economic Zone and how does the Commission deal with the defining of dominant position for digital online platforms that operate in the internal market.

The digital platforms are complex entities which can operate simultaneously in multiple markets that can be entwined in to each other so convolutedly that defining the relevant market and the abuse of dominance in that specific market can be paramount task for any legislation, thus developing more weight to the fact that the provisions of EU competition law must be clear and consistent. Thesis concentrates on European Union Law and European Competition law and policies and how the discussed definitions currently exist with proposed ideas about possible reforms of the legislation. The modern definition of dominant market position need to develop under competition law regulation since at present the corporations in the market do not have precise means and instructions how to avoid breaking competition rules, so to put it blankly many of the provisions are too vague which can generate enormous sanctions to large corporations like Apple, Google, Amazon & Intel which are not based in the European Union.

The thesis is divided into five chapters, the first and second chapters provide an introductory part presenting the concepts of market power and dominant position along with detailed explanation for defining digital platform as an entity. Third chapter focuses on definition of relevant market and the tests conducted in order to determine the actual market that digital online platform in question is conducting its business. Fourth chapter further analyses the impact of a single digital online platform has on the market based on its market size and the dynamics of that specific market. Chapter five brings out the theory of harm, which is an Post-Chicago school economic research theory introduced to the field of competition law in order to examine if dominant position has any strategic effect on the market, through comparative analysis of regulation and company's actions.

The expected outcome of the thesis is that the legal framework concerning the definition of the dominant position for digital online platforms is not sufficiently clear. The assessment will focus on whether this statement has grounds or not and the issues deriving from the lack of a legal framework and how it affects in practice are also discussed. The most desirable solution would be to discover that the case law has provided comprehensive guidance on the matter.

1. ARTICLE 102 OF THE TFEU

1.1. Application

Article 102 of the TFEU (previously known as Article 82 of the EC Treaty)[4] deals with the operations of undertakings with significant market power, it prohibits one or more undertakings which hold the dominant position in the internal market or a substantial part of that market from abusing that position in case it may affect interstate trade within the internal market.[5] The Article is primarily concerned with the unilateral conduct of a single undertaking, but may also, in certain circumstances, apply to the conduct of several undertakings, so-called 'joint dominant position'. Article 102 TFEU applies only to undertakings in a dominant position.[6] An undertaking's dominant position is not in itself prohibited, but Article 102 TFEU prohibits its abuse in relation to customers or competitors.[7] Abuse distorts competition, which in turn affects the functioning of the Union's internal market.[8] Abuse of a dominant position in competition law is accompanied by severe penalties.[9] The list of prohibitions in Article 102 TFEU gives examples of typical forms of abuse, but it should be noted that the list is not exhaustive and other activities may also be prohibited.

Monitoring primarily focuses on safeguarding the competitive process,[10] a number of dominant market cases dealt with by the European Commission and the European Courts have involved

[4] Jones A., Sufrin B. (2016) EU Competition Law: Text, Cases, and Materials. 6th ed. United Kingdom: Oxford University Press p 259
[5] Jones A., Sufrin B. (2011) EU Competition Law: Text, Cases and Materials. 4th ed. United Kingdom: Oxford University Press. p.259
[6] Wikberg O. (2011) Johdatus kilpailuoikeuteen, (1st Ed.) Talentum Oy p.161
[7] Ibid.
[8] Ibid.
[9] In 2018 the Commission fined Google in the amount of 4.34 billions € for abusing its dominant position in the mobile smartphone market. See: the Commissions decision C/2018/4761 p.324
[10] Wikberg O. (2011) Johdatus kilpailuoikeuteen, (1st Ed.) Talentum Oy p.162

situations where a dominant undertaking has sought to prevent or exclude its competitors.[1112] In order to establish a violation of Article 102 TFEU certain conditions need to be met: (1) there needs to be proof for dominant position being held on a relevant market by one or more undertakings, (2) the position must be held in the EU's internal market or a substantial part of it, (3) positive abuse of dominant position must take place (4) and it has to affect trade between Member States actually or potentially.[13]

1.2. Dominant Position as Part of EU Competition Policy

Understanding the elements of dominance, control and regulation requires a review of the underlying objectives of competition policy and law of the EU. The fundamental purpose of EU competition policy is to protect and promote economic efficiency and competition to achieve the goals set out in legislation. EU competition policy however, has many goals that can also conflict with each other. By contrast, the objectives of competition law are narrower. Competition law can be characterized constitution of the market economy, because one of the main purposes of the legal field is to ensure effective competition in the internal market in order to achieve the EU's internal market objective.[14]

In the context of competition law, the regulation of market power and the guarantee of sound market procedures are essential. However, the means of competition law are crucially dependent on the objectives of competition policy.[15] The objectives of EU competition policy are linked to those of the European Union as expressed in Article 2 of the TEU about EU's goals and objectives. According to Article 3 TEU, these mentioned goals and objectives are to be achieved by, inter alia, establishing the internal market and applying the rules on competition. One of the general objectives of competition policy is to maintain economic efficiency, which in economics

[11] See Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel) see: paragraph 3, (43) Commission fined Intel for 1.06€ bn for abuse of dominant position for illegal practices in the hardware component market.
[12] See also Case AT.39740 (C(2017) 4444) 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement Google Search (shopping) Commission fined Google 2.42€ bn for abusing dominance as search engine, by giving illegal advantage to own comparison comparison shopping service
[13] Lorenz M. (2013) An Introduction to EU Competition Law. Cambridge: Cambridge University Press p. 189
[14] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 44-45. (Publications of Finnish Lawyer's Association. A-series; 239).
[15] TEU article 3 & Preamble paragrapgh. 10

is to protect the competitive process by dividing the factors of production based solely on supply and demand of the market.[16] EU competition law has however, meta-objectives that go beoyond economic efficiency, which cannot be considered in isolation from individual competition rules. One of the main objectives of Union competition law is to safeguard undistorted competition in the internal market, consumers as part of the broader objective of integration, i.e. the internal market, as set out in Article 3 TEU. As part of this objective, the aim of Article 102 TFEU is to prevent distortions of competition and to promote consumer welfare in the Union.[17][18] Its profound structure is about the exercise of judicial control of economic power, not ultimately protecting the interests of competitors or consumers, but the structure of the market and competition as an institution.[19] By contrast, the objectives of competition policy are far more diverse. Whereas the objectives of European Union competition law and policy can be summarized as freedom, efficiency, justice and integration.[20]

The determination of dominance constitutes a central issue in both areas of competition law, even though the time horizons of those areas are different. EU competition law is neutral and thus the dominant position is often a natural consequence of the competitive process and may result as increased efficiency of the company leading inefficient firms to exit the market (no-fault monopoly).[21] Dominant position is always a phenomenon that is transient over a sufficiently long period of time, and the achievement of which often encourages companies to fund innovation and investment heavily.[22] Since, it is practically impossible to prevent the emergence of a dominant position, the legislature has only prohibited its abuse. Thus, the reasons on which the dominant position is based are also irrelevant to the assessment of market power.[23]

In principle, the verification of a dominant position does not impose any forward-looking obligations on the company, as the assessment of a dominant position changes as the market

[16] Alkio, M. Wik, C. (2004) Kilpailuoikeus p. 8
[17] Official Journal of the European Union, C 202, 7 June 2016 p. 308
[18] Case C-52/09 Judgment of the Court (First Chamber) of 17 February 2011. Konkurrensverket v TeliaSonera Sverige AB. p.22
[19] Case C-95/04 P Judgment of the Court (Third Chamber) of 15 March 2007. British Airways plc v Commission of the European Communities. p.107
[20] Kalimo, H. & Majcher, K. (2017) The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace, European Law Review Issue 2 2017
[21] Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 70
[22] Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511804038 p.89
[23] European Commission Decision Google Search (Shopping), AT.39740 – 27 June 2017 para. 315

situation changes.[24] However, verification of a dominant position is crucial for the legal position of an undertaking, since an undertaking in such a position has a particular responsibility to ensure that competition is not reduced, distorted or prevented by its measures.[25]

1.3. Dominant Position & Market Power

The case law of the CJEU and the Treaties of the European Union do not have a specific definition for the concept of ”Market Power”. However, market power is one of the most fundamental theoretical economic concepts of competition law and the existence of which is a prerequisite for the application of competition law. In the context of the research under neoclassical competition theory market power requires not only the ability to raise prices above competitive levels[2627], but also the long-term profitability of such a price increase.[28] Thus, legally defined, the ability to raise prices above competitive levels refers to the economic dominance of the company, which allows it to operate to some extent independently of the market mechanism without itself being harmed.[29] Definition of dominant position would be best described as in accordance of the CJEU’s decision laid down in United Brands v Commission[30]:

”The dominant position thus referred to buy Article 102 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.[31]

[24] Alkio, M. Wik, C. (2004) Kilpailuoikeus p.272-274
[25] Case Intel C-413/14 P, EU:C:2017:632, Intel, paragraph 135 &
Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa
(2003), p. 920-921. (Publications of Finnish Lawyer’s Association. A-series; 239).
[26]Kuoppamäki P.J. (2000) Kilpailuoikeuden Perusteet p.112
[27] Kuoppamäki, P. J. (2012). Uusi kilpailuoikeus. (2nd Ed.) Helsinki: Sanoma Pro p. 9
[28] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) paragraph. 11
[29] Whish, R. (2001), Competition Law. (4th ed.) p. 21
[30] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22
[31] ”Does not adequately reflect that Article 102 also applies to market power on the buying as well as the selling side of the market” since it was not an issue in the case – Whish, R. & Bailey, D (2012) Competition Law 7th.ed.p 179-180

The definition is traditionally distinguished as on the one hand, a structural element based on significant and relatively long-term market power (monopoly power) and, on the other hand, a strategic element which requires the ability of the company to harm effective competition in the relevant market (theory of harm).[32] Dominant position is almost always based on a number of factors which, in themselves, may not be sufficient to establish such a position.[33] However, there is no consensus in the jurisprudence or legal literature on whether these dominant elements are alternative or cumulative.[34]

Dominant position is a binary concept, that is to say, a company is in or is not in such a position.[35] The conceptual challenge of a dominant position culminates in its transparency, and interpretation is needed to determine its precise content. According to the TEU 19 (1) , the CJEU has the right and the duty to interpret the concept. The role of the Commission is to oversee the application of EU law under the supervision of the CJEU, and the Commission is bound by its interpretations.[36] However, the Commission enjoys a wide discretion as to the existence of a dominant position the interpretation involves complex assessments of technical and economic facts.[37] Judicial review of such matters, often linked to multi-directional markets is limited.[38]

1.4. Digital Online Platform

Because the concept of a digital two-sided platform (multi-sided platform) is still searching its shape, I consider it necessary to examine whether a platform should constitute a stand-alone legal concept and, if so, what the meaning of that concept should be. As a matter of principle, it is appropriate for a digital platform to define its independent concept only if it can identify a

[32] Nazzini, Renato, 2011. The Foundations of European Union Competition Law: The Objective and Principles of Article 102. Oxford University Press, Oxford. p.328 & Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa
(2003), p. 232-234. (Publications of Finnish Lawyer's Association. A-series; 239).
[33] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22 paragraph 66. See also paragraph 265
[34] Kuoppamäki, P. J. (2012). Uusi kilpailuoikeus. (2nd Ed.) Helsinki: Sanoma Pro p. 224-225.
[35] Whish, R. & Bailey, D (2012) Competition Law 7th.ed.p 179-181
[36] Opinion of Advocate General Kokott delivered on 23.2.2006. British Airways plc v Commission of the European Communities. C-95/04 P, EU:C:2006:133.
[37] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007.
Microsoft Corp. v Commission of the European Communities.
T-201/04, EU:T:2007:289, paragraph 85
[38] Ibid.

number of legal entities which share certain specific features and therefore require different reviewing than traditional companies. When looking at the different definitions, it can be clearly seen that platforms need to operate in a multi-dimensional market in order to be called as ”platform”. A platform operating in such a market has at least two distinct customer groups (market parties) with which the platform has a horizontal relationship, unlike traditional parallel markets, where the company has only one vertical relationship with a group of customers.[39]

According to Kalimo & Majcher, a company is a digital online platform if it creates indirect network effects between it's different customer groups.[40] Indirect network effects signifies an event where demand from one customer group depends on the demand of another customer group. For example marketplace platforms attract more buyers (users), the more vendors (producers) there are. In contrast, direct network effects occur on the same side of the market, as correlation between one customer groups size and the amount of other customers on that side.[41] Network effects are positive if the number of customers increases with more customers, and negative if there are fewer users.[42] However, there is no consensus in the literature on whether the concept of a digital platform requires multi-directional indirect network effects or if it is the parallel indirect network effects that fulfill the definition of a digital online platform. [43]

It has also been argued that a definition for digital online platform requires a platform-neutral pricing structure.[44] An unneutral pricing structure occurs when a platform sets its prices charged by different market participants at different levels. The unneutral pricing structure aims to

[39] Communication from the commission to The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM/2016/0288 final p.2
[40] Kalimo, H., Majcher, K. (2017). The concept of fairness: linking EU competition and data protection law in the digital marketplaces. In European Law Review, Vol. 42(2), 2017. page. 212.
[41] Filistrucchi, Lapo & Geradin, Damien & Damme, Eric & Affeldt, Pauline. (2013). Market Definition in Two-Sided Markets: Theory and Practice. Journal of Competition Law and Economics. 10. 10.1093/joclec/nhu007. p.5
[42] Parker, Geoffrey G. – Van Alstyne, Marshall W. – Choudary, Sangeet Paul, 2016. Platform Revolution. How Networked Markets Are Transforming the Economy – And How to Make Them Work for You. W.W. Norton & Company, New York. (Parker et al. 2016) p. 29–32.
[43] Luchetta, Giacomo, 2012. Is the Google Platform a Two-Sided Market? 23rd European Regional Conference of the International Telecommunication Society, Wien, Itävalta. 1–4 July 2012. Accessible: http://hdl.handle.net/10419/60367. p. 28
[44] Rochet, Jean-Charles – Tirole, Jean, 2004. Two-Sided Markets: An Overview. Mimeo, IDEI University of Tolouse 2004. p.10. Accessible: https://web.mit.edu/14.271/www/rochet_tirole.pdf

maximize indirect network effects and turn them into operating profit.[45] From the group of customers whose demand is most inelastic
that is to say, the demand for which is not significantly affected by minor price increases will be charged some or all of the expenses of another customer group (money side). Respectively, services to the other market are provided at prices below the marginal cost, either free of charge or at very low prices (subsidy side).[46]

The third and in my opinion the most relevant major group consists of definitions according to which the digital online platform acts as an intermediary between two or more customer groups. As an example, in the computer manufacturing market Apple makes computers by itself, while Microsoft leaves it to the independent manufacturers. As a result, Apple operates in a two-way market between end users and software providers whereas Microsoft operates in the three-way market for end users, software vendors and hardware manufacturers.[47] The role of the intermediary platform is limited to enabling direct interaction between customer groups and is not commercially or legally involved in the legal relationship between customer groups. The intermediary platform does not control the key terms of the two-way customer relationship, such as price or contractual terms.[48] The definition of a digital online platform requires that the platform has at least two groups of customers who, for whatever reason, bring the platform together for interaction.[49] A detailed examination of the different purposes of different platforms to bring the parties together is necessary, as it determines the extent to which customer demand is interdependent and convergent. This, in turn, determines whether multiple or only cases need to be defined one relevant market.[50] In the economic literature, platforms are often divided into transactional platforms and others than transactional platforms.[51] Transaction platform means a digital network platform which purpose is to bring together different market participants for a visible and immediate transaction.[52] Different customer groups share the same goal and

[45] Eisenmann, Thomas – Parker, Geoffrey – Van Alstyne, Marshall W., 2006. Strategies for Two-Sided Markets. Harvard Business Review On Point Article. Harvard Business School Publishing Corporation, Harvard, October. (Eisenmann et al. 2006) p.4-5
[46] Monopolkommission, 2015. Competition policy: The challenge of digital markets. Special Report No 68. Special Report by the Monopolies Commission pursuant to section 44(1)(4) of the Act Against Restraints on Competition 2015. p. 20 Accessible: http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.
[47] Hagiu, Andrei – Wright, Julian, 2015. Multi-Sided Platforms. Harvard Business School Working Paper 15-037, 2015. p. 4-6 Accessible: http://www.hbs.edu/faculty/Publication%20Files/15-037_cb5afe51-6150-4be9-ace2-39c6a8ace6d4.pdf.
[48] Ibid. p.5
[49] Filistrucchi et al. (2013), p. 4
[50] Ibid.
[51] Ibid. p.8-12
[52] Ibid. p.10

understanding of the transaction platform substitutions. For example, marketplace platform customers would move to another marketplace platform, and payment card platform customers to another payment card platform. Transactional platforms generate multi-directional positive indirect network effects that make it impossible for a platform to do business without every single customer groups participation.[53] Thus, unlike traditional vertically integrated companies operating in parallel markets, transaction platforms cannot exit some markets without having to leave other markets.[54] Instead, non-transactional platforms act as intermediaries between different market participants to combine these for non-transactional interactions examples of these platforms would be social media and content platforms.[55] Different platform customer groups do not have the same reasons to participate in the platform ecosystem, and market participants perceptions of which services replace the services provided by the platform are different. Non-transactional platforms can also operate without another customer group because only one-way positive network effects are generated.[56] If the platform divests from another customer group, it can continue to operate as a traditional company instead of a digital online platform.

Another similar, but less widely used breakdown is based on the platform's position as either a party integrator or an audience provider.[57] The features of so called matching platform are similar to those of transaction platforms, but the concept of matching platform is broader, including transactional platforms, with the purpose of enables other direct and visible interaction between different market participants. The concept of an audience providing platform (advertising platform) is similar to that of non-audience providers definition of transaction platforms, and the purpose of such platform is to enable one attracting the attention of another customer group.[58]

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[53] Evans, David S. and Schmalensee, Richard, The Antitrust Analysis of Multi-Sided Platform Businesses (January 30, 2013). Roger Blair and Daniel Sokol, eds., Oxford Handbook on International Antitrust Economics, Oxford University Press, Forthcoming; University of Chicago Institute for Law & Economics Olin Research Paper No. 623. p. 173-174 Available at SSRN: https://ssrn.com/abstract=2185373

[54] Ibid.

[55] Filistrucchi et al. (2013), p. 8-12

[56] Bundeskartellamt, (2016)Working Paper: Market Power of Platforms and Networks, p. 18-19 accssible: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2

[57] Hagiu et al. 2004, p. 8

[58] Bundeskartellamt (2016) p.20-22

2. MARKET DEFINITION

2.1. Concept of Market Definition

The existence of a dominant position is a matter of economic fact which requires a definition of the relevant product or geographic market.[59] The principles of market definition have evolved in the case law of the Court of Justice of the European Union and have been codified in the European Commission Notice on the definition of the relevant market.[60] Market definition provides a tool for the legislator to determine whether a firm has significant and long-term market power and whether it can prevent effective competition in the relevant market. If the market definition is too narrow or too broad, the market shares calculated on the basis thereof do not reflect the actual market position of the company. On the one hand the purpose of market definition is not to model reality[61] and, on the other hand, to fragment markets in a way that does not reflect economic reality. Defining the relevant market is a fundamental issue of competition law.[62] Market definition is necessary in a number of contexts for resolving competition law issues in order to determine the actual market that is entered[63]. The definition of the relevant market may already be necessary because the application of the competition rule in question is conditional on the occurrence of a market share threshold below or above such thresholds as:[64] (1) Assessing whether a particular firm holds a dominant position, if the market share is sufficiently high, the undertaking will already be in a dominant position on this basis, whereas in the opposite situation it may be considered not to be dominant.[65] (2) Support for de minimis restraints. In its so-called de minimis communication, the European Commission has defined market share thresholds when they are not a significant restriction on competition[6667]. (3) application of block exemption tests, the Commission block exemption regulations have on

[59] Kuoppamäki, P. J. (2012). Uusi kilpailuoikeus. (2nd Ed.) Helsinki: Sanoma Pro p. 209.
[60] Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN
[61] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 324–326. (Publications of Finnish Lawyer's Association. A-series; 239).
[62] Goyder & Albors-Llorens (2009) EC Competition law 5th ed. p. 302-313
[63] Boshoff W.H. (2013) Why define markets in competition cases? p.1-4 Stellenbosch Economic Working Papers: 10/13 MAY 2013
[64] Wikberg O. (2011) Johdatus kilpailuoikeuteen, 1st ed. Talentum Oy p. 38
[65] Ibid.
[66] Ibid.
[67] De minimis -communication of the European Commission (2014) Accessible : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=FR

several occasions provided for market share percentages which may affect the application of the block exemption regulations.[68]

2.2. Relevant Product Market

According to settled case-law the relevant product market also for digital online platforms comprises of goods and services which, in particular by virtue of their characteristics, are capable of satisfying a specific purpose,[69] unchanged and only to a limited extent substitutable with other products. The relevant product market dimension is defined by supply and demand-side substitutability.[70] Potential competition is taken as a rule only after the market definition, if the position of the actual competitors indicates a high degree of concentration in the market.[71] However, due to the inherently high degree of concentration in the platform market, the assessment of potential competition is likely to be constantly reviewed. Competition authorities commonly use either one of the supply and demand-side substitution methods to define the relevant product market.[72]

2.2.1 SSNIP,SSNDQ & Supply and Demand-side Substitution

According to the Commission Notice, demand-side substitutability is the most economically immediate and effective metric for defining the relevant market.[73] to identify competing sources of supply, commodities and suppliers from the customer's point of view[74]. General market demand shall include all products which the customer considers to be interchangeable, in particular with regard to their characteristics, prices and intended use.[75] The interchangeability between products belonging to the same relevant market do not need to be perfect, but its

[68] COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN

[69] See Case T-219/99. Judgment of the Court of First Instance (First Chamber) of 17 December 2003. British Airways plc v Commission of the European Communities. Paragraph. 91 Accessible: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48807&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=431581

[70] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), paragraph 13.

[71] Ibid. para 24.

[72] Notkin M.,(2014) Does Google abuse its dominant position in the search engine market? Munich: Grin Verlag p.4

[73] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03),

[74] Ibid. paragraphs 13 & 15

[75] Ibid. paragraphs 7, 20 & 36.

potential must be more than minor.[76] According to the Notice the purpose of market definition is to find out systematic methodologies in the corporate market competition and thus their potential.[77] The Commission Notice can be considered as an indication of emphasis on economic analysis in EU competition law. According to the Commission Notice, the relevant product market includes ”all products and / or services which are considered as interchangeable or substitutable by the consumer characteristics, prices and intended use”[78]

Primarily, demand-side substitutability is estimated by cross-elasticity measurement test called SSNIP (Small but Significant and Non-Transitory Increase in Price).[79] Cross-elasticity of demand refers to the elasticity of price between product x and y, it can be defined as the percentage change in the price of product y, which affects demand for product x. The cross-elasticity of demand indicates how close the two substitutes are to the original product and how significantly they compete with each other. According to SSNIP test commodities belong to the same market if a 5-10% price increase on product x would result that a significant number of buyers of the product would switch to y. The underlying idea is that a company has market power only, if it can profitably raise its prices.[80][81]

The SSNIP test is not more ”scientific ”test than a traditional test based on product characteristics and consumer options in the sense that it is necessary to determine the commodities to be compared choices. Attention must also be paid to price competitiveness before price increases. Provided prices are already high before the 5% test increase, the consumer's pain threshold is more easily exceeded, and the product is replaced. In that case, customer switching does not prove to be a substitutable product, but mainly because the company has previously used its market power to raise its prices above competitive level. It has not yet been resolved how significantly cross-elasticity indicates that the two products have

[76] See Case T-301/04, 9 September 2009 Judgement of the Court of First Instance Clearstream v. Commission paragraph 64.
[77] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), paragraph. 7
[78] Ibid.
[79] The SSNIP (Small but Significant Non-Transitory Increase in Prices) test is taken from the (hypothetical monopolist test) of US competition law. The US term "monopolist" corresponds to the "dominant position" of European law. (S. Bishop and M. Walker (2010) The Economics of EC Competition Law. p.111-113) but are occasionally refferred synonymously in literature: (Filistrucchi, Lapo & Geradin, Damien & Damme, Eric & Affeldt, Pauline. (2013). Market Definition in Two-Sided Markets: Theory and Practice. Journal of Competition Law and Economics. 10. 10.1093/joclec/nhu007. p. 2)
[80] Kuoppamäki, P. J. (2018). Uusi kilpailuoikeus. (3rd Ed.) p. 265-270
[81] Modern industrial organization versus old-fashioned European competition law, E.C.L.R. 1996, 17 (2), 75-87, 84

sufficient competition for the commodity. Elasticity is in itself an accurate measure but does not contain information on critical ranges or how elasticity should be interpreted.[82]

Another difficulty with using the test is that the market cannot be closed outside of external influences. The test is hypothetical and proving of practical causal relationships is complex[83]. SSNIP test can be supplemented by other econometric data such as price elasticity of demand and cross-elasticity, based on the similarity of different price changes over time valuation (price correlation), price series causalities and / or price levels and their analysis of similarity.[84] If there are companies selling related products noticeable customer shifts in their sales from one company to another it indicates that commodities are competing and belong to the same market.[85] Useful information can be obtained when importing new products in the market. Attention can also be given to statistics on external influences or so called ”shocks”. However, too far fetching conclusions from any changes resulting from the exceptional circumstances should not be made.[86] Another way to investigate whether two products belong to the same commodity market is solving of price correlation. If two products belong to the same market, their prices usually move temporally together. As the price of one product rises, the price of the other product may also rise, and subsequently both will fall simultaneously. If the correlation is particularly strong, it will indicate a common market. On the contrary lower correlation makes it more difficult to draw conclusions. In determining the substitution progress can be made gradually. First, the correlation between two indisputably commodities belonging to the same market is defined. The result obtained after this is compared to the products that are more controversial ones. If the correlation is at the same level, it speaks on behalf of interchangeability.[87]

The decisive part in market definition is normal substitutability. Demand-side elasticity is probably a better way to solve cross-elasticity, because it answers the right question, to what extent the manufacturer of a given commodity can increase its prices without losing its customers. Demand-side elasticity and cross-elasticity requires sufficiently detailed and undisputed statistical data which is not often available. As a result, market definition is often

[82] Kuoppamäki, P.J. (2018). Uusi Kilpailuoikeus. (3rd Ed.) p.264-275
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.

based on the judgmenet of practice of functional appraisal of commodities, customer feedback, case law, customer and competitor inquiries, etc. However, in most cases market definition is based on the consideration of several different pieces of evidence.[88]

In addition to demand substitution, supply can also be a secondary consideration substitutability, that is, the extent to which other companies could start manufacturing in the short term the item in question. Consideration of supply - side substitutability in the relevant market defines that rapid reorientation of production is reasonably possible with decent costs and risks if the company suspected of having a dominant position, for example, raises its prices. Crucial is not a principle opportunity for new supply, but a clear and powerful enough practical impact on the competitive behavior of companies. The likelihood that other companies would enter in the manufacture of the product under consideration. Consideration shall also be given to competitive analysis at a later stage, when assessing the intensity of potential competition. Future impact evaluation is particularly focused on merger control but has begun to anchor more attention than before, for example, for advanced technology products where new production generations will replace the former ones in the short term.[89] A well-established position on how market definition should be applied to digital online platforms. One suggested solution has been to assess the impact of absolute price changes and evaluating the effects of changes in the qualitative characteristics of the platform or its products. One idea is that the SSNIP test could be replaced by a thoughtful SSNDQ test. SSNDQ is the abbreviation for small but significant decreases in quality, meaning small but noticeable, permanent deterioration in quality. An SSNDQ test would determine the extent to which a company can calculate the quality of their commodity while everything else remains constant, without consumers shifting degree to other options. In addition to the quality of service provided by the platform, the terms of service of the platform change could constitute such a deterioration of quality. It is also possible to develop an SSNIP test by looking at changing the entire pricing structure across one platform only instead of price changes.[90] One of the European competition authorities, the German Bundeskartellamt has outlined the rest in a comprehensive report including discussion of the utility of the SSNIP test in multi-directional markets.[91] This sounds like a relevant approach, as a

[88] Ibid.
[89] Ibid.
[90] Filistrucchi, Lapo & Geradin, Damien & Damme, Eric & Affeldt, Pauline. (2013). Market Definition in Two-Sided Markets: Theory and Practice. Journal of Competition Law and Economics. 10. 10.1093/joclec/nhu007.
[91] Bundeskartellamt, (2016)Working Paper: Market Power of Platforms and Networks, accssible: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2

company operating in a two-sided market is just charging so that it takes into account the circumstances of each market and seeks to do so optimize their operating result.[92]

2.3. Relevant Geographic Market

The relevant geographic market consists of the areas in which the undertakings concerned compete objectively on the basis of assimilated conditions of competition[93], and which are distinguished from the surrounding areas by their very different conditions of competition.[94] The size of the geographic market can vary from a global market to a local market, and it is not relevant to the assessment whether the product is sold purchased over a wide radius which is actually possible, but whether it is commercially viable in a profitable way.[95] In any event, even when the relevant market is worldwide, the existence of a dominant position is limited to a digital internal market within the European Economic Area (EEA).[96] Sales of other products are limited to cost, technical, or for legal reasons in a narrower area. For example, transportation costs may limit the area for which a particular product should be marketed.[97] Also different consumer habits, as well as consumers' ability to obtain the product over long distances may be significant factors.[98] Economic integration, information technology and globalization have expanded many markets.

Many industrial product markets today are EU-wide or even global.[99] The digital platform economy has created a global marketplace with a level playing field around the world, and the

[92] Evans, David S. and Schmalensee, Richard, The Antitrust Analysis of Multi-Sided Platform Businesses (January 30, 2013). Roger Blair and Daniel Sokol, eds., Oxford Handbook on International Antitrust Economics, Oxford University Press, Forthcoming; University of Chicago Institute for Law & Economics Olin Research Paper No. 623. Available at SSRN: https://ssrn.com/abstract=2185373

[93] See: Case T-83/91. Judgment of the Court of First Instance (Second Chamber) of 6 October 1994. Tetra Pak International SA v Commission of the European Communities. paragraphs 2-3 of the summary Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991TJ0083

[94] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), paragraph. 8

[95] Kuoppamäki P.J. (2000) Kilpailuoikeuden Perusteet p.153.

[96] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 152-155. (Publications of Finnish Lawyer's Association. A-series; 239).

[97] Kuoppamäki, P. J. (2012). Uusi kilpailuoikeus. (2nd Ed.) Helsinki: Sanoma Pro p. 221-224

[98] Ibid.

[99] Ibid.

provision of services does not necessarily require the local presence of companies.[100] However, linguistic differences may still limit the global dimension of the market. For example, in the case of Google Search[101], Commission justified the national dimension of the geographic market, in spite of the global availability, generic search engine platforms were actually used only through country-specific websites. Smaller competitors could not expand beyond national and linguistic borders, including in the development of necessary technological expenses.[102] Similarly, for search engine platforms conducting comparative searches, the national dimension of the relevant geographic market was favored by regionally varying consumer preferences.[103] Instead, in the Amazon case, the Commission reviewed the market for English and German eBooks and the definition of the geographical dimension on the basis of national, linguistic and EEA boundaries, although it left a precise geographical dimension to the market completely open.[104]

However, the relevant market could not be wider than EEA, as the prices of e-books and value added tax rates were relatively high and converged in this area.[105] In the Google / Motorola[106] and Microsoft / Nokia [107]cases, the Commission considered the geographic market for the relevant telephone operating systems to be either EEA-wide or global, but left the exact dimension of the market again open. Similarly in case of Microsoft / LinkedIn[108] computer operating systems and case for Facebook / Whatsapp[109] about consumer applications, the relevant market was EEA-wide. What makes the latter case particularly interesting is while Whatsapp was free in some Member States and costed in others, this did not constitute a sufficient basis for defining national markets.[110] This is in marked contrast to previous Commission cases where it has limited platform services to distinct relevant markets on the basis of the method of financing its activities.

[100] Commission Decision of 03/10/2014 (Case No COMP/M.7217 - FACEBOOK / WHATSAPP) according to Council Regulation (EC) No 139/2004 p. 34 Accessible:
https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

[101] European Commission Decision Google Search (Shopping), AT.39740 – 27 June 2017
[102] Commission decision of 27.6.2017 supra nota 34 paragraphs 251-255
[103] Ibid. paragraphs 261-263.
[104] Commission decision of 4.5.2017 Case AT.40153 E-book MFNs and related matters (Amazon) p. 49-51 Accessible: https://eur-lex.europa.eu/legal-content/FI/TXT/?uri=CELEX%3A52017XC0126%2801%29
[105] Ibid. paragraph 51
[106] Commission decision of 13.2.2012, M.6381 – Google/Motorola Mobility, paragraphs. 33–35
[107] Commission decision of 4.12.2013, M.7047 – Microsoft/Nokia, paraghraphs. 74–77
[108] Commission decision of 6.12.2016, M.8124 – Microsoft/LinkedIn, paragraph. 17
[109] Supra nota 100, paragrahps. 36–44
[110] Supra nota 100 Ibid. paragraph. 42

2.4. Relevant Platform Market

There is no firm established position on how digital online platforms should be addressed and how the market should be defined. The solution has been to assess the impact of absolute price changes and evaluating the effects of changes in the qualitative characteristics of the platform or its products.[111] Digital online platforms (such as Google, Facebook, Amazon, Booking.com, Airbnb, and Über) have played an important role in the emerging economy market. As an intermediary organization between clients and service providers. Often the product is given for free on one side and charged on the other. This results in a two-sided platform market or two- or multi-sided markets.[112] Due to network effects and economies of scale, platform markets can create station. In a way, competition is more about the whole market itself, instead of products competing with each other. Whoever becomes dominant often also retains it.

A dominant position can be very strong and long-term, because of network impact, scale benefits, and potential high barriers to entry can be significant for customers due to switching costs. Barriers to entry may still exist to validate the collection and commercial exploitation of customer data by the platform benefits that a new entrant cannot replicate. A situation may arise where the platform that dominates the ecosystem is reinforced by valuable "big data" that smaller competitors also have need, but no access to the same extent.[113] The amount of data again affects the performance of the algorithm, which further strengthens the leading position. A rising platform can be collected not only directly from their own customers, but also indirectly from other companies utilizing the platform contracts and “click-through” consent from users. Challenging such a platform can be very difficult. On the other hand, completely significant change in the market, brought about by the new business model can lead to the erosion of a dominant position. The dynamic changes that take place will complicate market analysis as well as market definition. Therefore the situation cannot be about only a short-term Schumpeter-monopoly[114][115] but also a long-term super dominance.[116]

[111] Kuoppamäki, P. J. (2018). Uusi kilpailuoikeus. (1st Ed.) p. 220-222
[112] Ibid. p. 220-230
[113] Ibid. p. 222-223
[114] Schumpeter, Joseph A., 1934. The Theory of Economic Development. An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle..
[115] Schumpeter, Joseph A., 1942. Capitalism, Socialism and Democracy. 3rd ed.
[116] Kuoppamäki, P. J. (2018). Uusi kilpailuoikeus. (1st Ed.) p. 222-223

In conclusion, the platform market challenges the traditional in many ways an approach to determine dominance. The direct application of the SSNIP-test to the platform market should be considered inappropriate as a measure of demand-side substitutability, in particular as regards of free services. SSNDQ-test could come to question as a possibly more appropriate tool for determining dominance.

3. MARKET SHARE

3.1. Market Share in EU Competition Law

The calculation of the relevant market size and the market share of each company in that particular market is completed on the basis of the relevant market in question.[117] Usually market shares are calculated based on total sales volume, value, or other relevant factor.[118] High market shares can be attributed not only to the ability of the company to act independently, but also for greater competitive efficiency. This does not mean that dominant market positioning could not be based on greater efficiency, but it requires attention to be paid in particular to the durability of the competitive advantages that give rise to efficiency and stability of market shares.[119] The final evidentiary value of market shares are determined as part of the overall assessment based on market conditions and dynamics and the amount of product differentiation.[120]

Currently, the settled case law has not developed precise market share thresholds for dominant position.[121] In principle, an undertaking in an alleged dominant position with very high absolute market share of over 70-80% is in itself strong evidence of dominance.[122] More than 50% market

[117] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 701. (Publications of Finnish Lawyer's Association. A-series; 239).
[118] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), paragraphs 53-55.
[119] Court decision, 13.02.1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. EU:C: 1979:36 paragraph 44.
[120] Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), paragraph 13.
[121] Jones A., Sufrin B. (2011) EU Competition Law: Text, Cases and Materials. 4th ed. United Kingdom: Oxford University Press. p.283
[122] Court decision, 13.02.1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. EU:C: 1979:36 paragraph 68.

share forms the rebuttable presumption of such a position and reverses the burden of proof of the lack of significant market power on the company.[123] Similarly, low market share is generally a reliable indication of the absence of such market power.[124] However, a dominant position is not excluded even with a market share below 40% if the company, despite its small size, is able to operate significantly independently of competitors and customers.[125][126] For example, the lower the market share of a company, the greater its importance is to relative market share of the company, i.e. the difference between the market share of the company and its closest competitors.[127]

Competitors' market power may, on the one hand, restrict the independence of the alleged dominant undertaking and, on the other hand, increase its relative power in the relevant market. Historical market shares also provide important insights into the competitive structure of the market.[128] However, neither customary law nor legal literature have not developed a framework for assessing how long-term market power demonstrates dominance, but in most cases the evolution of market shares has been examined over a period of two or three years.[129] Minor changes in market shares do not affect the valuation if the relative market share of the alleged dominant undertaking remains significant.[130]

However, significant changes require a more critical attitude towards market shares as sources of market power.[131] This is particularly emphasized in the platform economy and the legal literature suggests that the temporal dimension of market power should be longer than in traditional

[123] Court decision, 02.04.2009, France Télécom SA v Commission of the European Communities, Case C-202/07 P, EU:C:2009:214 p. 100
[124] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). p 14.
[125] Ibid.
[126] Case C-95/04 P Judgment of the Court (Third Chamber) of 15 March 2007. British Airways plc v Commission of the European Communities. p.225-226. In this case the dominant market position was reached with 39,7% market share
[127] Jones A., Sufrin B. (2011) EU Competition Law: Text, Cases and Materials. 4th ed. United Kingdom: Oxford University Press. p.329
[128] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). p 13.
[129] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p.1317 . (Publications of Finnish Lawyer's Association. A-series; 239).
[130] Case C-95/04 P Judgment of the Court (Third Chamber) of 15 March 2007. British Airways plc v Commission of the European Communities. p.224.
[131] Commission decision 11.3.2008, COMP/M.4731 – Google/DoubleClick. p. 120-121, 128.

markets.[132] The longer a company retains its high market share, the more likely it is to hold a dominant position.[133] In this case, smaller competitors do not have sufficient resources to quickly satisfy the consumers seeking to leave the market leader.[134] Therefore, the size and maintenance of market shares are not in themselves sufficient evidence of the existence of a dominant position.[135]

3.2. Market Share in the Digital Online Platform Market

The probative value of market shares is largely based on what so called relevant factors[136] they have been calculated on. The calculation of market shares on the basis of total sales is mainly useful for transactional platforms where there is a visible and immediate legal transaction between the different market participants as well as for the paying market side of the public platforms. In this case, the market shares reflect the relative position of the platforms in the market based on completed transactions. However, the threshold for market shares based on sales volumes is encountered for other types of aggregator platforms as well as for the free market side of public platforms.

An alternative way to calculate market shares is based on total volume, i.e. the number of users. From a conceptual point of view, the key question is what kind of activity forms the basis for ”actual use” generally applicable to all individual cases.[137] It must also be possible to take this into account on a case-by-case basis for example, visits over a certain amount of time, based on cookies or data analytics tracked visitors and unique users (unique visitor).[138] The mentioned ”actual use” can thus be interpreted in the context of competition law as any measure whereby the user establishes a degree of legal relationship with the platform. The case law and the ruling

[132] Hartman, Raymond – Teece, David – Mitchell, Will – Jorde, Thomas, 1993. Assessing Market Power in Regimes of Rapid Technological Change. Industrial and Corporate Change, Vol. 2, No. 3. Oxford University Press 1993, p. 317–350. Accessible: https://doi.org/10.1093/icc/2.3.317. (Hartman et al. 1993)
[133] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). p 15.
[134] Court decision, 13.02.1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. EU:C: 1979:36 paragraph 41.
[135] Ibid. paragrah 44.
[136] Whish R., Bailey D. (2012) Competition law. 7th Ed. United Kingdom: Oxford University Press p. 631-633
[137] Rochet, Jean-Charles – Tirole, Jean, 2004. Two-Sided Markets: An Overview. Mimeo, IDEI University of Tolouse 2004. p. 5-20. Accessible: https://web.mit.edu/14.271/www/rochet_tirole.pdf
[138] Bundeskartellamt, (2016)Working Paper: Market Power of Platforms and Networks, accssible: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2 P. 70

of the Commission and national competition authorities indicate that the number of users seems to be best measured as unique users, over a period of time, usually one month, on the same device on a given device based on the number of people who used it.[139] The information produced in this way is particularly well suited to the purpose of legislation when activity is defined in many ways not only quantitative factors but also qualitative aspects, this is important since one person can be using multiple devices as well as one device can be used by multiple people.

The Commission has consistently calculated the market shares of public platforms on the basis of volume free services on the one hand and parallel positive network effects on the other. For example, in the Google Search case the Commission examined the volume of the market users, views and sessions.[140] Similarly, in the Microsoft/Skype-case, during a examination period of one month, the Commission used the definition of a unique user and calculated market shares that were based on volume.[141] The view expressed in the legal literature suggests that the Commission calculated the market shares in Microsoft and Google/ DoubleClick cases based on total sales of the companies.[142][143]

National competition authorities have also followed a similar line in calculating market shares. For example, in the case of Online Dating, the BKa(Bundeskartellamt) considered that if the services were free the market share calculated only on the basis of turnover was not sufficient to describe the platforms actual market position, and additionally calculated the market shares of registered users as well as monthly unique customers to form the basis of the actual market share.[144] Competition Commission of the United Kingdom also stated in the case of BSkyB / ITV that the probative value of absolute market shares in the differentiated markets was low and instead compared the relative market shares of the audience platforms by unique users and revenue.[145]

[139] European Commission Decision Microsoft/Skype, Case No Comp/M.6281, 7 October 2011, para 79.
[140] European Commission Decision Google Search (Shopping), AT.39740 – 27 June 2017 para. 274-278
[141] European Commission Decision Microsoft/Skype, Case No Comp/M.6281, 7 October 2011, para 79.
[142] European Commission Decision Microsoft, Case No COMP/C-3/37.792, 24 March 2004. para 431.
[143] European Commission Decision Google/DoubleClick Case No COMP/M.4731, 11 March 2008,. p. 104.
[144] Bundeskartellamt 22.10.2015, B6-57/15, Freigabe des Zusammenschlusses von Online-DatingPlattformen, paragraphs. 132–138.
[145] Competition Commission 22.12.2007, British Sky Broadcasting Group PLC / ITV PLC, paragraphs. 4.55– 4.63.

Primarily, even a significant market share on one market side of the multi-directional markets does not allow the platform to act independently of competitive pressure if the platform is exposed to such pressure on other side of the market.[146] If one online platform starts disregarding one group of customers, switching non-locked customers to another platform can trigger a cycle of negative indirect network effects that can eventually lead to switching of customers from all market parties to another platform. Dependence of demand in different markets targets two different customer groups rather than the same customer group. The exception to the rule is the producer side of platforms, because due to the parallel positive indirect network effects, a decline in active customers does not detract from the user-end customers amount for the platforms producer-side. The lack of positive indirect network effects is based on the fact that in practice the users do not select a platform based on the number of advertisers. Unless advertisers have any indirect network effects, the number of advertisers has no relation to the number of users. If advertisers cause negative network effects, the number of users will increase proportionally as the number of advertisers decreases.

High absolute market shares have not been interpreted in the legal and economic literature and in the practice of the Commission and the CJEU on digital platform markets, reliable evidence of the dominant position due to the specific characteristics of the platform market, in particular its dynamic nature and services often being free of charge.[147] For example, in the Cisco/Messagenet case, the CJEU considered that 80-90% market share did not demonstrate as such the described market power in the retail communications services market.[148] According to the Court, market shares cannot be considered as a strong indication of market power in a narrowly defined and constantly expanding market, especially when services are provided to users free of charge. Completion as such prevents an undertaking from acting independently of competitive pressures, for example by raising prices or stopping innovation.[149] In the Microsoft case, the company's market share in the computer operating systems market which were specifically provided by the employer to personal use, had been uninterrupted at more than 90% and thus more than 23 times larger in relation to the platform's closest competitor.[150]

[146] Competition & Markets Authority – Autorité de la concurrence 2014, paragraph 3.20.
[147] European Commission's Decision, Facebook/ Whatsapp, Case No. COMP/M.7217 – 3 October 2014 paragraph.99
[148] Case T-79/12, Judgment of the General Court (Fourth Chamber), 11 December 2013.
Cisco Systems, Inc. and Messagenet SpA v European Commission. paragraphs. 65-74 & 121.
[149] Ibid. paragraph, 52.
[150] European Commission Decision Microsoft, Case No COMP/C-3/37.792, 24 March 2004. paragraphs 430-436.

Therefore, the dominant position was not solely based on large and prolonged continuous market share but also to indirect and high barriers to entry to the market due to network effects.[151] Similarly, in the investigation concerning Google, the platform had a market share of around 90%, which was more than eight times that of its closest competitor in the relevant market.[152] However, the Commission did not establish the existence of a dominant position solely on the basis of Google's market share and did not even refer to established case law in this regard. Instead the existence of a dominant position was based on the combined effect of market shares, barriers to entry, single-homing, branding and free services.[153] The Commission came to a similar interpretation in the cases Microsoft / Yahoo![154] and Amazon.[155]

4. MARKET STRUCTURE

4.1. Significance and Potential Competition in Assessment of Dominance

The existence of a dominant position is assessed by the competition of the relevant market, described as the market structure along with competition pressure that the alleged company holding the dominant market position encounters.[156] The assessment of the market structure is based primarily on an examination of the market shares of the undertakings and the assessment of the competitive pressure, and at the position of actual and potential competitors along with customers.[157] The weak market power, high barriers to expansion or entry to the market along with dependence on customers, express the lack of competitive pressure on the alleged company holding dominant market position.[158] Similarly, the greater the competitive pressure a company faces, the more temporary the market power is. However, the determination of a dominant

[151] Ibid. paragrapahs 430-450.
[152] European Commission Decision Google Search (Shopping), AT.39740 – 27 June 2017 para. 276-286
[153] Ibid. paragraphs 273-330.
[154] European Commission Decision, Case No COMP/M.5727 – Microsoft/Yahoo! Search Business, 18 February 2010, Paragraphs. 105– 130.
[155] Commission decision of 4.5.2017 Case AT.40153 E-book MFNs and related matters (Amazon) p. 53-67
[156] Ibid. p.54
[157] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). paragraph. 12.
[158] Ibid p.12-18. Also; Whish R., Bailey D. (2012) Competition law. 7th Ed. United Kingdom: Oxford University Press p. 181-189.

position is always a holistic and case-by-case consideration and no assessment is possible without considering the combined effect of all the factors that may limit the company's competitive behavior.[159]

Competition is a dynamic process and its examination cannot be limited to the existing market situation.[160] Potential competition is used to assess whether the market is structured and governed by economic and legal rules from the point of view of the operating environment, and if it is factually and practically possible for a new or existing company to enter that market. In EU competition law, to take expansion and entry into account, it is necessary that expansion or entry into the market is likely, timely and sufficient.[161] Probability assessment is based on the profitability of expansion and market entry, that is, that return expectations outweigh the risks of establishment.[162] The potential competitor must take into account not only entry into the industry also the sunk costs associated with exiting the sector, and be prepared for the market leader to respond to competition and create strategic barriers.[163] Timeliness refers to expansion in a sufficiently short period of time, and sufficiency in terms of expansion and market entry.[164]

In the context of examining the competitive structure of the markets, it is possible in medium term that there will be an actualization of potential competition. In the case of shorter periods and low entry or expansion costs, potential competition is already taken into account in the market definition of supply in the form of substitutability.[165] If the threat of expansion or entry by potential competitors is real, even a large market share is not sufficient to support the conclusion that there is a dominant position.[166] The fulfillment of the conditions is resolved on the basis of the height of the entry barriers to the market.[167]

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[159] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). paragraph. 15
[160] Ibid. p.16.
[161] Ibid. p.16
[162] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 326-328. (Publications of Finnish Lawyer's Association. A-series; 239).
[163] Ibid.
[164] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). paragraph. 16.
[165] Bundeskartellamt, (2016)Working Paper: Market Power of Platforms and Networks, p. 42
[166] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 258. (Publications of Finnish Lawyer's Association. A-series; 239).
[167] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). paragraph. 16.

Due to the dynamic nature of the platform market and its particular cost structure, as in traditional markets, the examination of potential competition cannot be limited to only competitors in the neighboring market. In the platform market, competition may also arise from platforms and companies that are active only in other relevant markets or across the other side of multi-directional market.[168] Thus, as with supply-side substitutability, platforms that can establish relevant markets to compete with only one group of customers, and such traditional companies operating in parallel markets, which may extend their activities to one or more market parties in the platform market.[169] Therefore, whether the potential competitor is active in unidirectional or multi-directional markets, or the same or different financing model does not have an independent meaning for the purposes of competition law.[170]

4.2. Barriers to Market Entry

Barriers to entry and expansion refer to market conditions that prevent or hinder the successful establishment of a potential competitor in the relevant market that would have the actual conditions to do so.[171] Barriers to entry are relevant in assessing both structural elements of a dominant position.[172] Their height influences the intensity of potential competition, since, with low barriers, potential competition is expected to restrict the independence of the company almost as much as effective competition. [173]

Barriers to entry are all legal and economic conditions that allow incumbent companies to charge higher prices than competitive levels and, in EU competition law, extend to strategic barriers

[168] Ibid. p.20 Also; Commission decision 11.3.2008, COMP/M.4731 – Google/DoubleClick. p. 125-126, 131-132.
[169] Bundeskartellamt, (2016)Working Paper: Market Power of Platforms and Networks, p. 77
[170] Competition Commission 22 December .2007, British Sky Broadcasting Group PLC / ITV PLC merger inquiry, paragraph 4.63
[171] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). paragraphs. 23-25
[172] Nazzini, Renato, 2011. The Foundations of European Union Competition Law: The Objective and Principles of Article 102. Oxford University Press, Oxford. p.343
[173] Schulze Steinen, Petra, 1998. Kauppakumppanin mahti ja määräävä markkina-asema. Lakimiesliiton kustannus, KATTI A-sarja. Helsinki, Helsingin yliopisto. page. 43

created by business behavior along with structural barriers of competition process.[174] Strategic barriers will be discussed later on in the thesis. In legal literature the broad concept of barriers to entry reflects a dominant position well-established conceptual content that requires not only significant and sustained market power but also the ability to act independently to the detriment of consumers.[175] Case law has traditionally viewed barriers to entry as market-specific. The barriers to entry in concreto have been identified by finding a specific fact in the case the number of structural elements which, according to case-law, may in abstracto create barriers to entry.[176] This approach to barriers to entry is problematic due to the specificities of the platform market, as it already predetermines the barriers to legal consideration and their importance.[177]

Mäihäniemi points out and rightly so that traditional barriers to entry hardly ever form, even in abstracto barriers to entry in the platform market, but such barriers are largely traditional conditions unknown to the market.[178] Barriers to entry can also be approached in the sense that they are mirror images of the competitive advantage of companies in the market.[179] Such an approach to entry barriers raises company-specific considerations alongside market-specific circumstances, where the significance and impact of the barriers depend to a large extent on the specific characteristics of the competitive advantage in question.[180] So that the probability, timeliness and adequacy, the competitive advantage should be considered in terms of its importance, permanence and scope.[181]

[174] McAfee, Preston R. – Mialon, Hugo M. – Williams Michael A., 2004. What is a Barrier to Entry? The American Economic Review, Vol. 94 No. 2, Papers and Proceedings of the One Hundred Sixteenth Annual Meeting of the American Economic Association San Diego, CA, 2004, s. 461–465. Saatavilla: http://www.jstor.org/stable/3592928. (McAfee et al. 2004)
[175] Kuoppamäki 2003, p. 259–260.
[176] Nazzini, Renato, 2011. The Foundations of European Union Competition Law: The Objective and Principles of Article 102. Oxford University Press, Oxford. p.346-347
[177] Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 32
[178] Ibid.
[179] Virtanen, Martti, 1998. Market Dominance Related Competition Policy: An Eclectic Theory and Analyses of Policy Evolution. Publications of the Turku School of Economics and Business Administration, Turku. p.116-117
[180] Ibid. p. 116-123
[181] Ibid. p. 115

4.3. Innovation and Technology as Competition Advantages in Digital Platform Market

The prevailing notion in legal economics about the relationship between concentration and innovation is condensed into so called Schumpeter-Arrow debate which is developed around dynamic competition theory. In Schumpeter's theory, a dominant position can never be harmful or permanent, since there are continuous series of reactions and backlashes which cause competitive pressure even when there are no actual competitors on the market.[182] Thus, a dominant position always leads to new innovations and ultimately to a creative destruction of the company.[183] By contrast, Arrow considers that dominance as such, is anti-competitive, as the incentive for the dominant company to compete and innovate is less than its financial interest in maintaining the status quo.[184] Arrow's approach could be explained with plain human nature of contention. A company or legal entity that resides in comfortable and confident economical position often subsides itself into a state of inaction, slowing down innovation and development of business within that entity.

Both schools have their benefits and drawbacks, but the Arrow approach from competition law view is more appealing since there are numerous examples in European economic history about enormous bankruptcies and moments of flamboyant collapses of great companies which had no great threats towards their businesses (e.g. Wärtsilä Oyj & Parmalat S.p.A.).[185][186] The dynamic theory of competition has had a significant impact on the interpretation of Article 102 TFEU. As an result of it competition is seen as an evolutionary process in which the creation of a dominant position is a natural and necessary intermediate step.[187] Effective competition promoted by competition law allows for dominance, which in turn encourages companies to compete for new commodities, production methods, distribution channels and business models to gain a

[182] Scumpeter, Joseph A., 1976. Capitalism, Socialism and Democracy. 5th, Edition. Unwin University Books, London. p.85
[183] Schumpeter, Joseph A., 1942. Capitalism, Socialism and Democracy. 3rd, Edition. Harper & Brothers, New York. p.150
[184] Arrow, Kenneth, 1962. Economic Welfare and the Allocation of Recourses for Invention. Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council: The Rate and Direction of Inventive Activity: Economic and Social Factors. Princeton University Press, Princeton, p.620
[185] Transcript, bankruptcy of Wärtsilä Oyj's maritime industry (1990) https://www.eduskunta.fi/FI/vaski/Poytakirja/Documents/ptk_28+1990.pdf
[186] European Parliament; Joint motion for a resolution (2004) European Parliament resolution on corporate governance and supervision of financial services – the Parmalat case accessible: https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P5-RC-2004-0053+0+DOC+PDF+V0//EN
[187] Kuoppamäki 2003, p. 214

technological lead. Due to the dynamic effect of competition theory, the antitrust intervention threshold is only exceeded when the life cycle of the dominant position is considered to be too long or artificially maintained.[188]

Article 102 TFEU does not prohibit barriers to entry as such or authorize public authorities to address any market imperfections. Innovations in the digital platform market have a close connection to a company's technological lead since, digital platforms base their business models on data processing, innovation and the integration of tangible and intangible assets.[189] According to Porter, a technological lead can have ambivalent effects, as it can on corporate behavior depending on whether to increase or decrease the scale benefits and switching costs.[190] Respectively, Harbord and Hoehn argue that technological leadership can create barriers to entry, but only when combined with strategic over-investment and research & development.[191] Also, Whish and Bailey consider a technological edge as an important competitive advantage as it can give a business' a chance to turn the market over for their advantage.[192] The significance of technological leadership as a competitive advantage in the literature is thus closely linked to the firm's market behavior and to the openess of the platform.

With regard to the structural barriers to entry, it is particularly important to assess whether the technology required to succeed is rare, and whether there are technical or economic barriers to its development or deployment.[193] The ubiquity of technology can be demonstrated, for example, by its use in platform customers' own business. The assessment of the durability of the competitive advantage must take into account the short innovation cycles in the platform market and also the competitive technological advantage of a company holding dominant position has a shorter life cycle than a company with dominant position which is based on possessing dominance over the structural market management.[194]

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[188] Ibid.
[189] Virtanen, Martti, 2001. Uusi allianssikapitalismi ja kilpailupolitiikka.Taloustieteellinen näkökulma kilpailuoikeuteen. Kauppakaari, Lakimiesliiton kustannus, Helsinki, p. 229
[190] Porter, Michael E., 1985. The Competitive Advantage: Creating and Sustaining Superior Performance. The Free Press, New York. p. 173
[191] Harbord, David – Hoehn, Tom, 1994. Barriers to Entry and Exit in European Competition Policy. 14 International Review of Law & Economics 1994, p. 422
[192] Whish – Bailey 2012, p. 11–12.
[193] Commission decision 11.3.2008, COMP/M.4731 – Google/DoubleClick. p. 133
[194] Kuoppamäki 2003, p.419

Permanent competitive advantage is established only when the innovation cycles of the platform ecosystem are faster than the pace, where competitiors continue to further develop a leading model.[195] Thus, the comparison of competitors' pace of innovation can provide reliable evidence of the significance of the technological lead and persistence as a barrier to entry. In a one-way market, a company's technological lead is defined as a regular barrier to entry.[196] In cases involving platforms, parties have often invoked innovation and market dynamics as market forces as a reducing factor. In the Microsoft case, the applicant argued that the assessment of market power in the information technology sector should also have taken into account the permanent but also surprising threat along with a threat of an unspecified technological revolution.[197] Although the Commission agreed with the applicants view about the obligation to take into account the specificities of the market, the argument about also taking into account future factors did not to any degree reduce the current market power of the company. On the contrary, the special features of the new economy may even have required a stricter interpretation in this respect than traditional industries.[198] Also in the Google / DoubleClick case, the notifying party of the acqusition appealed on the dynamic nature of the search advertising market as a factor that diminishes the company's technological lead.[199] However, the Commission considered that Google had a technological lead so overwhelming that its competitors did not represent a real alternative for customers.

The persistence of competitive advantage was demonstrated by the fact that Google's market share in the relevant market had steadily increased at the expense of its competitors.[200] Instead, the CJEU made an intriguing interpretation in the Cisco / Messagenet case about importance of a technological advance in the platform market. The court rejected the plaintiffs' argument that Facebook, a social networking service, was not a true competitor of the concentration in the private communications market. Facebook's market share in the relevant market was only 10% , and it utilized instead of its own communication service technology the other party’s to the concentrations (Skype) technology. The court stated at first, when Facebook was a licensee of Skype and a strategic partner, that it couldn't use this technology to provide services that compete with Skype's paid service. However, this did not prevent Facebook from offering competing free

[195] Virtanen 1998, p.108
[196] Court decision, 13.02.1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. EU:C: 1979:36 paragraph 48.
[197] European Commission Decision Microsoft, Case No COMP/C-3/37.792, 24 March 2004. para 468
[198] Ibid. para 469-470
[199] Commission decision 11.3.2008, COMP/M.4731 – Google/DoubleClick. p. 335
[200] Ibid. p. 337

private communications services that could be switched to customers in the event that the concentration would try to use their market power. According to the court, the technological advantage as such did not create barriers to entry or give the concentration significant market power.[201][202]

5. THEORY OF HARM

5.1. General Approach

The theory of harm is based on a more economic approach to the competitive structure of the market than traditional jurisprudence and its application in the context of measuring market power provides already a dominant element of the normative framework for examining the dependence of competitors and customers. Harm theory is based on the post-Chicago school's model of thinking about promoting consumer well-being, which is also one of the maim objectives of EU competition policy.[203] Whereas the application of theory of harm requires comparison between the objectives of Article 102 TFEU and the effects of an undertaking's conduct in order to determine whether the conduct has adverse effects on competition and consumer welfare. In principle, as long as there are no such adverse effects, competition authorities should not interfere in the functioning of the market. To confirm this Zenger and Walker state that in order to demonstrate adverse effects, competition authorities must identify, the manner in which the practice is detrimental to competition and consumer welfare and can it be consistently combined not only with the disadvantage suffered but, also with the empirical evidence and incentives of the undertakings involved in the proceedings.[204]

Problems related to the enforcement of competition law are divided into so-called Type 1 and Type 2 errors in economics. The former points to a false positive result, in which case the

[201] Case T-79/12, Judgment of the General Court (Fourth Chamber), 11 December 2013. Cisco Systems, Inc. and Messagenet SpA v European Commission. para. 72
[202] European Commission Decision Microsoft/Skype, Case No Comp/M.6281, 7 October 2011, para 126.
[203] Wils, Wouter P.J., (2014) The Judgement of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance. World Competition: Law and Economic Review, Vol. 37, No. 4, 2014, p. 415
[204] Zenger, Hans – Walker, Mike, (2012) Theories of Harm In European Competition Law: A Progress Report, 2012. p.1 Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009296

competition authority intervenes in a procedure which does not in fact harm the competitive process or consumers. The latter again suggests false negative result, in which case the competition authority will not intervene in an anti-competitive practice.[205] In other words, it is an over- and under-enforcement of competition law. According to Mäihäniemi, Type 1 errors are significantly more harmful to competition in the platform market than Type 2 errors.[206]Mäihäniemi notes that the non-application of theory of harm in the platform market may lead to an increase in Type 1 errors, which may lead to so called opportunity losses and dynamic inefficiencies, as well as weakening platforms' incentives to acquire a dominant position.[207]

The EU Commission has emphasized the abuse of consumer welfare aspects more than what the courts have from the perspective of theory of harm.[208] The application of theory of harm in the context of the determination of a dominant position is particularly specific, justified by the dynamic characteristics of the competitive structure of the platform market; and due to the difficult predictability of market developments. Using theory of harm it is also possible to avoid the risk of circumvention, which is traditionally associated with an investigation under Article 102 TFEU, in which a dominant position and its abuse are established on the basis of the same procedure. This is because with theory of harm abuse control can be used in different stages and their different objectives are clearly distinguishable from each other in contrast to separate examinations of strategic behavior and customer dependence. In measuring market power, it is a question of an undertaking's ability and incentive to prevent effective competition and the frequency of such conduct, not the nature of the conduct as prohibited or as an abuse to be defended on the grounds of effectiveness.[209] In contrast to the subsequent abuse assessment, it is not essential to distinguish the detrimental conduct to the competitive process, demonstrating economic power and independence strategic behavior from performance competition.[210]

Competitive advantages of efficiency should not be interpreted as barriers to entry, but efficiency as a reason for competitive advantage should be taken into account when assessing the

[205] Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 26-27.
[206] Ibid. p. 27
[207] Ibid. p. 29
[208] Ibid. p. 38
[209] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 44-45. (Publications of Finnish Lawyer's Association. A-series; 239). p.245
[210] See Case C-52/09 TeliaSonera Sverige, 17.2.2009 EU:C:2011:83, p. 24

significanse of the barriers it creates.[211] In a traditional market, strategic behavior often manifests itself as pricing-based strategies, i.e., the ability of a company to raise the prices of its products higher and maintain competitive levels without having to consider the counter-reactions of competitors, customers, or suppliers.[212] If understood in this way, strategic dominance also includes the element of price power systematization in previous studies. However, due to competition in innovation and quality in the platform market, strategic behavior is mainly focused on competition parameters other than pricing and manifests itself, for example, in quality degradation, innovation retardation or narrowing of the product mix to the detriment of consumers.[213] In both cases, the long-term viability of strategic behavior presupposes that competitors' entry and customers' freedom of action are in one way or another limited so that customers do not switch to competitors' products.[214] In addition, the more incomplete the information on the market, the more the company's strategy to a potential competitor is also more credible.[215]

5.2. Application to Digital Platform Market

Behavior that is detrimental to the competitive process and consumer welfare has traditionally been considered to indicate the market power of the undertaking, even if the dominant position is structural the element is actualized at the same time.[216] However, the examination of strategic behavior in the platform market as an independent characteristic is justified in particular for two reasons:

Firstly, according to the case-law, purely structural barriers to entry have little evidence of an undertaking's ability to influence the conditions of competition in a market characterized by

[211] Harbord, David – Hoehn, Tom, 1994. Barriers to Entry and Exit in European Competition Policy. 14 International Review of Law & Economics 1994, p. 422-423;
[212] Case C-62/86 AKZO Chemie BV v Commission of the European Communities Judgment of the Court (Fifth Chamber) of 3 July 1991
[213] Communication from the European Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009). p 11.
[214] Virtanen, Martti, (2001) Uusi allianssikapitalismi ja kilpailupolitiikka.Taloustieteellinen näkökulma kilpailuoikeuteen. Kauppakaari, Lakimiesliiton kustannus, Helsinki, p. 131
[215] Ibid.
[216] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22 p. 68

dynamism, short cycles of innovation and free services.[217] Secondly, an examination of market behavior can avoid the difficult but crucial demarcation issues that define the relevant market on which the structural review is based.

In particular, in the case of digital online platforms operating in a multi-directional market, the fact that a company has a large market share and some characteristics restricting entry in the relevant market in abstracto does not sufficiently indicate the existence of a dominant position as it is specified. In the economic literature, the market power of platforms has been considered to be de facto weaker than the traditional companies because of the interdependencies of the members of the platform ecosystem.[218] Thus, behavior that must be interpreted as strategic behavior in a traditional market is not always the case in a platform market. For example, average variable costs, which are considered predatory pricing, should be below pricing on the other side of the market reflects the specificities of the platform market rather than strategic behavior.[219]

The line between normal and strategic competitive behavior has also been blurred due to the fact that the platform ecosystem consists of a large number of interacting goods and services that customers use with each other as a whole via a digital online platforms. The success of a commodity belonging mainly to a neighboring market requires the same compatibility with other commodities in the platform ecosystem.[220] Compatible assets enjoy the same network effects as customers value the network the higher the number of customers is in the same and/or opposite market. If compatibility is low, the strategic behavior of the platform can have a significant impact on the perceptions of potential competitors about the profitability of entering the industry.[221] This is largely based on the fact that due to the partial overlap of platform market networks and the constant shaping of market boundaries, the same companies may be competitors in one market and in a buyer-seller relationship in another. The identification of such market links are necessary in order to identify a possible foreclosure or foreclosure effect.

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[217] Case T-79/12, Judgment of the General Court (Fourth Chamber), 11 December 2013. Cisco Systems, Inc. and Messagenet SpA v European Commission. paragraphs. 65-74 & 121.
[218] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 44-45. (Publications of Finnish Lawyer's Association. A-series; 239). p.277
[219] Evans, David S. (2008) Antitrust Issues Raised By the Emerging Global Internet Economy. Northwestern University Law Review Colloquy, Vol. 102, 2008, p. 302
[220] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 44-45. (Publications of Finnish Lawyer's Association. A-series; 239). p.277
[221] Ibid.

5.3. Strategic Barriers to Entry

5.3.1. Strategic Foreclosure, Vertical Integration & Tying

In this study strategic barriers to entry should be mentioned when discussed about aspects of theory of harm, which include strategic foreclosure, vertical integration and tying and parity clauses. There are many behavioural methods in the platform market that are unknown to the traditional market and can only be identified through a goal-oriented competitive analysis of consumer welfare. [222]Strategic foreclosure is a general term for procedures in whereby an allegedly dominant vessel, by virtue of its economic dominance, seeks to enter into arrangements between different levels of production in order to make it more difficult for competitors to enter or operate in the market.[223] In particular, the platform market concerns vertical integration, exclusive supply agreements, supply bans, parity clauses and tying in new forms.

Vertical integration, i.e. operation in both upstream and downstream markets, is primarily related to closed platform eco-systems. It reduces platform dependence in the same market competitors and allows it to foreclose competitors in the downstream market.[224] Also leveraging market power from the upper market to the down market there is a partial overlap of the underlying ecosystems due to the typical phenomenon in the platform market, and, as in the traditional market, it can also give the platform market power.[225] However, unlike traditional markets, in a platform market, vertical integration does not as such reinforce the importance of other barriers to entry, as it has no direct link to firm size or economies of scale. In the platform market, the latter are primarily based on increasing the size of platform networks through indirect network effects.[226] Indeed, entry into the platform market is often based on the expansion of vertical operations through integration.[227]

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[222] Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 32
[223] Harbord, David – Hoehn, Tom, 1994. Barriers to Entry and Exit in European Competition Policy. 14 International Review of Law & Economics 1994, p. 417-420
[224] Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 138
[225] Evans, David S. (2008) Antitrust Issues Raised By the Emerging Global Internet Economy. Northwestern University Law Review Colloquy, Vol. 102, 2008, p. 303
[226] Parker, Geoffrey G. – Van Alstyne, Marshall W. – Choudary, Sangeet Paul, 2016. Platform Revolution. How Networked Markets Are Transforming the Economy – And How to Make Them Work for You. W.W. Norton & Company, New York. (Parker et al. 2016) p. 33, 74
[227] Ibid. p. 73-77

Closely related to vertical integration is so called tying. In tying event the company makes the conclusion of the contract conditional on the binding at the same time, the buyer of the commodity buys a tied commodity belonging to different commodity markets.[228] In the platform market, tying becomes relevant mainly through bundling as a special case, i.e. a so-called technological bond, in which two previously separate commodities are physically integrated into one commodity. In this case, for example, the device has a bound component belonging to the same platform ecosystem, such as a pre-assembled platform, and not the buyer can choose the tied component from competitors without repurchasing compatible components.[229] In the platform market, the line between technological binding and a new, innovative and cross-sectoral commodity component of the platform ecosystem is challenging. If barriers to entry are low, commodities tied up solely by market power will lag behind in competition due to rapid technological development.[230] In the Commission's practice, the combined provision of the various components of a platform ecosystem has been interpreted as a prohibited tying and thus an indication of market power when customers would incur switching costs to change by default to a competing platform.[231]

5.3.2 Parity Clauses

There have been parity clauses (most favored nation clauses or MFN's) in recent years under the special attention of the competition authorities as a condition of exclusivity specific to the platform market. Parity clause means a contractual term under which one party undertakes to offer to the other party at least as favorable terms as to its other counterparties.[232] The parity clause resembles the exclusivity clause, for it may in fact lead to exclusivity. In a study commissioned by the Consumer and Markets Authority, Smith and others divide parity clauses into narrow clauses that prohibit more favorable party to provide the terms and conditions on their own website, and to extensive parity clauses who deny the more favorable conditions for all competing distribution channels.[233] They make the conclusion that, unlike broad clauses, narrow

[228] Kuoppamäki, P.J. Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa (2003), p. 44-45. (Publications of Finnish Lawyer's Association. A-series; 239). p.870
[229] Whish R., Bailey D. (2012) Competition law. 7th Ed. United Kingdom: Oxford University Press p. 689
[230] Mustonen, Mikko (2001) Teknologiayritykset ja kilpailupolitiikka p.287
[231] European Commission Decision Microsoft, Case No COMP/C-3/37.792, 24 March 2004. paragraphs 979-982
[232] González-Díaz, Francisco Enrique & Bennett, Matthew, (2015) The law and economics of most-favoured nation clauses. Competition Law & Policy Debate, Vol. 1, No. 3, August 2015, p.40
[233] Smith, Alasdair et al. (2014) Private motor insurance market investigation: Final Report. Crown Copyright 2014. p. 57

parity clauses do not have the potential to often have significant adverse effects on competition but, on the contrary, increase efficiency by promoting intra-platform competition and reducing consumer search costs.[234]

There is currently no legal guidance at the level of the European Union or its Member States how parity clauses should be assessed in terms of competition law. Narrow clauses cannot be equated directly with exclusivity clauses because, unlike broad clauses, narrow parity clauses do not lead to exclusivity. Narrow clauses cannot, in principle, be considered harmful to competition and consumers, and the effects should be examined on a case by case basis. [235]The findings of the Consumer Market Authority's report are also applicable to more general competition law enforcement. Broad clauses can create strategic barriers to entry for the competitive factors they cover, most often prices. However, the main competitive factor in the platform market is most often innovation or product range competition instead of price competition. The Commission's investigation of the marketplace platform for the Amazon was based on the use of parity clauses. Under the terms of the Amazon Kindle platform for online book publishers had to inform Amazon of at least as favorable terms as Amazon 's competitors offered to these. The material scope of the clauses extended to all stages of production, and the obligation to notify applied not only to prices but also to all those involved in a competitive relationship terms of the contract. This reduced the willingness of Amazon's competitors to establish themselves on relevant ones market, developed barriers to entry and thus increased Amazon's market power.[236]

[234] Ibid. p.60-61
[235] Ibid. p. 59
[236] Commission's decision 4.5.2017, AT.40153 – E-book MFNs and related matters (Amazon), paraghraphs. 24-35

CONCLUSION

The thesis strives to give an assessessment to two research questions: how has the defining of dominant market position of digital online platforms under Article 102 of the TFEU taken form in the customary law of the CJEU, and whether and how the specificities of the digital online platform market affect the verification of dominance. While writing the thesis, I found that both research questions are closely related. The answer to the research questions of the thesis can be unequivocally summarized so that the specific features of the digital online platform market have a significant effect on the determination of a dominant position. Legally, the question is that the conditions for determining a dominant position must be derived from the content of the law in force, since the legal instruments and practical legal basis must be based on the laws in force. However, it follows from the specificities of the market that the application of these methods as such does not lead to a regulatory outcome. A legal solution must always be in accordance with the objectives of the law and must be reached in accordance with generally accepted legal methods. However, the current competition case law, which is largely based on the direct application of well-established competition law to the platform market, only fulfills the latter condition but not the former.

In terms of legal certainty and predictability, the extension of existing methods to multidisciplinary markets can be considered a positive development. However, without due regard to the multiplicity of the platform market, customer groups interdependencies and innovation and product mix competition as primary competition parameters, the competition law assessment does not provide an actual and relevant framework for the assessment of dominance. Competition authorities should identify the characteristics of the platform market, as changes in market conditions are not only a transient phenomenon, but rather the beginning of a new era for EU competition law as well. The legal research concerning EU's competition law must consider comparative and positive law and economics based research methods as essential tools. They also have a significant guiding effect on competition law, and as such oblige to include economic insights and theories. Applying competition law without taking into account these elements of law and economics would also be ignorance of the deeper elements of law itself. With both

research methods it is possible not only to understand but also to develop existing law to better meet regulatory purposes.

In particular, the adaption of existing definitions for dominant market position and modulation of analytical methods to the specificities of the platform market added value from the practice of national competition authorities. In addition, the analysis of positive law and economics provide a framework for achieving a regulatory outcome in the current state of EU law, where the legislator has to find a balance in applying a systematic methodological interpretation method without taking it into a changed operating environment which is too far in relation to the original aim of the legislators. Based on the comparative parts of this thesis, the guiding effect of positive law and economics research results are already reflected in the application of competition law.

I have concluded that in spite of the criticism occuring in the legal literature in the methods of the current existing law in force are properly adapted for determining the dominant market position for digital online platforms as well. In particular, recent international positive law and economics research and the practice of national competition authorities have shown useful methods for adapting traditional methods to the new market environment, taking into account the specificities of the market without compromising regulatory legitimacy and equality of market participants. Based on the research results, the existence of a dominant position in the digital online platform market must be examined with the help of elements systematized in previous studies, but the means of identifying them differ in some respects from traditional tools.
In the end the definition of a dominant position is largely a matter of legal policy and not so much a matter of jurisprudence. In European Union’s competition policy, it is almost inevitable that the Union's objectives of creating a single digital internal market, based on innovation, fair competition and fair trade, will have an impact on future case law especially for platform market operators.

LIST OF REFERENCES

Scientific books

1. Alkio, Mikko – Wik, Christian, (2004). Kilpailuoikeus. Talentum, Helsinki.
2. Bishop, S., & Walker, M. (2018). *Economics of EC Competition Law: Concepts, Application, and Measurement.* University ed. London: Sweet & Maxwell.
3. Craig, P., & Búrca, G. D. (2017). *EU law: Text, cases, and materials.* 6th ed. Oxford: Oxford University Press.
4. Goyder & Albors-Llorens (2009) EC Competition law 5th ed. Oxford: Oxford University Press.
5. Jones, A., & Sufrin, B. (2011). EU Competition Law: Texts, cases, and materials. 4th ed. Oxford: Oxford University Press.
6. Kuoppamäki P. (2000) Kilpailuoikeuden Perusteet
7. Kuoppamäki, Petri, (2003) Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa. Suomalaisen Lakimiesyhdistyksen Julkaisuja A-sarja N:o 239. Gummerus Kirjapaino Oy, Jyväskylä.
8. Kuoppamäki, Petri, (2012) Uusi kilpailuoikeus. Toinen, uudistettu painos. Sanoma Pro Oy, Helsinki.
9. Schumpeter, Joseph A., (1942) Capitalism, Socialism and Democracy. 3rd, Edition. Harper & Brothers, New York.
10. Schumpeter, Joseph A., (1976) Capitalism, Socialism and Democracy. 5th, Edition. Unwin University Books, London.
11. Whish, R., & Bailey, D. (2001). Competition law. 4th ed. Oxford, United Kingdom: Oxford University Press.
12. Whish, R., & Bailey, D. (2009). Competition law. 6th ed. New York, United States: Oxford University Press.
13. Whish, R., & Bailey, D. (2012). Competition law. 7th ed. Oxford, United Kingdom: Oxford University Press.

14. Whish, R., & Bailey, D. (2015). *Competition law*. 8th ed. Oxford, United Kingdom: Oxford University Press.
15. Wikberg O. (2011) Johdatus kilpailuoikeuteen, (1st Ed.) Talentum Oy

Scientific articles

16. Arrow, Kenneth, (1962) Economic Welfare and the Allocation of Recourses for Invention. Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council: The Rate and Direction of Inventive Activity: Economic and Social Factors. Princeton University Press, Princeton, s. 609–626.
17. Baudenbacher, C., & Bremer, F. (2010). European State Aid and Merger Control in the Financial Crisis From Negative to Positive Integration. – Journal of European Competition Law & Practice. Vol. 4, No. 1, 267–285.
18. Boshoff W.H. (2013) Why define markets in competition cases? p.1-4 Stellenbosch Economic Working Papers: 10/13 May 2013
19. Bundeskartellamt, (2016). B6-113/15, Working Paper – The Market Power of Platforms and Networks, June 2016. Accessible: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-TankBericht-Langfassung.pdf?__blob=publicationFile&v=2.
20. Eisenmann, Thomas & Parker, Geoffrey & Van Alstyne, Marshall W. (2006) Strategies for Two-Sided Markets. Harvard Business Review On Point Article. Harvard Business School Publishing Corporation, Harvard, October. (Eisenmann et al.)
21. Evans, David S. (2008) Antitrust Issues Raised By the Emerging Global Internet Economy. Northwestern University Law Review Colloquy, Vol. 102, 2008, s. 285–306. Accessible: http://www.law.northwestern.edu/lawreview/colloquy/2008/13/.
22. Evans, David S. & Schmalensee, Richard, The Antitrust Analysis of Multi-Sided Platform Businesses (January 30, 2013). Roger Blair and Daniel Sokol, eds., Oxford Handbook on International Antitrust Economics, Oxford University Press, Forthcoming; University of Chicago Institute for Law & Economics Olin Research Paper No. 623. p. 173-174 Available at: SSRN: https://ssrn.com/abstract=2185373

23. Filistrucchi, Lapo & Geradin, Damien & Damme, Eric & Affeldt, Pauline. (2013). Market Definition in Two- Sided Markets: Theory and Practice. Journal of Competition Law and Economics. 10. 10.1093/joclec/nhu007.
24. Gilbert, Richard J. – Sunshine, Steven C., 1995. Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets. Antitrust Law Journal Vol. 63, No. 2, Winter 1995, s. 569–601.
25. González-Díaz, Francisco Enrique – Bennett, Matthew, (2015) The law and economics of most-favoured nation clauses. Competition Law & Policy Debate, Vol. 1, No. 3, August 2015, s. 26–42.
26. Hagiu, Andrei & Wright, Julian, (2015) Multi-Sided Platforms. Harvard Business School Working Paper 15-037, 2015. p. 4-6 Accessible: http://www.hbs.edu/faculty/Publication%20Files/15-037_cb5afe51-6150-4be9-ace2- 39c6a8ace6d4.pdf.
27. Hagiu, Andrei & Evans, David S. & Schmalensee, Richard, (2004) A Survey of the Economic Role of Software Platforms in Computer-Based Industries. CESifo Working Paper No. 1314, Category 9: Industrial Organisation. October 2004. Accessible: http://hdl.handle.net/10419/18679. (Hagiu et al. 2004)
28. Harbord, David & Hoehn, Tom, (1994) Barriers to Entry and Exit in European Competition Policy. 14 International Review of Law & Economics 1994, 411-435.
29. Hartman, Raymond & Teece, David & Mitchell, Will & Jorde, Thomas, (1993) Assessing Market Power in Regimes of Rapid Technological Change. Industrial and Corporate Change, Vol. 2, No. 3. Oxford University Press 1993, p. 317–350. Accessible: https://doi.org/10.1093/icc/2.3.317. (Hartman et al. 1993)
30. Kalimo, H. & Majcher, K. (2017). The concept of fairness: linking EU competition and data protection law in the digital marketplaces. In European Law Review, Vol. 42(2), 2017.
31. Luchetta, Giacomo, (2012) Is the Google Platform a Two-Sided Market? 23rd European Regional Conference of the International Telecommunication Society, Wien, Itävalta. 1–4 July 2012. Accessible: http://hdl.handle.net/10419/60367.
32. McAfee, Preston R. & Mialon, Hugo M. & Williams Michael A., (2004) What is a Barrier to Entry? The American Economic Review, Vol. 94 No. 2, Papers and Proceedings of the One Hundred Sixteenth Annual Meeting of the American Economic Association San Diego, CA, 2004, s. 461–465. Saatavilla: http://www.jstor.org/stable/3592928. (McAfee et al. 2004)

33. Motta, M. (2004). Competition Policy: Theory and Practice. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511804038 p.89
34. Mustonen, Mikko (2001) Teknologiayritykset ja kilpailupolitiikka. In the publication of Kanniainen, Vesa – Määttä, Kalle; Taloustieteellinen näkökulma kilpailuoikeuteen. Kauppakaari, Lakimiesliiton kustannus, Helsinki, p. 279–294.
35. Mäihäniemi, Beata (2017) Imposing Access to Information in Digital Markets Based on Competition Law : In Search of the Possible Theory of Harm in the EU Google Search Investigations, University of Helsinki p. 70
36. Nazzini, Renato, (2011) The Foundations of European Union Competition Law: The Objective and Principles of Article 102. Oxford University Press, Oxford. p.328
37. Notkin M.,(2014) Does Google abuse its dominant position in the search engine market? Munich: Grin Verlag
38. Parker, Geoffrey G. & Van Alstyne, Marshall W. & Choudary, Sangeet Paul (2016). Platform Revolution. How Networked Markets Are Transforming the Economy – And How to Make Them Work for You. W.W. Norton & Company, New York. (Parker et al. 2016) p. 29–32.
39. Porter, Michael E. (1985) The Competitive Advantage: Creating and Sustaining Superior Performance. The Free Press, New York. p. 173
40. Rochet, Jean-Charles & Tirole, Jean, (2004) Two-Sided Markets: An Overview. Mimeo, IDEI University of Tolouse 2004. p.10. Accessible: https://web.mit.edu/14.271/www/rochet_tirole.pdf
41. Schulze Steinen, Petra, (1998) Kauppakumppanin mahti ja määräävä markkina-asema. Lakimiesliiton kustannus, KATTI A-sarja. Helsinki, Helsingin yliopisto. page. 43
42. Smith, Alasdair – Aaronson, Robin – Finbow, Roger – Oram, Stephen – Stern, Anthony – Chisholm, Alex (2014) Private motor insurance market investigation: Final Report. Crown Copyright 2014. Accessible: https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf (Smith et al. 2014)
43. Virtanen, Martti, (1998) Market Dominance Related Competition Policy: An Eclectic Theory and Analyses of Policy Evolution. Publications of the Turku School of Economics and Business Administration, Turku. p.116-117

44. Virtanen, Martti, (2001) Uusi allianssikapitalismi ja kilpailupolitiikka. Teoksessa Kanniainen, Vesa – Määttä, Kalle (toim.). Taloustieteellinen näkökulma kilpailuoikeuteen. Kauppakaari, Lakimiesliiton kustannus, Helsinki, s. 201–256.
45. Wils, Wouter P.J., (2014) The Judgement of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance. World Competition: Law and Economic Review, Vol. 37, No. 4, 2014, s. 405–434.
46. Zenger, Hans – Walker, Mike, (2012) Theories of Harm In European Competition Law: A Progress Report, 2012. Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009296.

Other sources

47. Communication from the Commission — (2009/C 45/02) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24 February 2009) Accessible: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29
48. Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions (2016) Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM/2016/0288 final Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0288
49. Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ C 291, 30.8.2014, Accessible : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=FR
50. Commission Notice (1997) on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN
51. European Commission Decision Google Search (Shopping), AT.39740 – 27 June 2017

52. European Commission, Online Platforms, 2019 available at https://ec.europa.eu/digital-single-market/en/policies/online-platforms ,7 May 2020
53. European Parliament; Joint motion for a resolution (2004) European Parliament resolution on corporate governance and supervision of financial services – the Parmalat case Accessible: https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P5-RC-2004-0053+0+DOC+PDF+V0//EN
54. Kilpailu- ja kuluttajavirasto, Alustat kilpailu- ja kuluttajaoikeudellisessa tarkastelussa, Kilpailu- ja kuluttajaviraston selvityksiä 4/2017, p. 36-44. accessible: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2017/kkv-selvityksia-4-2017-alustat.pdf , 7 May 2020.
55. Official Journal of the European Union, C 202, 7 June 2016
56. Opinion of Advocate General Kokott delivered on 23.2.2006. British Airways plc v Commission of the European Communities. C-95/04 P, EU:C:2006:133.
57. Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2018 https://ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf
58. Transcript, bankruptcy of Wärtsilä Oyj's maritime industry (1990) https://www.eduskunta.fi/FI/vaski/Poytakirja/Documents/ptk_28+1990.pdf
59. United Nations conference; Digital Economy Report (2019) p.19 accessible: https://unctad.org/en/PublicationsLibrary/der2019_en.pdf

Court & Commission decisions

60. Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 Case No COMP/M.7047 – Microsoft/ Nokia Accessible: https://ec.europa.eu/competition/mergers/cases/decisions/m7047_687_2.pdf Accessed 10.05.2020
61. Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area2 Case M.8124 – Microsoft / LinkedIn, Accessible:

https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf Accessed: 10.05.2020

62. European Commission Decision Microsoft, Case No COMP/C-3/37.792, 24 March 2004 Accessible: https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf Accessed 13.05.2020
63. Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 Case No COMP/M.6381 – Google/Motorola Mobility Accessible: https://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf Accessed: 10.5.2020
64. Commission Decision of 03/10/2014 declaring a concentration to be compatible with the common market (Case No COMP/M.7217 - FACEBOOK / WHATSAPP) according to Council Regulation (EC) No 139/2004 Accessible: https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf Accessed: 10.05.2020
65. Commission decision of 4.5.2017 Case AT.40153 E-book MFNs and related matters (Amazon) Accessible: https://eur-lex.europa.eu/legal-content/FI/TXT/?uri=CELEX%3A52017XC0126%2801%29 Accessed: 13.05.2020
66. Judgment of the Court of 14 February 1978. United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas. Case 27/76 European Court Reports 1978 -00207 ECLI identifier: ECLI:EU:C:1978:22
67. Judgment of the Court of 13 February 1979. Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. European Court Reports 1979 -00461 ECLI identifier: ECLI:EU:C:1979:36
68. Judgment of the Court of First Instance (Second Chamber) of 6 October 1994. Tetra Pak International SA v Commission of the European Communities. Case T-83/91. European Court Reports 1994 II-00755 ECLI identifier: ECLI:EU:T:1994:246
69. Judgment of the Court of First Instance (First Chamber) of 17 December 2003. British Airways plc v Commission of the European Communities. Accessible: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48807&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=431581

70. Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007. Microsoft Corp. v Commission of the European Communities. T-201/04, EU:T:2007:289
71. Judgment of the Court (First Chamber) of 2 April 2009. France Télécom SA v Commission of the European Communities. Case C-202/07 P. European Court Reports 2009 I-02369 ECLI identifier: ECLI:EU:C:2009:214
72. Judgment of the Court of First Instance (Fifth Chamber) of 9 September 2009. Clearstream Banking AG and Clearstream International SA v Commission of the European Communities. Case T-301/04. European Court Reports 2009 II-03155 ECLI identifier: ECLI:EU:T:2009:317
73. Judgment of the General Court (Fourth Chamber), 11 December 2013. Cisco Systems, Inc. and Messagenet SpA v European Commission. Case T-79/12.
74. Opinion of Advocate General Kokott delivered on 23 February 2006. British Airways plc v Commission of the European Communities. Case C-95/04 P. European Court Reports 2007 I-02331 ECLI identifier: ECLI:EU:C:2006:133

International and EU legislation

75. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Accessible: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN

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