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edited by

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Applying Article 102 TFEU to Multisided Online Platforms: Discrimination, Leveraging and Undefined Abuses of Dominance

*Daniel Mandrescu**

Summary: 1. Introduction. – 2. The economic context of platforms. – 3. Platform expansions and abusive market power leveraging. – 4. Platform pricing, governance, and abusive discrimination. – 5. Undefined abuses and new regulatory frameworks. – 5.1. The unexhaustive character of Article 102 TFEU. – 5.2. Abuses through infringements of alternative regulatory frameworks. – 6. Conclusion.

1. Introduction

The application of EU competition law to online platforms has proven time and time again to pose significant challenges to the European Commission (the “Commission”), the Member States’ National Competition Authorities (“NCAs”) and courts. The growing success of prominent platforms triggered a push towards adjusting and complementing the current framework of EU competition law to deal with these actors. This push for more effective and timely enforcement is seen particularly in the context of abuses of dominance under Article 102 TFEU, which has been the primary legal framework for dealing with the anti-competitive behavior of these actors so far¹. Despite the growing number of cases, the chal-

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¹ Over the past fifteen years, the leading cases against Google (e.g. case AT.40670 – *Google - Adtech and Data-related practices*; Commission Decisions of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*; 18 July 2018 in case AT.40099 – *Google Android*; 27 June 2017 in case AT.39740 – *Google Search (Shopping)*), Apple (e.g. case

lenges associated with this process have not necessarily become smaller or fewer. Nevertheless, there is an increasing understanding of the need to adjust current practice to the realities of online platforms to capture the pro-and anti-competitive potential behind their business practices. This realization can be witnessed in how new and more complex theories of harm have been identified in recently decided and ongoing cases². Furthermore, these evolving insights have been accumulated, translated, and eventually bundled in what now will become the leading competition law-oriented regulatory tool for online platforms, namely the Digital Markets Act (the “DMA”)³.

Nevertheless, the growing experience of current practice remains case-oriented, and general insights into the competitive concerns raised by multisided online platforms have not yet reached a consensus. This is also, to a great extent, reflected by the scope of the DMA. Although this new regulatory framework is intended to address the business practices of multisided platforms that may interfere with the process of healthy competition, it does so in a pinpointed manner. The scope of application is limited to a list of specific types of platform service providers, and the obligations included in it entail narrowly formulated prohibitions. Furthermore, its enforcement is, in principle, solely left in the hands of the Commission, whereby NCAs and national courts appear to be expected to play only a supporting role⁴. Admittedly, this approach is perhaps also why implementing the DMA was possible to begin with, as more sweeping and open-ended regulatory frameworks would have been met with

AT.40452 – *Apple – Mobile payments*; case AT.40437 – *Apple - App Store Practices (music streaming)*, Amazon (e.g. Commission Decisions of 20 December 2020 in case AT.40462 – *Amazon Marketplace* and in case AT.40703 – *Amazon Buy Box*; 4 May 2017 in case AT.40153 – *E-book MFNs and related matters (Amazon)*), Microsoft (e.g. AT.40721 – *Microsoft Teams*; Commission decisions of 16 December 2009 in case AT.39530 – *Microsoft (Tying)*), and Facebook (e.g. case AT.40684 – *Facebook Marketplace*) were all done under the scope of Article 102 TFEU and /or the national equivalent of this provision.

² The recent investigation into Facebook’s potential tying practices is a good example of this. See case AT.40684 – *Facebook Marketplace*, cit., and the related Commission press release No IP/22/7728 of 19 December 2022.

³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

⁴ Articles 37-39 of the DMA.

more opposition from practice and would be less likely to achieve the goal of timely intervention. These choices can be further justified by the fact that the DMA is not intended to replace EU competition law enforcement but rather to complement it⁵. In practice, however, this means that the (parallel) application of (EU) competition law to multisided online platforms will have to continue, especially at the national level, where the power to apply the DMA is only partial.

Against this background, this chapter aims to provide guidance on the application of EU competition law to multisided online platforms, specifically focusing on Article 102 TFEU. To do so, the chapter will be structured as follows. First, the characteristics of multisided platforms will be discussed to provide insight into the economic rationale behind their business practices, which may appear contentious when viewed through the lens of previous practice concerning non-platform entities. Such insights will be an inseparable part of the legal and economic context that must be accounted for when dealing with platforms under EU competition law to avoid erroneous findings stemming from applying insights from non-platform contexts⁶. Second, paragraphs 3 and 4 will be devoted to the characteristics of platforms that are likely to cross paths with Article 102 TFEU (or the national equivalent thereof) throughout their lifecycle. These paragraphs will provide an overview of the potentially anti-competitive practices that are most likely to manifest in platform settings and offer various options to tackle these under Article 102 TFEU. Finally, paragraph 5 will be devoted to presenting additional ways that Article 102 TEU can be used to tackle unprecedented business practices implemented by multisided online platforms. This paragraph, which will be followed by a final conclusion, focuses on the non-exhaustive character of Article 102 TFEU that enables the identification of new types of abuse as well as the possibility (and perhaps even obligation) to look at compliance with parallel regulatory frameworks to establish an abuse.

⁵ Recital 10 of the DMA.

⁶ J. WRIGHT, *One-Sided Logic in Two-Sided Markets*, AEI-Brookings Joint Center Working Paper, 10/2003, available at www.papers.ssrn.com.

2. The economic context of platforms

In the context of competition law policy, online platforms are commonly discussed in relation to their multisided market character, which places them in a different commercial reality compared to non-platform undertakings⁷. For platforms to be considered multisided, these must (i) facilitate an interaction between two or more separate customer groups, (ii) exhibit indirect network effects, (iii) and the platform is necessary for internalizing the externalities created⁸. These elements constitute the foundation of platform entities and thus directly impact their commercial and, therefore, also the legal reality that requires accounting for in the process of application⁹. Broadly speaking, the different commercial reality stems from the fact that platforms create value by successfully facilitating a (matchmaking) service between two or more separate customer groups¹⁰. Consequently, the success of platforms depends on their ability to bring the right customer groups ‘on board’ and coordinate the interaction between such groups in a profitable manner¹¹.

In the early days of every platform, this coordination task translates into a chicken-and-egg problem they need to solve. The first customer group to get on board has little or nothing to gain from their participation in the absence of involvement of additional customer groups on the other

⁷ B. MARTENS, *An Economic Policy Perspective on Online Platforms*, Institute for Prospective Technological Studies Digital Economy working paper, 5/2016, p. 12, available at www.ec.europa.eu.

⁸ *Ivi*, pp. 10-18; Commission Staff working document of 25 May 2016 on Online Platforms – Accompanying the Communication on Online Platforms and the Digital Single Market, SWD (2016) 172 final, pp. 1-9; OECD, *Two-Sided Markets*, 2009, p. 3, available at www.oecd.org.

⁹ This is to a great extent the main theme discussed in expert reports concerning the application of competition policy to online platforms see e.g., Commission, Expert report by J. CRÉMER, Y.A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the Digital Era*, Publications Office of the European Union, Luxembourg, 2019; OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018, available at www.oecd.org; Report of the Digital Competition Expert Panel, *Unlocking Digital Competition*, 2019, available at www.assets.publishing.service.gov.uk.

¹⁰ J.C. ROCHET, J. TIROLE, *Two-Sided Markets: A Progress Report*, in *The RAND Journal of Economics*, 2006, Vol. 37, Iss. 3, p. 645.

¹¹ B. CAILLAUD, B. JULLIEN, *Chicken & Egg: Competition among Intermediation Service Providers*, in *The RAND Journal of Economics*, 2003, Vol. 34, Iss. 2, p. 309.

side(s) of the platform and vice versa¹². In practice, this problem has been successfully overcome through various launch strategies¹³. Nevertheless, the interdependence between the different customer groups of platforms remains central to their survival throughout their entire lifecycle. Therefore, when competing with other (platform) undertakings, platforms compete to attract the customers they wish to get on board in optimal proportions, depending on their business model¹⁴. Doing so in practice means meeting different types and degrees of demand for the platform service(s), which requires making different value propositions for such customer groups to join the platform¹⁵. Such different offers entail the adoption of skewed pricing structures where (at least) one customer group (the subsidizing group) pays more to participate on the platform than another group (the subsidized group)¹⁶. This means that the price structure of platforms is non-neutral¹⁷. In other words, the demand for platform services depends not only on the overall level of platform fees but also on how these fees are allocated across the different customer groups¹⁸.

The economic literature on pricing in two and multisided markets has identified multiple variables influencing how platforms set their total price structure and level¹⁹. Such variables can be divided into on-plat-

¹² *Ibidem*. Perhaps the only exception to this problem are peer-to-peer platforms such as eBay and Airbnb as the customers of these platforms can in most cases participate on both sides of the interaction (or platform). Sellers on eBay are often also buyers and users on Airbnb can choose to either offer their residence for a short-term stay or rent one from other users.

¹³ E.g., some platforms started off as non-platform entities. Facebook, for example, was not open to ads during its early days when it was intended to be a university-oriented communication platform. TripAdvisor started off as a review site for consumer's experience of hotels, restaurants, and attractions and transformed at a later stage into a hotel room booking platform.

¹⁴ E.g., a ride-hailing platform would try to keep a specific balance between consumers and drivers per available territory. Such a balance may differ, for example, when compared to a hotel room booking platform or an online marketplace.

¹⁵ M. RYSMAN, *The Economics of Two-sided Markets*, in *Journal of Economic Perspectives*, 2009, Vol. 23, Iss. 3, p. 125, pp. 129-131.

¹⁶ B. CAILLAUD, B. JULLIEN, *Chicken & Egg: Competition among Intermediation Service Providers*, cit.

¹⁷ B. MARTENS, *An Economic Policy Perspective on Online Platforms*, cit., pp. 11-14.

¹⁸ See OECD, *Two-sided markets*, cit., pp. 29-30.

¹⁹ F. ZINGAL, F. BECKER, *Drivers of Optimal Prices in Two-sided Markets: The State of the Art*, in *Journal für Betriebswirtschaft*, 2013, Vol. 63, Iss. 12, p. 87.

form and off-platform variables. On-platform variables concern variables that originate from the platforms' business model. These include the nature and intensity of network effects, the homing patterns of customers, and the price sensitivity of customers. These variables indicate the relative value the respective customer groups derive from the platform and their willingness to pay. Off-platform variables concern variables originating from the market conditions and competitive pressure experienced by platforms in each case. These include the number of competitors the platforms face concerning each customer group and their homing patterns. These variables indicate the degree of (direct) competitive pressure experienced by platforms.

When getting various customer groups on board, their participation, called homing patterns²⁰, can differ. Homing patterns, which can be divided into single-homing and multi-homing, are considered one of the main indicators of market power. Single-homing occurs when a platform customer group uses a single platform to fulfill its specific demand for a service. This would occur, for example, if consumers only used Booking.com to reserve hotel rooms online. Multi-homing occurs when platform customers use multiple platforms to fulfill their demand for the same service provided by the platform. This would occur when consumers choose to search and reserve hotel rooms via multiple platforms outside of Booking.com. Since platforms inherently bring together two or more customer groups, homing patterns on a platform can result in (i) multisided single-homing²¹, (ii) multisided multi-homing²², and (iii) single-homing on one side and multi-homing on another side of the platform²³, also referred to as a bottleneck scenario. From a market power perspective, the platform undertaking would commonly have the incentive to ensure that at least one of its customer groups is single-homing, as this provides the platform with monopoly power with respect to the other platform customer groups that are interested in interacting with such sin-

²⁰ A. TIWANA, *Platform Ecosystems: Aligning Architecture, Governance, and Strategy*, Morgan Kaufmann Publishers, San Francisco, 2014, p. 36.

²¹ This occurs, for example, in the case of the Apple App Store which must be used by consumers and app developers to buy and sell iOS apps.

²² This occurs, for example, in the case of hotel room booking platforms where consumers and hotel owners use multiple platforms for the same purpose.

²³ This occurs, for example, in the case of payment cards: consumers usually have one credit card while merchants tend to accept multiple cards.

gle-homing groups. Where single-homing is achieved on all sides of the platform, such market power would be even greater as it would apply, in principle, to all groups simultaneously²⁴. By contrast, in a multisided multi-homing scenario, the market power of the platform with respect to its customer groups and competitors is constrained by the ability and willingness of such customer groups to use alternative solutions.

Once members of two or more separate customer groups join the platform, the network effects at play enable the platform's growth to viability (also referred to as critical mass) and, in the long run, even help secure a monopoly position²⁵. Network effects can be divided into direct and indirect network effects. In the case of platforms (positive), direct network effects are present when the value of the platform for one of its customer groups increases with the presence of more members of the same customer group. Indirect network effects, by contrast, are present when the value of the platform service for a customer group increases with the presence of members of a different customer group. Both types of network effects will vary in intensity and range between negative (decreasing value) and positive (increasing value) depending on the business model of the respective platform. Such a setting will also influence how the platform pricing scheme will be set²⁶. To harness and utilize the benefits of such effects, each platform must engage in constant refinement of its service(s), pricing structure, and governance rules that tackle undesired practices on the platform²⁷. The importance of network effects ex-

²⁴ This happens in the Apple App Store which imposes the single-homing of both consumers and app developers as part of the terms and conditions of the iOS ecosystem.

²⁵ D.S. EVANS, R. SCHMALENSEE, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in R. BLAIR, D. SOKOL (eds.), *Oxford Handbook on International Antitrust Economics*, Oxford University Press, Oxford, 2014, pp. 404-448; D.S. EVANS, R. SCHMALENSEE, *Failure to Launch: Critical Mass in Platform Businesses*, in *Review of Network Economics*, 2010, Vol. 9, Iss. 4; G.G. PARKER, M.W. VAN ALSTYNE, S.P. CHUDARY, *Platform Revolution*, W.W. Norton & Company, New York, 2016, pp. 123-127.

²⁶ J.J. GABSZEWICZ, D. LAUSSEL, N. SONNAC, *Does Advertisement Lower the Price of Newspapers to Consumers? A Theoretical Appraisal*, in *Economic Letters*, 2005, Vol. 87, p. 127.

²⁷ See A. HAGIU, *Pricing and Commitment by Two-Sided Platforms*, in *The RAND Journal of Economics*, 2006, Vol. 37, Iss. 3, p. 720; K.J. BOUDREAU, A. HAGIU, *Platform Rules: Multi-Sided Platforms As Regulators*, in A. GAWER (ed.), *Platforms, Markets and Innovation*, Edward Elgar, Cheltenham, 2009.

tends to the entire platform lifecycle as one of the main determinants of market power and growth.

Against this background, it can be said that the abovementioned will constitute an inseparable part of the legal and economic context that must be considered to evaluate whether a particular platform business practice entails *competition on the merits*²⁸. Doing so will allow one to adequately assess the risk of (anti-competitive) market power leveraging as well as the existence of potentially abusive (exclusionary or exploitative) discrimination while allowing practices that are legitimately in line with platform logic despite their initially concerning appearance.

3. Platform expansions and abusive market power leveraging

Implementing market power leveraging strategies is an (almost) inevitable aspect of a platform lifecycle. This is because most, if not all, platforms will, at some point in time, need to expand. Once a platform reaches critical mass, this signifies that it is considered viable and can proceed with maximizing the value creation and monetization of the service it facilitates²⁹. Increasing the value of the platform service(s) entails mainly reducing the costs incurred by the platform customer groups, including information, search, and transaction costs³⁰. Reducing such costs helps increase the volume of customers and, thereby, the likelihood of revenue-creating actions by these customers, such as purchases, clicks on ads, membership subscriptions, and more. This, in turn, may also raise the willingness of some customers to pay more for their use of the platform. It is not hard to imagine that sellers would be willing to pay a higher transaction fee for an online marketplace that attracts more consumers by offering a superior purchasing experience that increases sales.

²⁸ Competition on the merits refers to competition on parameters such as price, choice, quality, or innovation and not means only available due to significant market power. See further discussion in OECD, *Competition on the merits*, 2006, available at www.oecd.org.

²⁹ See e.g. A. HAGIU, *Multi-sided platforms: From micro-foundations to design and expansion strategies*, Harvard Business School Strategy Unit Working Paper 09-115/2009, available at www.papers.ssrn.com.

³⁰ *Ibidem*.

As part of the expansion process, platforms may also move on to increase their territorial reach. Such a step entails *de facto* a market power leveraging exercise where the platform extends from one geographical (sub) market to another. This can be seen, for example, in the case of platforms that offer services provided locally, such as ride-hailing or sharing (e.g., Uber) or food ordering and delivery (e.g., Grubhub, Uber Eats)³¹. Depending on how the relevant market is defined in such cases, territorial expansions may warrant caution as they may involve bellow price (i.e., predatory) or other exclusionary strategies by dominant platforms. Such strategies can involve, for example, initial reductions for new customers from a specific geographic location, price parity clauses (narrow or wide), exclusivity clauses, or rebates for business customers.

Although such practices may be pretty standard in certain sectors of the economy, such as hotel room booking, ride-hailing, food order and delivery, and even retail, when dominant actors implement these, their impact on competition will be significant. This is because such leveraging actions prevent other competing platforms from being able to get the right customer groups ‘on board’. Accordingly, when such practices are identified, assessing their anti-competitive potential requires first looking at how these may interfere with the ability of other (competing) platforms to compete for the same customer groups. Secondly, it is essential to assess the homing patterns of the customer group(s) to whom such business practices apply and to what extent such practices can (forcefully) curb the homing patterns of the respective platform customer groups. Thirdly, an assessment needs to be made as to what extent the network effects at play on the platform will amplify such shifts in homing patterns and thereby fuel the process of market power leveraging and growth. Finally, it must be assessed whether the identified business practices constitute competition on the merits or, instead, an abusive practice.

In practice, this analysis will go as follows. For example, Uber Eats operates in a market where both consumers and restaurant owners multi-home. Imposing an exclusivity clause or introducing a loyalty rebate system for restaurant owners will certainly have the potential to get restau-

³¹ See the example of OpenTable in D.S. EVANS, R. SCHMALENSEE, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, Boston, 2016, chapter 1; S.P. CHOUDRAY, *Platform Scale: How an Emerging Business Model Helps Start-Ups Build Large Empires with Minimum Investment*, Platform Thinking Labs Publishing, 2015, pp. 260-309.

rant owners to single-homing. If that were to occur, the indirect network effects at play would likely amplify such effects to some degree. The more restaurants the platform displays, the more interesting it becomes to consumers and vice versa. Nevertheless, as the nature of the food delivery service is locally focused, the magnitude of these effects will be limited. Accordingly, such practices could indeed have a foreclosure effect; however, its manifestation in practice would require an (almost) nationwide strategy to be effective. In the absence of such a strategy, it is unlikely for practices to come under the scope of Article 102 TFEU. If such a widespread strategy is in place, the next step would be to assess whether it can be (effectively) countered by competing platforms. At this last stage, when the concerned practices appear to fall within the ambit of established abuse categories under Article 102 TFEU, these can be applied as in the past while accounting for the multisided nature of the respective platform³².

In addition to the above-mentioned territorial expansions, platforms can also expand the scope of their services. Such a mode of expansion will occur with all kinds of platforms once the commercial potential of their core service(s) is utilized to their fullest (profitable) extent³³. Expanding the selection of services allows platforms to increase their revenue-generating options significantly and to engage or fend off a so-called envelopment attack from potential competitors in related markets³⁴. By adding more services to their existing portfolio, platforms can harness more of the growth potential that such business structures have, allowing them to extend their presence and capitalize on their activity across additional markets. When expanding, platforms essentially go back to the launching phase but can skip the chicken-and-egg problem as the new service(s) will be targeting (at least part of) their already existing customer base. For example, every time Booking.com added another service, it already had one of the needed customer groups on board, namely end consumers.

³² E.g., see D. MANDRESCU, *Abusive Pricing Practices by Online Platforms: A Framework Review of Art. 102 TFEU for Future Cases*, in *Journal of Antitrust Enforcement*, 2021, Vol. 10, Iss. 3, p. 469.

³³ See e.g. A.S. STAYKOVA, J. DAMSGAARD, *Platform Expansion Design as Strategic Choice: The Case of WeChat and Kakaotalk*, Research Papers, 78/2016, available at www.aisel.aisnet.org.

³⁴ T. EISENMANN, G. PARKER, M. VAN ALSTYNE, *Platform Envelopment*, in *Strategic management Journal*, 2011, Vol. 32, Iss. 12, p. 1270.

The moment of expansion represents the point in time when platforms will attempt to leverage their market power from the market(s) of their already established service(s) to the market(s) of the newly added platform service(s). Generally speaking, the prospect of successful leveraging depends on the relationship between the already established platform service and the newly offered one(s) and the degree of customer overlap between them. The relationship between the existing and the newly added platform services can be one of (i) complements (e.g., Amazon Marketplace and Amazon Pay), (ii) weak substitutes (Facebook and WhatsApp), or (iii) non-related (Windows OS and LinkedIn). The degree of customer overlap commonly depends on such relationships where complements often show the most significant potential. For example, in the case of eBay, the addition of PayPal was successful as PayPal was useful for eBay's already existing customer groups, namely consumers and traders. In the case of weak substitutes and non-related services, the correlation between the nature of the relationship and the degree of customer overlap can vary. For example, in the case of Facebook and WhatsApp, which were considered weak substitutes, there was a very significant degree of overlap. Similarly, in the case of LinkedIn, which was to be added to Windows OS, a non-related product, the degree of overlap was significant and also the reason why Microsoft was not allowed to combine them in one offer³⁵. Accordingly, during the evaluation of the anticompetitive potential of a strategy, it is crucial that the degree of customer overlap is addressed with diligence and explored extensively.

In light of the above, it can be said that the moment of expansion is also the moment in time when legal scrutiny under Article 102 TFEU and/or its national counterpart can be triggered. That is not to say that expansions are inherently harmful but rather that market power leveraging is inherent to the survival of platforms in the long run and will inevitably take place at some point in the lifecycle of every multisided platform. The main concern, then, from a competition law perspective, should be how this is done and whether that complies with the notion of competition on the merits.

When expanding their scope of services, platforms can choose to do so by either providing more services through an existing platform or by

³⁵ Commission Decision of 6 December 2016 in case M.8124 – *Microsoft / LinkedIn*, commitments section.

launching (or acquiring) another platform. This is something that can be seen in the case of almost all of the leading platforms today. For example, Booking.com started by offering hotel room bookings and recently attempted to extend into flight booking services by acquiring eTraveli, which the Commission prohibited due to the market power leveraging concerns of this concentration³⁶. Similarly, Uber started as a ride-hailing platform and is now being offered with Uber Eats, which is a food delivery platform. Although platform companies can also choose to expand with non-platform standalone products or services, such expansions are strategically less attractive as these will often not allow the respective platform to benefit from the (indirect) network effect at play. This can be seen, for example, in the case of Amazon, which offers a great deal of (physical) products like Alexa, Kindle E-readers, or home security devices on top of its marketplace service. While these products indeed represent new sources of revenue, they do not, as such, enhance the demand for Amazon Marketplace for consumers or sellers. By contrast, the addition of Amazon Pay relies on the existing success of the marketplace service while enhancing its value. Over time, the positive feedback loop between the two fosters further growth for both. In the context of competition law, it is precisely this feedback loop that represents the anticompetitive potential behind such expansions and, thus, market power leveraging exercises.

When assessing such practices, the main steps of assessment are similar to those of territorial expansions. Accordingly, the initial focus should be on the impact that such strategies may have on the homing patterns of the platform customers and how network effects at play will contribute to the (further) growth of the platform services involved. Once the leveraging potential of the strategy is identified, what remains to be assessed is whether the adopted practices entail competition on the merits. The abusive character of the expansion strategy can take various forms. Tying (or bundling) can be, for example, a very efficient strategy for market power leveraging³⁷. This would occur, for example, when participation in the established platform service requires the (passive or active) participation

³⁶ See Commission Decision of 25 September 2023 in case M.10615 – *Booking Holdings / Etraveli Group*.

³⁷ D. MANDRESCU, *Tying and Bundling by Online Platforms - Distinguishing between Lawful Expansion Strategies and Anti-competitive Practices*, in *Computer Law and Security Review*, 2021, Vol. 40, p. 1.

of platform customers in the newly added platform service³⁸. This was the case, for example, with eBay, which required the use of PayPal to complete transactions. More recent examples concern the ongoing investigation against Microsoft and the tying of Teams to its Microsoft 365 and Office 365 packages to the detriment of competitors such as Zoom or Slack³⁹.

Other possibilities, such as sub-cost (predatory) strategies, are also suitable for achieving a similar outcome by providing the newly launched platform service at a loss and cross-subsidized from the profits obtained in the market in which the platform is dominant. Where the concerned platform services are offered across separate platforms, the analysis of abuse entails applying the existing practice to them while accounting for the multisided nature of such platforms, which entails the costs involved in offering a platform service extend beyond the costs of service a single customer group⁴⁰. Where, however, the expansion occurs on a single platform, predatory strategies require great diligence when it comes to the market definition as the market definition determines to a great extent which costs can be taken into account and how these are to be allocated for the analysis⁴¹. Alternatively, leveraging strategies may take the form of discriminatory or self-preferencing practices when it comes to interoperability, access to data, and access to the market. These options can be seen in recent cases and investigations concerning platform undertakings.

Apple offers limited interoperability between the Apps Store and third-party payment processing services for (paid) iOS apps. Amazon restricts access to the data generated on its Marketplace to third parties, including the sellers using it, and until recently was accused of utilizing it to gain insights (and foothold) in other markets in competition with its customers (i.e., marketplace sellers). Such practices can be said to consist of unfair trading conditions having both exclusionary and exploitative aspects.

In cases where the respective practices do not resemble any of the al-

³⁸ *Ivi*, pp. 17-18.

³⁹ See case AT.40721 – *Microsoft Teams*, cit., and the related Commission press release No P/23/3991 of 27 July 2023.

⁴⁰ See D. MANDRESCU, *Abusive Pricing Practices by Online Platforms: A Framework Review of Art. 102 TFEU for Future Cases*, cit.

⁴¹ *Ivi*, pp. 482-489.

ready established forms of abuse, the fallback option is reliance on the broad category of abusive leveraging. This option used in *Google Shopping* offers the possibility to look at a collection of practices that on their own may not suffice to reach the finding of abuse; however, as an overall strategy or collection of actions, it may nevertheless be considered abusive⁴².

Similar circumstances have been identified in the recent investigation by the Commission in the case of Facebook Marketplace. According to the Commission, Facebook may be leveraging its position in the market for social media services to that of marketplace services. This appears to have been done by placing the Facebook Marketplace tile/icon prominently on the main interface page of the Facebook social media page while at the same time hampering the visibility of ads that are placed on Facebook⁴³. On their own, each of the actions is unlikely to be capable of constituting a standalone abuse; however, together, that may well be the case⁴⁴.

In light of the above, it can be said that the prospect of market power leveraging in the context of multisided online platforms is an inevitable one that will occur as part of their legitimate and illegitimate expansion strategies. Bringing such practices under competition law scrutiny and, more specifically, under the scope of Article 102 TFEU will require, however, identifying their anticompetitive potential in light of the multisided character of platforms and applying the existing frameworks of abuses in a manner that accounts for such character.

4. Platform pricing, governance, and abusive discrimination

The implementation of discrimination or, better yet, differentiation in governance rules and pricing is yet another inherent aspect in the existence of platforms that may trigger, rightfully or wrongfully, competition law scrutiny. As mentioned above, platforms must be able to make dif-

⁴² General Court, case T-612/17, *Google* [2021] ECLI:EU:T:2021:763.

⁴³ Commission press release No IP/22/7728, cit.

⁴⁴ D. MANDRESCU, *On-platform Tying or Another Case of Leveraging- A Discussion on Facebook Marketplace*, in *Kluwer Competition Law Blog*, 2023, available at www.competitionlawblog.kluwercompetitionlaw.com/.

ferent value propositions (which include prices) for their different customer groups. Such different propositions are then intended to match the various degrees of demand that the respective customer groups have for the platform service and the benefit they can derive from it. Without this approach, there is simply no feasible way for platforms to overcome the chicken-and-egg when launching nor to sustain a stable (and ideally growing) customer base once this problem is overcome. Nevertheless, this inevitable truth may, at times, cross paths with competition law scrutiny when claims of abusive discrimination or exploitation arise. This is currently seen in the case of the Apple App Store investigation, which was triggered by a complaint from Spotify claiming that the 30% commission levied by Apple was discriminatory⁴⁵. The rhetoric used by Spotify and repeated by media, however, does not correspond with the concept of abusive discrimination under Article 102 TFEU, especially when placed in the context of multisided platforms. This is likely also why actual investigations by the Commission and the Dutch NCA were eventually based on a different theory of harm, namely the imposition of unfair trading conditions.

Price discrimination in the context of competition policy concerns two main scenarios, namely competitor discrimination and customer discrimination. The practice itself entails a situation where the dominant undertaking is offering identical goods or services to different customers at different prices for reasons unrelated to costs⁴⁶. In practice, the main focus of enforcement is addressing competitor discrimination as it is considered the more harmful of the two and more likely to be part of a dominant undertakings' practice. Such type of discrimination requires that the concerned undertaking is active on two vertically related markets. In such circumstances, the concerned undertaking would have the incentive to discriminate against its customers in favor of its own downstream or upstream entity, thereby creating an exclusionary as well as exploitative threat. In the context of platforms, this would entail that the platform undertaking directly competes with (some) of its (business) customer groups. This can be seen, for example, in the case

⁴⁵ See case AT.40437 – *Apple – App Store Practices – music streaming*, cit., and case AT.40652 – *Apple – App Store Practices – e-books/audiobooks* cit., and the related Commission press release No IP/20/1073 of 16 June 2020.

⁴⁶ See e.g. OECD, *Price Discrimination*, 2016, Background note from the Secretariat, pp. 6-7, available at www.oecd.org.

of Apple, which provides both the App Store and Apple Music and TV in competition with Spotify and Netflix, which rely on the App Store to reach iOS users. Similarly, this can also be seen on Amazon Marketplace, where Amazon is also operating as a retailer in competition with third-party sellers. The extent to which such scenarios could arise across all platforms depends predominately on the launch strategy of the respective platform as well as the interest and ability to operate a vertically related non-platform business in tandem with the already established platform⁴⁷.

When the concerned platform is not active in a vertically related market, the prospect of discrimination and its impact will involve the competitive relationship between its business customers/trading parties. The competitive concerns associated with such practice are, to a great extent, the same as in the case of competitor discrimination; however, in this latter situation, there are fewer incentives for the dominant undertaking to pursue such a strategy. In the absence of exceptional circumstances, the dominant undertaking would not benefit from having one or more of its trading parties struggling to compete in a market where it is not itself active⁴⁸. In the context of platforms, however, the logic of having different prices for the different customers (groups) is, if done in good faith, in line with the inherent need to use skewed pricing structures and thus should not be erroneously labeled as abusive under Article 102 TFEU. At the same time, this inherent reliance on skewed pricing structures must not be used to hide prohibited anticompetitive practices.

According to economic literature, for either type of discrimination to take place, the concerned (platform) undertaking needs to have (significant) market power⁴⁹, be able to sort its customers based on their valuation of the service offered by it, and be able to prevent arbitrage through

⁴⁷ A. HAGIU, J. WRIGHT, *Marketplace or Reseller?*, in *Management Science*, 2015, Vol. 61, Iss. 1, p. 184.

⁴⁸ When confronted with such a scenario, the Court of Justice also cast doubt on the rationale of such a practice from the perspective of the dominant undertaking. See Court of Justice, case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* [2018] ECLI:EU:C:2018:270, para 35.

⁴⁹ D. GERADIN, N. PETIT, *Price Discrimination under EC Competition Law: The Need for a Case-by-case Approach*, GCLC Working Paper, 7/2005, available at www.papers.ssrn.com, p. 4; OECD, *Price Discrimination*, cit., p. 9. The precise degree of market power needed for this purpose is however unsettled, see e.g. M. E. LEVINE, *Price Discrimination Without Market Power*, in *Yale Journal on Regulation*, 2002, Vol. 19, Iss. 1, p. 2.

re-trades between its customers⁵⁰. When translating these criteria to the reality of online platforms, it is clear current market leaders have this ability. Amazon Marketplace, for example, charges sellers a transaction fee based on the types of goods they sell⁵¹. Similarly, the Google and Apple app stores charge app developers transaction fees based on the business model behind their respective app(s)⁵². Comparable examples can be found throughout all corners of the economy where platforms are active⁵³, whereby the degree of market power needed to implement such practices may not even require dominance. This alone, however, is not an indication of potential abuses of dominance, as the concept of (price) discrimination under Article 102 TFEU requires meeting more narrowly defined criteria.

Finding an infringement of Article 102(c) TFEU, which covers discriminatory pricing, requires showing the existence of (i) an equivalent transaction offered by the dominant undertaking to two or more trading parties; (ii) subject to dissimilar conditions; (iii) that creates a competitive disadvantage to some of these trading parties⁵⁴. In the context of platforms, the most important criterion for filtering out unfounded claims of abusive discrimination is perhaps the third one. Fulfilling this criterion requires that the platform customers subject to different prices are competitors, which means that these should, at the very least, be in the same relevant market⁵⁵. In practice, however, this is often not the case when looking at the pricing schemes of leading online platforms. The differentiation made commonly works along and not across the lines of competi-

⁵⁰N. GUNNAR, H. JENKINS, J. KAVANAGH, *Economics for Competition Lawyers*, Oxford University Press, Oxford, 2016, p. 181.

⁵¹See Amazon's transaction fee structure online, available at www.sell.amazon.com/pricing.

⁵²See Apple's information for developers based on the business model they intend to implement in their app, available at www.developer.apple.com; see Google's pricing guidelines for app, available at www.support.google.com.

⁵³See e.g. Booking.com's differentiated pricing information for property owners, available at www.partner.booking.com.

⁵⁴Of course, like with any abuse, the option of objective justification also remains to be considered as well, see Court of Justice, case C-95/04 P, *British Airways v Commission* [2007] ECLI:EU:C:2007:166, para 86.

⁵⁵Court of Justice, case C-52/07, *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättare Internationella Musikbyrå (STIM) upa* [2008] ECLI:EU:C:2008:703, para 46.

tion. For example, sellers on Amazon Marketplace that sell different kinds of retail goods are not considered competitors from the perspective of competition law policy, so any price differentiation will not fall under Article 102(c) TFEU. If the pricing scheme does not work along the lines of competition, the next steps would be to assess whether the offered service(s) constitute equivalent transactions and whether the price difference is sufficient to create a competitive disadvantage.

For platform services to be considered equivalent, these have to be commercially comparable and ideally utilized similarly by the respective customers. The utilization of platform service can generally be divided into (i) sales channel⁵⁶, (ii) advertisement channel⁵⁷, and (iii) data gathering channel⁵⁸. Once both (sub) criteria are fulfilled, the next step requires establishing whether a competitive disadvantage has been or could be caused. For this purpose, the impact of the price difference on competition needs to be assessed in the output market for which the platform service was used⁵⁹. Accordingly, when the platform is used as a sales channel, the competitive disadvantage among the sellers should concern the competitive relationship between them on the platform. When the plat-

⁵⁶ Such use is associated with the category of platforms coined by other authors as ‘transaction platforms’, where the various customer groups of the platform could conduct monetary transactions via the platform. See L. FILISTRUCCHI, D. GERADIN, E. VAN DAMME, P. AFFELDT, *Market Definition in Two-Sided Markets: Theory and Practice*, in *Journal of Competition Law and Economics*, 2014, Vol. 10, Iss. 2, p. 293 and BUNDESKARTELLAMT, *Market Power of Platforms and Networks*, Working Paper B6-113/15, 2016, pp. 18-30.

⁵⁷ *Ibidem*. Such use is associated with platforms coined by other authors as ‘non-transaction platforms’, audience providing platforms. In the context of the Google Shopping the Commission also made the distinction between sales channels platforms and advertisement channel platforms based on whether the concerned platform enables its customer groups to conduct a financial transaction, see case AT.39740 – *Google Search (Shopping)*, cit., paras 191-250. It is worth noting, however, that coining platforms with a specific label for its ‘type’ has limited value in practice as platform business models are often a result of mixed strategies that do not follow such strict division lines. Any categorization made in their case should be done with respect the specific platform functionalities involved in each case. For more on this see D. MANDRESCU, *Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)*, in *World Competition*, 2018, Vol. 41, Iss. 3, p. 453.

⁵⁸ See e.g. UK Data and Marketing Association, *DMA advice: Using third party data under the GDPR*, 2018, available at www.dma.org.uk.

⁵⁹ Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, cit., para 24.

form (service) is used as an advertisement channel or a source of data gathering, the competitive disadvantage should be assessed for the market(s) where these are customers active outside of the platform. These markets would be those for the advertised product or service or the market(s) of the product or service for which the data was gathered or acquired. For a competitive disadvantage to materialize, the ratio between the (higher) price charged by the dominant undertaking from the disadvantaged customer group(s) and the total operating costs of such customer group in the output market must be sufficient to impact its interests compared with its competitors⁶⁰. Therefore, a significant degree of price discrimination may, at times, not be considered abusive if the impact on the total operating costs of the platform customers in the affected output market is negligible⁶¹. Nevertheless, as there is no *de minimis* threshold under Article 102 TFEU, even relatively minimal effects in such situations could lead to findings of abuse once any of such effects are identified⁶².

In the specific case of platforms that operate in vertically related markets in competition with their trading parties, discriminatory pricing may, at times, manifest in a margin squeeze. For such an abuse to be established, there needs to be evidence that the platform fees are too high for as efficient competitors, which rely on the platform, to compete in a vertically related market viably. This is, to some extent, one of the core issues of Spotify's complaint against Apple and the implicit favoring of its Apple Music service. Successfully applying this framework will, however, be quite tricky as it would require showing that the respective platform is a quasi-essential facility, which most platforms will not likely be

⁶⁰ *Ibidem*, para 30. This position follows to a great extent the position of AG Wahl who noted that in order to establish that a competitive disadvantage was caused by discriminatory pricing requires looking into how much the input sold by the dominant undertaking costs in relation to the total costs of the disadvantaged party. See Opinion of AG Wahl, case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, ECLI:EU:C:2017:1020, paras 105-110.

⁶¹ For example a 5% difference in transaction fees charged by platforms that facilitate monetary transactions may have a greater impact on competition on the platform than a 5% price difference on pay-per-click ads on competition outside the platform.

⁶² Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, cit., para 29; Court of Justice, case C-23/14, *Post Danmark* [2015] ECLI:EU:C:2015:651, paras 70-73; case C-85/76, *Hoffmann-La Roche* [1979] ECLI:EU:C:1979:36, para 123.

since (viable) alternative channels for advertisement, sales, and data gathering will commonly exist.

Finally, where the skewed pricing scheme of a platform does not fulfill the criteria of abusive, discriminatory pricing yet appears problematic, an alternative approach would be to address it under the concept of excessive pricing or unfair trading conditions. Such alternative approaches should, however, only be considered in situations where the (dominant) platform manages to extract from specific (sub) group(s) of platform customers fees, which go beyond what platform pricing 'logic' would dictate. Such logic dictates that those who benefit the most and are easier to get on board will pay the lion's share of the platform fees. This is the reason why, in the case of most platforms, it is the commercial customers that are subject to the platform fees and not end consumers⁶³. When a customer group is required to cover more than its own cost (plus profit) for the platform service, it is important that such an obligation is aligned with its interests. For example, on Booking.com, it is reasonable that hotels cover the costs of serving consumers with room booking services since hotel owners want to have access to many consumers. By contrast, in the case of the Apple App Store, where only a select group of app developers cover most of the App Store operating costs, the extraction of fees is not entirely aligned with their interests. After all, why should certain app developers be interested in subsidizing other developers? When such circumstances arise, it can be argued that the price charged no longer relates to the economic value of the service and thus likely entails a situation where the dominant (platform) undertaking can make use of an opportunity that is open to it due to its dominance that would otherwise not be possible in a competitive market. Under such circumstances, it should be possible to argue that members of a particular customer group are charged excessive prices even without going through the traditional steps of the United Brands test. After all, the very purpose of the test is to show a mismatch between the price charged and the value provided.

Should the fee misalignment not suffice for a finding of excessive pricing, an alternative route in such cases is to tackle the mechanism that regulates or enables it as an implementation of unfair trading conditions.

⁶³ Of course, even though consumers are not presented with participation or usage fees these can and are often passed on in full or partly by the commercial customers of the platforms they use.

In the case of the App Store, for example, this was done concerning the obligation for app developers to use IAP and the prohibition to inform consumers of alternative payment routes outside their respective apps. This mechanism has become the focus of investigations at the EU and national levels, even though the main concerns of app developers concern the level of Apple's commission. Tackling the mechanism allows for a relatively more straightforward approach as the legal framework for such abuses is not as demanding and formalistic, similar in a way to the practice of finding abuses under the general term of abusive leveraging⁶⁴. Nevertheless, that is not to say that finding such abuse is entirely form-free as some core aspects would have to be assessed, such as (i) whether the mechanism serves a legitimate (ideally pro-competitive) aim, (ii) for which it is necessary and (iii) proportionate to the (alleged) harm inflicted upon those which are subject to it⁶⁵.

In addition to pricing schemes, differentiation and/or discrimination in the case of platforms can (and does) occur when the governance structure for the platform is developed. The term governance in this context refers to the set of rules established by the platform to determine which actors are allowed to participate on the platform and regulate the actions of such parties when using the platform⁶⁶. The governance adopted by the platform is intended to optimize the value creation of the platform while preventing undesired practices from taking place⁶⁷. Accordingly, governance rules cover matters such as openness, control, quality assurance, curation, and exclusion possibilities or other penalties⁶⁸. Determining the exact criteria of the governance rules in each case depends on the kind of value the platform seeks to create and monetize and will, therefore, vary across platforms⁶⁹. It is ex-

⁶⁴ For a broader discussion of the case see F. BOSTOEN, D. MANDRESCU, *Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores*, in *European Competition Journal*, 2020, Vol. 16, Iss. 2-3, p. 431.

⁶⁵ R. O'DONOGHUE, J. PADILLA, *The law and Economics of Article 102 TFEU*, 3rd ed., Hart Publishing, Oxford, 2020, p. 1043.

⁶⁶ *Ibidem*.

⁶⁷ K.J. BOUDREAU, A. HAGIU, *Platform Rules: Multi-Sided Platforms As Regulators*, cit.; D.S. EVANS, *Governing Bad Behavior By Users of Multi-Sided Platforms*, in *Berkeley Technology Law Journal*, 2012, Vol. 27, Iss. 2, p. 1201.

⁶⁸ See A. TIWANA, *Platform Ecosystems: Aligning Architecture, Governance, and Strategy*, cit., pp. 117-151.

⁶⁹ For various possibilities see e.g. D.S. EVANS, *Governing Bad Behavior By Users of*

pected, however, that not all platform customer groups will have the same rights or obligations and that certain parties will be denied access to the platform.

The main concerns identified so far with respect to platform governance rules concern the restriction of access to data generated on the platform, restriction of access to functionalities and/or the platform as a whole, and the obligation to use multiple platform functionalities as a condition for access. These concerns can be seen to a great extent in the case of Amazon Marketplace. Getting into the buy box on the Amazon Marketplace and becoming a prime member required making use of Amazon logistics, a practice that is currently under investigation in multiple jurisdictions. Data generated on the Marketplace was accessible to Amazon but not to the individual sellers who generated such data, a practice which Amazon eventually decided to abandon after the launch of an official investigation by the Commission⁷⁰. Similar circumstances can be seen in the case of the Apple App Store, where specific categories of apps must use IAP to offer in-app purchases. Sales and financial data generated through the App Store are visible to Apple but not to developers, and some (types of) apps are systematically refused or have been removed from the App Store.

In the context of Article 102 TFEU, there are several ways to deal with such governance rules. Outright denial of access to the platform can solely be tackled under the strict criteria of the essential facility doctrine laid down in the *Bronner* case⁷¹. As almost no platform can be considered indispensable in the sense of this doctrine, such refusals will not be covered by Article 102 TFEU. Restrictions of access through unfavorable or unreasonable terms can be dealt with under the scope of unfair trading conditions, as recently clarified in *Slovak Telekom* and *Lithuanian Railways*⁷².

Multi-Sided Platforms, cit.; A. HEIN, M. SCHREIECK, M. WIESCHE, H. KRACMAR, *Multiple-Case Analysis on Governance Mechanisms of Multi-Sided Platforms*, in V. NISSEN, D. STELZER, S. STRABBURGER, D. FISCHER (eds.), *Proceedings of the Multikonferenz Wirtschaftsinformatik*, Technische Universität Ilmenau, Ilmenau, 2016, p. 1613, available at www.db-thueringen.de/.

⁷⁰ See case AT.40462 – *Amazon Marketplace*, cit., and case AT.40703 – *Amazon Buy Box*, cit.

⁷¹ Court of Justice, case C-7/97, *Oscar Bronner v. Mediaprint* [1998] ECLI:EU:C:1998:569.

⁷² Court of Justice, case C-42/21 P, *Lietuvos geležinkeliai AB v Commission* [2023]

Consequently, restricted interoperability or restricted access to data generated on the respective platform can be addressed under the scope of Article 102 TFEU without having to apply the *Bronner* case law⁷³. Finally, conditionality between platform services can be treated as abusive tying practices, provided separate markets can be defined for such services. When the definition of separate relevant markets is not entirely feasible, the alternative approach would be to fall back on the framework of unfair trading conditions. This has recently been done by the Commission and the Dutch NCA (the Autoriteit Consument & Markt) in the case of the Apple App Store and the obligation to utilize IAP by developers of paid apps⁷⁴.

In light of the above, it can be said that the framework of the unfair trading conditions under Article 102 TFEU could serve as an essential tool for addressing (allegedly) prohibited practices of discrimination and/or differentiation. Although the reliance on this framework may bring about a degree of legal uncertainty since it does not consist of rigid legal tests as other types of abuses do, this looseness is, in the case of platforms, a noteworthy advantage for the parties involved. This approach allows the Commission and NCAs (and courts) to deal with unprecedented practices that are harmful and contrary to the objectives of Article 102 TFEU but do not fit within other existing frameworks, thereby decreasing the likelihood of false negatives. At the same time, for platforms, the less stringent test behind this abuse allows more room to account for platform ‘logic’ considerations, thereby decreasing the likelihood of false positives. Whether such potential is utilized well in practice will remain to be seen; however, from a practical perspective, it constitutes one of the best frameworks for dealing with the complexities of online platforms in the absence of a formal *rule of reason* framework.

ECLI:EU:C:2023:12; Case C-165/19 P, *Slovak Telekom v Commission* [2021] ECLI:EU:C:2021:239.

⁷³ D. MANDRESCU, *Why You (Often) Don't Need the Essential Facility Doctrine in the Digital Economy? – Interpreting Lithuanian Railways and Slovak Telekom*, in *CoRe Blog*, 2020, available at www.lexxion.eu/en/.

⁷⁴ See case AT.40437 – *Apple – App Store Practices – music streaming*, cit., and case AT.40652 – *Apple – App Store Practices – e-books/audiobooks* cit., and Autoriteit Consument & Markt Decision of 24 August 2021 in case ACM/19/035630 – *Apple* and the related Autoriteit Consument & Markt press release of 24 December 2021.

5. Undefined abuses and new regulatory frameworks

The sections mentioned above show how the inherent intricacies of multisided online platforms can cross paths with several existing types of abuses of dominance under Article 102 TFEU. Despite the wide range of potential approaches depicted, there may be situations where the business practices of dominant platforms could and even should be approached differently. Such situations concern cases that would require stretching the existing frameworks beyond their perceived and accepted boundaries, as well as situations that showcase a type of behavior that is suitable for qualifying as a new standalone form of abuse. In such cases, an alternative and preferable approach would be to turn to the unexhaustive nature of Article 102 TFEU, and consult other dedicated regulatory frameworks that apply in tandem.

5.1. The unexhaustive character of Article 102 TFEU

The unexhaustive character of Article 102 TFEU has been confirmed time and time again in the case law of EU courts⁷⁵, which extended the scope of application of this provision over time and continues to justify its expansion in the future. This is not to say that any behavior can be fit under the umbrella of Article 102 TFEU as long as it concerns dominant undertakings. That would make the application of this provision unpredictable, undermining its legitimacy. Any scope extensions, while possible, should be limited only to practices that go against the fundamental logic of this provision when it comes to addressing exclusionary and exploitative practices, as well as practices that go against the main objectives of the EU internal market.

Defining new abuses for potentially exclusionary practices, therefore, requires identifying actions that can produce a (realistic) foreclosure effect while consisting of measures that do not entail *competition on the merits* within the legal and economic context of the respective case. The most recent case in this regard is that of *Lithuanian Railways*, where re-

⁷⁵E.g., Court of Justice, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECLI:EU:C:2011:83, para 26.

moving a trail rail section to prevent (downstream) competition was considered a standalone form of abuse under Article 102 TFEU⁷⁶. A similar approach can be taken in the case of multisided online platforms, where the respective practices can be framed as an action to distort competition. Of course, given the vast scope for interpretation in such cases, such options must be preserved for practices that are clearly harmful to competition despite being unprecedented, which is quite a high threshold to meet. The reason for this high threshold is that identifying a new type of abuse under Article 102 TFEU also means introducing a new corresponding legal test to address similar behavior in the future. If the case that introduces such a framework is unclear, its framework cannot be that either, nor can it be used in future cases, which again will undermine the legitimacy of applying Article 102 TFEU in future cases.

In the case of exploitative practices, the core logic behind coining new types of exploitative abuses should be that the practices entail a situation where the dominant platform undertaking makes use of an opportunity open to it due to its dominance that would otherwise not be possible in a competitive market. Such circumstances could occur, for example, where the dominant platform continuously modifies its business model in a manner that results in the extraction of higher rents from its customers, which bear no correlation to the (potential) increase in value it offers such customers. In practice, this can be seen where changes in the algorithms involved in the platform's monetization undergo significant and, at times, disruptive changes for its users⁷⁷. This could be for example, the sudden termination of freemium services (i.e., ad financed) to force all customers to switch to a paid model (e.g., pay-as-you-go based or subscription-based), which could also be considered exploitative where the lock-in effects of a dominant platform are powerful due to network effects and/or customization⁷⁸. This could happen, for example, if all of Meta's (Facebook) leading platforms (Facebook, Instagram, WhatsApp)

⁷⁶ Case C-42/21 P, *Lietuvos geležinkeliai AB v Commission*, cit., para 91.

⁷⁷ See e.g., a discussion of the changes made in YouTube's algorithm and its impact on creators. A. NEVES, *YouTubes Algorithm in 2023: What changes Moving Forward?*, in *rockcontent Blog*, 1 June 2023, available at www.rockcontent.com/.

⁷⁸ Alternatively, the introduction of an expensive paid version to keep customers from steering away from the free version can also take place. Arguably this can be seen in the case of Meta which introduced subscription models for Facebook and Instagram. More information and news are available at www.about.fb.com.

moved to a paid model on short notice, which would essentially force consumers to comply.

Similar to the case of exclusionary practices, and perhaps even more so, the use of the open-ended nature of Article 102 TFEU to identify new types of exploitative abuses should be done cautiously. Exploitative abuses of dominance are, at times, controversial, even when it comes to well-established examples. Enlarging the scope of abuses in this respect can be expected to be met with apprehension. It thus should be reserved for cases where clear evidence of anti-competitive intent and/or strategy can be found. The need for a clear-cut case and evidence to make use of the open-ended nature of Article 102 TFEU is even more significant when such use is done at the Member State level rather than at the EU level, as it decreases the likelihood of uniform application of this provision. In such circumstances, it is preferable from a legal formalistic perspective that Member States (NCAs, courts, legislators) use the available room provided by Article 3 of Council Regulation (EC) 1/2003 to implement stricter norms for dealing with unilateral behavior. Although divergence in enforcement should ideally be avoided, particularly when dealing with undertakings active in multiple MS (or the entire EU), this form of divergence creates fewer legal problems and can be justified more easily in light of diverging national market conditions.

5.2. Abuses through infringements of alternative regulatory frameworks

The interplay between EU competition law and various regulatory frameworks has been explored multiple times. In the case of online platforms, this option, generally limited to situations covered by sector-specific regulation, will only grow in importance as the regulatory horizon covering their business practices and technology continues to evolve quickly. Overall, this interplay means that the regulatory framework that is relevant in each case forms part of the legal and economic context in which the concerned (dominant) undertaking operates. Consequently, when the potentially abusive behavior of a dominant actor is analyzed, the content and impact of such frameworks need to be accounted for in the scope of the analysis. After all, many regulatory frameworks determine the market conditions in various sectors and thus also (indirectly)

determine to a large extent what needs to be understood as competition on the merits in such circumstances⁷⁹.

In the case of platforms, the legal and economic context of these actors is constantly becoming broader and more complex. For example, the recently implemented DMA, DSA, and P2B Regulation entail frameworks that dictate numerous obligations that must be followed by specific kinds of platforms when dealing with their trading partners and end consumers. Where these regulations cover prohibited practices that also undermine the prospect of healthy competition, such as in the case of the DMA, violations of such obligations could also be considered evidence of anti-competitive behavior under EU competition law. In this sense, such regulatory obligations dictate, to a large extent, the meaning of the notion of competition on the merits of dominant (platform) undertakings. This, in turn, also determines which legal test for abuse needs to be applied and whether a new type of abuse can be identified, as was the case in *Lithuanian Railways*. Similarly, in the case of platforms, various access restrictions are covered by the DMA, thereby removing the need to rely on the *Bronner* case law to establish an abuse.

A comparable situation can also be found with regard to various prohibitions on imposing joined offers that would otherwise require going through an analysis of tying or bundling under Article 102 TFEU⁸⁰. Consequently, where the dominant platform is covered by the DMA and infringes its obligations under this framework, such behavior can be used to establish a *prima facie* infringement of Article 102 TFEU. As the threshold of gatekeeper platform is intended to work as a lower threshold for market power than the concept of dominance under Article 102 TFEU, it can be argued that the obligation within the scope of the DMA should fall within the ambit of the special responsibility of dominant undertakings⁸¹. Nevertheless, this synergy between the two does not mean that an infringement of the DMA would result in an automatic infringement of Article 102 TFEU. The effects-based approach under Article 102 TFEU will

⁷⁹N. DUNNE, *The Role of Regulation in EU Competition Law Assessment*, in *World Competition*, 2021, Vol. 44, Iss. 3, p. 287.

⁸⁰D. MANDRESCU, *Tying and Bundling by Online Platforms - Distinguishing between Lawful Expansion Strategies and Anti-competitive Practices*, cit.

⁸¹Court of Justice, case 322/81, *Nederlandsche Banden Industrie Michelin v Commission* [1983] ECLI:EU:C:1983:313, para 57.

still require a clear delineation of the anti-competitive effects resulting from the breach of the DMA and also allow for efficiencies arguments that are not available within the DMA framework. If both kinds of infringements are established, these should be managed in a manner that accounts for the principle of *ne bis in idem* as required by the case law of CJEU⁸². Where the abuse of dominance is pursued based on national competition law, more far-reaching conclusions can be drawn from DMA infringement as a stricter approach to unilateral behavior is allowed under Council Regulation (EC) 1/2003. Nevertheless, this should not go so far as to undermine the uniformity that the DMA is attempting to achieve. Consequently, at the remedy stage of abuses of dominance, both under national or EU competition law, it is imperative that the imposed remedies can co-exist with the obligations already imposed by the DMA on the undertaking concerned.

In the case of the DSA and the P2B Regulation, which are less focused on objectives that contribute to the state of competition, potential violations will have less bearing on the notion of competition on the merits. Nevertheless, where non-compliance provides the concerned undertaking with a clear competitive advantage, such behavior can constitute evidence of anti-competitive practice, which other types of evidence can ideally supplement. The mere violation of such frameworks alone will not suffice, however, to find an abuse of dominance. This has been recently seen in the case of Facebook, where an infringement of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the “GDPR”⁸³) can be considered for the finding of abuse but does not, on its own, suffice for such a finding⁸⁴.

Consequently, a *prima facie* finding of abuse in such cases would not be justified. In essence, the more distant the objectives of the respective regulatory framework are to those of competition law, the more elaborate

⁸² Court of Justice, case C-117/20, *bpost v Autorité belge de la concurrence* [2022] ECLI:EU:C:2022:202.

⁸³ Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁸⁴ Court of Justice, case C-252/21, *Meta Platforms inc., v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, paras 36-63.

the effects analysis would have to be. As such scenarios would require that more than the mere infringement of the regulatory framework is observed, clashes with the *ne bis in idem* principle are less likely to occur. In the case of the P2B Regulation, which does not have a penalty clause, such an event should, in principle, not occur at all. Nevertheless, at the remedy stage, as in the case of the DMA, it is essential that the remedies imposed for the competition law infringement can co-exist with the existing obligations of the concerned undertaking under the regulatory frameworks that were used for the purpose of analysis.

6. Conclusion

The discussion in this chapter has shown that establishing abuses of dominance in the context of online multisided platforms is a complicated matter. The effective enforcement of such practices starts by accounting for the specific legal and economic context involving these entities. While this requirement applies to all cases where EU competition is applied, in the case of platforms, it requires being open to different modes of monetization, different strategic concerns and requirements, and a good understanding of the technology employed by these actors.

The specific characteristics of multisided platforms and their expected life cycle will almost inevitably cross paths with competition policy and, in the case of the most successful platforms, specifically, with Article 102 TFEU. Such expected clashes will occur on multiple occasions, where the platform governance and pricing schemes, as well as expansion strategies, are the most likely ones. The implementation of skewed pricing schemes and governance rules by platforms inherently requires some degrees of differentiation and exclusion (or restricted access) to optimize and preserve the prospect of growth viably. Accordingly, in practice, it will be imperative to correctly make the distinction between practices that are in line with the economic and commercial logic behind platform structures and those that deviate from this logic and consist of anti-competitive strategies and intent. Similarly, the prospect of expansions, which are inherent to the lifecycle of all platforms, will inevitably trigger competition law scrutiny as the successful deployment of (service) expansions entails various forms of market power leveraging. The crux in such instances is not to prevent or deter such expansions but rather to en-

sure that these are achieved through means that coincide with competition on the merits.

The current framework of Article 102 TFEU and the variety of tests it offers for identifying abuses of dominance provide multiple avenues for dealing with the risk associated with these platform-oriented concerns. Nevertheless, even the wide array of abuse types will, at some point, run the risk of being overstretched by entirely unforeseen practices that cannot be caught by such legal tests. In such instances, the open-ended character of Article 102 TFEU and the effects-based approach can offer additional benefits, albeit subject to restricted circumstances and cautious application. The identification of new types of abuses under Article 102 TFEU, while possible, requires diligence and should preferably be done at the EU level as it involves establishing a new EU-wide practice, which should ideally be done uniformly. The constantly intensifying effects-based approach under Article 102 TFEU, which makes the finding of abuses overall more labor intensive, offers at the same time the ability to include compliance with external regulatory frameworks in the context of the analysis. With the growing scope of such frameworks in the case of platforms, this possibility enables taking on board more sources of evidence pertaining to the anti-competitive effects of a given practice or strategy. At the same time, it is imperative that such cross-framework use does not lead to (automatic) parallel sanctioning and is done in a manner that accounts for the *ne bis in idem* principle.