The P2B Regulation and its Effects on Competition and Consumer Choice in Digital Markets in the Perspective of Abuse of Dominance by Ranking

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This thesis aims to identify and analyse the challenges and regulatory measures needed in the digital economy. Digitalisation affects on competition and consumer welfare, and it can also affect how consumers live their lives. To reach the aim of the thesis, forming an overall understanding of the digital economy is necessary. Also, learning how platforms and search engines operate on the digital markets and how they may influence the competitive markets, fairness in platform-to-business relationships and most importantly, on consumer choice through search results, is essential.

This thesis will examine the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation). The P2B Regulation entered into force due to the digitalisation of the economy, market dominance and expansion of the digital platforms, as well as the need for more fairness and transparency in the digital markets. One of the matters that led to acknowledging the need for the P2B Regulation was the Google Search (Shopping) case. Therefore, this thesis analyses the case in the view of ranking as the ranking biases performed by leading platforms can distort users' perception of the market. This thesis will systematise the impacts that the P2B Regulation has on the application of competition law and consumer welfare.

In this thesis, the purpose is to clarify the governing legal framework by using legal dogmatic approach. This research considers the societal and economic perspectives and uses a method called Law and Technology. The material used for the thesis consists mainly of EU competition law research related to the platform economy.

The conclusion of this thesis suggests that the P2B Regulation has helped improve transparency and fairness in the digital markets, which indirectly improves consumer welfare. Also, consumers are more informed about ranking, and, therefore, consumers have gained a better understanding of how the platforms operate. However, the P2B Regulation is complementary, and competition law still holds the position as the primary legislative tool in the digital economy.

Keywords
competition law, consumer behaviour, consumers, digitalisation, EU regulation, Google, platform economy, ranking

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Tutkielman tavoitteena on tunnistaa ja analysoida digitaalisen talouden haasteita ja sääntelytoimenpiteitä. Digitalisaatio vaikuttaa kilpailuun ja kuluttajien hyvinvointiin, ja se voi vaikuttaa myös siihen, miten kuluttajat elävät elämäänsä. Tutkielman tavoitteen saavuttamiseksi tarvitaan kokonaisymmärrys digitaalisesta taloudesta. On myös tärkeää oppia, miten alustat ja hakukoneet toimivat digitaalisilla markkinoilla ja miten ne voivat vaikuttaa kilpailukykyisiin markkinoihin, oikeudenmukaisuuteen ja kuluttajavalintaan hakutulosten kautta.

Tutkielma tarkastelee 20 päivänä kesäkuuta 2019 voimaan astunutta Euroopan parlamentin ja neuvoston asetusta (EU) 2019/1150 oikeudenmukaisuuden ja avoimuuden edistämisestä verkossa toimivien välityspalvelujen yrityskäyttäjiä varten (P2B-asetus). Asetus säädettiin digitalisoitumisen, digitaalisten alustojen määräävän markkina-aseman lisääntymisen sekä digitaalisten markkinoiden oikeudenmukaisuuden ja avoimuuden tarpeen vuoksi. Yksi niistä asioista, joka johti P2B-asetuksen tarpeen tunnustamiseen, oli Google Search (Shopping) -tapaus. Tutkielmassa siten analysoidaan kyseistä tapausta, varsinkin koska johtavien alustojen rankinglistaukset voivat vääristää kuluttajien käsitystä alustamarkkinoista. Tutkielma systematisoi ja tulkitsee P2B-asetuksen vaikutuksia kilpailulainsäädännön soveltamiseen ja kuluttajien hyvinvointiin.

Tutkielman tarkoituksena on selkeyttää oikeudellista kehystä oikeusdogmaattisella lähestymistavalla. Tutkielma tarkastelee myös yhteiskunnallisia näkökulmia ja tutkielmassa käytetään apuna menetelmää nimeltä *Law and Technology*. Tutkielman lähdemateriaalina on käytetty enimmäkseen EU:n tasoista kilpailuoikeudellista tutkimusta alustataloudesta.

Tutkielman johtopäätöksen mukaan P2B-asetus on auttanut parantamaan avoimuutta ja oikeudenmukaisuutta digitaalisilla markkinoilla, mikä parantaa välillisesti kuluttajien hyvinvointia. Kuluttajat ovat myös tietoisempia rankinglistauksista, ja siksi he ovat saaneet paremman käsityksen alustojen toiminnasta. P2B-asetus on kuitenkin luonteeltaan täydentävä, ja kilpailulainsäädäntö on edelleen ensisijainen lainsäädäntöväline digitaalitaloudessa.

Asiasanat
alustatalous, digitalisaatio, EU-säädös, Google, kilpailuoikeus, kuluttajakäyttäytyminen, kuluttajat, rankinglistat

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Abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
BEUC	The European Consumer Organisation (Bureau Européen des Unions de Consommateurs)
CJEU	Court of Justice of the European Union
CSS	Comparison Shopping Sites
EC	European Commission
EEA	European Economic Area
EU	European Union
FTC	Federal Trade Commission
Google Search Case	Case AT.39740 Google Search (Shopping)
NCA	National Competition Authority
OISP	Online Intermediation Service Providers
P2B	Platform-to-Business
P2B Regulation	Platform to Business Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services
SMEs	Small and Medium Sized Enterprises
T&Cs	Terms and Conditions
TFEU	Treaty on the Functioning of the European Union
US	United States
UTPs	Unfair Trading Practices

1. Introduction

1.1 Introduction to Platforms and Competition

Online platforms play an important role in increasing European social and economic well-being.[1] As platforms raise challenges and new regulatory measures, they can also be the leading innovators in the digital economy while growing exponentially. New platforms allow smaller businesses to reach new markets online, challenge traditional business models, and offer opportunities for increased efficiency.[2] The digitalisation of the economy has played a crucial role in the consumer market as well. Digitalisation benefits consumers and affects how consumers live their lives.[3] Consequently, digital platforms enhance consumer choice.[4] Therefore, digitalisation shapes the economy and society as a whole.

A digital platform is a formation of different technologies that are a foundation for other applications or platforms where other technologies are developed.[5] Online platforms cover online marketplaces, social media, price comparison websites, as well as general online search engines. Platforms use information technologies to facilitate interactions and other transactions between users. They also collect and use data from such interactions. In the view of network effects, platforms make the use valuable in user-to-user situations.[6]

The market dominance and expansion of these digital platforms are under consideration. This raises a question of what kind of limitations are needed to ensure effective competition in the digital markets. These powerful platforms have the leverage of user data as well as scale and scope economies.[7] Leading platforms can engage in self-preferencing, commit to ranking biases, and ordering search suggestions, as well as search

[1] Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy 2016, p. 1.
[2] See COM(2015) 192 final.
[3] BEUC Factsheet: Competition in the Digital Era 2020, p. 1.
[4] See COM(2015) 192 final.
[5] Techopedia: Definition - What does Platform mean?
[6] European Commission: Shaping Europe's Digital Future, Online Platforms
[7] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.

engine manipulation. Manipulation may lead to distortion of users' perception of the market for goods and services.[8] In addition, there are a number of antitrust issues that platform companies have already faced, and they can only try to learn from them because incidents are likely to increase.[9] Therefore, competition enforcement needs to tackle these issues raised by the digitalisation, and the enforcement needs to be fast and effective.[10]

Consumer welfare and consumer choice tie digital economy concerns together: consumers are the platforms' users in the digital economy. Also, all the business-to-business (B2B) relationships influencing the digital markets have an effect on consumers – either directly or indirectly.[11] Moreover, efficient competition provides an incentive for companies to offer consumers products that benefit them, such as more innovative products, more choice and thus, better value for money. Even though this is a possible outcome in the new innovative and competitive economy, digital markets are driven by companies that succeed in offering innovative products while trying to preserve their powerful market position. This means that powerful companies can find ways to exclude other innovative companies that could challenge them and benefit the consumers by offering more variety of innovative products and competition in price.[12] Consequently, the power that platforms have may affect our privacy, freedom, and fairness, among other values.[13]

While protecting consumer welfare is the primary goal of competition law, there are many aspects of the digital economy, which need to be viewed and considered before achieving this goal. One of the ways is to enhance the fairness and transparency on platform-to-business (P2B) relationships.[14] Therefore, due to the digitalisation of the economy, market dominance and expansion of the digital platforms, as well as the need for more fairness and transparency in the digital markets, the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and

[8] BEUC: The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era 2019, p. 9.
[9] See, for example, Cusumano – Gawer – Yoffie 2019, Chapter 1.
[10] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[11] Whish – Bailey 2015, p. 20 and Ezrachi – Stucke 2016, p. 4.
[12] BEUC Factsheet: Competition in the Digital Era 2020, p. 1.
[13] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[14] Whish – Bailey 2015, p. 20 and Ezrachi – Stucke 2016, p. 4.

transparency for business users of online intermediation services (P2B Regulation) entered into force.

1.2 Objective and Scope

This thesis will examine the P2B Regulation, which was adopted on 20 June 2019 and which has been applied since 12 July 2020.[15] The P2B Regulation has direct effect in the Member States of the European Union (EU). It is the first-ever rule with the aim to create a fair, transparent, and predictable business environment between platforms and businesses. The businesses benefiting the most from this P2B Regulation are smaller businesses and traders in their use of the platforms.[16]

One of the matters that led to the acknowledgement of the need for the P2B Regulation was the Google Search (Shopping) case[17] in which the European Commission (EC) opened an antitrust proceeding in 2010. The investigation based on a suspicion that Google abused its dominant market position in online search by preferencing its own vertical search services in search results in order to exclude competing services.[18]

This thesis will systematise the impacts the P2B Regulation has on the application of competition law and consumer welfare. From this perspective, this thesis examines Article 102 of the Treaty on the Functioning of the European Union (TFEU) as most of the concerns in the platform economy are related to the conduct of dominant undertakings. The P2B Regulation is significant since, as mentioned, it is the first rule to tackle the issues in platform economy that have raised concerns on fairness and transparency. It is also a highly current topic as the Regulation entered into force very recently. Moreover, this kind of Regulation also presents the need for a more profound analysis of the transparency and fairness requirements set forth for platforms.

There is a lot of academic discussion going on regarding, whether competition law is able to meet its purpose in the digital age or whether new regulations are necessary to this end. The discussion supports well the primary focus of this thesis as it aims to analyse the new

[15] Businesses needed to make the required changes in one year before the regulation started to apply.
[16] See European Commission: Shaping Europe's Digital Future, Platform-to-business trading practices.
[17] Case AT.39740 Google Search (Shopping) (2017).
[18] Buttà 2018.

challenges that the digital economy has brought to the competitive markets. This thesis compares the new P2B Regulation goals based on a case that applied fundamental principles of competition law into the digital markets. Also, the relation between economics and competition law has been subject to debate when discussing competition enforcement and intervention matters. For these reasons, this thesis also takes an economic perspective.

To reach the aim of the thesis, forming an overall understanding of the digital economy is necessary. Also, learning how platforms and search engines operate on the digital markets and how they may influence the competitive markets, fairness in P2B relationships[19] and most importantly, on consumer choice through search results, is important. Understanding this is critical because competition law and consumer choice are crucial aspects when fulfilling the aim of increasing European social and economic well-being. Consumer welfare is also essential when interpreting and applying competition law. Moreover, consumer choice reflects significantly on our society, and as competition law has its focus on consumer well-being and welfare, it is an important point of view to take in this thesis. In addition, the perspective of consumer welfare is well justified because consumer choice is affected by the search results that online search engines present to the consumers. Platforms rank[20] the search results based on different reasons that might be unknown by the consumer. The placement of these search results can have significant impacts on consumer welfare. As the Google Search case concerned ranking of search results in order to exclude competitors from the markets, Article 5 "Ranking" in the P2B Regulation is significant in this thesis.

Accordingly, this thesis's main research question is as follows: Is the P2B Regulation able to indirectly improve consumer welfare?

The following additional research questions are necessary in order to reach the answer to the main question:

1. Has the digitalisation changed competition law?
2. Can competition law alone offer enough protection for consumers?

[19] The concept of fairness is a relevant issue as well because the EU competition rules have this moral norm embodied in them. See Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 12.

[20] Ranking can be defined as *"the position or level something or someone has in a list that compares their importance, quality, success, etc.".* See Cambridge Dictionary: Ranking.

However, some exclusion has been made. This thesis focuses mainly on competition law, not consumer law. Even though competition law and consumer law both focus on promoting welfare, competition law aims to consider consumers' welfare in the economy. In contrast, consumer law aims to protect the welfare of the individual consumer.[21] Therefore, this thesis considers only consumers in the economy.

In addition, many of the questions around the digital economy revolve around data. Even though the matter of collecting data in connection with the digital platforms and the role of data in most of the digital markets is crucial,[22] the aspect of data is excluded from this thesis. It is its own wide subject matter, which cannot be included in order to go more in-depth on the analysis of the issues more relevant for this thesis. On the contrary, while data issues have been subject to broad discussions in the academic circles, the question of transparency on ranking and its effects on consumers have not been that broadly covered. On the consumer side, one of the biggest concerns is the impartial results given. It has been unclear whether the platform is valuing more its own benefits or putting the consumer's benefits first when practising its business. Therefore, this thesis does not analyse other types of conduct of dominant platforms as thoroughly as the issue of ranking.

Furthermore, issues concerning liability as well as unfair terms and conditions (T&Cs) are also excluded from this thesis.[23] Moreover, the removal of information by search engines, for example, based on a violation of human rights[24], is ruled out of the scope of this thesis. The concept of 'fake news' and other political issues that might raise concerns and the way search engines deal with these is also out of the scope of this thesis.[25] Also, online advertising tools are not analysed in-depth as they are not in the scope of the P2B Regulation.

[21] See Botta – Wiedemann 2019, p. 435.
[22] See Dittrich 2018 at 2.3.3.
[23] See for example, BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018.
[24] Intermediaries may be required to remove information such as offensive material. More information regarding the blacklists and notice-and-termination programs on Tusikov 2016, pp. 52-53.
[25] See for example, Farhall – Wright – Carson – Gibbons – Lukamto 2019.

1.3 Research Method and Materials

Sources used for this thesis are mostly legal literature about competition law and digital markets, official publications as well as literature related to economics, algorithms and telecommunication markets. Case law is also presented in this thesis, and as the subject is new, internet articles and other internet sources have been a great asset while searching topical discussion.

In this thesis, the purpose is to clarify the governing legal framework by using the method of traditional legal doctrine, legal dogmatic approach.[26] Legal dogmatic approach systematises and analyses normative legal material, structure, models and legal technique.[27] Systematisation refers to defining the relationship between legal norms that are currently in force.[28] In this research, systematisation is in place when defining competition law and its relationship towards the new P2B Regulation. The definition of interpreting legal norms currently in force means that a semantic interpretation is given to the legal rule.[29] This interpretation is used in this thesis to explain relevant terms and their meaning. However, the formal dogmatic approach studies law as such, and it does not take economics, politics, ethics and other social sciences into consideration. This research considers the societal and economic perspectives as well. Therefore, this thesis is also based on a pluralistic method.[30]

In addition to these more traditional methods, this thesis and its subject focus on a new and evolving field of platform economy that is somewhat still unknown. Therefore, a new interdisciplinary method called law and technology is used as well.[31] The utilisation of this method helps the law and legal framework to be viewed through technology. This method is relevant when researching more about issues of today's digitalising society because the traditional legal analysis is not efficient for this purpose as it cannot consider all the impacts that technology has on society and the connection between law and technology.[32] Even though this thesis is more about the effects that ranking has on society

[26] Aarnio 1989, p. 48.
[27] Aarnio 1989, p. 48.
[28] Siltala 2003, p. 384.
[29] Siltala 2003, p. 384.
[30] Hirvonen 2011, p. 9.
[31] Cockfield 2004, p. 384.
[32] Cockfield 2004, p. 384.

and consumers and how it is regulated, ranking is based on algorithms that are one of the new forms of technology that have impacted legal issues as well. Search engines have a lot of influence on how society works and how consumers make choices and, therefore, it is important to take a technological approach to this research. One of the purposes of the method is to recognise situations where law is used as an incentive to bring new technologies into use to protect certain values. The method tries to analyse whether the legal rule is scientific.[33]

Even though some legal comparison is carried out in this thesis, its purpose is not to produce normative results. It is used only to illustrate the subject at a deeper level and to improve qualitative legal argumentation. Therefore, comparative legal research is not used as a methodology.

1.4 Structure

This thesis consists of six chapters. The content is structured to fulfil the objectives set forth. The first chapter includes a short introduction of the subject matter on which the thesis is based, and it describes the purpose and goals for the thesis. The second chapter outlines the case of Google Search, which played an important role when discussing the dominance of digital platforms and the emergence of the P2B Regulation. It also describes the concepts of platforms, ranking and other relevant terms. The third chapter focuses on the economic perspective of the features of digital markets.

The fourth chapter concerns the P2B Regulation and EU competition law in general. The chapter analyses the possible effects of the P2B Regulation and considers the possible needs for competition law changes in the EU. It also analyses how the dominant platforms are currently regulated. The fifth chapter goes in-depth on how the competition in digital markets effects on consumers. The sixth chapter concludes all the relevant points from previous chapters together and provides an answer to the research question presented in this chapter.

[33] Cockfield 2004, p. 399–400.

2 Digital Platforms

2.1 Google Search Case

2.1.1 Facts of the Case

The European Commission commenced an antitrust proceeding in 2010[34] in the Google Search (Shopping) case.[35] The investigation was based on a suspicion that Google had abused its dominant market position in online search. Google was said to lower the ranking of natural search results of competing vertical search services and by preferencing its own vertical search services in the results in order to exclude competing services.[36]

All the complainants in the Google case offered vertical search services.[37] These are search engines that aim dealing search requests for specific content, not general search requests.[38] The complaints concerned Google downgrading their web pages in its search results while placing its own competing services in more preferential position. According to the complaints, downgrading competitors' web pages resulted in them being less attractive to advertisers, which could eventually lead to competitors offering vertical search services excluded from the markets. Complainants also accused Google of influencing paid search results.[39]

Before the final decision took place, there were seven years of parallel investigations in the background of other investigations against Google. These parallel investigations were broader and took place in Europe and worldwide.[40] Concerns were about the search ranking bias. Specifically, concerns existed regarding exclusivity agreements with

[34] European Commission Press Release, Antitrust: Commission Probes Allegations of Antitrust Violations by Google 2010.
[35] Case AT.39740 Google Search (Shopping).
[36] Buttà 2018.
[37] The complaints filed against Google with the European Commission were made by three companies: Foundem, a UK price comparison website, Ciao, a German price comparison website and eJustice, a French search engine directed at legal search requests. The full list of the complaints in the Case AT.39740 Google Search (Shopping) paragraphs 38–105.
[38] van Loon 2012, p. 16.
[39] van Loon 2012, p. 17.
[40] See Iacobucci – Ducci 2019, p. 17.

advertisers, limits of portability, and unauthorised content scraping.[41] Before adopting a decision, the EC sent a Statement of Objection to Google in 2015, which narrowed down concerns over scraping, exclusivity and portability.[42] The concern left was the question of search bias in the comparison shopping services.[43]

Finally, the EC adopted a prohibition decision against Google on 27 June 2017 for infringing Article 102 TFEU. The EC ordered Google to bring the abuse to an end and stay clear from conduct that would have the same or similar object or effect.[44] The decision concluded that the final amount of the fine imposed on Alphabet Inc. and Google Inc. was EUR 2 424 495 000.[45] The EC adopted a decision establishing that Google's own comparison shopping service had more favourable positioning and display in Google's own general search result pages than the competing comparison shopping services.[46]

As the investigations already suggested, the imposition of the fine for violation of Article 102 TFEU was based on Google giving systematically preferential treatment and prominent placement to its own service on general search results.[47] The EC stated that Google's conduct was abusive because it diverted traffic away from competing comparison shopping services through Google's general search results pages to Google's own comparison shopping service.[48] In addition, this conduct happened at the expense of other rivalling services.[49] Accordingly, the EC stated that Google's conduct had possible anticompetitive effects in the comparison shopping services and general search services.[50] While Google promoted its own comparison shopping service in its search results, it

[41] Iacobucci – Ducci 2019, p. 17. See also European Commission Press Release, Antitrust: Commission Probes Allegations of Antitrust Violations by Google 2010.
[42] Iacobucci – Ducci 2019, p. 17.
[43] European Commission Press Release, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service 2015.
[44] Summary of Case AT.39740 Google Search (Shopping), paragraph 29.
[45] Case AT.39740 Google Search (Shopping), paragraph 758, Article 2 and Article 3.
[46] The relevant product markets were the market for general search services and the market for comparison shopping services. See the requirements for constituting a distinct product market in the provisions of general search services and comparison shopping services in the Summary of Case AT.39740 Google Search (Shopping), paragraphs 4 and 5. See also Buttà 2018.
[47] Case AT.39740 Google Search (Shopping). See also Iacobucci – Ducci 2019, pp. 18-19 and Vesala 2018, pp. 60-61.
[48] Case AT.39740 Google Search (Shopping) paragraphs 341-348 and 444-494.
[49] Case AT.39740 Google Search (Shopping). See also Iacobucci – Ducci 2019, pp. 18-19.
[50] Case AT.39740 Google Search (Shopping) paragraphs 341-348, 444-494 and 589-636.

ended up demoting those of competitors.[51] Concerning was also the lack of information given to the customers about the priority.[52] Therefore, Google abused its dominant position on horizontal search[53] and Google's conduct resulted in preventing competition, harming consumers and specialised search engines. Consequently, investments and innovation suffered in vertical search.[54]

In the decision, the EC reviewed Google's dominant position in general search. The EC considered the anticompetitive behaviour on the national markets for comparison shopping services and general search services and its considerable economic impact. In its decision, the EC also considered the duration of the infringement. While Google not only held a dominant position in the thirteen national markets[55] in which the conduct took place, it also showed that Google's market shares were much higher than those of its competitors.[56] According to the decision, Google has held a dominant position since 2007 in each national market for general search in the European Economic Area (EEA[57]). These facts are based on Google's market shares, the infrequency of user multi-homing and the existence of brand effects and the lack of countervailing buyer power.[58]

Regarding ranking, Google was using enhanced features to display its own comparison shopping service more favourable. These features were inaccessible to its rivals. Google also displayed its services near the top of the first general search page. Consequently, this conduct led the EC to conclude that Google diverted traffic from competing comparison shopping services. [59] In this setting, when traffic is redirected away from Google's rivals, it limits the users' ability to find a more specific range of specialised search services. Google thus abused its market power to the detriment of customers by reducing the

[51] Summary of Case AT.39740 Google Search (Shopping), paragraph 1. See also Buttà 2018.
[52] Vesala 2018, pp. 60-61.
[53] European Commission Press Release: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service 2017.
[54] Case AT.39740 Google Search (Shopping) at 7.3 and paragraphs 345–358 and 512. See also Vesala 2018, pp. 60-61.
[55] The infringement took place in each of the relevant national markets in the EEA since Google first started favouring its comparison shopping service in that market: since January 2008 in Germany and the United Kingdom, since October 2010 in France, since May 2011 in Italy, the Netherlands, and Spain, since February 2013 in the Czech Republic, and since November 2013 in Austria, Belgium, Denmark, Norway, Poland and Sweden. See Case AT.39740 Google Search (Shopping), paragraph 744 and Article 1.
[56] Case AT.39740 Google Search (Shopping), paragraph 743.
[57] Czech Republic is an exception because there Google held a dominant position since 2011.
[58] Summary of Case AT.39740 Google Search (Shopping), paragraphs 7 and 8.
[59] Case AT.39740 Google Search (Shopping) paragraphs 341-348 and 589-636.

quality of services.[60] The EC analysed the influence on what the position and display of search results have on user behaviour. It showed that users tend to click more on those links more visible on the search results page.[61] Google's conduct could have led to higher fees for merchants, higher prices for consumers as well cause a decrease in innovation. The conduct could have reduced the consumers' access to the services most relevant to them. Also, it raised several other anticompetitive concerns that comprised comparison shopping services and merchant platforms.[62]

As the evidence shows, consumers tend to click more often on more visible results. Therefore, Google abused its market dominance when providing an advantage to its own service.[63] In light of this case, it has been shown that the ranking of results in Google Search has an immediate influence on the click-through rates on these search results. This has been proven by investigating user behaviour and the evolution of traffic to competing comparison shopping services. The more favourable and prominently positioned and displayed results in Google's search results pages, the more traffic is in that service.[64] Google's general search results pages' traffic is in a significant role in the overall traffic amounted to different services. There are some alternative sources available to competing comparison shopping services, but none of them is effective enough to replace the traffic from Google's results pages.[65]

Google's conduct was not a simple passive refusal of access. It was active behaviour of favouring Google's Shopping service by visual prominence, higher ranking, and immunity from adjustment algorithms. The EC concluded that this form of preference violated Article 102 TFEU.[66] This was a practical example of the challenges that the digital economy and platforms bring to the applicability of the current form of competition law. However, the EC's view in this decision can be challenged because it was a matter of adaption of the written form of competition law into digital society in a way that has not been done before to this extent.[67]

[60] Vesala 2018, pp. 60-61.
[61] Case AT.39740 Google Search (Shopping) paragraphs 341-348 and 589-636.
[62] Case AT.39740 Google Search (Shopping) paragraphs 589-638.
[63] Iacobucci – Ducci 2019, pp. 18-19.
[64] Case AT.39740 Google Search (Shopping) paragraphs 540-548.
[65] Case AT.39740 Google Search (Shopping) paragraphs 454-461.
[66] Iacobucci – Ducci 2019, p. 18.
[67] See for example, a more critical approach on the Commission's decision: Mäihäniemi 2020, pp. 220-223, Kokkoris 2017 and Bork – Sidak 2012.

As an outcome, the EC suggested different actions Google should take in order to follow the decision and terminate the anticompetitive conduct. Naturally, the search results on Google's search page should be ranked in order of relevance.[68] In particular, the principle of equal treatment needs to be applied to Google's own service and competing comparison shopping services.[69] Google needs to treat other competing comparison shopping services in the same way as it treats its own service within its general search results pages.[70] An approach that resembles the principle of "equivalence of input" in the telecommunication industry was also given as an example. The approach means that Google should apply the same methods to Google's own service as it applies to competing services. These methods are targeted for the positioning and display in search results pages. They should include elements that impact the visibility or ranking of a search result.[71]

However, an argument has been presented that even with these requirements, Google could still monetise its general search results pages. Google was given a possibility to choose the measures to comply with the decision, and monetisation was not precluded. Although, it was clarified that measures complied should not have the same or an equivalent object or effect as the infringement established by the decision. Additionally, these measures should not lead to charges made from other competing comparison shopping services. Consequently, Google changed its specialised results and allowed the comparison shopping services to pay for the appearance in the same place as Google's own comparison shopping results.[72]

In the EC's investigations, Google abused its dominance by systematically favouring its own comparison shopping service in its general search results.[73] However, articles commissioned by Google defended Google's conduct.[74] Indeed, the form of abuse is controversial.[75] A new type of abuse under Article 102 TFEU, discrimination, refusal to

[68] Iacobucci – Ducci 2019, p. 18.
[69] European Commission Press Release: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service 2017.
[70] Case AT.39740 Google Search (Shopping), paragraph 699.
[71] Buttà 2018.
[72] Buttà 2018.
[73] Case AT.39740 Google Search (Shopping), paragraph 343.
[74] See for example, Akman 2017.
[75] See for example, Lianos – Motchenkova 2013.

supply and tying, might be more suitable in this case.[76] Characteristics of the Google case seem similar to those of discrimination in Article 102 (c) TFEU.[77] Google applied a different algorithm to its own service while placing its vertical competitors at a competitive disadvantage. It is worth noting that if a dominant undertaking cannot privilege one trading partner over another, it surely cannot do the same for its own subsidiary.[78] Article 102 TFEU and its meaning in digital markets are analysed later in this thesis.

2.1.2 Other Investigations

Both the Federal Trade Commission (FTC) and the EC have investigated the favourable treatment of Google's own specialised search services. However, the FTC decided not to pursue those claims further like the EC.[79] Investigation in the United States (US) found a legitimate business justification in Google's conduct.[80] During the Google investigations by the FTC, Google was discovered to prefer its own content unfairly on the Google search results page and selectively demoting its competitors' content from those results. The FTC concluded that Google did not violate the law regarding search bias, since the FTC found insufficient evidence on anticompetitive conduct. Google's goal is to innovate and offer a high-quality product, and Google also aims at increasing its own revenues by directing consumers to its own vertical search services.[81] The FTC noted that Google's actions were aggressive in order to gain an advantage over rival search providers. However, the FTC protects competition, not individual competitors. The findings on search bias indicate that it is vague and unclear if it constitutes an anticompetitive activity or if it constitutes a competition of merits.[82]

After the FTC had stated its opinion and decided not to pursue the claims in the Google investigations, a staff report from the agency's bureau of competition was released. It

[76] See for example, Vesterdorf, 2015.
[77] It is abusive for a dominant firm to apply "*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*.
[78] Abdollah Dehdashti 2018, pp. 338.
[79] Vesala 2018, p. 59.
[80] FTC: Statement of the Federal Trade Commission Regarding Google's Search Practices 2013.
[81] FTC: Statement of the Federal Trade Commission Regarding Google's Search Practices 2013 and Mäihäniemi 2020, pp. 127-128.
[82] FTC: Statement of the Federal Trade Commission Regarding Google's Search Practices 2013 and Mäihäniemi 2020, pp. 127-128.

concluded that Google's *"conduct has resulted – and will result – in real harm to consumers and to innovation in the online search and advertising markets"*. During the investigation, it was concluded that Google's conduct *"helped it to maintain, preserve and enhance Google's monopoly position in the markets for search and search advertising"*. Furthermore, it stated that Google's behaviour *"will have lasting negative effects on consumer welfare"*.[83]

In France, the Autorité de la Concurrence in December 2010 investigated the French online advertising sector. It stated that Google had a dominant position on the advertising market on search engines.[84] The French Authority clarified that Google's dominant position as such is not prohibited because of its innovative nature and significant and continuous investments.[85] However**,** Google's conduct can be abusive when putting up technical obstacles, manipulating competitors' quality scores as well as lacking transparency and possibly discriminating in the AdWords mechanism.[86]

Similarly, the Italian competition authority (Autorità Garante della Concorrenza e del Mercato) opened an investigation in August 2009 against allegations of tying between Google search and Google News. Complaints were made about publishers lacking control over their publications being used in Google News. If a publisher extracted publications from Google News, those would have been excluded from Google search. In the end, Google proposed search functionality for Google News, which would allow publishers to delete or exclude their content from Google News without them being excluded from Google Search. Another concern was Google's contract conditions in the AdSense program. To tackle this concern, Google proposed to be more transparent about the revenue sharing formula and modifications of AdSense. In January 2011, the Italian Authority accepted Google's commitments.[87]

[83] Mullins – Winkler – Kendal Inside the U.S. Antitrust Probe of Google: Key FTC Staff Wanted to Sue Internet Giant after Finding "Real Harm to Consumers and to Innovation" 2015.
[84] van Loon 2012, p. 19.
[85] It must be added that even if the French Authority would not have perceived Google's position as a result of innovation, Google's position as such could not have been prohibited. French competition law does not prohibit a dominant position per se, only the abuse of the position.
[86] van Loon 2012, p. 20.
[87] van Loon 2012, p. 21.

Another case example of Google that goes even further back is the Google and DoubleClick merger in 2008 where stakeholders were already concerned that Google could by using DoubleClick For Publishers Small Business (DFP) easily favour its own intermediation services.[88] At the time, the EC did not accept these arguments. Commission considered Google having the incentive to act neutrally towards competing intermediaries because without acting neutrally, it could cause customers switching to another service.[89]

The case of Google Search is not an isolated one, and similar concerns may arise soon. For example, the case led the EC and the German Competition Authority to launch a preliminary investigation of Amazon's e-commerce platform.[90] The investigation is focused on Amazon's dual role as a competitor, and as a host, to third-party merchants selling goods on Amazon's websites. Amazon has this dual role and therefore has access to data on competitors' prices and popularity. This information can be used to set out retail activities at the cost of the marketplace's third-party sellers.[91]

A formal investigation by the EC was conducted in July 2019 on Amazon's self-preferencing practices.[92] The Commission assessed Amazon's use of data from independent retailers on its marketplace. The question was whether the use of data is in breach of EU competition rules and does it form an abuse of its dominant position in the market.[93] There is a possibility that this constitutes an application of the Google Search case.[94] In its preliminary view, the EC informed that Amazon's conduct is in breach of EU antitrust rules by distorting competition in online retail markets. Amazon relies on *"non-public business data of independent sellers who sell on Amazon's marketplace, to the benefit of Amazon's own retail business, which directly competes with those sellers"*. The EC also opened formal an antitrust investigation into the possible preferential

[88] Case No COMP/M.4731 – Google / DoubleClick paragraph 290.
[89] Geradin – Katsifis 2019, p. 90.
[90] Toplensky – Bond, EU Opens Probe into Amazon Use of Data About Merchants 2018 and Toplensky, German Cartel Office Launches Investigation into Amazon Marketplace 2018.
[91] Geradin – Katsifis 2019, p. 90.
[92] European Commission Press Release, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon 2019.
[93] Kimberley – Sciberras Debono – Vella 2020.
[94] Signoret 2020, p. 27.

treatment of Amazon's own retail offers and those of marketplace sellers that use Amazon's services.[95]

If the findings from the Google Search decision are confirmed in the Amazon investigations as well, it would mean a perspective on seeing self-preference as a per se abuse of dominance. This could lead to alarming consequences for the further application of competition law in the area of Article 102 TFEU in digital markets. In this setting, it is good to mention that the possibility of assessing any abuse of dominance according to its effects on the market is important. Any abuse of dominance should not be regarded as forbidden per se. It would be preferable for EU competition law to focus on the assessment of whether the conduct of restricting access of users by means of anticompetitive input or customer foreclosure is, in fact, anticompetitive.[96]

2.2 Platform Economy

2.2.1 Digital Platforms and Online Search Engines

Digital platforms, or online platforms, operate in sectors such as marketplaces, search engines, social media and payment systems.[97] The term 'digital platforms' can be problematic because it has not been explicitly defined.[98] While some unclarity may revolve around the term, digital platforms generally refer to online services that can function as intermediaries between two or more clearly identified groups. Several platforms differ by a variety of features and characteristics that cannot be compared; thus, it is more appropriate to use a broader definition of the digital platforms. Moreover, it could be necessary to take into account the different specifics of each platform.[99]

[95] European Commission Press Release, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices 2020.
[96] See Mäihäniemi 2020, p. 285.
[97] Signoret 2020, p. 17.
[98] The European Commission has described some characteristics of digital platforms and mentioned examples such as, search engines, social media, e-commerce platforms, app stores and price comparison websites. See COM(2015) 192 final.
[99] Podszun 2015, p. 108. See also Cockfield 2004.

Digital platforms constitute two-sided markets and strong network externalities.[100] Consequently, the EC limits the definition of digital platforms to two- or multi-sided markets. Multi-sided markets are compiled of distinct user groups. There needs to be an increasing number of users on one side of the platforms in order to be beneficial to users on the other side. Some platforms do not fulfil this definition of multi-sided markets because they have a technical base that delivers content to end-users, such as Netflix. Moreover, businesses can move from a one-sided to a multi-sided platform and vice versa. There are also various digital platforms where communication between users on all sides of the platform is possible, and these platforms can offer a variety of services. Therefore, it is not useful nor possible to analyse policy interventions for digital platforms as a group.[101]

Network effects are an integral part of digital platforms. The number of users correlates directly to the popularity of certain platform: the more users a network has, the more users it attracts. Even though such concentration of one platform might be harmful for competition, it can bring benefits for consumers. The quality of services is also usually in line with the number of users – the more the platform has users, the larger the platform gets, the quicker it gets and the better results it gives. For example, search engines can improve quality in its search results by way of learning from its users' clicks and what the users see as relevant.[102] The network effects are explained in more detail later in this thesis.

The following figure presents the complexity of the concept of platforms as there can be different types and characteristics. These types and characteristics need to be considered when regulating digital platforms.

[100] See for example, Japan Fair Trade Commission, Report on Trade Practices on Digital Platforms – Business-to-Business Transactions on Online Retail Platform and App Store 2019, Chapter 1.
[101] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, pp. 10-11.
[102] Zimmer 2018, pp. 299-300 and 627.

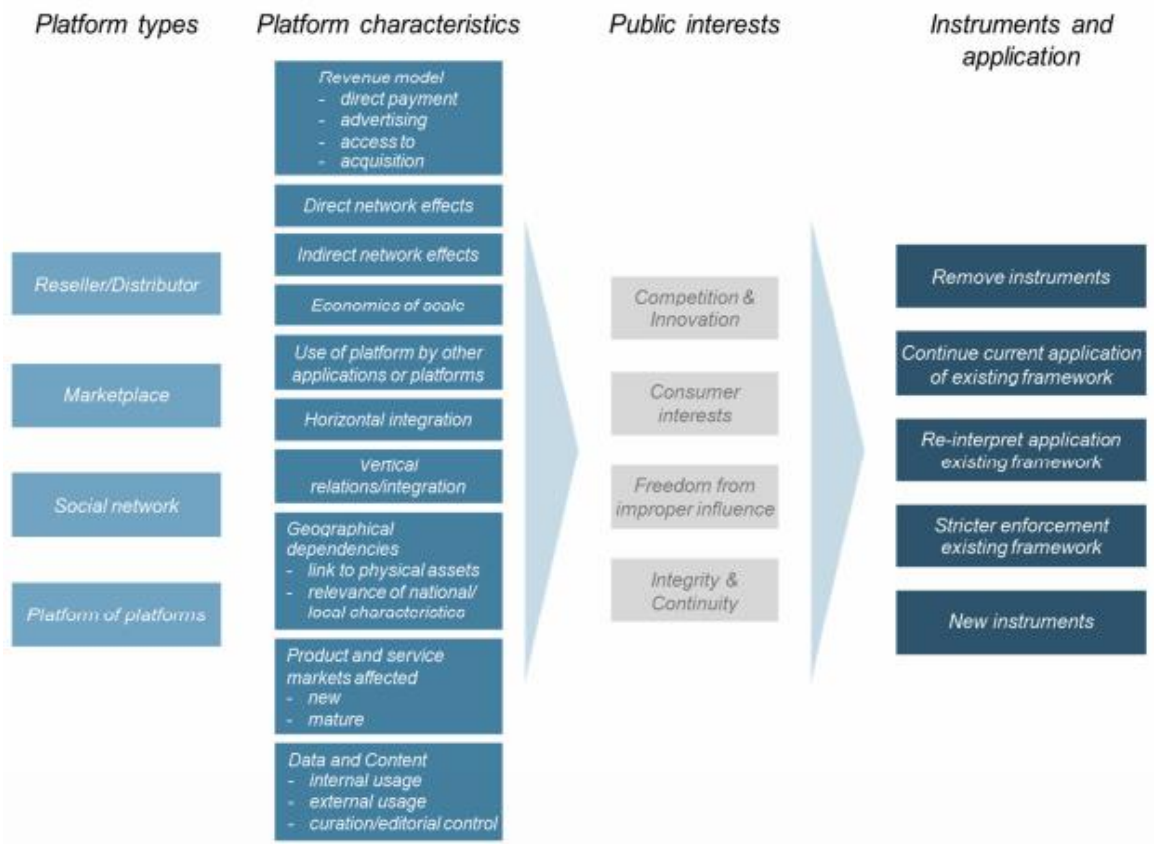

Figure 1: "The analytical framework for digital platforms".[103]

Online search engines are a subcategory of digital platforms. Search engines have a technology called 'Search Engine Optimisation' applied to them, which constitutes the methods designed to increase the visibility of a web page. In other words, an increase in visibility is carried out by ranking the search results on the search engine's result page.[104] For example, Google has a dominant position on online search engine markets, and it has become some sort of a synonym to all the other search engines as well.[105]

Online search engines have a significant impact on competition, innovation and consumer choice because, among these platforms, there is not much competition due to the strong market concentration. For instance, the largest search engine can process even 90 per cent of all the queries done in Europe, which gives a clear advantage in the online markets. Market concentration can be the consequence of certain economic conditions or the result of natural markets. A certain cost structure can also cause a strong market concentration.

[103] Figure: van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 10.
[104] Rovira – Codina – Guerrero-Solé – Lopezosa 2019, p. 2.
[105] Tusikov 2016, p. 116.

The creation of a digital platform may end up being very expensive. However, the stage where the platform is expanding its infrastructure to reach more users, the expansion can almost be at zero monetary costs. Therefore, it is relatively easy for an already established platform to expand the infrastructure and get more users. However, it makes it harder for competitors to enter the market and to achieve significant market share.[106]

Recently published reports from topics related to economic and legal impacts of the digital economy[107] have stressed the different characteristics of digital platforms which constitute high barriers to entry.[108] In this respect, digital platforms usually have strong economies of scale and scope because of low marginal costs, the role of data, the low distribution costs and the opportunity to reach consumers wherever they are.[109] In addition, data constitutes a crucial role in the digital markets.[110] Digital platforms are also characterised by the situation where consumers are influenced by social affairs[111] that encourage them not to change their default situation. For instance, it is common for consumers to agree with the service provider's settings without question. Moreover, it is common that consumers do not scroll down the searches to see more results.[112]

Undoubtedly, digital platforms play a central role in societal and economic life. Through platforms, consumers find information and businesses can benefit from online markets. In the EU, the platform economy is still growing, but the markets are quite fragmented, which lowers down innovation and expansion in the markets.[113] However, platforms have helped many small businesses to transfer their services and products online to reach new markets. Even though the effects of the platforms depend on their nature and market power, some platforms have the power to regulate market access. Therefore, the growing market power of some platforms has raised concerns, and the lack of transparency is as

[106] Zimmer 2018, pp. 299 and 627.
[107] Reports such as the Furman, Jason and others, Unlocking Digital Competition, Report of the Digital Competition Expert Panel 2019 (Furman Report); Stigler Committee on Digital Platforms, Final Report, Stigler Center for the Study of the Economy and the State 2019 (Stigler Report); and Crémer, Jacques – de Montjoye, Yves -Alexandre – Schweitzer, Heike, Competition policy for the digital era 2019 (Crémer Report).
[108] Stigler Report 2019, pp. 41-43.
[109] Stigler Report 2019, pp. 41-43. See also Signoret 2020, pp. 1-2.
[110] Dittrich,2018, pp. 11-12. Specifically, targeted advertising and platforms' revenues are based on personal data. Digital services don't have a monetary price, but it does collect and process personal data. See for example, Signoret 2020, p. 2 and Stigler Report 2019, pp. 34-36.
[111] See Samuelson – Zeckhauser 1988, pp. 38-39.
[112] Signoret 2020, p.2. See also Stigler Report 2019, pp. 40-43.
[113] COM(2015) 192 final p. 12.

concerning. Platforms that have significant market power can negotiate, for example, prices quite freely and decide the terms on their T&Cs which can lead to negative effects on competition as well.[114] In addition, the number and size of online platforms have grown rapidly in recent years, and this has raised more discussion about if and how these platforms should be regulated.[115]

The business model of online search engines is also connected to online advertising. Before some technical improvements, it was easier to divide the advertising into sub-divisions of search-based and non-search-based advertising. Nowadays, it is harder to set these two apart. Search engines used to have the advantage of targeted advertising. This means that they can offer advertising corresponding to the search terms and to the interest of the individual using the internet. Targeting display advertising via so-called cookies on the undertaking's website on a user's web browser is possible. This allows targeted advertisement in the future because cookies identify the user. Therefore, both forms of advertising can be viewed to compete with each other.[116] Even though the online advertisement is connected to search engines, it is not relevant for the aim of this thesis, and, therefore, not necessary to delve into the concept any further.

Even though this thesis is not focusing on the relation of data and competition due to the limits set out, it is important to acknowledge the role that data has on the consumers in a digitalised economy. Digital platforms have a lot of consumer data in their use. Data is an indispensable input for the development of innovative products and services; however, consumers often do not have control over the use of their personal data gathered by businesses. In the same manner as the governance of the platform economy, data governance requires a consumer-centric approach to ensure a healthy digital ecosystem. Behind this idea is the importance of fostering competition, consumer choice and innovation, all of which benefit consumers.[117]

[114] COM(2015) 192 final p. 12.
[115] See O'Connor 2016, p. 1.
[116] Zimmer 2018, p. 302.
[117] BEUC's response to public consultation: A European Strategy for Data 2020, p. 1.

2.2.2 Ranking and Search Bias

P2B relations can create problematic behaviours.[118] Sudden unexplained changes in T&Cs that are unilaterally imposed by platforms without prior notice is one of those. More examples of problematic behaviours are delisting of products, services or businesses without reasoning and ranking business users or their offers. Ranking might become problematic if the businesses' position in search results has an impact on their sales. Ranking is also proved to affect consumer choice. Therefore, ranking systems should be predictable in order to avoid biases in search-related practices. Discrimination and favouring online platforms' own competing services have become an issue as well. Such discrimination can happen through more favourable ranking or use of transaction data to improve their own services.[119]

Platforms are built on algorithms that are usually a mystery to the consumers. Problems arise especially with the search engines, comparison sites and online booking platforms and how they rank and display information. Consumers might falsely think that the offers are based on the value and relevance when actually service providers can pay for their offers to be promoted. This information should be disclosed and explained properly, but usually, it is hidden in the T&Cs. Also, results that have been artificially ranked higher in the results need to be clearly identified. Consumers should also know the reasons why the content is given its placement in the search results.[120]

Relevant concern among consumers is a search engine's possible bias. In-platform search tools can be used to maximise profits of the platforms at the expense of not reducing the consumer's search costs.[121] This is a justified concern because the aim of many undertakings is ultimately to maximise their profits. Notably, online intermediaries provide a perfect search environment. This in-platform search engine environment is designed to facilitate matching between the seller side to the buyer side. These platforms are built on the idea that search costs for users should be lower when searching for a suitable result on the other side of the market.[122]

[118] SWD(2018) 138 final, pp. 10-21.
[119] Madiega 2019, p. 2.
[120] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 5.
[121] See, for example, COM(2016) 288 final.
[122] Duch-Brown 2017, p. 6.

Platforms perform balancing acts, shape economic interactions and design the technology that allows users to interact with each other. The concept of 'intermediation bias' is used in economic literature in the context of a platform using technology to direct user interactions. In other words, platforms are businesses that want higher revenues, and in order to reach this, intermediaries might lower the quality of the interaction provided. For example, while search engines provide a ranked list of relevant websites for a query and collect fees from the firms, they can simultaneously trade-off revenues per interaction for the number of interactions.[123] It can be viewed that these intermediaries put their compensations ahead of the consumer welfare, and thus, consumers do not get the best results that would match their needs.

Today's society requires deeper, more specific and more relevant search results. Vertical search[124] has tremendous potential to serve users through highly relevant search results from specific domains by leveraging domain knowledge and concentrating on specific user tasks. Relevance ranking, which has drawn more and more interest from both industry and academia over the past few years, is the central element of vertical search.[125]

Visual search ranking is one form of ranking. It can be presented in text-based, query example -based or concept-based form.[126] Mobile search ranking is another form, and it allows users to search and access information while on the go. The availability of location information has allowed mobile local search and user location to overtake a significant part of the query volume as the main factor in searching for local entities. The efficiency of any mobile local search engine is primarily defined by its ranking function, which formally specifies how we retrieve and rank local entities. Mobile local search ranking uses a large-scale query log that can be exploited by developing effective ranking features.[127] A traditional search engine ranks mainly in a single domain. This means it

[123] Calvano – Polo 2020. p. 5.
[124] Vertical search refers to *"search on a specific topic area or a specific segment of an overall search. There are vertical or specialized search engines."* See Ryte Wiki: Vertical Search.
[125] Chang – Long 2014, p. 1.
[126] Chang – Long 2014, p. 2. Visual search contains four paradigms: self-reranking detects relevant patterns from initial search results without any external knowledge; example-based reranking discovers relevant patterns from query examples provided by users; crowd reranking mines relevant patterns from information available; and interactive reranking utilising user interaction. See for further information Chang – Long 2014, pp. 59-80.
[127] Chang – Long 2014, pp. 2-3. See for further information Chang – Long 2014, pp. 81-105.

focuses on one type of data source, and its efficient modelling depends on a sufficient number of labelled examples, requiring a costly and time-consuming method of labelling. However, performing ranking in different verticals is very normal for a vertical search engine, which poses a more challenging ranking problem, cross-domain ranking.[128]

Businesses' position in the platforms' result page can be random, yet crucial. The position and the ranking in search results impacts on the businesses heavily.[129] The ranking of their products or services on the online platform impacts consumer choice and businesses' revenues.[130] In addition, the businesses' products and services can be ranked higher and more visible in the search results by payments made by the business users.[131] The increase in visibility can be achieved, for example, via direct payment for advertising. Business users have criticised that they pay without being certain on how and to what extent the service they pay is delivered to them.[132] In this setting, the concept of Symmetric Informative Equilibrium with Steering is used. It means a situation where intermediaries that offer information collect fees from undertakings after the product is purchased and then provide a personalised ranking to this consumer. Platforms might supply ranking with a goal to maximise the commission, but then they collect high fees and consequently face a low demand from consumers. Low or elastic demand means that the suggested product does not match the consumer's preferences. Therefore, when users' demand is elastic enough, the platform internalises consumers' surplus and supply informative ranking.[133]

Search and ranking practices can be associated with transparency problems, and as already noted, uncontrollable results in online search platforms. Undoubtedly, the problem with transparency is in connection with the search and ranking algorithm. Business users criticise that they are not being shared enough information on the criteria that the algorithm is based on and how these criteria influence on the results. Information

[128] Chang – Long 2014, p. 4 and pp. 181-200.
[129] Online platforms and general search engines argue this by ranking algorithms' increasingly complex nature. Innovation needs to be held on a high level because this creates better the user experience. On the other hand, platforms argue that to create better user experience, the platform needs to be successful. Consequently, this will create benefits also for the business users. See SWD(2018) 138 final, pp. 13-14.
[130] SWD(2018) 138 final, pp. 13-14.
[131] The term used for this practice is 'paid-for-ranking'.
[132] SWD(2018) 138 final, p. 14.
[133] Calvano – Polo 2020. p. 6.

about the criteria allows business users to increase their visibility on the platform, and therefore the information is necessary.[134]

While online platforms play an important role in giving business users enough information, giving too much information has its downside. If the online platform reveals too much on the algorithms, it might be possible for the businesses to manipulate the search and ranking algorithm. When the European Commission performed a study on the B2B relations in the online platform environment, it concluded that none of the online platforms they examined gave complete information about the functions of their search and ranking algorithm and criteria. On the other hand, business users understand that the algorithm is the core asset for online platforms and therefore, they understand why the complete disclosure is not available to them.[135]

Researches support that an effective search can be improved by social rating information and personal preference information. Content based ranking is not as effective.[136] Empirical approaches are required when decision making is enhanced, and the behavioural and experimental benefits for the users from information selection is revealed. These approaches extend beyond rating predictions and rankings. The user benefits quantify in the effects of social data for user behaviour and utility.[137] In addition, personalised social ranking leads to better search results.[138]

In conclusion, the discriminative problem with the conduct of online search platforms has been the inconsistency in the application of search and ranking algorithm. Moreover, some platforms base their ranking on special membership programs where businesses can pay their way up. Even though some of the business users think that ranking should not be linked to the payments they make to the platform, the problem here is that this kind of distinction between businesses is not always properly indicated to the consumer in the search results. This brings us back to the transparency issue. The lack of transparency in the criteria used and the discriminative practices on the ranking criteria is a problem itself,

[134] These payments can be either direct or some sort of membership schemes. See European Commission Final Report on Business-to-Business Relations in the Online Platform Environment 2017, pp. xii and 37.
[135] European Commission Final Report on Business-to-Business Relations in the Online Platform Environment 2017, pp. xii and 37.
[136] Orso – Ruotsalo – Leino – Gamberini – Jacucci 2017, p. 1269.
[137] Orso – Ruotsalo – Leino – Gamberini – Jacucci 2017, p. 1270.
[138] Orso – Ruotsalo – Leino – Gamberini – Jacucci 2017, p. 1283.

but in addition, these practices have a detrimental impact on innovation. Ranking and visibility affect businesses in all industry sectors, and online search platforms are important to the businesses as they create an opportunity to be found by consumers and customers. Similarly, search engines help the consumer discover relevant products that fulfil the need and purposes of the consumer.[139]

2.2.3 Self-Preferencing Practices

In the digital economy, search engines can manipulate search results through filtering and ordering. These practices may remain undetected.[140] Leading platforms and search engines can also engage in self-preferencing and commit to ranking biases. Manipulation of the search results effects the competitors' ability to compete effectively with the entities in control of the search parameters and results.[141] Consequently, this may lead to distortion of users' perception of the market.[142] The problem of identifying the point where these distortions need to be intervened or treated as an abuse of a dominant position is strongly present.[143] In this regard, enhancing the values of plurality and freedom is important.[144]

Competition law enforcement has identified that some online platforms engage in certain activities that may lead to consumers' harm.[145] First, self-preferencing has negative effects when done in vertically related markets such as general search, comparison shopping and local search.[146] The effects can cause direct harm to consumer choice as

[139] European Commission Final Report on Business-to-Business Relations in the Online Platform Environment 2017, pp. xii and 37.
[140] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 16.
[141] See Case AT.39740 Google Search (Shopping).
[142] BEUC: The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era 2019, p. 9.
[143] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 16.
[144] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 16.
[145] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.
[146] For example, the Google Search case illustrated that competition problems concerning a dominant platform, which competes on a downstream market with firms that need access to the dominant platform to provide their services, is a relevant concern and these problems can arise in the future as well. The abusive conduct in the Google Search case was identified as self-preferencing. With its dominant platform, Google gave a competitive advantage in its search results to its own services over rival services. It did this by demoting rival comparison shopping services in the results shown to consumers. Geradin – Katsifis

well as harm on innovation and competition. Secondly, some practices lead to the 'lock-in' of consumers into the ecosystem. Other examples of this kind of practices are high switching costs and information asymmetries for consumers.[147]

Accordingly, self-preferencing practices are a type of anticompetitive conduct. Self-preferencing practices can exclude equal rivals from a relevant market and prevent consumers from having a free choice.[148] Search and ranking algorithms should not be able to preference their own services above competitors' services. It is necessary to provide the possibility for consumers to choose freely between services.[149]

As an example of Google's self-preferencing practices is its position as the largest publisher ad server. In order to avoid preferencing the services of its own supply-side platforms', Google suggested a unified first-price auction in which competitors could take part.[150] Google removed access of its own AdExchange to the bids submitted by competitors before running its own auction. However, the incentive remains to give preference to Google's own service, because the information of competitors' bidding does not permit them to verify that the auction has been conducted fairly.[151] Consequently, an argument favouring that Google's auction remedy complies with the decision has been presented in the literature. However, some competing comparison services stated that without full ownership unbundling, Google Shopping's participation in the auction does not improve the situation better. It has been noted that any fully- or over-subscribed auction leads to a fee for competing services. This fee has the equivalent object or effect as Google's infringement.[152]

The auction system can lead to consumers ending up seeing results of their query that are based on an offer of a company which paid more for display, while as the results which most correspond to their search may end up unseen. This auction model may also result

2019, pp. 89-90 and BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.

[147] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.

[148] CMA, Online Platforms and Digital Advertising, Market Study Interim Report 2019, at 6.42.

[149] CMA, Online Platforms and Digital Advertising, Market Study Interim Report 2019, Chapter 5.

[150] CMA, Online Platforms and Digital Advertising, Market Study Interim Report 2019, at 5.219.

[151] CMA, Online Platforms and Digital Advertising, Market Study Interim Report 2019, at 5.221. See also Signoret 2020, pp. 24-27.

[152] Buttà 2018.

in higher prices for consumers because vertical search services will have to pay to be visible. This can result in increased visibility for those who have the biggest buying power. This increases the risk of consumers not having the cheapest offers placed at the top of the list. Moreover, an auction system can stifle innovation because it is hard to gain as much power as Google and its main rivals to compete within the markets. It is important to offer consumers impartial results based on the merits and not on the financial resources of Google or its rivals.[153] This type of system can make existing problems even worse in the search market and further impact competition.

Regarding the concept of 'lock-in', Google stated that competition is only *"one click away"* after the EC announced its antitrust investigations. It is true at least in principle because users can switch to another search engine anytime. The reason why consumers have not switched might be a result of Google's first-mover advantage.[154] In the Microsoft case, the EC stated that it could apply antitrust analysis to 'hi-tech' markets, and considered some aspects of such markets as a strong indication of dominance.[155] In the case of Intel, Commission ruled that for Intel's customers, a switch was unrealistic.[156] The EC tries to ensure that big platforms do not make it harder for customers to switch over to rivals. The EC also tries to keep an eye on big platforms that try to exclude competition by discouraging their users from multi-homing. The opportunity for smaller rivals to break into the market is important to preserve.[157]

Vertically integrated undertakings have incentives to favour their own services. These practices clearly hinder free choice among consumers. However, vertical integration should not be sanctioned per se, and a thorough analysis of anticompetitive effects is necessary. These self-preferencing practices are now being investigated by several National Competition Authorities (NCA).[158] For example, the Dutch competition authority has investigated Apple's self-preferencing practices in its App Store, and these investigations could be continued with Google's app store in the future.[159] Similarly, the

[153] BEUC Google case: Consumer concerns on auction-based model for shopping services, pp. 1-2.
[154] van Loon 2012, pp. 26-28.
[155] Case COMP/C-3/37.792 Microsoft (2004), paragraph 470.
[156] Case COMP/C-3/37.990 (2009) Intel.
[157] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[158] Signoret 2020, pp. 4-5.
[159] Authority for Consumers and Markets, ACM Launches Investigation into Abuse of Dominance by Apple in its App Store 2019.

Italian competition authority has an ongoing investigation regarding Amazon's self-preferencing practices.[160]

In conclusion, in order to avoid harmful practices in the search environment, platforms need to explain the main parameters determining ranking and the reasons behind these parameters. Moreover, nowadays, search engines are required to inform corporate website users of the main parameters determining ranking and keep such information updated. However, platforms and search engines do not need to disclose trade secrets within the meaning of EU law.[161]

2.2.4 Google Search

Relevance ranking is usually used together with other sorting types, such as chronological and alphabetical sorting, by the number of queries and the number of citations.[162] Search engines like Google, use relevance ranking as the primary approach, considering more than 200 factors.[163] Google has been known to release only general information about these factors and not any precise details. For example, Google has stated that inbound links and content quality are important.[164] It has justified lack of transparency in order to fight search engine spam and prevent ranking low-quality documents at the top of the results by false characteristics.[165]

It is good to understand how Google operates with its search results. Before showing the search results, Google Search evaluates the usability of the chosen websites. The easier the sites are to use, the better ranking they get. Google's algorithms go through data and present a selection of information that is useful for the search. Algorithms analyse if the results are shown to all users. It then checks if the website is shown correctly in different browsers and whether it is designed to all types and sorts of equipment. It also checks if the loading time is not too much for those who have a slow internet connection. All

[160] Autorità Garante della concorrenza e del Mercato, A528 - Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services 2019.
[161] Dunleavy 2019.
[162] Rovira – Codina – Guerrero-Solé – Lopezosa 2019, p. 2.
[163] See 'How Google Search Works'.
[164] See Ratcliff, WebPromo's Q & A with Google's Andrey Lipattsev 2016 and Schwartz, Now We Know: Here Are Google's Top 3 Search Ranking Factors 2016.
[165] Rovira – Codina – Guerrero-Solé – Lopezosa 2019, p. 2.

websites can improve the usability of their site and Google tries to inform if something requires major changes. For example, starting from 2018, Google's algorithms took the loading speed into account and website owners were informed about this change six months beforehand. Google also offers tools and guidance on how to enhance the mobile version of the site.[166]

For example, Google uses programs called "crawlers" when it is combing the Internet. Crawlers search for things such as new web pages and changes in existing web pages. These programs build an index of the information they find. This index helps people find information quickly. Moreover, crawling is associated with the number of computer servers. The more servers businesses run, the more it crawls the internet.[167] For example, Google runs twice as many computer servers as Microsoft and, consequently, Google crawls more of the Internet than any other company.[168] However, crawling is very expensive and, therefore, most of the search engines do not use these crawlers. For example, Yahoo stopped crawling long ago. As a result of this, when Yahoo's search engine presents search results, they come from other companies, such as Google.[169]

When searching on Google.com, Google's software mainly carries out four things: parsing, selecting, ordering, and displaying. When explained in more detail, parsing means that it analyses what is typed. The analyse comprises of breaking down the words into terms which it then uses for search purposes. The software first looks for terms it has already in its index. Then it looks modifiers to narrow down the search.[170] If a person has allowed Google to track everything they do, Google adds the information it has about the person to the parsed search term.[171] After parsing, the software selects the relevant web pages from its index and shows how many relevant pages it has found. Next, it orders the search results from best to worst. This phase can easily be used for manipulation purposes.

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[166] Miten Haun algoritmit toimivat: Parhaiden tulosten näyttäminen.
[167] Epstein 2018, pp. 298-299.
[168] By 2015, Google was estimated to maintain an index of 45 billion web pages. When compared this to Microsoft's, it is more than three times as many than Microsoft's.
[169] Epstein 2018, pp. 298-299.
[170] Epstein 2018, p. 299.
[171] Google's profile of each of contains information of our personal preferences and this allows the software to predict what we want. The free information that the company gives us based on our profiles has its downside as well. Due to the vast amount of information collected it is not in balance with the information we are receiving. The collected information effects, for example, on what we purchase. In a way, Google sells us to vendors, and this is what thrives it as a business. Epstein 2018, p. 300.

The criteria that Google uses for the ranking is kept in secret. Finally, the software displays the results in numbered groups.[172]

When searching for a simple fact, it might not be as important to know how Google proceeds with the searching. The main thing that most of the consumers are interested in is that they end up with the correct answer. However, when searching for a question with no correct answer such as 'best ice cream', consumers are influenced by the selecting and ordering by Google. Google may interpret the word 'best' differently, and the results might not be unbiased and objective.[173]

It is good to look at the issue through the Google Search case.[174] Google's favourable treatment of its own Google Shopping service constituted only one of the initial concerns that the EC had in previous investigations, and it focused only on comparison shopping. This proved that the issue of search bias is challenging to address with the commitments and that search bias requires a complicated behavioural remedy.[175]

2.3 Effects of the Google Search Case

Recent discussion and developments in the digital platform economy and search engine markets have mostly revolved around the Google Search case. Competition law in the digital era is under pressure while trying to answer to the new competition concerns arising from the strong network effects of digital platforms and from the multi-sided business models that pose challenges to traditional market definition techniques.[176]

Academics have widely debated the decision of Google Search. Mainly because of its technical, legal and economic grounds as well as the EC's order to Google to implement a form of search neutrality.[177] In that perspective, policymakers need to impose more non-discrimination rules since transparency alone is not efficient enough to solve the

[172] Epstein 2018, p. 299.
[173] Epstein 2018, p. 299.
[174] Among complainant of the case there were also information providers mostly focused on search bias. Several of these companies have started a group 'FairSearch.org'. "FairSearch" is an association of businesses and organisations united by the goal of promoting economic growth, innovation, and choice by fostering and defending competition in online and mobile search.
[175] Mäihäniemi 2020, pp. 121-125.
[176] Picht 2019, p. 789.
[177] Madiega 2019, p. 3.

competitive issues at stake. Others call measures, such as the enactment of a system of liability for algorithms like those presented in the E-commerce Directive.[178]

Before the Google Search case, there was no specific legislation addressing the P2B relationships at the EU level.[179] For example, the EU consumer protection law[180] applies only to business-to-consumer transactions. It can also be stated that existing EU competition law measures that target harmful trading practices apply only to the offline world. They are also not made to tackle the issues arising in B2B relations in the online world. At least the EC considered that the existing rules do not apply to these online practices due to the specificities of online business models and algorithms' important role.[181]

Google Search case showed the EC that they needed to do something broader. This led to regulating the P2B Regulation. The Regulation was created to provide a fair and transparent environment when interacting with platforms. Under this Regulation, all platforms are required to be fair and transparent with the businesses they host. Competition law and this Regulation works, allegedly, very well together.[182] The aim and scope of the P2B Regulation are addressed in more detail after discussing about the economic perspective of digital markets.

[178] Madiega 2019, p. 3.
[179] Several EU Member States have already adopted laws addressing online platforms' behaviour (France, Austria and Italy) while others (Germany, Belgium, Italy) consider doing the same. Therefore, a risk of legal fragmentation in the EU is existing. See SWD(2018) 138 final, p. 19 and Annex 8. See also Madiega 2019, p. 3.
[180] See the Unfair Commercial Practices Directive.
[181] See SWD(2018) 138 final, p. 19 and Annex 8. See also Madiega 2019, p. 3.
[182] OECD Podcast: Margrethe Vestager on looking out for the little guy & the bigger picture of digital competition 2019.

3 Features of Digital Markets

3.1 Economic Perspective

Competition law *"cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context".*[183] Therefore, the economic discussion is relevant to take into consideration in this thesis as well.

Digital platforms are designed for growth and innovation. This allows platforms to bring value in the digital markets. For example, small businesses can reach out to millions of customers at very low cost through the platforms.[184] In addition, a number of opinions state that due to the innovation, facilitation of social interactions and the huge potential of growth, online platforms have significant benefits.[185] With platforms, information symmetries increase information flow, and thereby sellers and buyers make better decisions and markets become efficient. Information asymmetries can be fewer because of the increase in the possibilities of exchanging information between service providers and users.

Due to the information available online, customers are more aware of the options available, new products and services, and prices. Therefore, choosing the option best fit for their preferences is easier to find.[186] In contrast, ill-informed consumers are more likely to pay higher prices. They may even end up being subject to a level of pricing more commonly encountered in monopolistic markets. However, as online platforms facilitate information flow, they enable consumers to find and compare more products with relevant prices.[187] Digital platforms are also efficiently matching supply and demand. They utilise technology when acquiring services, and this helps them to reduce transaction costs.[188] Economically, *"a digital multi-sided platform has two or more groups of customers who need each other in some way but who cannot capture the value of their mutual attraction on their own and rely on a digital 'catalyst' to facilitate value*

[183] European Commission XXIInd Report on Competition Policy 1992 p. 13.
[184] Ezrachi – Stucke 2016, p. 4 and de Streel 2018, p. 5. See also Williamson – Bunting 2018.
[185]See Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy 2016 p. 1.
[186] Ezrachi – Stucke 2016, p. 4 and de Streel 2018, p. 5. See also Williamson – Bunting 2018.
[187] Ezrachi – Stucke 2016, p. 5.
[188] Coyle, The hobbit approach to the sharing economy. Financial Times 2015.

creating interactions between them".[189] Also, by reducing search costs, online platforms enable multiple searches on multiple platforms. Indeed, it can be said that platforms enhance competitive pressure on the seller side for consumer benefit.[190]

Values promoting EU competition law may create a conflict with economic theory. This conflict may lead to economic theory supporting a narrower analytical approach. Indeed, the relation of economics to law has been subject to debate.[191] In such debate, a broad consensus exists that economics shape competition enforcement and intervention.[192] Also, it is noted that decision-making complies with the overall aims of competition.[193] It can be argued that economic theory should be more involved in establishing the scope of competition enforcement and that antitrust laws should only promote economic welfare.[194] This view might lead to arguments favouring a narrow utilitarian approach.[195] This approach overlooks the norms promoted in legislation and case law because they can be seen as undesirable outcomes of political compromise. Even values that form a central part of the EU Treaty or case law may be dismissed.[196]

Economic models and theories can be rooted in unrealistic assumptions.[197] In terms of the wider goals set in EU competition law, economic theory should not remove them. A multitude of views on the optimal balance between law and economics as well as the economics' ability to reflect the goals of EU competition law is inevitable. This may change when competition policy adjusts, and economic and legal theory evolves.[198]

Protection of effective competition is a key goal in the EU. Effective competition does not have a universal definition, but the term can be followed to the concept of 'workable

[189] The definition is provided by Evans and Schmalensee, see for example Evans – Schmalensee 2005.
[190] Ezrachi – Stucke 2016, p. 5.
[191] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 18.
[192] See Kovacic 1992, Kovacic – Shapiro 2000 and Kovacic 2007.
[193] See Gerber 2012.
[194] See Posner 2001.
[195] See Ahlborn – Padilla 2008.
[196] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 18.
[197] Economic models and theories can be on a case-by-case basis inconsistent, as economic experts may become an advocate for the instructed party. See Streetmap v. Google hearing in Case Streetmap.EU v. Google Inc. [2016] EWHC 253, at 47.
[198] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 19.

competition'[199]. On the other hand, economic theory provides tools to describe forms of business behaviour. Therefore, economic theory can be a helpful tool while assessing implications of certain conduct in market structure as well as the effect on social welfare.[200]

Economics and competition can work well together, and economics can help describe the issues involved in analysing the competitive market structure in the digital economy.[201] In this setting, recent reports on economic and legal impacts of the digital economy[202] have stressed the strong economies of scale and scope that digital platforms have due to low marginal costs, the role of data, low distribution costs and the opportunity to reach consumers beyond borders.[203] In the digital markets, consumers are influenced by a *status quo* bias,[204] which gives them incentives not to change their default situation. As a concrete example of this, it is proved that consumers do not scroll down the search results to see more of the suggested results. After the first ones, these results could be as relevant, but the consumers may not know this.

Characteristics of a platform can also constitute high barriers to entry.[205] Digital markets are subject to a 'winner-takes-most' principle[206] which can reduce competition, consumer welfare, and create productive inefficiency.[207] However, platforms can create a market mechanism where consumers and businesses are free to take decisions. This market mechanism can create efficiency and maximise social welfare. This mechanism does not work if distortions are arising from externalities, asymmetric information or the existence of public goods. Consequently, competition policy must be understood in the context of the society's objectives, because it does not work in isolation.[208]

[199] The concept was first developed by J. M. Clark in 1940. 'Workable competition' sees the degree of competition that can be achieved in each market based on the industry's features, such as the level of product differentiation, the character and means of market information, and the degree of flexibility of capacity. See Lorenz 2013, p. 22.
[200] Lorenz 2013, p. 22.
[201] Lorenz 2013, p. 26.
[202] Furman Report 2019, Stigler Report 2019 and Crémer Report 2019.
[203] See Crémer Report 2019, Chapter 2.
[204] Samuelson – Zeckhauser 1988.
[205] Stigler Report 2019, pp. 41-43.
[206] Furman Report 2019, at 1.81.
[207] Signoret 2020, pp. 1-2.
[208] Lorenz 2013, p. 26.

3.2 Network Effects and Multi-Sided Markets

Platforms work in multi-sided markets. They act as entities in the markets and enable interactions between users. These users are usually on different sides of the transaction. The process between platform and user is called an intermediation process. The process can lower search costs for both sides and improve the exchange interaction.[209] Digital multi-sided markets have structural features of network effects and economies of scale. Digital markets often constitute two-sided markets and have strong network externalities and network effects can be direct or indirect.[210] Demand-driven dynamic economies of scale can lead to so-called network-like effects. These arise in situations where, for example, search engine users do not care about the engine's market share. It is good to note that the search result quality is linked to the scale of operations.[211]

There are certain common features that make most of the platforms similar to their features, and that distinguishes them from conventional one-sided markets. An indirect network effect usually characterises online platforms. Their value increases for the one side if the number of users on the other side rises. Platforms act as intermediaries bringing two groups together, such as sellers and buyers. They facilitate actions that would otherwise be left undone, such as transactions or communications.[212] Also, the internet has encouraged the development of new companies by reducing the range of costs. These companies are characterised by the interaction of economic agents that can be charged at different rates. Feedback can connect one group of economic agents to another group. These network effects are indirect as well.[213]

Direct network effects arise when the availability of more interaction partners bring benefits.[214] Direct network effects also increase with the quality of goods as they are directly linked to the number of consumers consuming the same goods.[215] For example, in a telecommunications network, the utility is zero if only one user uses a particular

[209] Duch-Brown 2017, p. 3 and Ezrachi – Stucke 2016, p. 131.
[210] Birke 2013, p. 13. See also Japan Fair Trade Commission, Report on Trade Practices on Digital Platforms – Business-to-Business Transactions on Online Retail Platform and App Store 2019, Chapter 1.
[211] Calvano – Polo 2020. p. 2.
[212] Abdollah Dehdashti 2018, pp. 331-332.
[213] Calvano – Polo 2020. p. 2.
[214] Birke 2013, p. 13.
[215] Birke 2013, p. 15 and Ezrachi – Stucke 2016, p. 133.

technology. Network effects arise in physical networks and virtual networks.[216] The network's size and the number of utility users from a service determine direct network effects. Direct network effects increase with the number of users. On the other hand, indirect network effects arise when users on one side of the market attract more users on the other side. Indirect network effects benefit users on one side of the market because of the increase in the number of users on their market side. Moreover, this attracts more transaction partners on the market side as well, and the network effect expands indirectly through the opposite market side.[217]

Both direct and indirect network effects allow the participation of more agents to the platform. Moreover, they allow entry promotion, increase innovation, and generate business opportunities for Small and Medium Sized Enterprises (SMEs). However, only a small number of successful businesses have grown to dominate, which does not leave room for a competitive fringe. The existence of potentially 'unfair trading practices' (UTPs) has been noticed to be imposed by these intermediaries. These practices may be extremely harmful, especially for small users reaching customers through platforms. In B2B relationships, some UTPs can impose unfair terms and conditions, and they can distort the efficiency of the transactions intermediated by platforms. Blocking the entry of new platform participants can lead to efficiency losses, which would increase prices and decrease consumer choice.[218]

Online platforms are involved in almost all transactions that deliver services or applications over the internet to consumers. Online platforms also have a role as an intermediary to other online and offline services.[219] Competition among sellers intensifies when more variety of goods are offered. This creates a more attractive trading platform for more potential buyers.[220] The buyer or the seller side of a multi-sided market will be most attracted to the idea of joining the platform only if the other side of the market is deemed large enough. Therefore, attracting users only from one market side is not sufficient because of the interrelationship of the user groups on both market sides.[221]

[216] Birke 2013, p. 15.
[217] See Rochet – Tirole 2003.
[218] Duch-Brown 2017, p. 3.
[219] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 3.
[220] See Rochet – Tirole 2003.
[221] Duch-Brown 2017, p. 4.

Even though platforms bring positive things to our society, such as bringing the markets closer to the consumers, there are many concerns that the growth has brought up.[222] For example, due to the special characteristics of dominant firms being able to set prices close to zero, it is not trouble-free to apply the traditional antitrust rules to the platform markets. Especially, the definitions of the relevant market and market power are extremely hard to assess.[223] Regarding two-sided markets, the definition of the relevant market should include all services provided. The assessment of the market should include the overall price level on charges on all sides.[224]

Market power is the ability to raise prices above marginal cost profitably. This usually ends up in trading off quantity for prices. Network effects are also a source of market power, and it can protect the business from competition. Network effects create a situation where some users' willingness to pay increases with quantity. It is possible for platforms to increase their profits even though they are making losses on one side of the market because they can gain those losses back on other sides. Therefore, negative mark-ups or prices do not show evidence of low market power. It is important to evaluate all market-sides simultaneously.[225] In addition, competition between platforms has a two-dimensional focus: prices and product innovation.[226] When evaluating platforms and competition, it is good to know that reducing costs can be a significant source of competitive advantage in other industries, but this is often less the case in the digital industry.[227]

However, it has not been researched enough to prove that the welfare-enhancing function might somehow be compromised if there is no competition between platforms, especially when comparing to a monopolistic market structure. When indirect network effects are present, the existence of multiple platforms may not be efficient. Also, when all agents

[222] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 3.
[223] For example, the broadcasting industry and traditional free-to-air operators were faced with a claim that since "*viewers receive content for free, there is no commercial relationship of the TV operators with viewers*". Hence, the relevant market for free to air operators was restricted to the sale of advertising space. Consequently, the exercise of market power of broadcasters on viewers was not possible to establish, even if it was a monopolist free-to-air TV. Calvano – Polo 2020. p. 5.
[224] Calvano – Polo 2020. p. 5.
[225] Calvano – Polo 2020. pp. 3-4.
[226] Crémer Report 2019, p. 32.
[227] Crémer Report 2019, p. 32.

coordinate over a single platform, network effects are maximised. When this happens, monopoly platforms can be efficient. Therefore, strong network effects may result in highly concentrated market structures, but they can also make these structures efficient. It is suggested that if these are left alone, closed ecosystems will be created. Closed ecosystems might develop an incentive for the platforms to innovate and develop their own services. It might also lead to an outcome where competing services cannot access the platform. However, these closed platform ecosystems can improve competition. They can generate enlarged incentives to innovate, and future profit expectations will make entry more desirable. These aspects can increase intersystem competition.[228]

More in-depth studies in telecommunication networks have shown that there are some key similarities in markets that professionals in this field have viewed as very different before. These studies have shown that professionals were no longer seeing traditional markets being subject to a standard supply and demand function. Those have been replaced with platform economy that has a quality of bringing different groups of customers together. Rules on one side of the platform affect the demand on other sides of the platform and, consequently, the old methods cannot give the right answers for multi-sided platforms because the math is simply wrong. For example, in traditional economics, selling products at less value than they cost is never profitable. However, in the new multi-sided economics, it is proven that paying customers instead of charging them can be profitable in theory. For the regulators and enforcers, this means that business decisions traditionally viewed as anticompetitive and predatory could actually be welfare-enhancing in a competitive environment. Moreover, the platform's restrictive terms for one side of the market can be explained, for example, by the need to attract participants on the other sides of the platform.[229]

This multi-sided platform analysis is noted to be *"well within the economic mainstream"* with *"no serious controversy among economists"*.[230] In conclusion, if the dynamics of the multi-sided market concerns are not understood correctly, this can lead to over-enforcement and consumer harms. Courts have already often overemphasised the problems of supposed anticompetitive behaviour in platform markets and have not

[228] Duch-Brown 2017, p. 7.
[229] O'Connor 2016, pp. 8-10.
[230] Evans 2013, p. 3.

considered the positive effects on the entire system. The continuous growth of the multi-sided platforms makes this analysis in competition policy more important. When the analysis is not in use, competition enforcement and regulation may end up penalising behaviour that is beneficial and thus, consumer harm may increase.[231]

As consumer welfare is an important aspect of this thesis as well, it is worth mentioning that 'network effects' is a relevant term when describing consumer choice. It is a term frequently used in economics, but it has also landed among the terms used in competition law. Network effects are relevant to consumer choice because they exist when consumers benefit from using a product. To be more precise, network effects exist if the benefits increase along with the number of other consumers using the same product.[232] When consumers decide how they evaluate potential sellers, the search environment incorporates high search costs to prevent consumers from evaluating too many potential sellers. On the contrary, when consumers carry out an in-depth evaluation of the potential sellers they have chosen, search costs are low.[233]

4 Regulating Digital Platforms

4.1 P2B Regulation

4.1.1 Aim and Scope of the P2B Regulation

One could argue that the prevailing competition law in the EU is not suitable to tackle the needs of the platform economy. New business models, digital technologies, and behavioural patterns raise questions about platforms functioning within the Digital Single Market.[234] The incomparable access to cross-border markets that online platforms offer has increased the importance of online marketplaces to businesses. However, while more and more businesses shift to online marketplaces, new dependencies and imbalances of power have been created. Until recent improvements in the regulatory sector, the services

[231] O'Connor 2016, pp. 8-10.
[232] Birke 2013, p. 13.
[233] Duch-Brown 2017, p. 6.
[234] Joint Letter from the United Kingdom, the Czech Republic, Poland, Luxembourg, Finland, Sweden, Denmark, Estonia, Latvia, Lithuania and Bulgaria 2016.

these platforms provide and activities they carry out had not been regulated as a whole. Especially, online intermediation B2B relationships have remained without any specific legislation addressed to them at the EU level prior to this Regulation. The need to prioritise fairness in P2B relations was detected, and the EU Digital Single Market strategy confirmed this as an area that needs to be given priority.[235]

Therefore, a need for new regulation arose, and the P2B Regulation on the contractual relationship between online platforms and their business users was regulated. The Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 aims to create a fair and transparent business environment for smaller businesses and traders that use online search engines and online platforms to reach consumers. This Regulation on promoting fairness and transparency for business users of online intermediation services is the first EU legislation to address the B2B relationships of this kind specifically.[236]

The target of competition law in the EU is to tackle, among other things, anticompetitive behaviour by undertakings. The P2B Regulation aims to influence on unilateral potentially harmful trading practices that the EU competition law Articles 101 and 102 TFEU do not necessarily cover. Therefore, this Regulation was necessary as competition law at EU or national level did not address all the types of issues or infringements covered now under this Regulation.[237] The P2B regulation also has an intention to encourage consumers to trust the online platform economy indirectly. Trust will also increase healthy competition while also leading to increased consumer choice.[238]

The aim of the P2B Regulation is to protect businesses that use online platforms to reach consumers and other businesses.[239] The P2B Regulation also protects platforms' innovation potential. Direct harm, or even the possibility for direct harm, to businesses undermine the innovation potential of platforms.[240] Platforms hold a gateway position to organise millions of users. They can decide how the consumers see the results from their

[235] COM(2018) 238 final, p. 2 and Kimberley – Sciberras Debono – Vella 2020. See SWD(2017) 155 final.
[236] Competition Law Newsletter: European Commission Proposes Draft Regulation on Online Platforms and Search Engines 2018.
[237] COM(2018) 238 final, p. 2.
[238] Kimberley – Sciberras Debono – Vella 2020.
[239] Kimberley – Sciberras Debono – Vella 2020.
[240] European Commission: Shaping Europe's Digital Future, Platform-to-business trading practices.

searches and these powers that the platforms have may lead them to carry out harmful unilateral trading practices.[241] The Regulation requires more transparent ranking from marketplaces and search engines. Sellers need to understand how to optimise their presence and, therefore, platform entities need to disclose the main parameters used for ranking goods and services.[242]

The P2B Regulation applies to online intermediation service providers (OISPs)[243] and online search engine providers[244], and it applies irrespective of the online service providers' place of establishment. The requirement is that they direct offerings to consumers located in the EU. However, online intermediation services and online search engines providers do not have control over to whom the offerings are directed. This can cause problems in practice. Another requirement is that their services need to be directed to businesses that are established in the EU. However, the P2B Regulation does not apply to service providers that connect consumers to consumers or businesses to businesses. Additionally, it does not apply to online advertising tools and online Search Engine Optimisation (SEO) software services. Technology and interfaces that connect hardware and applications and online retailers that directly sell their products to consumers without third parties are not in the scope of the P2B Regulation.[245]

According to the Article 1 of the P2B Regulation, the purpose of the Regulation is to *"...contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities."* To mention a few, Article 2 of the P2B Regulation provides definitions for online search engines and ranking.[246]

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[241] See for example Crémer Report 2019.
[242] European Commission Press Release, Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices 2019.
[243] This refers to online e-commerce marketplaces, such as eBay and Facebook Marketplace; online software applications services, such as the Google Play and Apple App Store; and online social media services, such as Facebook or Instagram. See Kimberley – Sciberras Debono – Vella 2020.
[244] This refers to a digital platform that allows users to input queries in order to search based on a query and returns results to the users (for example Google Search or Yahoo!). See Kimberley – Sciberras Debono – Vella 2020.
[245] Kimberley – Sciberras Debono – Vella 2020.
[246] The definitions are as follows: *"online search engine means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found"* and

The most crucial Article for this thesis is Article 5 of the P2B Regulation that applies to ranking.[247] Article 5 establishes requirements for describing the main parameters determining the ranking of business users in search results. According to Article 5, a description where ranking is influenced by the business user giving direct or indirect remuneration needs to be included in the T&Cs. The Article establishes a similar requirement to provide the main parameters for determining the rank of providers of online search engines utilising an easily accessible and publicly available description. It also requires that the description of the main parameters determining ranking should give the business users or corporate website users concerned an adequate understanding of the possible implications of the characteristics of the goods or services offered, the relevance of those characteristics for consumers, as well as of the design characteristics of websites used in the context of online search engines.[248] The Article 5 does not include an obligation to reveal business secrets, such as the algorithms used in ranking, as such obligation would likely result in the manipulation of the algorithms and, consequently, manipulation of search results.[249] This Article is in line with the transparency aim of the Regulation as it increases the knowledge of the parameters behind the ranking.

Another relevant Article is Article 7 of the P2B Regulation, which aims to prevent differentiated treatment by providers of online intermediation services and search engines. Before this Regulation, the OISP had the incentive to give preference to its own products or services over competing business users. Conduct like this undermines fair competition and limits consumer choice. If any differentiated treatment is given, it should be clearly set out in the terms and conditions or, regarding online search engines, in some other way in relation to goods or services offered to consumers.[250]

"ranking means the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication".

[247] Ranking gives prominence to business users' offers or relevance to search results. Ranking is a result of algorithmic sequencing, rating or review mechanisms, or visual highlights. These are called parameters and their description need to be in OISPs terms and conditions.

[248] COM(2018) 238 final, p. 10.

[249] See U 82/2018 vp.

[250] Kimberley – Sciberras Debono – Vella 2020.

The P2B Regulation also sets out rules on access to data.[251] In addition, when OISPs restrict practices where business users offer the same product to consumers at a different price or on different conditions, OISPs must include the grounds of the main economic, commercial, or legal considerations for that restriction in their terms and conditions. They also need to be easily available to the public. The P2B Regulation also covers dispute resolution and therefore, OISPs are required to offer different methods to resolve disputes.[252] The Regulation sets out restrictions on an OISP's ability to terminate or suspend the services to a business user.[253]

To comply with the P2B Regulation and to create a fair and transparent framework, platforms must adhere to requirements set for their terms and conditions.[254] OISPs and online search engines should assess their terms and conditions and modify them if needed to meet the P2B Regulation requirements. Also, OISPs should adopt new procedures if they need to make changes to their general terms and conditions. Furthermore, they should review their practices with procedures in restrictions, suspensions, and business users' termination from their service. Moreover, they may need to adopt a more comprehensive approach to receiving and handling business users' complaints.[255] Also, mediation and complaint handling processes need to be considered. The most difficult ones to comply with are the requirements for transparency and only time will tell how this is going to be carried out by the platforms.[256]

The P2B Regulation answers some of the concerns caused by the digital economy. However, there are some situations that the P2B Regulation does not give answers. It does not impose legal consequences on violations against the P2B Regulation. It only provides rules on terms and conditions, under which such terms and conditions shall be

[251] OISPs must set out rules how business users can access personal data or other data and any access the OISP has to that data after the expiry of the contract with the business user needs to be expressed.
[252] Kimberley – Sciberras Debono – Vella 2020.
[253] OISP should, at least 30 days prior to or at the time of this conduct to take effect, provide grounds for the restriction or suspension. The grounds should have been set out in advance in terms and conditions and it should be justified by the specific circumstances. Only individual goods or services of a business user should be excluded because termination of the whole of the online intermediation services is very sever and it should be last resort. Kimberley – Sciberras Debono – Vella 2020.
[254] The text of the terms and conditions needs to be in plain and intelligible language, easily available and any changes should be notified within at least 15 days. Terms and conditions not complying with the obligations are null and void. Kimberley – Sciberras Debono – Vella 2020.
[255] Kimberley – Sciberras Debono – Vella 2020.
[256] Dunleavy 2019.

null and void in case of violation of certain new rules. This is one of the things that remains to be seen on the Member State level.[257] Another thing that is not quite clear in the Regulation is the rules set out for terms and conditions. The P2B Regulation states that it *"shall not affect national civil law, in particular contract law".* The question here is the correlation with national laws and whether there is any need for amendments.[258]

It is worth mentioning that the exploitation of the full potential of the European online platform economy has not been possible. P2B Regulation aims to change this. This was a problem that was set on the EU's agenda to tackle. It was important to stop businesses being subject to harmful trading practices[259], mostly because there was no existing national legislation providing effective redress against these practices. This kind of *status quo* could have an impact on limiting the sales of the platform businesses. Consequently, this situation would impact negatively on the cross-border sales of non-platform businesses. Moreover, it could undermine their trust as well as limit consumer choice, and innovation capacity and growth of platform businesses.[260]

4.1.2 Intervention by Ex-Ante Regulatory Framework

The P2B Regulation is an ex-ante regulatory framework and an additional regulatory framework that is directed to digital platforms acting as gatekeepers. The framework can replace some lengthy and resource-intensive competition cases. Indeed, this Regulation may potentially have the tools that allow for timely interventions needed for the avoidance of irreparable harm to competition. Furthermore, an ex-ante regulatory framework allows for a more targeted and proportionate intervention against platforms that consumers and companies rely on. This also concerns the cases where the platforms are not considered dominant under competition law.[261]

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[257] See, for example, Baker McKenzie: New EU Rules for Platform Providers 2020.
[258] For example, the German law on standard business terms applies also in B2B relationships and includes strict requirements. See Baker McKenzie: New EU Rules for Platform Providers 2020.
[259] Practices such as *"sudden unexplained changes in terms and conditions without prior notice the delisting of products and services and the suspension of accounts without clear statement of reasons; issues related to ranking (including paid-for ranking) of businesses and products; unclear conditions for access to, and use of data collected by platforms; the discrimination of businesses and favouring of platforms' own competing services, and most-favoured nation clauses".* SWD(2018) 138 final, p. 10.
[260] SWD(2018) 138 final, p. 9.
[261] Finnish Competition and Consumer Authority, Digital Platforms and the Potential Changes to Competition Law at the European Level 2020, p. 17.

Sometimes ex-ante regulation is a better option than ex-post investigations. Particularly with platforms, efficient means are needed when trying to guarantee fair treatment for all parties and maintain competitive markets. In these purposes, the P2B Regulation can be deemed promising. It aims to solve some of the platform economy issues that affect the competitiveness of the market and consumers.[262] However, an ex-post element in competition law allows for effective regulation in the market by prohibiting specific conduct or limitation of certain acquisitions as the broad legal provisions can be applied to various anticompetitive behaviours.[263]

Intervention by an ex-ante regulatory framework may not ensure the same level of flexibility and adaptability as competition law enforcement offers. For example, a detailed list of obligations and prohibitions may not be beneficial as one type of conduct may have both pro- and anticompetitive effects. Also, the list could be outdated quickly because the digital markets are fast-moving. Moreover, the intervention needs to define which companies are considered digital gatekeepers, and the type of regulation must be foreseeable. While the business models in digital platforms vary in different ways, it is challenging to establish clear ex-ante criteria. The high pace of innovation in this dynamic sector does not help. Unfortunately, a lack of clarity may reduce trust from companies and hinder incentives to invest and innovate.[264]

It can be argued that the P2B Regulation is necessary because intermediaries working on the online environment have problematic effects on the businesses also working online. These problems can be related to transparency on contract terms, and competition law is not sufficient for tackling these issues in depth. The P2B Regulation creates more trust in the markets and predictability in the business environment online.[265] However, competition law as the main baseline is regarded as flexible and competent enough to tackle UTPs. Even with the new P2B Regulation, competition law would still apply in situations where a dominant undertaking is involved. The Regulation is for supplementing the existing competition and consumer policies while staying neutral to

[262] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 19.
[263] Strowel – Vergote 2018, p. 11.
[264] Finnish Competition and Consumer Authority, Digital Platforms and the Potential Changes to Competition Law at the European Level 2020, p. 17.
[265] U 82/2018 vp.

the application of these rules.[266] UTPs can be practised even by non-dominant platforms when businesses are dependent on such platforms. These kinds of UTPs are prohibited in the P2B Regulation. However, the Regulation may not be effective to prevent some of these practices, and it may not provide effective redress.[267] Nonetheless, P2B Regulation is needed because an ex-ante approach enhances transparency in these P2B relations. It prevents common unfair practices and guides the business environment in online platforms. Moreover, as a complementary regulation, it leaves the application of competition law unaffected.[268]

The issue of UTPs in the *online environment* is the only one taken into consideration by the EC, not other types of UTPs. This is not objective considering all the different forms of markets. It should not matter whether the form of market is online or offline, one-sided or multi-sided. However, the EC considers online platform UTPs as more crucial and more in need for regulation because the online services are more of a cross-border nature, and the geographical market is unlimited. All of these features imply the need for a less fragmented approach in the EU.[269]

4.1.3 The Concepts of Fairness and Transparency

The concept of fairness is deeply rooted in the moral norm of EU competition rules.[270] Still, fairness is a challenging concept to define. The concept is reviewed in the EU in various subsets of law, specifically consumer, contract and competition law.[271] It can be noted that fairness always emerges as a contrast between power and weakness.[272] Fairness is also linked with bringing equal opportunities for all kinds of actors in the market. As long as 'competition on the merits' exists, fairness and equal opportunity are achieved.[273]

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[266] Finnish Competition and Consumer Authority, Lausunto eduskunnan talousvaliokunnalle sekä liikenne- ja viestintävaliokunnalle 2018. See also Abdollah Dehdashti 2018, pp. 334-335.
[267] Abdollah Dehdashti 2018, pp. 334-335.
[268] Abdollah Dehdashti 2018, pp. 334-335. In addition, it is good to mention that usually a regulation has several objectives, such as increase market static and ensure a fair distribution of the welfare surplus generated by market transactions among the players of the transaction. These rights are protected by Articles 7, 8, 11, 16 and 17 of the Charter of Fundamental Rights of the European Union. When adopting rules, it is important sets the objectives and minimise the conflict between them. See de Streel 2018, p. 21.
[269] Abdollah Dehdashti 2018, pp. 334-335.
[270] See, for example, Wasastjerna 2019, p. 86; and Ezrachi, EU Competition Law Goals and The Digital Economy 2018, p. 13-17.
[271] Specifically, Art.102 TFEU.
[272] Abdollah Dehdashti 2018, p. 307.
[273] Abdollah Dehdashti 2018, pp. 307-308.

In this setting, the EC recognised online platforms' fairness and responsibility as an area where action was needed to ensure a fair, open and secure digital environment.[274]

Poorly drafted legislation in the platform economy may have negative effects on undermining business users and risking consumer trust, jeopardising legitimate business models and reducing investments for start-ups in the platform economy. For example, the concept of fairness in the P2B Regulation could cause legal uncertainty if the concept is not defined clearly. If common legal tradition around this concept in the EU is lacking, it can lead to different interpretations in courts and cause market fragmentation. It is important to keep in mind also that excessive transparency may come with negative effects. For example, ranking can undermine an intermediary's strength to avoid manipulation by allowing actors with bad intentions to game the system. Too much shared information from the platform's side can result in the deception of consumers by manipulating search results. Therefore, while increasing transparency and predictability in the platform economy, it is important to keep legal certainty, consumer trust and growth opportunities for businesses as priorities to ensure.[275]

Users of online platforms have a common problem on the lack of transparency and information provided. The information should be provided more on how the platform works and on the nature of its services. A lack of this part may lead to consumers not having all the relevant information in order to be able to assess the real value of the service. Consumers want that platforms are clear and transparent, especially on who is responsible when something goes wrong. Another important aspect for consumers is to know more about their rights if the price or quality of a product or service is faulty. Transparency in pricing practices is important because the search results may not show the total price. For example, some platforms add fees from 10% to 25% only at the booking stage.[276]

Obligations that concern transparency help to understand how the markets function. It also contributes to the identification of possible P2B unfair practices and ensures

[274] See SWD(2017) 155 final and Madiega 2019, p. 2.
[275] Letter to the EU legislators: Regulation for Promoting Fairness and Transparency for Business Users of Online Intermediaries 2019.
[276] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 4.

consumer protection.[277] However, it can be argued that these obligations do not necessarily end unfair terms and practices because the foreseen transparency is limited. In addition, as transparency decreases some information asymmetry, it does not solve market power or dependency issues. Intervention through the P2B Regulation at the EU level is justified because of the cross-border nature of many online services.[278]

In addition, research has shown that more transparency is needed for platforms. Some of these issues that can be viewed to require more transparency concern the display of sponsored search results and marketing by professional suppliers in order to avoid misleading marketing.[279] Because transparency is important to consumers, it is important to let the consumer be aware of the matters affecting ranking. Algorithms are one of these matters that usually lack transparency because consumers do not have enough information on how they actually work.

Companies need powerful platforms to act as intermediaries to access the digital markets. These intermediary platforms can distort the market through unfair practices, and consumers eventually bear the costs of this type of conduct. Therefore, it may be necessary for the EU to do more than only demand transparency from platforms as transparency requirements set on unfair and discriminatory practices is not efficient. Platforms should not be able to blame their algorithms when they rank services in a discriminative manner on their search engines. Companies and consumers should be kept up to date on how the search engines rank their search results.[280] As noted, platforms need to be fair and transparent with the businesses they host. Not having enough competition can have a significant impact because competition is needed in order to make the platforms more innovative and keep prices low.[281]

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[277] SWD(2018) 138, p. 43.
[278] de Streel 2018, pp. 20-21.
[279] Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy 2016, p. 7.
[280] BEUC Press Statement: New EU rules for platforms and businesses: a first step towards fairer online markets 2018.
[281] OECD Podcast: Margrethe Vestager on looking out for the little guy & the bigger picture of digital competition 2019. Regarding the innovation on the market, tech companies argue that they need mergers and acquisitions to stay competitive and innovative. However, these tech giants need to remember that when they become dominant, they will have more responsibility. In other words, with power comes responsibility. This also means that with market strength there always comes a risk of misuse of that strength

It is still possible that equal treatment in the search markets might negatively affect innovation, product improvements, and search engines' evolution. The requirement of equal treatment does not acknowledge that many users freely chooses to see Google's results and prefer Google's services over competitors'.[282] Google's competitors could receive free promotion of their services by means of this neutrality.[283]

4.2 Competition Law

4.2.1 Article 102 TFEU

Article 102 TFEU is an essential part of EU competition law that deals with agreements between two or more undertakings.[284] Under the provision is a restriction of certain conduct carried by undertakings in a dominant market position.[285] Dominant undertakings can freely engage in economic activities.[286] However, they have a certain responsibility not to hinder competition.[287] Thus, Article 102 does not directly prohibit dominance as such. It just lays specific restrictions on companies in a dominant position.[288] In addition, Article 102[289] applies only where a one undertaking has a dominant position or where two or more undertakings are collectively dominant.[290] The Court of Justice of the European Union (CJEU) in United Brands v. Commission laid down a test of what is meant by a dominant position.[291] The dominant position in Article 102 can be interpreted

[282] Mäihäniemi 2020, p. 264.
[283] See Akman 2017.
[284] Lorenz 2013, p. 188.
[285] The requirements for abusive conduct by Article 102 should not only focus on the impact on prices because the possible effects on the freedom of choice for the users of platforms needs to be considered as well. Most of the platforms have the tools to increase the choice of users. Similarly, the platforms can use this power in a way that negatively impacts on consumer choice. See Strowel – Vergote 2018, pp. 7-8.
[286] Lorenz 2013, p. 188.
[287] More specifically the term is 'special responsibility'. This term was first used in Case 322/81 Michelin v. Commission (1983). The ECJ confirmed the EC's finding that Michelin had a dominant position on the relevant market. In paragraph 57 of the case, the ECJ noted that: *"a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".*
[288] Lorenz 2013, p. 188.
[289] Article 102 TFEU applies only to undertakings having a dominant position on the relevant market. The assessment is a two-stage test, and it is completed in each individual case. First, the relevant market is established by defining the proper product, geographic and temporal markets. Second, the dominant position is investigated, and the market power of the company, its market share and the significance of barriers to entry among other factors are considered. See Lorenz 2013, p. 194.
[290] Whish – Bailey 2015, p. 190.
[291] Case 27/76 United Brands v. Commission (1978). See also Case 85/76 Hoffmann-La-Roche v. Commission (1979), paragraph 38.

as a position of economic strength. When an undertaking is enjoying this strength, it can prevent effective competition being maintained on the relevant market. This happens through the conduct of independence: the power to act independently from its competitors, customers, and consumers.[292] Article 102 applies to market power on the buying and selling side of the market.[293]

Article 102 (c) TFEU is explicit when it identifies abuse of a dominant position in the form of discrimination.[294] It states that it is abusive for a dominant firm to apply "*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."* This has been interpreted and limited to discriminative practices towards other undertakings, mostly secondary line injury cases where discrimination is applied on downstream customers of a non-vertically integrated dominant business. Article 102 (c) does not, however, handle the leverage of market power.[295]

Article 102 (c) TFEU can be assessed in light of the Google Search case to take a more practical approach to its application. A problem arises when applying the discrimination in Article 102 (c) to Google as the term 'competitive disadvantage' is unclear, and applying this raises a problem in the context of horizontal search rankings. Evaluating discrimination in the context of the horizontal search page is concerning because the search algorithm is built to discriminate, rank and pick the best ones based only on some chosen units. Another problem is that the provision is viewed as an explicit acknowledgement of fairness considerations toward competitors as it might be better to see it more of a concern for welfare-reducing conduct. Therefore, when the focus should be on consideration of exclusionary effects, Google's ranking and algorithms leading smaller platforms in unfair position are emphasised instead.[296]

There are concerns towards two possible theories of antitrust harm that may apply to search bias.[297] It has been argued that Article 102 (c) TFEU does not provide an efficient

[292] Case 27/76 United Brands v. Commission, paragraph 65.
[293] Whish – Bailey 2015, p. 190.
[294] Abdollah Dehdashti 2018, p. 308.
[295] Iacobucci – Ducci 2019, p. 20.
[296] Iacobucci – Ducci 2019, pp. 20-21.
[297] Views on the legal theory of harm that are applicable to Google is ranging from seeing the essential facility doctrine as the only possible characterisation (Vesterdorf 2015), to envisaging multiple available

legal basis for the examination of search bias.[298] One of the theories is the theory of tying. This theory provides an economic justification for exclusion. The other theory, refusal to deal based on the essential facility doctrine is a plausible legal theory of harm.[299] The refusal to supply entails a dominant upstream company competing with the buyer on a downstream market whom it refuses to supply. For this theory to apply, Google's general search platform needs to be regarded as an essential facility to which competing vertical search engines need access to compete effectively.[300]

To sum up, the application of Article 102 TFEU in the Google Search case is a consideration of a more formalistic view.[301] The provision concerns abusive practices that harm consumers directly. Also, it concerns indirect harm that happens through the impact on an effective competition structure.[302] It also states a way of determining abuse when dissimilar conditions are applied to *"equivalent transactions with other trading parties"* while *"placing them at a competitive disadvantage"*.[303] However, it only states out general principles and is not necessarily connected to the concrete conduct at issue.[304] Markets where Google operate qualify as new economy markets. In these markets, the competition is about innovation, and dominant positions may be highly transitory. Therefore, it has been argued that Google holding a dominant position within the meaning of Article 102 TFEU may be less certain than it has been thought.[305]

4.2.2 Competition Law in Digital Markets

Competition in digital markets is not the same as in traditional brick-and-mortar markets. For example, it is not as simple to determine which digital firms compete against each other, and a platform's market share does not indicate their market power. One matter

avenues, such as structural abuses based on the more formalistic elements of Article 102 TFEU (Lianos – Motchenkova 2013; Petit 2015); to believing Google's conduct does not fit under any traditional form of abuse (Nazzini 2015).

[298] See Case C-209/10 Post Danmark A/S v. Konkurrencerådet (2012), paragraph 22: *"the fact that the practice of a dominant undertaking may, like the pricing policy … [be] described as 'price discrimination', …, cannot of itself suggest that there exists an exclusionary abuse."*

[299] See Case C-6/73 Joined Cases 6 and 7/73 R Istituto Chemioterapico Italiano and Commercial Solvents v. Commission (1974).

[300] Iacobucci – Ducci 2019, pp. 20-21.

[301] Case AT.39740 Google Search (Shopping), paragraphs 331 and 336.

[302] Case AT.39740 Google Search (Shopping), paragraphs 332 and 339.

[303] See Case C-280/08 P Deutsche Telekom v. Commission (2010), paragraph 175.

[304] Iacobucci – Ducci 2019, p. 20.

[305] van Loon 2012, pp. 26-27.

that points this out is the fact that a next market leader can easily be a start-up entrepreneur. Online platforms have lowered entry costs even for new entrants, which sometimes can even challenge the existing platforms. Unlike traditional markets, digital platforms' product cycles are shorter, barriers to entry are lower, market borders are not as clear, and new companies can quickly join the market and take the leader place away from the existing industry leaders.[306]

As digital markets are different when compared to more traditional markets, challenges arise when applying competition law in the digital economy. The most problematic situation is when the technology companies touch upon in the least developed areas of competition law and economics. These areas are, for example, the relationship between innovation and competition, collective dominance and exploitative abuse.[307] The consumer welfare standard can guide enforcement in digital markets. However, if the standard is replaced with the protection of a market structure overlying by the ideals of those gleaning into the market, competition policy would end up in the wrong direction.[308] Therefore, problems arising from digital markets can harm healthy competition because platforms can reduce competition and consumer welfare. Digital markets can also create productive inefficiency. These can be a consequence of the nature of highly concentrated markets, but above all, the winner-takes-most principle.[309]

Online platforms can bring benefits to the digital economy and society. If the problematic issues caused by the digital economy can be avoided, this can lead to greater competition, which has an impact on bringing more benefits for consumers. Furthermore, it leads to growth and innovation.[310] Online platforms facilitate efficiency gains, increase consumer choice and contribute to the competitiveness of the industry as well as enhance consumer welfare. On top of all these benefits, they also have a role in facilitating access to information, which enhances citizens' participation in society and democracy across borders.[311] In addition, greater competition in digital markets benefits consumers. The competitive framework leads to consumers benefits, efficiency, growth and innovation.[312]

[306] O'Connor 2016, p. 3.
[307] Akman 2019, p. 589.
[308] Akman 2019, p. 590.
[309] Furman Report 2019, p. 35. See also Signoret 2020, p. 2.
[310] Crémer Report 2019, pp. 32-36. See also Signoret 2020, p. 5.
[311] COM(2016) 288 final, p. 3.
[312] Crémer Report 2019, Chapter 2.

Competition is generally considered as promoting innovation while an anticompetitive creation or strengthening of market power can reduce innovation.[313] In addition, platforms help start-ups scale up activity and support new business models as well as lower barriers to entry and increase competition in established markets. Competition is increased through new business models that compete with existing models. These are things that the policymakers should take into consideration when assessing the overall competitive impact of platforms and the impact of possible regulation.[314]

Cases of Google Search and Microsoft[315] both indicate that the types of conducts to restrict competition, which initially was meant for the traditional industry, for example tying, are now in need of reassessment in the digital environment. Competition authorities have not concluded the same results, for example, in the Google Search case where the FCA did not find that the ranking of the search results gave rise to antitrust proceedings.[316] It can be argued that refusal to deal and the essential facility doctrine do not apply to online search. Critique has been presented towards the top results being wrongfully considered an essential facility. Based on this critique, a position ranked in the top is not as valuable as assumed. Also, the possibility of Google not being in a monopoly position is presented, and that competing horizontal online search engines exist in which vertical platforms could rely on. It has also been brought up that not everyone can occupy the first ranked position, and therefore simultaneous access cannot be provided to all competitors. This view is inconsistent with ranking.[317] A principle of equal treatment imposing duty to treat comparison shopping services equally to Google's own services in general result pages led to a remedy that goes more towards an essential facility.[318] Nonetheless, a doubt remains for the applicability of the essential facility doctrine to Google.[319]

It can be viewed that Google's strategy is a form of unconventional tying: it is tying vertical search to general search.[320] Tying usually means a practice to induce and require

[313] Stigler Report 2019, pp. 74-78. See also Signoret 2020, p. 5.
[314] Williamson – Bunting 2018, p. 17.
[315] Case COMP/C-3/39.530 Microsoft (tying) (2009).
[316] Björkroth – Järvelä – Raijas – Rosendahl – Saastamoinen – Vuorinen 2017, p. 21.
[317] Iacobucci – Ducci 2019, p. 22. See also, Bork – Sidak 2012.
[318] Case AT.39740 Google Search (Shopping), at 699.
[319] Iacobucci – Ducci 2019, p. 23.
[320] Iacobucci – Ducci 2019, p. 23.

buyers of the tying good also to purchase the tied good.[321] In the context of Google, tying is more about the incentive to click on Google's vertical search services through more visual positioning. Google induces to select its tied good because discounts are not available, and this gives the search a zero price. The behavioural tendency of searchers shows visually prominent links to be more frequently chosen.[322]

Businesses have the common goal of increasing their profits through the competitive act of acquiring a bigger market share. This is possible when they offer lower prices and allocate more resources to innovation in product design and production technology. Governments play an important part here. When competition is possible, governments have the instruments of competition policy in their use, such as cartel agreements, monopolisation strategies and mergers. This way, governments can ensure that undertakings do not hinder competition.[323] In regard to the digital economy, these tools are not as effective or applicable in some of the situations. This also applies to the fact that the written form of competition rules may not be applicable or adequate anymore to answer the needs of a digitalised world.[324]

A standard claim in competition law is made on neutrality towards different business models. Competition law may never be neutral. Also, if taken a more technological approach, consumers would be viewed differently. Consumers are more involved these days in terms of, for instance, giving more input in production and being more flexible. They may also change their consuming preferences as soon as new innovations are brought into markets. Therefore, it is not adequate to reduce consumers' choice to their current preferences.[325]

Platform economy's effects on competition have been under debate, and no unanimity has been found. For example, a point of view is presented that in the analyses made within competition law usually end up in a result that is falsely exaggerating the competition

[321] For instance, discounts to make the bundle cheaper than the tying-tied good combination if purchased separately. See Case COMP/E-2/36.041/PO Michelin II (2001), para 300 and Case IV/31043 Tetra Pak II (1991). See also Whish – Bailey 2015, pp. 779–800.
[322] Iacobucci – Ducci 2019, p. 23.
[323] Crémer Report 2019, p. 19.
[324] See Wasastjerna 2019, p. 15.
[325] Podszun 2015, p. 108.

problems in the platform economy.[326] Defining markets on a view of static competition, applying one-sided analysis to multi-sided markets and ignoring the limits of network effects is problematic. These often lead to a false conclusion on the competitiveness of the internet, and it can be seen as far less competitive than it is. Consequently, these issues may lead to the incorrect application of competition law. Additionally, this also shows that competition law is not sufficiently regulating online platforms.[327]

Another point of view represents a paradigmatic interpretation. This is based on the observation that algorithm-based platform economy changes the competition and economy exponentially. Therefore, it could be deemed necessary that competition economy and competition regulation should be reassessed. For example, in these markets, the collusion between competitors through algorithms can form a permanent situation.[328] Consequently, algorithms and super platforms have the ability to hasten the end of competition. This can end up in a decline of the market system we know.[329]

Hence, digital markets and tech giants working in digital markets have a central role in today's economy. Deep understanding of the functioning of these markets is necessary when providing regulation.[330] For example, due to the significant differences between different platforms, it is not useful nor possible to analyse policy interventions for digital platforms as a group.[331] Also, the objective of preventing the fragmentation of the internal market by creating a single regulatory environment is important for both online platforms and business users. It is important to continue monitoring the development of the digital market. In addition, it is critical to ensure that any regulation does not prevent the business of start-up platforms.[332] The features of innovation, growth and consumer benefits are important in the Digital Single Market. Online intermediation platforms carry out important trade that has an impact on the digital economy. For the digital transformation to evolve, businesses need to use the platforms in a growing amount. Problems in the

[326] Björkroth – Mylly – Vuorinen 2018, p. 317.
[327] O'Connor 2016, p. 18.
[328] Ezrachi – Stucke 2016, pp. 15-32. See also Björkroth – Mylly – Vuorinen 2018, pp. 317-318.
[329] Ezrachi – Stucke 2016, p. 233.
[330] Calvano – Polo 2020. p. 1.
[331] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, pp. 10-11.
[332] U 82/2018 vp.

platform toward business practices prevent the platform economy from fully contributing to a well-functioning Digital Single Market and seize innovation opportunities.[333]

4.2.3 Adaptability of Competition Law

Digital markets are still in an experimental stage.[334] This reflects the application of competition law to digital markets and can cause a risk of careless and inconsiderable application of competition law.[335] Actions like these can harm the goals that competition law was created to preserve.[336] The foremost task for competition law should be the gatekeeper of innovation. Even though competition law related literature has brought up that the goal of competition law is to protect innovation and efficiency, it does not have that important role in the decision practice. Moreover, it has not been analysed in economic evidence that often. New terminology and new concepts are also needed to make the written form of competition law answer the challenges of the digitalised world.[337] In addition, competition law has a purpose of preventing large search engines using their market strength in the wrong way and preventing them from buying the competition off the market. Competition law should also prevent these businesses to avoid conduct such as abusive contracts.[338] Therefore, competition law needs to keep up with the development of digital markets.[339]

Competition law has always needed to keep up with the changes that the economy has thrown in its way and the platform economy is one of such changes. It can be possible that the existing regulation governing competition is not enough to tackle all the

[333] SWD(2018) 138 final, p. 31.
[334] Picht 2019, p. 790.
[335] Even companies such as Microsoft or Nokia do not know what happens next. Hence, how should the legislators in the EU know. See Picht 2019, p. 790.
[336] Picht 2019, p. 790.
[337] Podszun 2015, p. 108.
[338] Zimmer 2015, p. 627.
[339] Interim measures can be the answer in issues of keeping up with the pace of change of digital markets and the enforcement speed with competition cases. The Swedish Competition Authority provided an example of the use of interim measures in 2019. In this case a fitness aggregator used exclusivity agreements with fitness centres and the Authority found this to likely constitute a violation of the competition rules. The authority also found grounds to prohibit the company from applying exclusivity agreements before it decided whether the agreements in question constituted a violation of the Competition Act. The case is now closed, and voluntary commitments have been accepted to limit the use of exclusivity agreements. The cases illustrate that competition rules can be the applied to new circumstances through traditional enforcement. See Finnish Competition and Consumer Authority, Digital Platforms and the Potential Changes to Competition Law at the European Level 2020, p. 11.

problems.[340] These can be new regulations that ensure the fair and transparent treatment of business customers of platforms.[341] With these new regulations, it may be possible to tackle the problems that the platform economy creates.[342] A new policy issue in the online platform markets is *the* platforms' intermediary role for online businesses that sell their services and products to customers via the online platform.[343] EU antitrust rules already tackled anticompetitive agreements or abuses of dominant position.[344] However, the trading practices may not have an anticompetitive object or effect under Article 101 TFEU. In addition, the application of Article 102 TFEU is difficult, because the existence of a dominant position in the relevant market needs to be established.[345] However, competition law will be the main tool to regulate the platforms. As the competition law has a long history in the EU and it is regarded as adaptable and having a sweeping nature, among other qualifications, it is possible that competition law can adapt to these new problems.[346]

Competition law has a crucial significance in the perception of regulation needs for platforms. If a solution is not obtained to the problems of the platform economy through competition law, one may end up with special regulation that goes too far. It is argued that so far none has been able to intervene well within an existing competition regulation

[340] Björkroth – Mylly – Vuorinen 2018, p. 328 and OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019. Current competition law framework is capable of handling most of the anticompetitive behaviour in the digital economy due to its resilient and flexible nature it is relevant tool in digital markets. In addition, enforcing competition law in digital markets is actual and, for example, in 2020 the Danish Competition Council issued in one of its cases that a digital platform had infringed competition law by facilitating collusion, see Danish Competition and Consumer Authority, Danish Competition Council: Ageras has Infringed Competition Law 2020. The council also had two other cases where it issued that the platforms had set minimum prices, see Danish Competition and Consumer Authority, Commitment Decision on the Use of a Minimum Hourly Fee (Happy Helper) and (Hilfr) 2020; and Finnish Competition and Consumer Authority, Digital Platforms and the Potential Changes to Competition Law at the European Level 2020, p. 11. See also BEUC: Shaping Competition Policy in the Era of Digitalisation Response to Public Consultation 2018, pp. 7-8.

[341] For example, platform operators and business users are not each other's competitors, thus the relationship by itself is not subject of the antitrust regime. This may have repercussions on the competition between the platforms because competition law does not directly target it. See European Commission Final Report on Contractual Relationships Between Online Platforms and Their Professional Users 2018, p. 34.

[342] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.

[343] Madiega 2019, p. 2.

[344] The EU Treaties normative principles can be seen as abstract and this allows a broad interpretation of Article 101 and 102 TFEU to prove anticompetitive conducts in digital markets. BEUC: Shaping Competition Policy in the Era of Digitalisation Response to Public Consultation 2018, pp. 7-8.

[345] Madiega 2019, p. 3.

[346] Competition law can reconstruct its perspectives with the evolving economics and economy. The goals and the range of instruments competition law has been easily calibrated to the innovations and other issues that the future brings along in order to keep competition law relevant. Björkroth – Mylly – Vuorinen 2018, pp. 340-341.

to the restraints of competition that are related to the platforms.[347] Indeed, competition law is flexible, and it has been able to adapt to the earlier challenges that have taken place, such as the new economy at the turn of the millennium.[348] However, flexibility can reach its limits when the pricing decisions are transferred to an increasing extent from human beings to algorithms. For instance, in competition law, the challenge of self-learning algorithms has to be met in the future.[349]

One could argue that the internet has not changed competition law.[350] Legislators have not always been eager to change the rules of competition law to meet the challenges in the digital age. Therefore, academics and practitioners have tried to emphasise the importance of getting online experience into competition law that only targets the offline world.[351] Even though competition law is the right instrument in the situations concerning the abuse of market power, other problems in the platform economy are hardly solved with the methods of competition law. Platforms should be approached through separate branches of jurisdiction, their general doctrines, and existing regulation. Some of them may have to be partly updated.[352] Accordingly, the platform economy is claimed to have such impacts that competition law needs changes. The concern is that platforms will keep on growing and becoming more and more dominant, and this will let them set the terms for the market.[353]

Even though digitalisation may have created a new sector with new factual features that has not required any revolutionary attention, it may be more relevant to assume that the whole economy has changed during digitalisation.[354] There may still be businesses that have not been impacted by the ongoing digitalisation. However, it still can be concluded

[347] Vuorinen 2017.
[348] Even if digitalisation has been under discussion in recent years in relation to competition aspects, there have also been other trends influencing competition law. These trends impact on competition and are in relation to the internet, such as the rise of private enforcement and new economic views. See Podszun 2015, p. 102.
[349] Vuorinen 2017. For example, competition law enforcement should complement the implementation of ex-ante measures to resolve market failures that go beyond the actions of one business, see BEUC: Shaping Competition Policy in the Era of Digitalisation Response to Public Consultation 2018, pp. 7-8.
[350] For example, from comparing the rules in Europe in 2014 and in 1994 it is possible to draw a conclusion that there is not any principal difference happened that is causally linked to the rise of the internet.
[351] Podszun 2015, p. 101. For example, the application of competition law to cases like Google Search and other cases related to the digital environment has not yet seen any revolutionary changes.
[352] Vuorinen 2017.
[353] Björkroth – Mylly – Vuorinen 2018, p. 328.
[354] For example, the emergence of the internet is comparable to the invention of electricity. See Podszun 2015, pp. 101-102.

that if a business is thinking forward in its business plans, it must be influenced by digitalisation.[355] Therefore, competition law may not be the answer for all the issues raised by the online platforms as the challenges raised by the platforms concern more than just competition law. It is important to take into consideration the importance of consumer protection and the laws protecting some categories of beneficiaries, such as creative contributors and individuals.[356]

While mitigating the perils of the digital economy, there are a few key areas to focus on. First, it is important to have a legal framework that includes ex-ante and ex-post elements. Second, the participation of stakeholders in a planning and decision-making process of building a benchmark is needed. Third, a creative approach is needed when focusing on enforcement and remedies.[357] In addition, approaching competition law with a more technological and economic view may be necessary in some cases[358]. It may be relevant to view an individual case through its economic effects and consumer welfare standpoint and use these as a benchmark for the application of competition law. If a more technological approach is used, a case would need to be individually analysed through its technological effects on the behaviour in question. This kind of approach requires a deeper understanding of the technologies used in the individual case. Additionally, it requires an understanding of the business models and economics in the digital economy. In relation to this, the Google Search case can be viewed as a warning example of the lack of understanding of what this powerful search engine really does and how it works.[359]

Moreover, it is important for the EU to take advantage of all the benefits of the platform economy. In order to achieve this, there cannot be different national or local rules in every Member State for online platforms in a single market.[360] Different rules within the single

[355] Podszun 2015, pp. 101-102.
[356] Additionally, it needs to be considered how the role of data has a competitive aspect as well and how undertaking can use this a mean to increase dominance. Strowel – Vergote 2018, p. 11.
[357] Picht 2019, p. 790.
[358] The market design by competition authorities that was inspired by belief that smart interventions are allowed through modern economics works only in an unchanging environment and may not be able to make the markets more innovative. At best, competition law would make technological leaps much more probable. These questions could be tackled by more technical approach in competition law. Podszun 2015, p. 108.
[359] Podszun 2015, p. 107.
[360] Maximum level of harmonisation in the online platform legislation is crucial to the protection of the cross-border dimension of the economy. Without harmonisation, it will lead to market fragmentation, thus undermining the achievement of the Digital Single Market. See Letter to the EU legislators: Regulation for Promoting Fairness and Transparency for Business Users of Online Intermediaries 2019.

market would create uncertainty for economic operators and set negative limitations in the digital services as well as negatively impact the emergence of new platforms. It would also affect consumers and businesses because this would generate possibility for confusion. Even though the EC has concluded that there is need for regulation in the platform economy, online platforms are already subject to existing EU rules. They need to be compliant with rules related to, for example, competition and consumer protection.[361] For example, the existing EU consumer and marketing law already requires transparency from online platforms and that they do not mislead consumers.[362] However, the existing legal framework has been evaluated not appropriate to some of the concerns arising from online platforms.[363] Improved enforcement can create more trust, transparency and fairness within the platform economy.[364] However, if the EU's regulatory measures on online platforms go too far, it could have an impact on the innovation of the platforms. Therefore, it is important to address the regulation to only clearly identified specific problems.[365]

Platform operators are faced with emerging national legislations. These national legislations can affect negatively on the global nature of the platform economy and the natural cross-border market for the online intermediation services in the EU through fragmentation.[366] These uncoordinated national legislations can harm the online platforms' ability to scale up. Scaling up allows platform businesses to improve their business strategies through stronger network effects. New market players in the digital markets are also important because they create competition. Without this pressure created by more competition in the market, existing platforms can easily reinforce their market strength. With such growing market strengths, competition concerns increase. When online operators have more bargaining power, business users become more dependent on the platforms.[367]

[361] COM(2016) 288 final, pp. 4-5 and SWD(2018) 138 final, p. 31.
[362] COM(2016) 288 final, p. 11.
[363] See COM(2016) 288 final, pp. 4-5.
[364] COM(2016) 288 final, p. 11.
[365] COM(2016) 288 final, p. 5. See also Björkroth – Mylly – Vuorinen 2018, pp. 340-341.
[366] Fragmented market impacts the most especially start-ups and other similar small online platform operators. Platforms as such, have more limited capacity to comply with different national rules. See SWD(2018) 138 final, p. 31.
[367] SWD(2018) 138 final, p. 31.

In conclusion, competition is needed for the markets to be innovative. However, it is hard to know what is innovative and cutting edge in the future.[368] Old and new platforms co-exist in today's markets even though some have become more important than others. In the future, artificial intelligence, machine learning, virtual and augmented reality, blockchain applications and quantum computing are likely to challenge current dominant platforms.[369] This can cause new legal uncertainties with competition law.

4.2.4 Other Legal Regimes

In addition to competition law, there are also other legal regimes available to tackle information-based practices. Increased regulation and antitrust surveillance of digital platforms are becoming more common. For example, Denmark and Germany have planned to impose stricter regulation on digital platforms through digital agencies that would have extensive antitrust powers.[370]

Indeed, several EU Member States have introduced legislations prohibiting the abuse of economic dependence. In France, article L.420-2 para. 2 of the Business Code refers to the abuse of economic dependence by an undertaking towards a client or a supplier.[371] This legislation was not originally targeted towards digital markets, but it was applied by the French NCA to sanction Apple. In this case, Apple required in its contracts an almost complete exclusivity from its distributors and prevented them from opening shops selling exclusively a competitive brand, even six months after the expiration of the contract term. The abuse consisted of delays and lack of supply from Apple, which caused a disadvantage for the distributors compared to Apple stores.[372] Under French law, the assessment of an economic dependence requires taking criteria such as the reputation of the brand, the supplier's market share, the part of the distributor's turnover dedicated to

[368] OECD Podcast: Margrethe Vestager on looking out for the little guy & the bigger picture of digital competition 2019.
[369] See, for example, Cusumano – Gawer – Yoffie 2019, Chapter 7.
[370] Taylor, Denmark is Naming an Ambassador Who Will Just Deal with Increasingly Powerful Tech Companies 201 and Ritz, Germany Suggests Ramping up Regulation of Digital Platforms by Establishing a "Digital Agency" with a Robust Antitrust Mandate 2017. See also Mäihäniemi 2020, p. 295-296.
[371] Three cumulative conditions need to be fulfilled: (1) the existence of a situation of economic dependence, (2) an abuse, and (3) an affectation of competition.
[372] Áutorité de la Concurrence, Fines handed down to Apple, Tech Data and Ingram Micro 2020.

the supplier's product, and the absence of an equivalent solution to the contractual relationship existing between the supplier and the distributor into account.[373]

Similarly, a recent Belgian Code of Economic Law, article IV.2/1 was adopted targeting vertical abuses of economic dependence. The criteria require the existence of no reasonably equivalent alternative. Also, it requires that the undertaking has the bargaining power by which it can impose trading conditions that would not be imposed under normal market circumstances.[374] Also, Germany proposed a new antitrust legal framework with the protection of relative market power.[375] The notion of economic dependence may be relevant in the framework regarding exclusionary practices in digital markets.[376] Moreover, the notion may refer to the position of a digital gatekeeper. Digital gatekeeper is an economic agent that controls access to online services to reach a group of users.[377]

Several countries outside the EU have adapted competition rules to digital markets as well. For instance, the Japan Antimonopoly Act, article 2, para 9(v) prohibits the abuse of a superior bargaining position.[378] In its guidelines on the abuse of superior bargaining position in digital markets, the Japan Fair Trade Commission developed the concepts of counterparty and abuse of superior bargaining power over consumers and its consequences[379]. The behaviour of a business abusing its bargaining power can impede free and independent choices by consumers and enable gaining a competitive advantage over competitors.[380] The notion of abuse of bargaining position is relevant in digital markets and can be transferred to exclusionary conducts towards competitors. Business

[373] Conseil de la Concurrence, Décision 01-D-42 (2001) and Cour de Cassation, Chambre Commerciale n°02-14.529 (2004).
[374] Freshfields, Abuse of Economic Dependence: Belgian Competition Authority Adds Another Tool to Its Enforcement Toolkit 2019.
[375] Hogan Lovells, Germany's Proposed Digital Antitrust Law: An Ambitious Project to Regulate Digital Markets 2019, and Monopolkommission, Policy Brief on the Draft Bill for a Competition Law Digitisation Act 2020.
[376] Signoret 2020, pp. 20-21.
[377] Signoret 2020, p. 23.
[378] There are three specific types of behaviour towards a counterparty: (1) making the counterparty of continuous transactions purchasing goods or services that it would not have purchased in normal business practices, (2) making the counterparty of continuous transactions providing money or services that it would not have provided in normal business practices, and (3) being late with payments, reducing the payment or forcing the counterparty to accept unfair terms and conditions.
[379] The notion of counterparty includes consumers. An abuse of bargaining position occurs where an operator uses its position to cause a disadvantage for consumers without justification. See Japan Fair Trade Commission, Report on Trade Practices on Digital Platforms – Business-to-Business Transactions on Online Retail Platform and App Store 2019, 1 and 2.
[380] Japan Fair Trade Commission, Report on Trade Practices on Digital Platforms – Business-to-Business Transactions on Online Retail Platform and App Store 2019, 1.

partners and consumers are economically dependent on an undertaking that has a position of superior bargaining power. Thus, scrutinising the undertaking's behaviours, and clarifying potentially damaging behaviour is crucial.[381]

4.3 Preserving Competition with Dominant Platforms

4.3.1 Dominant Platforms

It has been established that the conduct of a firm needs to be taken into consideration when deciding whether it is dominant.[382] The rules of the dominant platform need to protect efficient and functioning competitive markets. EU competition law prohibits abuses[383] by *"undertakings of a dominant position"* in Article 102 TFEU that only applies to undertakings that are engaged in economic activity, *"regardless of its legal status and the way in which it is financed"*.[384] In this setting, an economic activity includes *"any activity consisting in offering goods and services on a given market"*.[385] The decisive criterion is whether or not the activity is carried out under market conditions.[386] Competition analysis under Article 102 TFEU requires the relevant market definition[387] and the assessment of dominance in this relevant market,[388] and the analysis of a potential abusive behaviour by the dominant undertaking.[389] A dominant undertaking has a special responsibility not to abuse its dominance.[390] Traditional analysis is questioned in the

[381] Signoret 2020, pp. 22-23.
[382] Case 27/76 United Brands v. Commission, at 67-68.
[383] An abuse may consist of a behaviour impairing effective competition from smaller competitors. Dominant undertakings cannot eliminate rivals by exploiting their market power. The concept of abuse is objective. The intentions of the dominant company do not have to be established. See Lorenz 2013, p. 215.
[384] See Case C-41/90 Klaus Höfner and Fritz Elser v. Macrotron GmbH (1991), paragraph 21.
[385] See Joined Cases C-180/98 and 184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten (2000), paragraph 75.
[386] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio (2008), paragraph 25. Case C-205/03 Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities, Opinion of AG Poiares Maduro (2005), paragraph 13.
[387] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law 1997.
[388] Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the EU Regulatory Framework for Electronic Communications Networks and Services 2018, paragraph 52.
[389] Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings 2009.
[390] Case 322/81 Michelin v. Commission (1983), paragraph 57. In addition, while dominant platforms have great power, they also need to remember that they have a special responsibility to use that power in a way that does not undermine competition. They should never misuse that power to harm competition. It is possible that cases like Google Search are to be seen in the future as well and the EC must require platforms to treat other companies' services equally with their own. See OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.

context of digital markets, because of its lengthy antitrust proceedings and difficulties on restoring competition.[391]

Dominance is a position of economic strength. This position enables an undertaking to behave independently of its competitors. If this kind of conduct appears on the market, the market mechanism is not able to exercise its function to discipline. Therefore, the undertaking in the dominant position is bound by legal rules that will ensure effective competition. Market power can be measured by several indicators, although, the most important indicator is market share.[392]

Dominant firms may also create barriers to entry. This allows undertakings to make market entry of rival businesses difficult; thus, market power will be reinforced. When the entry barriers are lower, naturally, the significance of market share is reduced. Countervailing buyer power may also diminish the market power. Undertakings that have a market position that could be almost compared to a monopoly position may be subject to several obligations which work in favour of their rival undertakings. The company does not need to be very large in order to be viewed to hold a dominant position in the market. Even with a very low turnover, a business can possess a dominant position if working in a small relevant market. Therefore, turnover is not a decisive element when assessing the undertaking's position in the market. The existence of a dominant position can be determined by way of assessing whether such a market qualifies as a substantial part of the internal market. This is likely when there is a strong cross-border element involved in the conduct in question.[393]

Competition law is driven by the misuse of market power by undertakings. This enables independently made increases in prices, reduce in quality, limiting consumers' choice or innovation.[394] Digital markets face rapid and unpredictable innovation every day, increasing amounts. Therefore, in the digital markets, likely market power indicators are barriers to entry and market position contestability by potential entrants and innovators.[395]

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[391] Signoret 2020, p. 19.
[392] Lorenz 2013, pp. 211-212.
[393] Lorenz 2013, pp. 211-212.
[394] Whish – Bailey 2015, at 5.6. See also, Signoret 2020, p. 18.
[395] See Case T-79/12 Cisco Systems, Inc. and Messagenet SpA v. European Commission (2013). The Court observed at paragraph 69 that: *"recent and fast-growing sector which is characterised by short innovation*

In addition, users often multi-home on different platforms. Therefore, the platforms may not be able to behave independently of their users.[396] In conclusion, high market shares and concentration ratio are not per se indicators of market power.[397] With online platforms, market power and dominance is present when their position is difficult to contest or when only one side multi-home but the other side do not.[398]

While the gateway position of online platforms creates new markets and opportunities, enables the organisation of millions of users, guarantees the success of millions of firms, and offers unparalleled efficiencies in access to cross-border markets, they also raise significant economic challenges.[399] For example, businesses can exploit the advantages of e-commerce because of the existence of online platforms.[400] In addition, platforms create challenges for public policy and open the possibility for harmful unilateral trading practices.[401] This is a concern as the possibility for such harm to businesses undermines the innovation potential of platforms. No effective redress has been available against these harmful practices for businesses using these platforms.[402]

In addition, in many new economy markets competition revolves around innovation rather than price. It can be said that competition works for the market, and this is called dynamic competition. When markets are mostly filled with this kind of dynamic competition, it usually means that the winner takes all. In other words, the most successful competitor in the market dominates it. However, the dominant position is fragile. There is always a possibility that another competitor may innovate more successful goods or services and take over the whole market. If the focus is drawn too much on product substitutability and market share, it is rare that these kinds of dynamics of new economy markets are taken into consideration.[403]

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cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power."

[396] See Case T-79/12 Cisco Systems, Inc. and Messagenet SpA v European Commission (2013), paragraph 79.

[397] de Streel 2018, pp. 5-6.

[398] SWD(2018) 138, p. 21. See also Duch-Brown 2017.

[399] European Commission: Shaping Europe's Digital Future, Platform-to-business trading practices.

[400] Madiega 2019, p. 2.

[401] Crémer Report 2019, p. 19.

[402] European Commission: Shaping Europe's Digital Future, Platform-to-business trading practices.

[403] Lopez-Tarruella 2012, p. 14.

The problem with high market shares in the new economic markets is that they cannot be considered in the same way as in the 'normal' markets. This is because the market shares do not reflect the competitive constraints that the winning business is under. This traditional approach, focusing on traditional methods when establishing dominance and market definition, can lead to a wrong conclusion concerning that an undertaking is dominant in the market even though it is under severe competitive constraints. Another reason why these new economy markets work differently is their products. The products can be more technologically complex and characteristically different, which is why the consumers will perceive certain products as non-substitutable. When focused on the product substitutability, markets seem narrower.

Therefore, focus on 'traditional' methods and price competition is under critique.[404] In addition, a price increase cannot be assessed similarly in digital platforms as with the brick-and-mortar stores. Many of the products are offered for free in return for data, which is not the case in brick-and-mortar stores. However, a decrease in efficiency is still required when proofing consumer harm. This is relevant because a digital monopoly does influence consumer choice, as well as rivals' and own incentives to invest and innovate and still lead to inefficiency. Also, it could be viewed that in antitrust cases, the competition authorities should not rely on fairness and societal goals. Fairness allows looking at the problems from an alternative perspective and, therefore, it could be seen as a welfare option. It is also good to keep in mind that the concept of fairness is quite vague.[405]

In the platform economy, first-mover advantage, network effects and lock-in often lead to unfair practices. A dominant platform can control the markets, take advantage of its dominance and use it to become a stronger player in the market in other business areas or make its dominant position more permanent.[406]

Suppose a business with growing market power has a more efficient strategy than its rivals or has better products and distribution channels, and consumers want to buy the

[404] Lopez-Tarruella 2012, p. 14.
[405] Mäihäniemi 2020, p. 281.
[406] Björkroth – Mylly – Vuorinen 2018, p. 326. Investigations in the case of Microsoft concerning competition law issues in the EU make a great example of such conduct, case T-201/04 Microsoft Corp. v. European Commission (2007).

business' products on their free choice. In that case, that is not conducting an infringe in competition law.[407] This has been stated in the US, and it is a relevant concept in a European context as well, as the CJEU recently confirmed this principle.[408] In this context, harms to entry can be shown, and one of these is the existence of high barriers to entry. Entrants have a significant disadvantage compared to the business with great market power as the entrant is dependent on data detained by this market player.[409]

Another harm to entry can be caused by the incentives and capacity to leverage entry barriers that prevent access to the market.[410] In this regard, Google was fined by the European Commission for its practices of tying Google Search with Google Play Store, which gave Google a competitive advantage which was impossible to compensate by competitors in general search.[411] Google was also fined for its restrictive clauses in contracts with third-party websites which prevented competitors from placing their advertisements on these websites.[412] Overall, Google has special responsibility for its dominant position, and when in breach of these responsibilities, substantial fines have been imposed. Other types of abuses of dominance can be observed in digital markets as well, and harm to competition and consumers can take the form of exploitative and exclusionary conducts.[413]

For example, vertical foreclosure is a category of abuse of a dominant position. Vertical foreclosure requires the conduct of integration and exclusive contracts between vertically related firms. These contracts have critical welfare-enhancing effects on pricing and investment incentives. However, rivals' ability to compete may be affected by denial or limitations set to access the market. Foreclosure can reduce competition which can lead to welfare harms.[414] A firm engaging in anticompetitive vertical foreclosure increases the business' market power and reduces overall competition.[415]

[407] Stigler Report 2019, pp. 82-84.
[408] Case C-413/14 P Intel Corp. Inc. v. Commission (2017), paragraph 133.
[409] Signoret 2020, p. 4.
[410] Stigler Report 2019, pp. 71-72.
[411] Case AT.40099 Google Android (2018).
[412] Case AT.40411 Google Search (AdSense), not yet published. See European Commission Press Release, Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising 2019.
[413] A non-exhaustive list of exploitative abuses is in Article 102 TFEU. Exclusionary conducts are not explicitly mentioned in Article 102 TFEU but is developed by the CJEU. Signoret 2020, p. 4.
[414] Bijlsma – Kocsis – Shestalova – Zwart 2008, p. 9.
[415] Bijlsma – Kocsis – Shestalova – Zwart 2008, p. 23.

Platforms are good to have in our society because they make connections between businesses and consumers possible as a digital meeting place in a manner that would not be possible in a world without a digital environment. However, through the growth of these platforms, they act in a position where they can have a fundamental impact on the way our societies work. Digital platforms can censor the information and set rules that govern entire markets. It is necessary to find ways to keep that sort of power under proper control.[416] Therefore, it is crucial to find proper ways to keep their powers under control without going too far.[417]

4.3.2 Power to Set Rules

It is important to make sure that when platforms are expanding into new markets, it cannot undermine competition. Issues may occur when a platform business competes in other markets in which the competitors of such platform business are companies that depend on the platform. Therefore, a risk remains that the platform operator is too tempted to modify its rules and features to benefit its own interest. Moreover, when the platform has a dominant position in the markets, it truly has the power to set rules.[418] With this power, they can decide via their design ranking systems how easily certain businesses can be found, and which businesses cannot be found at all.[419] For instance, Google's conduct on showing unjust results does affect the ability of its rivals to compete, especially when Google's own comparison shopping service is shown at the top of the first page of search results when the competing services of its rivals are shown down on page four. This can lead to a loss in clicks of more than 90%.[420]

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[416] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[417] It could be viewed that biggest threat to competition and innovation comes from platforms that are centre of large empires, not from those that are just a single business. Integration or products and services within one platform might be good for consumers but if this integration depends on getting all products and services from the same company, it can become harder for smaller businesses to get into and to compete in the market. Products of one company will need to work properly with products of other companies' because it can be vital for the openness of competition in the markets. For example, when the Microsoft's takeover of LinkedIn was approved, it was agreed that Office had to work properly with other professional social networks as well, not just with LinkedIn. See OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[418] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.
[419] These platforms can engage in abusive self-preferencing or they can work under incentives to sell some sort of monopoly positions to their business users in terms of ranking of results. These results can be ranked differently, and the platform has the power to decide how the results are displayed to consumers. See OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019 and Crémer Report 2019, p. 6.
[420] OECD Conference on Competition and the Digital Economy, Special Address from Vestager 2019.

This rule-setting power occurs in different forms, and it can determine the way competition takes place.[421] Dominant platforms have a role as being responsible for ensuring that competition is not compromised. The rules they impose should not limit competition unless it is necessary for the functioning of the platform.[422] Accordingly, platforms implement different kinds of rules in relation to platform design choices, such as ranking, and the criteria used in their algorithms. They also have rules that concern the relationships between the platform and the users, such as the sharing of information. They also have rules between user interaction, such as the rules of conduct for the platform and rules determining how third parties interact in the platform.[423]

These rules that platforms choose may create problems. Of course, competition between different business models and platforms and especially innovation is much needed. Innovation has made it possible for platforms to generate large efficiencies. These are enabled by types of transactions that were not possible before. Platforms that concentrate on profit maximising could have motives to shape their rules to bring more value to the users. When working with two-sided platforms and expecting to benefit from network externalities, these rules would need to serve both sides.[424]

In conclusion, dominant platforms need to follow their responsibility to ensure free and undistorted competition. Their rules cannot impede such competition without objective justification. Because a dominant platform could apply the rules as a regulator in a manner that harms competition, it is important that they do not use this power in such a manner.[425]

[421] Crémer Report 2019, pp. 60.
[422] Crémer Report 2019, pp. 64-65.
[423] Crémer Report 2019, pp. 61-65.
[424] Crémer Report 2019, pp. 61-65. Competition policy concerns do not arise when fees and their influence on the ranking is made explicit to the consumers. It is required that the consumer has a clear understanding of the trade-offs. Sufficient competitive pressure reduces the incentives to reduce competition or to offer irrelevant goods or services to the consumers. However, network externalities have a role on reducing the intensity of this competition. Sufficient competitive pressure encourages platforms to offer goods in a quality that the consumer requires and, therefore, it increases competition. However, network externalities and information asymmetries can reduce the competition and make such practices profitable.
[425] Crémer Report 2019, p. 6.

5 Consumer Choice in Digital Markets

5.1 Consumers in the Digital Economy

The digital economy can be beneficial for consumers. It can make consumers better informed, and firms need to innovate to keep up with the pace of the evolving playing field.[426] However, in recent years competition law enforcement in digital markets has lacked effective ways of dealing with problems occurring in the markets. Competition law should try to prevent the harms that digital markets are causing to consumers or at least remedy them. It has been important, especially in the interests of the consumers, to deal with these problems and consider tools to help with this aim.[427] Consumer welfare and well-being are central when intervening in digital markets.[428]

Competition brings benefits, such as reduction of prices, a broad range of choices for consumers, and overall efficiency and innovation. The basic competition mechanism allows and encourages businesses in the market economy to offer goods and services with the best, favourable terms to consumers. To maintain effectiveness in the market from a competitive perspective, companies need to act independently without influencing each other. However, they need to be subject to the competitive pressure exercised by others. The core of competition is that the consumers and suppliers should interact freely. They also need to interact according to their own incentives. It is crucial that there is no coordination between any of the market players. Competition can act as a self-regulating mechanism, an 'invisible hand' [429], that reduces prices to a socially optimal level and ensures maximum welfare for society.[430]

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[426] Ezrachi – Stucke 2016, p. 10.
[427] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 1.
[428] Ezrachi, EU Competition Law Goals and The Digital Economy 2018, p. 6.
[429] The term 'invisible hand' by Adam Smith was first used in a discussion of domestic versus foreign trade. The term has nowadays a more generalised meaning and refers to the functioning of the market in general. See Smith 1776.
[430] Lorenz 2013, pp. 1-2. There is a model that describes the features and ideal environment for perfect competition. That model assumes the existence of homogeneous products, several firms in the market that all act as price takers. The model also assumes that the barriers to entry and exit are non-existent and sellers and buyers have all the relevant and needed information. Naturally, prices would be low, and output would be as high as it can be. Consequently, social welfare will be maximised, and full efficiencies will be achieved. It might be clear without saying that the assumptions that the model of perfect competition sets are rarely fulfilled in practice. Nonetheless, it can be used as a benchmark of the potential benefits resulting from competition. Lorenz 2013, p. 9.

Digital markets may in some parts be characterised and structured in a way that is hard for innovative newcomers in which case competition cannot reach its goals of bringing benefits for consumers.[431] By ex-post competition enforcement focusing on tackling specific market structural problems, this new legal framework could address the oversight areas of competition law enforcement and create better conditions for consumer welfare in the digital economy.[432] However, the digital economy has brought significant benefits to consumers. It is still a relevant concern to consider the market strength that some players in the digital economy have and how they may end up deploying anticompetitive practices. Another relevant concern is whether these practices can lead to significant consumer harm.[433] In this regard, competitors and consumers both suffer when companies use their market power in a harmful way. Situations, where companies with great market power define the rules for an entire market, are examples of harmful behaviour. Therefore, EU competition policy should seriously take consumers into consideration in the digital single market.[434]

Platforms play an important role in the digital society because they improve the industry's efficiency and competitiveness while enhancing citizen participation in society.[435] Most importantly, platforms increase consumer choice. The one thing that ties all this together is the fact that digitalisation of the economy profoundly affects how consumers live their lives. Consumers can find information online due to online platforms. This plays a central role in social and economic life. Thus, digitalisation is shaping both the economy and society.[436] For example, search engines play a gatekeeper role in consumers' online behaviour. Therefore, platforms need to understand the responsibility they have along with this role. It is important for the platforms to be fully transparent on the ways they

[431] Online platforms can impose unfair T&Cs on their contract business partners. In fact, online platforms can regulate the access to broad consumer groups and infrastructures that are necessary for the undertakings. These practices affect greatly on consumer choice. Furthermore, these practices may further effect on the entire dynamics of the markets. Havu 2019, p. 185. See also BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.
[432] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.
[433] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 3.
[434] BEUC Press Statement: Amazon Antitrust Case: An Example for All Online Platforms 2017. This kind of harmful behaviour in the markets can lead to, for example, consumers not finding better deals.
[435] European Commission: Shaping Europe's Digital Future, Online Platforms.
[436] Madiega 2019, p. 2.

operate. As platforms have this gatekeeper role, consumers need to be informed on how the algorithms are used and what is the logic behind them. With this also comes a responsibility for the platforms to let the consumers be aware of the logic behind information organised and made available to them.[437]

Cross-border online shopping is increasing in the EU, and therefore, consumer protection becomes more important. Collective redress and dissuasive penalties on non-compliant companies can help in reaching this goal. It is important to tackle situations where no EU law currently exists, especially in the online world.[438] For example, the "New Deal for Consumers" ensures more transparency in online search results. This allows users to be more aware of the possible monetary compensations made to place the ranking of certain product or service higher in search results.[439]

When regulating on a national level to protect consumers, obstacles to trade may consequently occur. Therefore, it is viewed that provision is needed to protect consumers *"when a reasonably well-informed and reasonably observant and circumspect consumer needs it"*.[440] This standard allows for striking down certain national measures and remove obstacles to trade.[441] Accordingly, some EU legislation and policies apply to platforms as providers of online content, services, products and applications. There are still occasions where consumers are exposed. The situation could lead to problems among consumers if the existing legislation is not appropriately enforced, or it is not sufficient. The variety of platforms brings challenges because it might be impossible to find a solution that answers all the questions and deals with all the problems.[442]

Competition authorities stress the centrality of consumer welfare in their interpretation and application of competition law. However, it is not meant to be interpreted in a way that competition law applies only when a specific increase in prices to end customers is demonstrated.[443] The harm can be indirect as well by actions that harm the competitive

[437] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 5.
[438] European Parliament News: New EU consumer protection rules to tackle misleading and unfair practices 2019.
[439] European Parliament News: New EU consumer protection rules to tackle misleading and unfair practices 2019.
[440] Sibony 2015, p. 73.
[441] Sibony 2015, pp. 72-73.
[442] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 3.
[443] Whish – Bailey 2015, pp. 19-20.

structure of the market.[444] Ultimately, competition is intended to deliver benefits for consumers.[445] In this regard, the P2B Regulation does not directly protect consumers. However, the measures therein indirectly benefit consumers as they provide a fairer and more transparent marketplace.[446]

In the Digital Single Market, it is important to build a good consumer-driven foundation based on trust, choice and a high level of consumer protection that benefits both businesses and consumers.[447] The EU may not have enough information about the digital borders. Therefore, while platforms offer their services across the entire EU, legislative and policy instruments need to be kept up to date to ensure adequate protection for consumers.[448]

5.2 Consumer Choice and Welfare

5.2.1 Competition Law and Protection of Consumers

Competition has been used as an instrument in a market-based society to ensure that the needs of the citizen are guaranteed by the economy.[449] The needs of the citizens can usually be seen to reflect that their welfare is granted. This means from a competition perspective that when an increase in consumer choice is granted, welfare among consumers grows. Additionally, consumer trust in the platform economy is linked to consumer choice. When consumers trust online platforms, it will increase healthy competition while leading to increased consumer choice.[450] This is the intent of the P2B Regulation while it aims to increase trust toward platforms.

[444] See Case 6/72 Europenballage and Continental Can v Commission (1973), paragraphs 20-26.
[445] Whish – Bailey 2015, p. 20.
[446] Consumer protection is provided through other means, such as the Enforcement and Modernisation Directive (2019/2161) that provides a range of new protections for consumers and amends the Directive on unfair commercial practices (Directive 2005/29/EC), the Directive on consumer rights (Directive 2011/83/EU), and the Directive on Consumer Price Indications (Directive 93/13/EEC). Kimberley – Sciberras Debono – Vella 2020.
[447] For example, France established new transparency and responsibility obligations on online platforms. See French Government: The Digital Bill 2016.
[448] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 3.
[449] Crémer Report 2019, p. 19.
[450] Kimberley – Sciberras Debono – Vella 2020. See also Ezrachi, EU Competition Law Goals and The Digital Economy 2018, pp. 4-7.

EU competition rules have a moral norm embodied in them, which is the concept of fairness.[451] Fairness has the scope needed to adjust in new situations as well as the capability to remain relevant and effective.[452] EU competition ensures the protection of competitors and consumers[453] and the aim is to protect competition by enhancing consumer welfare and ensuring an efficient allocation of resources.[454] Competition regimes also protect the structure of the market and competition as such.[455] In the digital markets, consumer welfare and well-being play a central role.[456] In addition, the concept of fairness aligns with the interpretation of consumer welfare and efficiency benchmarks.[457] However, fairness should not be confused with the protection of competitors.[458] The dynamic of competition may drive less efficient undertakings out of the market. Fair competition creates more trust in markets, define the legitimate aims of market participants and increases competition. Fair competition also benefits the companies and consumers as it leads to a wide variety of high quality, innovative products and services at a low cost. It is necessary for companies to compete on their own merits.[459]

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[451] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 12.
[452] BEUC: The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era 2019, pp.11-12 and 14.
[453] Mäihäniemi 2020, p. 281. Moreover, avoiding the distortion of competition in the internal market is done by increasing the well-being of consumers. European competition law can help addressing many market failures with a valuable and flexible perspective. All of the competition regimes worldwide have a mission to advance consumer welfare, however, the scope of protection and approach to distribution of wealth and fairness may vary. See BEUC: The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era 2019, pp.11-12 and 14.
[454] As noted by the General Court: *"[T]he ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers… Competition law and competition policy… have an undeniable impact on the specific economic interests of final customers who purchase goods or services"*. Joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission 7.6.2006, paragraph 115.
[455] Case C-501/06 P GlaxoSmithKline Services Unlimited v Commission and Others (2009), paragraph 63. See also Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings 2009, paragraphs 1, 5-7; and Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 3.
[456] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, pp. 6-7. See also Ezrachi, EU Competition Law Goals and The Digital Economy 2018, p. 2.
[457] COM(2016) 393 final and Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 12.
[458] Fairness typically protects those harmed by monopolies, mainly consumers, but also competitors. Therefore, consumer welfare should be a valid antitrust standard, even in digital markets. However, Article 102 TFEU does not require that an investigation include the effects of the possible foreclosure on the overall efficiency and consumer welfare. Mäihäniemi 2020, p. 281. See also COM(2016) 393 final and Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 12.
[459] COM(2016) 393 final and Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 12.

While competition rules and consumer welfare cross their paths, it is important to acknowledge competition law's primary goal to increase consumers' well-being. It is essential to ensure that competition is not distorted in the internal market. While from an economy perspective consumer welfare is measured in monetary terms, from a competition law perspective it is measured by the concept that extends to fairness, plurality, democratic values and freedom. Consumer welfare is important in competition law because it protects consumers from anticompetitive practices that affect consumers in price increases, and it ensures the conditions for innovation that result in a higher quality of products and remarkable benefits for the society.[460]

Traditional antitrust enforcement endorses consumer welfare and prevents consumer harm that is happening through price-fixing, market sharing and output restrictions.[461] The problem arises when new innovations come along in competition law enforcement. The enforcers might not have enough knowledge on these issues. It is also uncertain whether the information on the new products is efficient enough.[462] This leads to the fact that the enforcement needs to take risks because they are facing something new and unknown.

Competition law enforcement has had a track record on having effective and beneficial tools for hindering anticompetitive behaviour and promoting consumer welfare. Before having to include innovation in the assessment of anticompetitive conduct, competition law enforcement only needed to consider whether a type of conduct presented a clear or potential impact on prices and output. The downside to when regulators are trying to find ways of enforcement for tackling, for example, unilateral conduct by dominant players is the lack of information and experience enforcers have on these markets. This can lead to over-enforcement that, consequently, may prevent competitive conduct and result in being disadvantageous for the consumers. Therefore, a more cautious approach could be

[460] Reyna 2019, pp.1-2. Competition law and competition law enforcement play an important role in consumer welfare. They have a purpose of maximising consumer welfare by the guarantee of free functioning markets. Businesses need to be able to compete freely and on the consumer side, the market needs to offer a selection of a variety of goods and services. In order to have functioning markets, the businesses need to be efficient and produce goods and services in qualities that satisfy the needs of different consumer types as well as offer price ranges that meet the demands set by the consumer. Marcos 2018, p. 33.
[461] On a broader term, competition law is focusing on enforcing to preserve market competition to increase surplus. Competition law enforcement is focusing on keeping product prices low, guaranteeing choice among competing products, enhancing product quality and increasing output. Marcos 2018, p. 35.
[462] Marcos 2018, p. 38.

considered better. Remedies could work better if imposed only when negative effects in the market are ascertained.[463]

The digital economy is a messenger of innovation, efficiencies and consumer welfare. Future prosperity requires the revolution of business models, services and communications relevant in competition law and consumer welfare to continue. While the economic landscape is changing, and the digital economy is growing rapidly, they pose competition enforcement challenges. These challenges can be described as practical level and policy level challenges that the enforcers must confront. The first one refers to the difficulties of conducting assessments in a dynamic environment and changing economic landscape. These are the nature of competitive pressures, markets' ability to self-correct, likely harm, efficiencies, and disruptive innovation. The second one refers to the challenges that new market realities and business strategies bring to the table. It is a question of whether competition law is used in its most optimal way. The question here is more about the normative scope of competition enforcement and, more specifically, whether the ways of the digital economy is interacting with consumers, and whether accumulating data and using big data analytics is a competition problem.[464]

The close relationship between consumer protection and competition usually becomes concrete when dominant platforms abuse their positions. This usually results in the disadvantage of the consumer.[465] However, it is good to keep in mind that in the platform economy, the market power is not about prices; thus, consumer harms may occur in different ways.[466] For example, if search engines use behavioural discrimination, it may end up in consumers paying higher prices in markets that seem competitive.[467] However, search platforms can support market transparency and reduce the capacity for price discrimination and safeguard consumer welfare. In order to get full benefits from search engines, they need to have low switching costs and have the incentive to search. These platforms have the capability to create a transparent market environment and support a competitive dynamic.[468]

[463] Marcos 2018, p. 49.
[464] Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, p. 2.
[465] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 25.
[466] Wasastjerna 2019, p. 15.
[467] Ezrachi – Stucke 2016, p. 117.
[468] Ezrachi – Stucke 2016, pp. 131-132.

In conclusion, consumer welfare is important to take into consideration in competition law. Digital platforms are new in the competitive markets, so due to this new landscape, there are also some aspects that are not working properly in the digital markets.[469] Even though there is no doubt that large tech companies have brought services to consumers that benefit them[470], without healthy and competitive markets, consumers will gain some disadvantages. These are situations where consumers do not get the best choices in goods, or the most innovative products and services.[471] However, digitalisation affects consumers' lives in different ways. It has also brought along a lot of positive things, such as an increase in consumer choice and better availability of new products and services. In order to fully benefit from the positive effects, consumers need access to digital platforms and the possibility to use their services.[472]

5.2.2 Competitive Markets to Promote Consumer Welfare

Economists recognise the importance of information in the promotion of competitive markets which promotes consumer welfare.[473] Indeed, information flow is one of the conditions of perfect competition when consumers benefit from lower prices, wider choice and better quality. Market transparency is also a relevant factor, for example, in helping consumers and buyers reduce search costs.[474] Even though it is important and beneficial to maintain the market competitive, consumer interests should not be forgotten. For example, consumers should be granted the freedom of choice, fair contractual terms and sufficient information. Competition and consumer protection usually go hand in hand

[469] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 1.
[470] Benefits brought to consumers in the market can be expressed in three dimensions that are value for money, product variety or consumer choice, and innovativeness. It is under discussion that if the competition policy should consider societal goals. Mäihäniemi 2020, p. 281.
[471] BEUC Contribution to the Roadmaps: Digital Services Act (Ex-Ante Rules) and New Competition Tool 2020, p. 1.
[472] Björkroth – Järvelä – Raijas – Rosendahl – Saastamoinen – Vuorinen 2017, p. 24.
[473] Economics look at the concept of 'consumer welfare' in terms of the difference between consumers' willingness to pay a certain amount to the amount they have actually paid. However, the legal term for consumer welfare is rather different. It is defined by the EU Treaties, legal instruments and the objectives of competition law. See Reyna 2019, pp.1-2. Essentially, consumer welfare means productive and allocative efficiencies, see Podszun 2015, p. 107.
[474] Ezrachi – Stucke 2016, p. 4.

and are closely related because markets benefit if the consumer interests have been taken into consideration, and the competition in markets is functioning.[475]

As noted, in order to protect consumer welfare, competitive markets are essential.[476] Market concentration in the platform economy threatens diversity and innovation on the internet. Dominant platforms can be seen as gatekeepers of information, choice and prices. They have the ability to restrict consumer choice. Additionally, search engines can define the information consumers receive. The gatekeeper role allows influence on the consumer by way of a strategical placing of information. This will build an illusion of information on consumers' screens based on what they think is best for them. The most problematic issue here is that this placement is done by algorithms that only want to maximise consumer data value for advertising purposes.

An example is Google's conduct on exercising control through its search engine when downranking the results of its competitors in Google Search with its algorithms or even excluding competitors from the results shown to consumers. This decreases consumers' and businesses' options without them even realising.[477] Digitalisation continues to bring new opportunities for consumers, but it also brings new forms of algorithmic manipulation, gatekeeping and exploitative practices, abuse, and market power accumulation. These can reduce choice and innovation and threaten the healthy development of markets, and the well-being of consumers and the whole society.[478]

In addition, network effects may cause restraints in consumer choice, especially if the consumer is locked in. To be locked in means that direct network effects cause difficulties to switch to a competing platform when inter-platform operability is non-existent.[479]

[475] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 21.
[476] Competition is an interaction between rivals and among rivals and the consumer. Market can be seen as well-functioning when the consumers can be active and exercise their choice. Active consumer choice leads to pressure on businesses to improve their products and this way increase innovation in the market. The most successful firm would be the one producing product that best fit for the purposes and values of consumers. Marsden 2014, pp. 667-668.
[477] BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, pp. 17-19. See also Marsden 2014, p. 668.
[478] Marsden 2014, p. 668.
[479] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 25.

Platforms can reduce information asymmetries caused by their gatekeeper role.[480] Information asymmetries can be avoided when buyers and sellers are brought together and are offered full transparency on prices and the products' quality. Transparency in quality can be reached through reviews submitted by users.[481] In this regard, it is worth mentioning that the information provided by the platform is not always done in the best interest of the consumer. When the information is usually enclosed on the T&Cs, the outcome usually is that the end-users accept these without reading. This kind of conduct easily gives the government the justification to intervene and protect consumer interests.[482]

Innovation nowadays plays an important role in the businesses' ability to keep up with competition and consequently to satisfy consumers' desires. For example, cheap quality products are not enough anymore because new, better quality products are constantly in higher demand by the consumers. Innovations bring new goods and technologies available as well as a better variety and quality in goods. Innovation promotes new business methods in more efficient ways. This can include, for example, contractual innovations that ease the relationships between businesses and their customers.[483] From a societal perspective, innovation also promotes consumers access to new products. Innovative requirements have meant for some businesses that they need to innovate constantly in order to survive and succeed, especially on the internet-based economy.[484] Although, it is important to bear in mind that innovation itself might not be as important as the quality of these innovations. Perhaps, it could be said that quality beats quantity in this case.

In the digital environment, the monetary price for products and services is often zero. However, quality is an important aspect of competition. If the quality of the services is getting worse, it will harm consumer welfare even without the price effects. Therefore, a price-centric approach fails to identify consumer harm in these conditions because it may

[480] When the platform is used by other platforms and the consumers do not have the same information on the quality and safety of the platform as the platform itself. See van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 25.
[481] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 25.
[482] van Eijk – Fahy – van Til – Nooren – Stokking – Gelevert 2015, p. 26.
[483] Marcos 2018, p. 34.
[484] Marcos 2018, p. 35.

produce a distorted picture of effects.[485] Price and quality appeal to consumers, and even though consumers share these views, it is often required to provide customized products to please everyone's personal needs. Consumers exercising choice drives competition and produces efficient markets. In practice, exercising consumer choice is the operation by consumers to identify and compare competing products or offers. Naturally, the result is a selection of a product, and this selecting is based on the consumer's values.[486]

In the online search markets, consumer experience and digital services may be affected by a decrease in quality when a company gives prominence to its own services and manipulates and demotes the search results of rival firms.[487] This kind of conduct leads to less choice and less innovation. The choice is affected by an undertaking that offers vertically integrated services and favours its own services. This way, the undertaking excludes competitors from the markets and prevents access to more choice for consumers. Innovation is under threat when rivals are prevented from competing on their merits and innovating. Consequently, new products are not released in the markets, and consumers cannot buy more innovative products.[488]

5.3 Behavioural Economics

To understand how competition law, consumer choice and economics can be tied together, approach from the perspective of behavioural economics is useful. Its application to law led to behavioural law and economics that provides an economic analysis of law. The analysis is based on a more precise picture of human decision-making with empirical behavioural findings. The application of behavioural law and economics to the field of competition law is called behavioural antitrust.[489]

[485] BEUC: The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era 2019, pp. 16-17 and Ezrachi, BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy 2018, pp. 6-7.
[486] Marsden 2014, p. 667.
[487] Case AT.39740 Google Search (Shopping) paragraph 324: *"Google could alter the quality of its general search service to a certain degree without running the risk that a substantial fraction of its users would switch to alternative general search engines"*.
[488] BEUC: Shaping Competition Policy in the Era of Digitalisation Response to Public Consultation 2018, p. 5.
[489] Heinemann 2015, pp. 213-214.

In the platform market, a new concern relates to the dissemination of information to influence users' behaviour. Misleading information or misrepresented facts have unwanted societal impacts.[490] Algorithms effect on people's everyday life as they use technology to search for information, to learn or to socialise. Algorithms are based on complex processes, and they influence how consumers make choices, have ideas and face opportunities. However, consumers should be informed more about how they work and what factors are used on their performativity.[491] Algorithms can be seen as a way to distort our perception. Therefore, and as already mentioned, platforms should be more transparent about their technological mechanisms.[492]

As in competition law, the objective of consumer law is to protect consumer choice and free choice. However, one of the differences between competition law and consumer law is the distinction between individual consumer and consumers' in the economy. On the one hand, both aim at the promotion of welfare, but competition law has clearly a more economic perspective. It aims to aggregate consumers' welfare in the economy. On the other hand, consumer law is designed to protect the welfare of the individual consumer.[493] The second difference between competition law and consumer law is sanctioning. Competition law sanctions anticompetitive behaviour indirectly negatively impacts on the final consumers' welfare while consumer law sanctions unfair contractual terms that potentially harm consumers' free choice. Such contractual terms can mislead consumers which has a direct impact on the final consumers' welfare.[494] The third difference is the scope of application. While competition law covers B2B relationships, consumer law does not. Consumer law policy covers the contractual relationship between undertakings and final consumers.[495] EU consumer law relies on that consumers are *"reasonably well-informed and reasonably observant and circumspect"*.[496]

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[490] For example, this kind of conduct can influence the outcome of elections or societal debates. Users are 'hooked' by a certain tool that give preference to content that triggers feelings such as anger and fear, for example with 'fake news' which stimulate such feelings. BEUC: Ensuring Consumer Protection in the Platform Economy Position paper 2018, p. 23.
[491] Rieder – Matamoros-Fernández – Coromina 2018, p. 51.
[492] With the alleged role of 'fake news' in the 2016 US presidential elections, this issue has raised more debate and its scope has intensified and broadened. See for example, Farhall – Wright – Carson – Gibbons – Lukamto 2019.
[493] See Botta – Wiedemann 2019, p. 435.
[494] Albors-Llorens 2014, pp. 163 and 169.
[495] Botta – Wiedemann 2019, p. p.435. Regarding the concept of 'consumer' in European competition and consumer law, see Albors-Llorens 2014, pp. 168–69.
[496] Established case law since Case C-210/96 Gut Springenheide and Tusky v. Oberkreisdirektor des Kreises Steinfurt (1998), paragraph 31.

The homo economicus, the model used in economics to predict human behaviour, can be described as a perfect human being who always acts rationally, can process all the information presented, and is not distracted by external effects. Homo economicus focuses on making the right decision from an economic point of view. However, in real life human beings are not rational, and they are not capable of processing all the information. Also, if confronted with too much information, decisions are not of desirable quality. From the perspective of behavioural economics, the consumer looks a lot weaker and more vulnerable to influences than the classical consumer model. This may lead to an impression that consumers need to be protected on a higher standard. However, the decision of whether to intervene by law or not must be made through a proper legal evaluation process, and all arguments need to be considered. [497]

In economics, prospect theory is based on a scenario where a loss is given stronger meaning than gaining the same amount of money. This impacts on consumer choice because many people will refrain from acting when the risk of loss is involved.[498] Another theory is truncated reasoning, where people do not consider all the relevant information. Opposite of this theory is overreaching reasoning where people take into consideration irrelevant information.[499] The last one of the theories is the impact of framing on decision-making. Default biases can be regarded as a form of framing. Default is normal for people, so they usually stick to the default. Thus, it has an impact on consumer choice.[500]

The case where EC accuses Microsoft of abusing its dominant position in 2009 by tying, is a good example of behavioural aspects. Microsoft committed to offering users the choice of downloading the browser they wanted in addition to, or instead of, the Internet Explorer.[501] This approach allowed users to make an active choice and autonomy of consumers were strengthened. This kind of conduct breaks the power of defaults and also minimises the impact of market dominance.[502]

[497] Böhler 2015, pp. 34-35.
[498] Heinemann 2015, p. 215.
[499] Heinemann 2015, pp. 216-217.
[500] Heinemann 2015, p. 217.
[501] Case COMP/C-3/39.530 Microsoft (tying) (2009). Microsoft was fined for non-compliance with its browser choice commitments, see Case AT.39530 Microsoft (Tying) (2013).
[502] See Heinemann 2015.

It is important not to create a counter-productive 'choice overload'. For example, in the Google case, Google committed to displaying three rival services whenever it displays its own specialised search services. The restriction to three competitors helped to avoid information overload on consumers. It could be concluded that behavioural economics enhances competition law remedies.[503] It can also be said that behavioural antitrust intends to provide a better base for the application of competition law. The remedy in this case was based on behavioural arguments. It had an influence on promoting active choice and autonomy.[504] As proved by behavioural economics, it is possible that if consumers are offered too much choice, they may end up choosing nothing. If focused too much on the increase of choice, the result may not be what was originally intended. When aiming to protect competition, it is important to know how consumers make choices and not to focus on the choice itself.[505]

In the Google Search case, the EC also analysed the influence of the position and display of search results on user behaviour. It concluded that users have a tendency to click more on the links that are more visible on the search results page.[506] Accordingly, the ranking in Google Search has an influence on the click-through rates of search results, and the more favourable and prominently positioned results are, the more traffic it gets.[507] The traffic in Google's general search results pages play a significant role in the overall traffic amounted to different services. Even though there are some alternatives available to competing comparison shopping services, they are not effective enough to replace the traffic from Google's results pages.[508]

For example, Google's recent changes in displaying its own shopping services and rival Comparison Shopping Sites (CSS) seems compliant with the prohibition decision. However, the changes made may not be as compliant as it seems. An effective remedy from a consumer point of view is when consumers have wider access to choosing CSS, merchants and better deals. Consumers need easy access to alternative CSSs, and still, CSS's visibility to consumers is almost non-existent. Consumers click more likely on

[503] Heinemann 2015, pp. 229-230.
[504] Heinemann 2015, p. 237.
[505] Marsden 2014, p. 668.
[506] Case AT.39740 Google Search (Shopping) paragraphs 341-348 and 589-636.
[507] Case AT.39740 Google Search (Shopping) paragraphs 540-548.
[508] Case AT.39740 Google Search (Shopping) paragraphs 454-461.

merchant site than on the link referring to the CSS, and by directing consumers like this, Google preserves the advantage of consumer activity on its own platform and prohibits users from accessing rival websites. By this conduct, CSS becomes less relevant, consumers cannot benefit from innovative CSS, and the conduct creates an artificial race between large retailers who want a prominent placement on Google's own CSS. Diversity of different models for comparison tools allows consumers to access information from different sources and make an informed purchasing decision. Google's conduct threatens this because it is pushing rival CSS and their models out of the market. A competitive market for CSS needs competition between merchants. This benefits consumers because, in order to reach more customers, merchants invest in product display via CSS to attract consumers with promotions and lower prices. However, merchants need a guarantee to get visibility among consumers to their products, but this is not possible if CSS does not have any traffic.[509]

Therefore, even behavioural economics might be needed when regulating platforms in the digital markets and assessing their conduct as it can provide a better base for the application of competition law. When protecting competition, it is important to know how consumers make choices.

6 Conclusions

The purpose of this thesis has been to examine the current situation of digital platforms from the viewpoint of transparency and fairness. The answers to the research questions presented at the beginning of this thesis have been assessed from the perspective on how the platforms operate in the digital markets, how they are regulated and how the conduct of a dominant platform may affect consumers.

Digitalisation shapes the economy and society as a whole. As can be concluded from the Google Search case in the EU, a dominant platform has the power to prevent competition as well as harm consumers, investments and innovation through the conduct of ranking. Ranking harms consumers as they have the tendency to click more often on more visible

[509] Goyens, Monique, BEUC: Consumer Concerns with Google's Non-Compliant Remedy in Antitrust Shopping Case (AT.39740) 2019, pp. 1-2.

results. However, the type of conduct Google practised may not always be regarded as anticompetitive behaviour. Google's behaviour may be justified by Google's goal to innovate and offer a high-quality product, as it was concluded in the investigations in the US. This can lead to more differing interpretations of competition law in digital markets globally. New case law in the area of platforms and digital markets has significant importance on the application of competition law. It is important that the case law will not lead to the situation that any abuse of dominance is regarded as forbidden per se. For example, EU competition law should focus more on the assessment of whether the conduct of restricting access of users by means of anticompetitive input or customer foreclosure is, in fact, anticompetitive.

Digital platforms play a central role in societal and economic life. Platforms help consumers find information and businesses benefit from online markets. However, the conduct of ranking by search engines is proved to have an effect on consumer choice. Therefore, ranking systems should be predictable in order to avoid biases in search-related practices. In addition, it is important to make sure that online platforms do not discriminate other platforms and favour their own competing services. Consumers may be affected by a decrease in quality when a company gives prominence to its own services and manipulates and demotes the search results of rival firms. Consumers exercising choice is important as it drives competition and produces efficient markets.

Consumers need to be informed about the main parameters determining ranking and such information must be kept updated. This promotes transparency in the markets. The information is important, especially if the search results' position is based on a payment, as the consumers may falsely think that the offers are based on the value and relevance. However, if the transparency requirements set out for the digital platforms go too far, too much information might be revealed. Consequently, this information could be used in manipulation purposes which, in turn, could lead to consumer harm. Furthermore, ranking biases, ordering search suggestions, and search engine manipulation may distort users' knowledge of the market for goods and services. However, it cannot be concluded that platforms have only negative effects on consumers. Platforms enhance competitive pressure on the seller side for consumer benefit. In addition, platforms can create a market mechanism where consumers and businesses are free to take decisions. This market mechanism can create efficiency and maximise social welfare.

In the digital economy, competition law tools are not as effective or even applicable in some situations. The written form of competition rules may not be applicable or adequate, and competition law enforcement has lacked effective ways of dealing with problems occurring in the digital markets. Measures of EU competition law that target harmful trading practices do not tackle B2B issues relations in the digital markets due to the specific nature of online business models and the role of algorithms. It is not trouble-free to apply traditional antitrust rules to the platform markets as dominant businesses are often able to set prices close to zero. Therefore, the P2B Regulation is aimed at unilateral potentially harmful trading practices that the Articles 101 and 102 of the TFEU do not necessarily cover.

Competition law and the P2B Regulation is meant to work well together, but it remains to be seen whether this is the case as there are no practical examples of this yet. However, this Regulation was necessary because competition law at EU or national level did not address all the types of issues or infringements in the platform economy. The P2B Regulation requires more transparent ranking from marketplaces and search engines and indirectly encourages consumers to trust the online platform economy. This will increase healthy competition and consumer choice. Therefore, even though the P2B Regulation is not regulating the platform-to-consumer transactions, it has an indirect impact on consumer welfare.

Article 5 of the P2B Regulation requires that the description of the main parameters determining ranking should give the business users an understanding of the possible implications of certain characteristics and the relevance of those characteristics for consumers. This supports the conclusion that the Regulation helps to bring indirect benefits for consumers as the ranking is more transparent than before. Article 7 of the P2B Regulation prevents differentiated treatment by providers of online intermediation services and search engines. Preferencing own products or services over competing business users undermines fair competition and limits consumer choice. Therefore, Article 7 requires that any differentiated treatment given should be clearly described. This increases transparency and fairness between businesses and increases consumer choice as they are aware of the possible differentiated treatment given.

The P2B Regulation creates trust in the markets and predictability to the business environment online. It also allows more targeted and proportionate intervention against platforms even when the platforms are not considered dominant under competition law. However, intervention by this Regulation may not ensure the same level of flexibility and adaptability as competition law enforcement offers. A detailed list of obligations and prohibitions may not be the right way to go as the same type of conduct can have both pro and anticompetitive effects. Digital markets evolve quickly, which may lead to a situation that the Regulation becomes outdated quickly. In addition, any lack of clarity in the Regulation may even reduce trust from companies and hinder incentives to invest and innovate. However, the P2B Regulation supplements existing competition law and consumer policies, while it stays neutral to the application of these rules. The Regulation enhances transparency in P2B relations and prevents common unfair practices. EU competition law still remains the main tool for tackling UTPs.

Digital monopolies influence consumer choice, as well as rivals' and their own incentives to invest and innovate. Platforms can have a fundamental impact on the way our societies work, and they can censor information and set rules to govern entire markets. In addition, algorithms can be seen as a way to distort consumers' perception, which is why platforms should be more transparent about their technological mechanisms. Therefore, it is crucial to find proper ways to keep the platforms' power under control without going too far. While increasing transparency and predictability in the platform economy, it is important to keep legal certainty, consumer trust and growth opportunities for businesses as priorities to ensure. Obligations of transparency help to understand how the markets function, identify possible P2B unfair practices and ensure consumer protection. However, a counter argument can be presented that the requirement of equal treatment does not acknowledge the fact that many users prefer to see Google's results and that Google's competitors could actually receive free promotion of their services.

While competition law covers B2B relationships, consumer law does not. Therefore, competition law and the complementary P2B Regulation is needed to ensure consumer welfare indirectly by providing a fairer and more transparent marketplace. However, a deep understanding of the characteristics of the current digital markets is always needed before enacting additional regulation. Also, the objective of preventing the fragmentation of the internal market by a single regulatory environment is important. In addition, it is

important to continue monitoring the development of the digital market as it is subject to rapid and unpredictable innovation. Due to unpredictable innovation, enforcement sometimes needs to take risks as they face something unknown. Still enforcement needs to be cautious as there exists the risk of over-enforcement which might prevent competitive types of conduct and result in the disadvantage for the consumers.

In conclusion, the P2B Regulation has helped improve transparency and fairness in the P2B relationships, which indirectly improves consumer welfare. Also, consumer choice is better as consumers are more informed about ranking, and, therefore, consumers have gained a better understanding of how the platforms operate. However, as noted, the P2B Regulation is complementary, and competition law still holds the position as the primary legislative tool in the digital economy. Competition law has always needed to keep up with the changes, and it is trying to do the same now in the digital markets. Whether competition law can stay unchanged, remains to be seen.