The Interdisciplinary Centre for Competition Law and Policy (ICC)

Queen Mary
University of London

GLOBAL ANTITRUST REVIEW

ISSUE 9, 2016

ICC Global Antitrust Review

A Publication Of The Interdisciplinary Centre For Competition Law And Policy (ICC)

Editors Dr Eda Sahin (e.sahin@qmul.ac.uk)

Anja Naumann (a.s.m.naumann@qmul.ac.uk)

All inquiries to:
Global Antitrust Review (GAR)
Interdisciplinary Centre for Competition Law and Policy (ICC)
67-69 Lincoln's Inn Fields London
WC2A 3JB United Kingdom
Tel: + 44 (0)207 882 8122
Fax: + 44 (0)207 882 8223
Email: gar-icc@qmul.ac.uk
www.icc.qmul.ac.uk

Prospective contributors should consult the 'Guidelines for Authors' before submitting their articles.

© Individual contributors and the ICC, 2016

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form, or by any means, electronic, mechanical photocopying, recording, or otherwise, without the prior permission of the ICC.

ICC GLOBAL ANTITRUST REVIEW

ISSUE 9, 2016

ICC GLOBAL ANTITRUST REVIEW

ISSUE 9, 2016

EDITORIAL BOARD'S MESSAGE **5**

ARTICLES

Title	Author	Page
The Interface between Companies' Fundamental Rights and Competition Law Enforcement in the EU: Past, Present and Future	**I-JU CHEN**	**7**
Tie- In Agreements: How The C.C.I. Got It All Wrong?	**RAVI GANGAL & DEESHA DALMIA**	**42**
The Sharing Economy: Regulation and the EU Competition Law	**DENI VITKOVIC**	**78**

ESSAY

Title	Author	Page
Dominant Undertakings in the Digital Era: A Call for Evolution of the Competition Policy Towards Article 102 TFEU	**EVELIN HLINA**	**119**

EDITORIAL BOARD'S MESSAGE

In line with the GAR's commitment to provide a forum for academic debate on matters of international competition law and policy, the 2016 volume consists of contributions discussing a diverse selection of prominent and controversial topics.

The first article regards the tension between competition law enforcement and the concerned companies' fundamental rights, particularly under the aspects of the right to fair trial and the right to be heard. The article analyses the case law before the EU Courts and the European Court of Human rights and offers an evaluation of the need for changes. It argues that the enforcement system should prevail over the fundamental rights protection. The second article considers the Indian Competition Commission's approach to tie-in agreements as abuse of dominance and as vertical restraint. The article undertakes a comparison of the matter in the Indian, US and EU competition laws, drawing on US competition law regarding the history of tying arrangements and EU competition law regarding the possibility of justification under Art. 102 TFEU. Lastly, the article offers an evaluation of two decisions regarding tie-ins by the Indian Competition Commission, ultimately advocating the adoption of an effects-based approach similar to Art. 102 TFEU by the Indian Competition Commission. The third article in this volume deals with aspects of the sharing economy. Highlighting the way in which the sharing economy changes the way of doing business, the article considers whether government intervention or self-regulation is the better means to regulate the sector while recognizing and promoting the characteristics of the sharing economy. It advocates regulating in a way that ultimately puts the consumers' interests at the heart of the regulation. The author also gives an overview of EU competition law concerns arising with regard to the sharing economy, putting special emphasis on the scrutiny of issues emerging in the context of dominant position and mergers.

The volume concludes with an insightful essay dealing with questions surrounding dominance in digital markets. After giving an overview of the characteristics of digital markets and of the discussion regarding dominance in these markets the essay scrutinizes whether an improvement of the EU's rules on abuse of dominance or whether the adaption of competition policy is

more adequate to deal with the arising challenges, concluding that the advancement of competition policy towards Art. 102 TFEU is most suited to protect competition while taking into account the characteristics of digital markets.

As always, we would like to especially thank Prof. Eyad Maher Dabbah, the director of the ICC, for his guidance and endless support in our efforts.

We hope you will enjoy this volume, and we already look forward to receiving excellent contributions from all interested young scholars for the next one.

The GAR Editorial Board
December 2016

THE INTERFACE BETWEEN COMPANIES' FUNDAMENTAL RIGHTS AND COMPETITION LAW ENFORCEMENT IN THE EU: PAST, PRESENT AND FUTURE

I-Ju Chen[*]

Since the EU is bound by the EU Charter of fundamental rights due to the amended Treaty of the European Union, the critical points of companies' fundamental rights in competition proceeding has generated a large number of legal debates. This article evaluates whether changes to the current competition enforcement are necessary as to comply with EU fundamental rights standards. This article discusses the paradox between the EU competition enforcement and companies' fundamental rights protection. In author's view, the EU should comply with EU fundamental rights law, particularly due to the Charter's binding effects on the EU. The case law concerning EU competition law has reflected compliance with the European Convention on Human Rights. Nevertheless, the effective competition enforcement is still necessary for an undistorted market and will ultimately maintain a well-functioning market. This brings a result to consumer welfare, which is another kind of protection of fundamental rights.

I. Introduction

Fundamental rights' compliance of public enforcement in European Union (EU) competition law is a particularly complicated issue.[1] Competition public enforcement in the EU may considerably affect the protection of suspected companies' fundamental rights, and reasons underlying include that the European Commission (Commission) holds investigation and first-instance decision-making powers to sanction penalties to companies' illegal antitrust infringements. Procedural rules dictating the competition enforcement by the

---

[*] I-Ju Chen obtains LL.B. (Taiwan) and LL.M. (Taiwan and UCL Laws) and is a PhD candidate in law at the University of Birmingham in the UK. She had worked as a paralegal in a multinational company in Taiwan before studying in the UK.

[1] Arianna Andreangeli, 'Competition Law and the Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights: Back to Square One?' (2015) Journal of European Competition Law and Practice Advance Access 1.

Commission are in Regulation 1/2003 and Regulation 773/2004, together with abundant notices or guidelines, such as: Guidelines on setting fines and the Leniency Notice.[2] Among all these norms, Regulation 1/2003 plays a key role in providing various kinds of powers that the Commission carries. Pursuant to this Regulation, for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibit cartels and the abuse of a dominant market position respectively, the Commission holds the power to deal with the antitrust cases in the EU.

Articles 17 to 21 of Regulation 1/2003 stipulate the Commission's investigation powers. These provisions regulate the power of the Commission's request for information that is necessary for determining antitrust cases,[3] and the Commission may also interrogate natural or legal person as to collect the information.[4] Moreover, the Commission is able to exercise its powers of inspection by means of entering and sealing any premises according to the Regulation. On the condition that undertakings are found to be illegal after the Commission's inspection, they might face fines as penalties. Due to this, the Commission's investigative, prosecutorial and adjudicative powers which are highly related to companies' legal and financial status, such as the interest of property and the freedom to conduct commercial activities. Thus, they may violate companies' fundamental rights, which are fundamental values of the EU.

While the Commission makes decisions on higher fines, the situation becomes that it is not judges but administrative body decides to impose fines.[5] Consequently, because this kind of sanction has the deterrent and punitive effects, the competition proceedings are an administrative process, yet they contain criminal charges. Accordingly, since Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing […] by

---

[2] Wouter Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Fundamental Rights' (2010) 33(1) World Competition 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492736> accessed 23 September 2016.
[3] Articles 17 and 18 Regulation 1/2003.
[4] Articles 19, 20 and 21 Regulation 1/2003.
[5] Denis Waelbroeck, 'The Development of a New "Settlement Culture" in Competition Cases- What is Left to the Courts?' in Charles Gheur and Nicolas Petit (eds) *Alternative Enforcement Techniques in EC Competition Law* (Bruylant 2009) 256.

an independent and impartial tribunal", the standard under Article 6 of the ECHR becomes the judicial remedy for antitrust defendants.

Having regard to the tension between the competition enforcement and companies' fundamental rights, the crucial issue is to what extent the suspected companies' fundamental rights are respected by the Commission in its investigation processes and whether the Commission's implementation is consistent with the fundamental rights within the EU legal order. This critical issue has arisen from two developments in the EU. First of all, one must consider the increased importance of fundamental rights protection after the implementation of the Treaty of Lisbon: the Charter of Fundamental Rights of the European Union (EUCFR) became legally binding on the EU, when the Treaty of Lisbon entered into force in 2009.[6] Although the EU is not yet bound by the ECHR, both the Convention and the Charter are instruments that establish the fundamental rights legal order, because of Article 52(3) of the EUCFR.[7] Accordingly, since Article 6 of the ECHR corresponds to Article 47 of the EUCFR, the right to a fair trial and effective judicial remedy provided by Article 6 of the ECHR is applicable in the EU. Moreover, recital 37 in Regulation 1/2003 implies that this Regulation has to be applied with respect to those principles and rights stated in the EUCFR. Therefore, it could be concluded that the Commission's competition enforcement must be compliant with the Convention and the Charter.

Secondly, pursuant to Article 23(2) Regulation 1/2003, the Commission carries the discretionary power to impose fines on undertakings and associations of undertakings. As a consequence, there are increased sanctions imposed on companies, when the Commission deals with antitrust cases relating to Articles 101 and 102 of the TFEU. Looking at the Commission's statistics, the total amount of fines imposed on illegal cartels between 2000 and 2014 has increased approximately three-fold to 8.7 billion euros.[8] The

---

[6] David Anderson and Cian Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law After Lisbon* (OUP 2012) 161.

[7] The provision stipulates: "…this Charter contains rights which correspond to rights guaranteed by the ECHR […]".

[8] DG Competition, 'Cartel Statistics' <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 23 September 2016.

fines of the truck producers case[9] levied for infringing Article 101 of the TFEU appears to be the highest individual monetary sanction.

The requirements of fundamental rights protection in competition proceedings include the right to a fair trial and a fair administrative process stated in Articles 41 and 47 of the EUCFR.[10] The procedural rights standards guaranteed by Article 6 of the ECHR focus on a person's civil rights or defence of criminal charge against him by way of a fair and public hearing within a reasonable time by an independent and impartial tribunal. In the case law of the Court of Justice in the European Union (CJEU) concerning the competition enforcement, the CJEU upheld the essence of fundamental rights protection in, for example, the *Alrosa* judgment,[11] which affirmed that companies' fundamental rights should be heard during the commitment proceeding. In addition to that case, there are increased cases demonstrating the tension between the fundamental rights of companies and the Commission's enforcement procedure, such as the *KME*[12]and the *Chalkor* cases.[13] These cases imply that the Commission's decisions on fines fall within the control of a judicial body, which has the full jurisdiction. Accordingly, there is compliance with a fair trial required by Article 6 of the ECHR.

This article aims to analyse the case law concerning the companies' fundamental rights in EU competition law before the EU Courts and the European Court of Human Rights (ECtHR) from two essential aspects: the right to a fair trial from the General Court (GC) when reviewing the Commission's decisions on fines, as well as the companies' rights to be heard. Subsequently, this work will evaluate whether changes to the current competition enforcement are necessary, in order to comply with fundamental rights standards in the EU. Section II explores the background of the EU fundamental rights protection scheme, i.e. the ECHR and the EUCFR, followed by the necessity of companies' fundamental rights protection

---

[9] European Commission, 'Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel' (*Press release*, 19 July 2016) <http://europa.eu/rapid/press-release_IP-16-2582_en.htm> accessed 23 September 2016.

[10] Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 360.

[11] C-441/07 P *Commission v Alrosa* para88

[12] C-389/10 P *KME Germany AG & Others v Commission*.

[13] C-386/10 P, *Chalkor v Commission*.

brought by the discussion of the EU's accession to the ECHR. Section III depicts the critical points by means of case law from the fairness of rights to a fair trial and a fair hearing, and Section IV will declare that current enforcement system may be compatible with effective fundamental rights protection.[14] This article, however, discusses a balance between the effective EU competition enforcement and companies' fundamental rights protection.

II. EU Law and Companies' Fundamental Rights Protection

1. Fundamental Rights Protection after the Treaty of Lisbon

The development of embedding of fundamental rights norms in EU law is prosperous after the Treaty of Lisbon.[15] The position before the Treaty of Lisbon was that the EU should respect fundamental rights as enshrined by the ECHR, and as they were derived from the constitutional traditions common to the Member States as EU law foundational general principles, pursuant to Article 6(2) of the TEU.[16] To a further extent, the EU Courts must take into account the case law of the ECtHR according to Article 6(3) of the TEU. In this regard, EU fundamental rights norms develop to a greater extent acquiring a positive function, alongside their more disciplinary and traditional role.[17]

Initially in *Stauder*, the CJEU stated that it had the competence to rule on the case of fundamental rights protection in the EU. This case indicated that the respect for fundamental rights is included in the general principles of EU law.[18] This ruling was subsequently upheld in the *Internationale Handelsgesellschaft* case, in which the CJEU declared that respect for fundamental rights constitutes a component of the general principles protected by the Court. In addition, the judgment emphasised the importance

[14] This protection scheme is guaranteed by Articles 41 and 47 of the EUCFR, which are afforded by Article 6(1) of the ECHR.
[15] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn OUP 2011) 364.
[16] Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66(1) Current Legal Problems 174.
[17] Ibid 177.
[18] Case 29/69 *Stauder* para 7.

of the protection, which was derived from the constitutional traditions of the Member States and must be guaranteed within the framework and objectives of the EU.[19] Furthermore, in the *Nold* case, the CJEU confirmed and added that international treaties for the protection of fundamental rights collaborated on or signed by the Member States should also be secured in EU law.[20] Finally, the importance of the ECHR is explicitly recognised in *Rutili*, and the judgment stated that the general fundamental principles of EU law could be found in the ECHR.[21] These CJEU's judgments concerning the respect for fundamental rights led to a debate on whether or not the EU should accede to the ECHR.[22] Later in 1994, the Council sought the opinion of the CJEU (then the ECJ) dealing with the accession of the EU (then the EC) to the ECHR.[23]

In Opinion 2/94, the CJEU confirmed the ECHR's particular position among international fundamental rights treaties. Yet it also indicated that the EU's accession to the ECHR was impossible, on the grounds that the EU had no competence to accede without amending the EU Treaty.[24]

With respect to the EU's pending accession to the ECHR, the issue concerning the relationship between EU law and the Convention has been continuously discussed and remains open. The prominent *Bosphorus*[25]case stated that the Member States, according to their obligations of EU law, may have a defence against the violation of fundamental rights, because the CJEU carries the identical system of protection as the ECtHR. This outcome could be interpreted as a consequence of the consolidation of the EU fundamental rights discourse achieved in past years and of the important role played by the

---

[19] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Für Getreide Und Futtermittel*, para 4.
[20] Case 4/73 *J Nold, Kohlen-und Baustoffgrosshandlung v Commission* para 13.
[21] Case 36/75 *Roland Rutili v The Minister for The Interior* para 32.
[22] See Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 Common Market Law Review 995; Tobias Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 Common Market Law Review 1025; Giorgio Gaja, 'Accession to the ECHR', in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds) *EU Law After Lisbon* (OUP 2012).
[23] Further comments on Opinion 2/94, see Giorgio Gaja, 'Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms', (1996) 33 Common Market Law Review 973.
[24] Opinion 2/94 paras 27 and 35.
[25] *Bosphorus Hava Yollan Turizm ve Ticaret Anonim Sirketi v Ireland*, No 45036.

ECtHR itself in setting up the principles applied in this context by the CJEU.[26] The most recent development arose from the Opinion 2/13, in which a draft accession agreement was submitted to the CJEU as to obtain an opinion pursuant to Article 218(11) of the TFEU.[27]

The draft agreement had envisaged arrangements that were made to address issues of the EU's inactive position before the ECtHR and the possible participation of the EU judiciary with respect to claims involving the EU and addressed before the ECtHR.[28] According to Advocate General Kokott's opinion regarding the Opinion 2/13, she supported the standing claimed by both of the Commission and the Council that such an accession is unlikely to have an impact on the competition enforcement of Articles 101 and 102 of the TFEU.[29] She particularly examined three issues. First of all, she reaffirmed that sanction scheme of a competition authority that is entitled to judicial review has been upheld by the ECtHR.[30] Secondly, the draft accession agreement does not contain rules against double jeopardy, since under the draft accession agreement, the EU was established to accede only to the ECHR and the first Protocol.[31] The third issue concerned the principle enshrined in Article 6 of the ECHR, which equally proves the principles of Article 41 and 47 of the EUCFR. AG Kokott addressed that the draft accession agreement would not necessitate institutional changes, irrespective of the breach of this principle by the Commission and the GC. To conclude, in AG Kokott's view, the draft accession agreement is compatible with the EU treaties with a certain number of safeguards.[32]

---

[26] Joseph Phelps, 'Reflections on Bosphorus and Human Rights in Europe' (2006) 81 Tulane Law Review 275-276.
[27] Opinion 2/13 re ECHR Accession EU:C:2014:2454.
[28] Arianna Andreangeli, EU Competition Enforcement and Compliance with Fundamental Rights' Standards: The Challenge and the Promise of Accession to the ECHR <https://www.competitionpolicyinternational.com/eu-competition-enforcement-and-compliance-with-fundamental-rights-standards-the-challenge-and-the-promise-of-accession-to-the-echreu-competition-enforcement-and-compliance-with-fundamental-rights-stan/> accessed 23 September 2016.
[29] Paras 146-156 in AG Kokott's Opinion re Opinion 2/13, 13 June 2014, EU:C:2014:2475.
[30] Menarini Diagnostics v Italy No 43509/09 [2011].
[31] See Article 4 of Protocol 7.
[32] Peter Oliver and Thomas Bombois, 'Competition and Fundamental Rights' (2015) Journal of European Competition Law and Practice 1-2.

2. The EU Charter of Fundamental Rights

Prior to the Treaty of Lisbon, the EUCFR was enacted according to the fundamental rights outlined in European and international agreements (for example the ECHR), and the Member States' national constitutions, which the CJEU drew upon when formulating the general principles of law and fundamental rights in EU law since the 1970s.[33]

The EUCFR has become legally binding because of the amended Article 6(1) of the TEU. The provision stipulates that the Charter, which establishes the political, social and economic rights of EU citizens, has equal legal value to the TEU and TFEU.[34] The EUCFR creates the obligation for the EU to provide full respect to enshrined fundamental rights. For example, the right to a fair hearing stipulated in Article 41 of the EUCFR as well as the right to a fair judicial review in Article 47 of the EUCFR. Due to this, the EU courts must resolve the question of whether or not the competition proceedings are compliant with the standard of Article 6(1) of the ECHR, incorporated in both Articles 41 and 47 of the EUCFR, with the reference to the ECtHR's case law. The EUCFR does not truly contain any definition of the criminal charge. However, due to the intensive relationship between the EUCFR and the ECHR, the clearest approach would be to use the definition of the term "criminal" outlined in the ECHR as the notion of this term in the EUCFR.[35]

3. Companies' Fundamental Rights Protection in the EU

This article will not extensively focus on companies' fundamental rights protection under the EU fundamental rights legal order. Instead, this article examines more specifically the EU competition law enforcement system and its compliance with Article 6(1) of the ECHR.

---

[33] Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham International Law Journal 1141-1142.
[34] David Anderson and Cian Murphy 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds) *EU Law After Lisbon* (OUP 2012) 161-162.
[35] Wouter Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) 77.

In *Niemitz*, the ECtHR has stated that, among the entire ECHR, Article 6 can apply to both natural and legal persons, such as companies.[36] The ECHR has recognised the business freedom, such as the right to receive and impart information, and the right to peaceful enjoyment of the property. This recognition demonstrates the importance of business freedom as a perspective of the democratic society on which the ECHR is established. In this context, there is a critical issue relating to the control of companies in the commercial field in which economic rights and freedoms are not unrestricted, thus giving rise to the complex legal system for regulating the commercial activities of private enterprises.[37] Consequently, because of the objectives of the ECHR, according to which companies are subject to seek protection of the right to a fair and impartial trial, the companies' fundamental rights should be put into understanding and implementation in the EU.

It is also clear that according to the ECHR's text, not every protection of the ECHR is equally applicable to legal entities.[38] There is indeed a distinction between companies' fundamental rights protection derived from its due process rights and the individual's human rights. This difference justifies a restriction on the companies' fundamental rights protection on the requirements concerning the scope and intensity of judicial review of competition enforcement decisions.[39]

Pursuant to scholars' observations, the ECHR becomes a legal instrument to protect 'everyone' from the arbitrary and excessive exercise of authorities' public power, and this implication illustrates a sound justification for the application of the ECHR to the advantage of private enterprises, in the relevant regulatory scheme.[40] The ECHR is indeed inherently applicable to companies (and more generally, legal entities) in a limited scope. In view of advocating that corporate fundamental rights exist in the ECHR, it has been argued that a number of rights have always and without discussion been

---

[36] *Niemitz v Germany* No 13710/88 [1993]
[37] Arianna Andreangeli *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008) 17.
[38] Ibid.
[39] Albert Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?' 12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156904> accessed 23 September 2016.
[40] Wolfgang Weiß, 'The EU Competition Policy as an International Human Rights Issue' in Jan Wetzel (eds) *The EU as a "Global Player" in Human Rights?* (Routledge, 2011) 174.

considered as applicable to legal entities, principally the right to the enjoyment of procedural rights guarantees in Article 6(1) of the ECHR.[41] Even having contested as such by some authors, Graells claimed that such maximalist position requires further review in light of the possible de facto configuration of the ECtHR as a third appellate instance in EU competition law.[42] In other words, if judicial reviews applied by both the GC and the CJEU are deemed insufficient, all EU competition law cases could be appealed before the ECtHR pursuant to Article 6(1) of the ECHR and possibly Article 13 of the ECHR as well.[43]

Overall, it would be predictable that the EU shall accede into the ECHR. Hence, the issue of companies' fundamental rights in the competition enforcement is reflected in recent developments in the case law. Section III will subsequently examine whether the competition enforcement system is compatible with Article 6 (1) of the ECHR, by means of case law before the EU Courts and the ECtHR.

III. EU Competition Law Enforcement and Companies' Fundamental Rights Protection

1. Overview of EU Competition Enforcement System

EU competition law provides a broad variety of institutional schemes for the public enforcement of Articles 101 and 102 of the TFEU at the levels of both the EU and the Member States.[44] The Commission has provided Guidelines outlining the methodology for setting the amount of fines.[45] Additionally, the Commission has published a Leniency Notice[46], where it has commitments to give immunity from fines or reduction of fines in cartel cases to companies that provide cooperation with the Commission in voluntarily offering

[41] Graells (n 39) 10.
[42] Ibid.
[43] Ibid.
[44] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (4th edn OUP, 2011) 1026.
[45] Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, [2006] OJ C 210/2.
[46] Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

intelligence and/or evidence of antitrust infringements, according to the criteria stated in the Notice.

Pursuant to Article 23(2) of Regulation 1/2003, the Commission is able to make a decision on imposing fines on undertakings, which breach Articles 101 and 102 of the TFEU either intentionally or negligently. Article 23(3) of Regulation 1/2003 stipulates that in deciding the amount of fines, it is necessary to have regard to the gravity and the duration of the antitrust infringement. Owing to the wide discretion power of the Commission in complex economic assessments and the consequent inability of an appellant to engage in the Court's discussion on the merits of its economic arguments, it appears somehow questionable to assume that an investigative undertaking can possibly give an effective remedy for the injustice caused after the Commission's final decision.[47] However, in accordance with Article 263 of the TFEU stipulating that the legality of acts of the Commission shall be amenable to judicial review, while the Commission's decision is binding on the suspected undertakings, the undertakings are able to request an annulment of the decision before the GC.

The Commission carries out a combination of investigative, prosecutorial and adjudicative functions and acts as 'police, prosecutor and judge'.[48] All of these powers have led to a legal dispute in relation to Article 6(1) of the ECHR. The Commission's discretion powers, particularly in imposing fines, may constitute the notion of a 'criminal charge' as defined in that provision, and then would violate company defendants' procedural rights protection in EU antitrust proceedings. Accordingly, since the Commission is not an 'independent and impartial tribunal' and the ECtHR acknowledges that the Commission's decisions are subject to subsequent judicial control by a court that has full jurisdiction and provides the guarantees of Article 6 of the ECHR.[49]

[47] Adrianna (n 37) 177.
[48] Ioannis Lianos and Arianna Andreangeli, 'Chapter 9: The European Union: The Competition Law System and the Union's Norms' in Eleanor Fox & Michael Trebilcock (eds) *The Design of Competition Law Institutions*, (OUP, 2012) 390.
[49] *Menarini Diagnostics v Italy* No 43509/09 [2011] paras 38-44 and 58-59.

2. Companies' Fundamental Rights to a Fair Trial

The nature of the competition proceeding has been broadly disputed. It is remarkable that this controversy was probed by the Opinion of the Commission on Human Rights in the *Stenuit* case.[50] The Opinion declared that fines imposed on undertakings by the administrative authority were criminal in nature, because of the nature and severity of the sanction.[51] Some studies at the 1990s had discussed the assessment of the nature and its compliance with the ECHR.[52] The debate explored the disputed competition proceedings in view of: firstly, how EU competition enforcement involving the imposition of a fine would relate to criminal charges within the broader autonomous concept in Article 6 of the ECHR, regardless of whether this proceeding is or is not categorised as criminal under EU law. Secondly, as the Commission is not an independent and impartial trial, its decisions are entitled to subsequent control by a judicial body that has full jurisdiction. The critical issue is therefore focused on whether the GC exercises full jurisdiction when reviewing the Commission's decisions.[53] In this section, this issue will be analysed based on these two streams delineated in the debate.

On the intention of the application of Article 6 of the ECHR, it is essential to understand whether or not the Commission's competition enforcement related to Articles 101 and 102 of the TFEU is criminal in nature. Although Article 23(5) of the Regulation 1/2003 indicates that decisions in which the Commission imposes fines on undertakings based on that regulation 'shall not be of a criminal law nature', this provision is not decisive in determining whether procedures pursuant to that regulation are of a criminal nature under the ECHR.

The ECtHR has developed the notion of a criminal charge as an autonomous concept that actually belongs to treaty law. Regarding the notion of 'criminal charge', the ECtHR implicated that the examination of a criminal charge

---

[50] *Société Stenuit v France* No 11598/85 [1992].
[51] Ibid.
[52] Denis Waelbroeck and Denis Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge- The Impact of the European Convention of Human Rights on EC Antitrust Procedures?' in A Barav and D A Wyatt (eds) *1994 Yearbook of European Law* (Clarendon, 1995).
[53] Ibid.

relies on substantive factors, which are: 'the nature and severity of the offence and the penalty' and 'the purpose of the fine, for example, the intentions of sanctions are both deterrent and punitive'.[54] The *Engel* judgment established the 'Engel Criteria' - the classification of the offence under national law, the nature of the offence, and the nature and severity of the potential penalty. There is no implication of any specific degree of seriousness when assessing a criminal charge. However, the Engel Criteria provides a distinction between a serious and a minor criminal offence (such as tax surcharges or traffic offences).[55]

Additionally, from the *Le Compte, Van Leuven and de Meyere* judgment, the ECtHR has frequently upheld that the determination of civil rights and obligations or criminal offences within the meaning of Article 6 of the ECHR can be authorised by administrative proceedings.[56] The approach adopted in *Le Compte Van Leuven and de Meyere* stated that the concept of a determination of civil rights and obligations and the criminal offences should be given a substantive meaning.[57] Following this approach, the judgment concluded that Article 6(1) of the ECHR should be applicable to all proceedings, be they judicial or administrative.[58] Moreover, the stand adopted in *Stenuit* supports the argument that the Commission's proceeding for the enforcement of antitrust cases can be assessed to be criminal in nature. It can therefore be concluded that the adoption of the 'substantive' test and its expansion to administrative processes in the area of minor criminal offence has allowed the ECtHR to extend the reach of Article 6(1) of the ECHR to a diversification of administrative proceedings.[59] As a result, when the Commission makes the decision to impose fines on companies, it becomes important to assure the companies' rights of defence in administrative proceedings, as the rights are the standards of administrative fairness in the ECHR.[60] This significance can be exemplified by both of the *Jussila*[61] and *Menarini*[62] cases.

[54] *Schmautzer v Austria* No 15523/89 [1996].
[55] *Engel v Netherlands* No 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 [1979-1980].
[56] *Le Compte, Van Leuven and de Meyere v Belgium* No 6878/75; 7238/75 [1982].
[57] Ibid para 45.
[58] Ibid para 47.
[59] Arianna (n 37) 30.
[60] Ibid.
[61] *Jussila v Finland* No 73053/01 [2011].
[62] *Menarini* (n 49).

a. Case Law

The *Jussila* and *Menarini* cases are both prominent in respect of the interface between fines imposed by the Commission in competition proceedings and companies' fundamental rights protection. The *Jussila* judgment concerns with the field of companies' fundamental rights and its interplay with the EU competition enforcement. Therefore, it has an essential meaning. This is not only due to the facts of the case, but also because of the levying of fines, which relates to the discussion of competition law and the imposition of criminal penalties in the first instance by the Commission. The judgment of *Jussila* indicated that 'the autonomous interpretation adopted by the [ECHR] of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties […]'.[63] Through this statement, the ECtHR reassured that fines levied on companies for infringements of competition law came within the broader and autonomous concept of 'criminal charge', yet the imposition does not fall under the hardcore criminal law. Accordingly, penalties infringing competition law are criminal within the wider autonomous meaning of Article 6 of the ECHR but differ from the hard-core criminal offences. The criminal-head guarantees provided by Article 6 of the ECHR do not necessarily apply with its full stringency outside the hard-core of criminal law.

In that regard, the matter that the Commission, which is not an independent and impartial tribunal, has the competence to make decisions and impose fines of criminal law nature may be inconsistent with the ECHR.[64] By contrast, according to *Özturk*, it is compatible with Article 6 of the ECHR for criminal penalties to be imposed in the first instance by an administrative or non-judicial body that has both investigative and decision-making powers.[65] This is because there is a possibility of a judicial review that has full jurisdiction and the power to annul an administrative body's decisions, in all perspectives of facts and of law.[66]

---

[63] *Jussila* (n 61) para 43.

[64] Themistoklis Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-Dumping/ Anti-Subsidies Proceedings* (Kluwer International Law 2011) 25.

[65] *Özturk v Germany* No *26138/95* recital 56.

[66] Ibid.

It is worth noting that, from the view of the compatibility of Article 6(1) of the ECHR with a decision by an administrative body that has integrated powers, the *Jussila* case takes the *Bendenoun* and *Janosevic* judgments as a reference. In both the *Bendenoun*[67] and *Janosevic*[68] cases, the ECtHR put a further extent than *Özturk.* The Court declared that the authorization of prosecution and punishment to an administrative body is compatible with the ECHR, even the imposition of criminal penalties lead to a substantial amount of fines.[69] Nonetheless, this implication contradicts the argument provided by some scholars that an administrative first-instance decision would merely be acceptable for minor infringements.[70]

With regard to the judgment in *Menarini,* it also directly concerns companies' right to a fair trial in the competition enforcement system in Italy. Menarini is a company that was sanctioned for an infringement of Italian competition law. The Italian competition authority, acting in a similar manner to the Commission, holds both investigatory and first-instance decision-making powers. Menarini complained that the Italian administrative courts, which had heard its appeal against the Italian competition authority had not exercised full jurisdiction.

As in the ruling of the *Jussila* judgment, the ECtHR confirmed that the challenged competition proceedings concerning fines in *Menarini* fell under the criminal head of Article 6 of the ECHR. The provision does not reject a first-instance decision on fines by an administrative body, although the authority is not an independent and impartial tribunal established by law. This is because there is a potential for appeal before a judicial body that has full jurisdiction to quash in various perspectives of the decisions of an administrative body, such as on questions of facts and law. As a consequence, the ECtHR indicated in the judgment that the Italian administrative courts had exercised such full jurisdiction.

---

[67] *Bendenoun v France* (Application no. 12547/86).
[68] *Janosevic v Sweden* (Application no. 34619/97).
[69] See Ibid recital 81, and *Bendenoun* (n 67) recital 46.
[70] For instance, Arianna Andreangeli, Onno Brouwer et al, 'Chapter 3: Enforcement by the Commission- The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System' in Massimo Merola and Denis Waelbroeck (eds) *Towards an Optimal Enforcement of Competition Rules in Europe- Time for a Revision of Regulation 1/2003?* (Bruylant 2010).

To conclude, it is clear that Article 6(1) of the ECHR, as interpreted by the ECtHR in both the *Jussila* and *Menarini* cases, does not require amending the EU enforcement system. However, it is essential to examine the scope and intensity of the GC's jurisdiction in the cases of fines in the competition enforcement, on the grounds that this kind of case involves complex economic assessments, which belong to the Commission's discretionary powers.

b. Judicial Review as the Right to a Fair Trial

Jurisprudence of the ECtHR as aforementioned has established that the right to a fair trial and due process before an impartial and independent tribunal in civil procedures does not preclude some cases of an administrative or professional disciplinary nature from being determined by an administrative body at the first instance, as long as they are ultimately subject to judicial review.[71]

Most arguments have been established on the basis of the first paragraph of Article 6 of the ECHR.[72] The frequent claims are that competition decisions involve the determination of civil rights and obligations, and that due to the combination of its functions, the Commission is not an "independent and impartial tribunal" as Article 6 of the ECHR clearly requires.[73] The allegation continues on that, although the Commission does not meet the meaning of 'independent and impartial tribunal', it is a de facto tribunal since its decisions are binding even if appealed before the GC.

This outcome can firstly be evaluated by means of the rulings of the *KME*[74] and *Chalkor*[75] cases. The KME was sanctioned approximately 40 million Euros for its participation in a copper tubes cartel. On its appeal to the CJEU,

---

[71] See the case study of *Menarini* and *Jussila* in Section III. 2. a.
[72] See in general, Ian Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedure' (2009) 34 European Law Review 817, and 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 European Law Review 185.
[73] Nicolo Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respects for the Right to be Heard?' 2010 7(1) The Competition Law Review 130.
[74] KME (n 12).
[75] Chalkor (n 13).

KME complained that the GC permitted excessive discretion to the Commission. Advocate-General Sharpton pointed out that KME's appeal was in fact focused on challenging the scope of judicial review, and it argued that the amount of fine was too high. Following this claim, she had examined whether or not the EU Courts had 'unlimited jurisdiction' in reviewing fines. She concluded that the scope and intensity of jurisdiction that the EU Courts exercised were compatible with the full jurisdiction required under Article 6 of the ECHR.[76]

In *KME*, the CJEU held that there indeed is a judicial review under Article 263 of the TFEU. The unlimited jurisdiction of the Court to review the Commission's penalties in respect of Article 261 of the TFEU is consistent with the requirements of the principle of effective judicial protection in Article 47 of the EUCFR.[77] The CJEU followed and adopted a similar approach in *Chalkor*. The judgment of *Chalkor* stated that even though the GC had mentioned that the Commission's discretion was wide or substantial, this did not prevent the GC from exercising an unlimited and unrestricted review of the law and facts.[78]

However in *Otis and Others*[79], the CJEU considered the judicial review of legality under Article 263 of the TFEU in the sphere of competition law to be insufficient, owing to the margin discretion that the EU Courts leave to the Commission in dealing with economic matters.[80] The Court concluded that the kind of judicial review outlined by the TFEU still complies with the principle of effective judicial protection in Article 47 of the EUCFR.[81] In such a conclusion, the Court confirmed that in areas of complex economic assessments, the Commission has a margin of discretion with regard to economic matters. The EU Courts cannot carry out the Commission's margin of discretion, as the method and criteria delineating the powers are mentioned in the Commission's fining guidelines.[82] It also added that this respect for the Commission's discretion does not mean that the EU Courts must be prohibited from reviewing the Commission's interpretation when assessing

---

[76] KME AG Sharpton Opinion.
[77] KME (n 12) para 133.
[78] Chalkor (n 13) para 109.
[79] C 199/11 *Europese Gemeenschap v Otis and Others*.
[80] Ibid para 58.
[81] Otis and Others (n 79) para 59.
[82] Otis and Others (n 79) para 61.

economic matters. The EU Courts must examine not only whether the reliance of economic evidence is accurate and reliable, but also whether the evidence contains all the information in order to assess a complex situation. It is therefore capable of substantiating the conclusion.[83]

In view of effective judicial protection in competition enforcement, EU competition law has provided for the unlimited jurisdiction to review the Commission's decisions concerning the gravity of fines or periodic penalty payments in Article 31 of Regulation 1/2003. In addition, Articles 261 and 263 of the TFEU can both be demonstrated to give the full jurisdiction in competition matters, in particular the cases of imposing fines. The control of legality under Article 263 of the TFEU may be viewed as a comprehensive method to review the facts and law, and the purpose of this provision is to ensure the protection of citizen's rights. Fines in competition enforcement are entitled to unlimited jurisdiction, pursuant to Article 31 of Regulation 1/2003 in a relationship to Article 261 of the TFEU. In other words, these two provisions of the TFEU and Article 31 of Regulation 1/2003 have empowered the GC and the CJEU to review the Commission's decisions in competition cases, particularly in terms of the legality of the Commission's decisions dealing with fines.

Such a legal effect has put further for the discussion concerning fair trial requirement of Article 6 of the ECHR and the Commission's role in carrying out the enforcement. This discourse between EU competition enforcement and the role of the EU Courts in terms of their judicial review as a company's fair trial protection has also been at the core of EU competition law. Given this critical issue, the subsequent content will analyse the scope and intensity of the judicial review that the EU Courts can exercise, while ruling on the antitrust cases.[84]

---

[83] Otis and Others (n 79) para 59.

[84] José Carlos Laguna De Paz 'Judicial Review in European Competition Law' (2012) 5 <http://intranet.law.ox.ac.uk/ckfinder/userfiles/files/JUDICIAL%20REVIEW%20IN%20EUROPEAN%20COMPETITION%20LAW.pdf> accessed 26 September 2016.

c. Judicial Review and the Commission's Complex Economic Assessment

The judicial review of the amounts of fines in antitrust cases is more in-depth, because of the relationship between Article 261 of the TFEU and Article 31 of Regulation 1/2003.[85] However, following the ruling of the *Otis and others*, the EU Courts cannot use the Commission's discretion power, which is usually related to a complex economic appraisal, and therefore the Courts would have a marginal review.[86] This lighter scope and intensity of review consequently constitutes a doctrine of judicial deference of the EU Courts.[87] In fact, the EU Courts have shown its utmost judicial deference to the Commission in the cases of the commitments.[88] The *Alrosa* case concerns the Commission's decision object to commitments pursuant to Article 9 of Regulation 1/2003. The CJEU upheld the manifest error test, and it had left the Commission a wide margin of discretion when deciding whether or not to accept commitments. However, this case of decisions concerning the imposition of fines for infringements of Articles 101 and 102 of the TFEU is fundamentally different from the commitments.[89]

The Commission has the decision-making power to carry out a complex economic appraisal in the infringements of Articles 101 and 102 of the TFEU. It follows that the loss of this decision-making power may be problematic as it undermines the authority's policy-making functions.[90] As a consequence, an introduction of a marginal review is generated, when the EU Courts examine elements and factors of the Commission's decisions that have been adopted in consideration of a margin of appreciation that the decision-maker legally holds. The EU Courts would thus restrain themselves to justifying

[85] Ioannis and Adriana (n 48) 401.
[86] Otis and other (n 81) para 59.
[87] Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) Journal of European Competition Law and Practice 300.
[88] Ibid 304.
[89] C 441/07 P, *Alrosa Company Ltd v Commission* paras 63 and 64. Advocate General Kokott's Opinion para 81.
[90] Marco Bronckers and Anne Vallery, 'Fair and Effective Competition policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?' (2012) 8(2) European Competition Journal 297.

whether the Commission's acts have been compliant with the procedural rules and whether there have been any manifest errors.[91] It could be argued that the marginal review of the EU Courts is focused on two main issues: reviewing the finding of infringements and reviewing the amount of fines by the Commission. This article will therefore evaluate to what extent the EU Courts are entitled to control the decisions from these two perspectives.

Firstly, regarding the marginal review of infringing Article 101(1) of the TFEU, according to *Remia*, judicial review would be restricted to justifying whether the statement of reasons for the decision is appropriate, as well as assessing whether there has been a manifest error of appraisal or a misuse of powers.[92] It is notable that the identical standard of judicial review has also been applied to exemption decisions under Article 101(3) of the TFEU based on *Van den Bergh*.

This marginal review was extended to Article 102 of the TFEU which assesses where there is an abuse of dominance as well. For instance, in *Microsoft*[93] and *AstraZeneca*[94], the GC had to review the definition of the market on which the existence of a dominant position would be determined. The GC applied the marginal review in respect of the Commission's analysis relating to the abuse. The Court referred to the *Deutsche Telekom*[95] and the *Wanadoo*[96] cases and ruled that the calculations of margin squeeze and recovery of costs of predatory pricing on markets were upraised to the Commission's discretionary power to carry out complex economic assessments.[97]

With respect to reviewing the amount of fines, the Commission has a considerable margin of discretion according to Regulation 1/2003, the Fining Guidelines and Leniency Notice and the case law of the Commission. This broad margin of discretion may contradict with the GC's unlimited jurisdiction under Article 261 of the TFEU and Article 31 of Regulation 1/2003. This unlimited jurisdiction legalises the GC to reduce, increase or

[91] Jaeger (n 88) 296.
[92] C 42/84 *Remia v Commission* para 26.
[93] T 201/04 *Microsoft v Commission* para 30-35.
[94] T 321/05 *AstraZeneca v Commission* para 30-31.
[95] C 280/08 P *Deutsche Telekom v Commission* para 143.
[96] T 340/03 *France Télécom v Commission* paras 129 and 163, upheld by C 202/07 P.
[97] Jaeger (n 91) 298-300.

cancel the fines. Although many companies appealed to the CJEU that the GC had failed to exercise its unlimited jurisdiction in dealing with the Commission's discretion regarding the amount of fines, the CJEU ruled in both the *Chalkor* and *Schindler* cases that the GC cannot substitute the Commission, on the grounds that the application of the Fining Guidelines and the Leniency Notice both belong within the Commission's margin of discretion.[98]

To sum up, provided in *Menarini*, it is clear that the decisive factor for the compliance with Article 6(1) of the ECHR is whether or not the judicial body actually exercises its full jurisdiction when reviewing the administrative first-instance decision.[99] In view of the case law of the CJEU, it is admitted that the GC did not infringe the right to a fair trial protected by Article 6(1) of the ECHR.[100] In other words, this indeed complies with the principle of effective judicial protection by the GC, because the Court has in fact exercised a comprehensive review of the law and of the facts, and the complex economic assessment does not fall within the scope of the Court's judicial review. Section IV will provide a further analysis concerning the scope and intensity of the GC's judicial review.

3. Companies' Fundamental Rights to be Heard

There are a number of procedural rights and safeguards, which are derived from the EUCFR, restricting the Commission's powers of investigation. Good administration, or due process guarantees, is one of the procedural rights standards protected in Article 41 paragraph 2 (a) of the EUCFR. The due process guarantees support the proposition that the Commission carries a general duty to undertake a fair and impartial examination in dealing with complaints.[101] These procedural rights turn to be more and more essential and appear to establish a significant principle of fundamental rights protection in the EU competition enforcement.[102] For example, as to show the respect for

---

[98] Chalkor (n 13) para 62 and C 501/11 P *Schindler v Commission*.
[99] Menarini (n 49) para 60-67.
[100] Ibid and Chalkor (n 13) para 51-52 and 67.
[101] Tridimas (n 10).
[102] Wouter Wils, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-Law' (2006) 29(1) World Competition 15.

the rights of defence, in *Orkem*, the CJEU ruled that the Commission cannot force undertakings to admit that they have constituted antitrust infringements of Articles 101 and 102 of the TFEU.[103] Moreover, the *Nexans* case affirmed the guarantees of companies' fundamental rights to defence in the Commission's inspection.[104]

In the context of EU law, it would be difficult to provide a clear account of the notion defining due process guarantees.[105] However, the due process rights could be established within the principle of natural justice of *audi alteram partem*.[106] The case law of the EU Courts consequently states that the rule of *audi alteram partem* has acquired the status of "objective or absolute standard of good administration".[107] It is recognised that there is no general applicable framework of fair administrative procedures stipulated either by the EU treaties or by the legislature, albeit a number of rules of procedures have been dictated by EU law in specific areas.[108] Nevertheless, early in *Hoffmann-La Roche* the CJEU indicated that a fundamental principle of EU law is the recognition of the due process rights in administrative proceedings that possibly result in sanctions.[109] The CJEU further upheld that companies' fundamental rights of defence expand to the Commission's preliminary investigation procedures.[110]

Among these procedural protections, the significance of the right to be heard as related to companies' fundamental rights in the EU competition enforcement system has vastly developed and therefore drawn the attention.[111] The Commission's practice proved that the right to be heard has become an essential component of the rights of defence of the suspected companies. Furthermore, the kind of rights of defence has led to a particular responsibility imposed on the Commission to 'observe the procedural safeguards provided for by EU law'.[112]

---

[103] C 374/87 *Orkem v Commission* paras 32-34.
[104] T-135/09 *Nexans v Commission* para 3.
[105] See Lianos & Andreangeli (n 48), 407.
[106] Arianna (n 37) 32.
[107] Arianna (n 37) 34.
[108] Lianos and Andreangeli (n105).
[109] Case 85/76 *Hoffmann-La Roche v Commission* p511.
[110] Joint Cases 97-99/87 *Dow Chemical Ibérica* para 12; Case 85/87 *Dow Benelux v Commission* para 3.
[111] Tridimas (n 10) 395.
[112] Arianna (n 37) 38.

In view of the case law, the *National Panasonic* case was involved in a claim by National Panasonic for the validity of the Commission's competition inspections at its office and a request for the return of the documents taken from its premises. Another issue in this case concerns whether or not the Commission's action violated the companies' right to be heard within an inspection process.[113] In the judgment of *National Panasonic*, the CJEU held that between the Commission's decisions taken in the exercise of investigatory powers and those taken to terminate an infringement, there is a substantive difference.[114] The distinction stated by the CJEU is that the inspections processed by the Commission carry the intention to enable it to collect the necessary evidence so as to assess the real existence and scope of a given legal and factual situation. Hence, the Commission is not required to carry out a communication with the undertaking before reaching a decision ordering an investigation, as not to affect the lawfulness of the information collected.[115]

The judgment additionally stated that, with regard to the validity of the Commission's investigation and the companies' fundamental rights, provisions related to investigatory decisions under Articles 18 and 20 of Regulation 1/2003 may be carried out by the Commission without having to uphold the investigated undertakings' right to be heard. This implies that the due process rights are not affected in respect of investigated powers, since the Commission is only focused on the 'collection of the necessary information'.[116]

Having discussed the *National Panasonic* case, this does not necessarily illustrate that the principle of due process cannot be applied in the enforcement system of Articles 18 and 20 of Regulation 1/2003. In other words, the assessments of these provisions will concern whether or not there are procedural rights and safeguards applicable to suspected undertakings,

[113] Case 136/79 *National Panasonic v Commission* [1980].
[114] Ibid, para 21.
[115] *National Panasonic* (n 113) para 17-22.
[116] Ibid.

insomuch as administrative due process principles are enshrined in the ECHR.[117]

Despite the debate for an overprotected procedural rights in competition enforcement, it could be contested that there is a rather limited possibility to have access to the oral hearing. Such limitation results in several concerns.[118] The cases in which third parties are involved in for a clarification and further examination of complaints can demonstrate the problematic issues. Accordingly, Alrosa is a recent case concerning the third party's right to be heard.[119] Alrosa was not a simple interested third party in the case, yet it was the party having a contractual relationship with De Beers in a long term. The CJEU analysed Alrosa*'*s rights to be heard in the administrative proceeding. Accordingly, it held that Alrosa should have been considered as an 'undertaking concerned'.[120] Having been widely recognised by EU law, the right to be heard is a general principle of the law in all kinds of proceedings, and such a right is liable to terminate a measure which may affect the person in question.[121] Because the Commission had altered its mind, after having published draft commitments which it had been ready to accept, the Commission carried a responsibility to hear the parties' comments on the observations of third parties. Moreover, the Commission is able to change its mind only if the facts had altered or its initial assessment was established on wrongful information. Therefore, the CJEU upheld that Alrosa had a right to be heard on the extra commitment offered by De Beers, and Alrosa had not been granted such a right completely.[122]

To conclude, the implication of the *National Panasonic* and *Alrosa* cases is that due process rights in competition proceedings are considered important.[123] The *National Panasonic* judgment indicated that companies' fundamental rights to be heard should be protected only in the circumstance to terminate an infringement. However, this does not mean that due process

[117] Sophia Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement' (Master Thesis, Faculty of Law Lund University 2011) 26-27.
[118] Arianna (n 37) 40-41.
[119] Alrosa (n 89).
[120] Ibid, para 88.
[121] Tridimas (n 10) 371.
[122] See the detailed case study and comments by John Temple Lang, 'Commitments Decisions Under Regulation 1/2003' in Charles Gheur and Nicolas Petit (eds) *Alternative Enforcement Techniques in EC Competition Law* (Bruylant, 2009) 132.
[123] Ibid 131.

rights cannot be applied in Articles 18 or 20 of Regulation 1/2003. Indeed, due process guarantees play an essential role in EU competition enforcement scheme as to protect company defendants. Although the protection of the right to be heard seems sufficient, there are some issues regarding the completeness of the statement of objection and the involvement of the Hearing Officer in antitrust cases.[124] The matter of contentions will be evaluated in the next section.

IV. Legal Analysis and an Outlook

As discussed in Section III on the companies' fundamental rights protection within competition proceedings, it may be concluded that the Commission is permitted by the ECHR and the EU treaties to act both as an investigator and as a decision maker. However, this permission from the case law does not indicate that the Commission is able to unrestrictedly carry out its investigatory and decision-making powers. A number of internal checks and procedural guarantees have illustrated their functions in protecting fairness in the EU administrative proceedings. They can be exemplified by, firstly, Regulation 773/2004 and other procedural rights guarantees, such as the best practice guidelines on competition proceedings that have all bound the Commission's enforcement abilities. Secondly, the possibility of the GC exercising its full jurisdiction concerning fines in competition enforcement constrains the Commission's powers. In this section, the current practice and debates regarding these two main contentions will be evaluated in this article.

1. Ensuring Full Respect for a Fair Hearing

In the context of protecting the right to be heard, Article 14(1) of Regulation 773/2004 provides that hearings shall be conducted by a fully independent Hearing Officer. The role of Hearing Officer was established in 1982, and it has dramatically changed in the last decade.[125] The essential function of the Hearing Officer is to contribute to the impartiality, objectivity, transparency and efficiency of the competition proceedings, by giving the Hearing officer

---

[124] Arianna (n 37) p31.
[125] Michael Albers and Jérémie Jourdan 'The Role of Hearing Officer in EU Competition Proceedings: A Historical and Practical Perspective' 2(3) *Journal of European Competition Law and Practice* (2011) 188.

competences and responsibilities to ensure the concerned undertakings' rights to be heard.[126] Therefore, he or she can not only conduct the oral hearing, but also is also empowered to exercise a full review of the Commission's investigation team's decision, and modify it if necessary.[127] The New Hearing Officer Mandate in 2011 has demonstrated the power of protecting companies' rights in procedural matters between the Commission's investigation team and suspected undertakings and the third parties subject to the proceedings.[128]

In addition to the Hearing Officer's important function in protecting the procedural rights, the creation in 2011 of the Commission's Best Practices Package on the proceedings concerning the application of antitrust and merger cases has brought about numerous benefits. The Commission has published the Best Practices in antitrust proceedings of Articles 101 and 102 of the TFEU,[129] Best Practices on submission of economic evidence (hereafter collectively referred to as "Best Practices Package").[130] The purposes of these new measures are to strengthen procedural guarantees and transparency, while respecting for the need for efficient enforcement proceedings. In line with the Best Practices Package, the Hearing Officer provided a plain classification for two dissimilar types of procedural rights protection during the competition proceedings. There are two kinds of procedural guarantees in this Best Practices Package. The first category focuses on the rights of defence, which concern the truth and relevance of the facts and the documents used by the Commission for inspection.[131] The second category is related to procedural rights of complainants.[132] The right to a fair hearing as well as the right to a fair trial derived from the protection of the EUCFR, are both within the group of rights of defence and therefore compliant with the general principle of EU law.[133] Although the Best

[126] Ibid.
[127] See Albers and Jourdan (n 125) 186.
[128] Decision on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ 275/29 (New Hearing Officer Mandate).
[129] Commission Notice on Best Practices for the conduct of Proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/06 (Best Practice Notice).
[130] DG Competition, Best Practice for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases.
[131] Guidance on procedures of the Hearing Officers, para 4.
[132] Ibid.
[133] Zingales (n 73) p143.

Practices Packages does not change the Commission, it has led to a number of changes in its previous practice.[134] It could therefore be concluded that the Best Practices Packages provides more certainty and transparency, and it delineates clearer stages and phases to the competition proceedings.[135]

Despite the full independence of Hearing Officer and the advantages of the Best Practice Package, the current framework of oral hearing raises a lot of issues. Many competition law practitioners suggest for strengthening the Hearing Officer's function to ensure a full respect for a fair hearing.[136] Several stakeholders of companies have claimed for an earlier and wider Hearing Officer's involvement, while the others advocated for improving the transparency of the competition proceedings. In response to these requests, Albers and Jourdan provided a neutral opinion which did not take sides, yet emphasised the significance of the EUCFR.[137] They pointed out that due to the envisaged EU's accession to the ECHR, the competition procedure shall change to show respect for the increased fundamental rights protection.[138] In my opinion, this concluding remark is convincing, for the reason that the development of numerous policies in competition law is in support of fundamental rights protection in the EU. As there is few judgment questioning the competition law procedure, this argument would let the EU Courts reconsider its current case law.[139]

2. The Scope and Intensity of the GC's Judicial Review

There is increased criticism of the EU competition enforcement and review mechanisms applicable at the level of the EU, from the perspectives of the institutional hierarchy of the Commission and the potential for judicial review of its decisions in competition cases before the EU Courts. In other words, due to the institutional design and the concurrent powers of investigation and decision-making in the Commission concerning Regulation 1/2003, it could be argued that the Commission as an institution does not uphold the standards

[134] Anne MacGregor & Bogdan Gecic 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings' (2012) 3(5) Journal of European Competition Law and Practices 433.
[135] Ibid.
[136] Albers and Jourdan (n 125) 199.
[137] Ibid 200.
[138] Ibid.
[139] Ibid.

of Article 6(1) of the ECHR for a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[140] Commentators advised that the full jurisdictional control exercised by the EU courts over an interpretation of law derives from their function that is within the institutional framework of the EU. Review of law thus gives power to the GC to interpret the law and then assess whether the legal principles are correctly applied by the Commission to cases.[141]

By contrast, if the competition cases appealed by the companies challenge the Commission's complex economic assessments, the EU courts may become less forceful. In the case, *Società Italiana Vetro SpA and Others*[142], the GC provided a reserved stand and ruled that if any further extensive powers of review were conferred to the court, this extension could interrupt the balance among the EU institutions and would therefore run the risk of prejudicing the companies' rights of defence.[143] One academic opinion claimed that although the Court must be empowered to review the legality of the Commission's decisions, it cannot displace the role of the Commission as the administrative body which is authorised with particular and specific powers and expertise.[144] In addition, the principle of separation of powers demonstrates that the function of the EU Courts is to review, not to substitute, administrative authorities' decisions.[145] The Commission is thus responsible for carrying out the complex economic assessments required by the enforcement of competition law in the EU.[146] The Commission's appraisal of facts will be raised into question only if there has been a manifest error of assessment, the facts in competition cases have not been precisely stated or there has been any misuse of powers.[147]

---

[140] Graells (n41) p3.
[141] Vesterdorf 'Standard of Proof in Merger Cases: Reflections in the light of recent case law of the Community Courts' 1(1) European Competition Journal 12 cited in Arianna (n 37) 166.
[142] T 68, 77-78/ 89 *Società Italiana Vetro SpA and Others v Commission* [1992].
[143] Ibid, para 319.
[144] Laguna De Paz (n 84) 15.
[145] Heike Schweitzer 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Ehlermann, Claus-Dieter and Marquis, Mel (eds) *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 33-35.
[146] Arianna (n 37) 167.
[147] Cases 142/84 and 156/84 *British American Tobacco Co Ltd and RJ Reynolds Industries Inc v Commission* para 104.

With a view to the case law, it appears justifiable to argue that there is the necessity to guarantee the administrative power within the EU institutional framework and the nature of competition enforcement as requiring 'complex economic assessments'. Consequently, the EU courts would exercise a limited review of the assessment of the evidence conducted by the Commission.[148] Nonetheless, this concluding approach has led to the criticism that the components of a complex economic assessment might be unclear. In particular, while the Commission did not succeed in providing an adequate statement of reasons to support its decision, this situation caused an argument that the procedural and the substantial factors may be so actively connected as to become interdependent.[149]

However, even if the Commission does not qualify the standards of an 'independent and impartial tribunal', this should not be automatically considered as an adequate justification for any major alterations in the enforcement scheme of EU competition law. Pursuant to the standard interpretation of Article 6(1) of the ECHR, the requirement for a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' does not need to be met in the first instance, when an administrative body makes the initial decision by levying fines (even if they fall within the concept of 'criminal charge' under the ECHR).[150] Article 6(1) of the ECHR stipulates that the guarantees would be supported if the initial conviction can be evaluated before an institution qualifying the standards of Article 6(1) that can be evaluated before an institution qualifying the standards of Article 6(1) that can examine it on the merits of both the law and the facts. GRAELLS argues that this is in compliance with Article 13 of the ECHR as well, on the grounds that the available access to judicial review constitutes an effective remedy confronting any possible infringements of the fundamental rights of the companies concerning the conviction in the investigation led by the Commission.[151]

---

[148] Ibid.
[149] T 68, 77-78/ 89 *Società Italiana Vetro SpA and Others v Commission* (n 143) para 95.
[150] Graells (n 41) 3.
[151] Ibid.

One may consider that whether or not the current competition enforcement system shall be modified. In view of the evolving case law in the judgments of *KME*[152] and *Chalkor*[153], the answer to whether any changes to the review of EU competition enforcement scheme are required for the compliance with Article 6(1) of the ECHR has been in tentatively negative tone.[154] From the perspective of the CJEU, since the review before the EU Courts includes the review of law and facts, which means the Courts have the power to annul the Commission's decisions and change the amount of fines, this implies that EU competition law is in accordance with Article 47 of the EUCFR and that there is no infringement of the standard of effective judicial protection in that provision. Moreover, in the current enforcement system, there are already sufficient guarantees of undertakings' due process rights in investigations of competition matters. As a consequence, in Graells' point of view, he claims that it is unnecessary to set up a more protective enforcement scheme, and he also states that there is sufficiency in the scope or intensity of judicial review in EU competition law cases.[155]

Nonetheless, one discussion[156] stemming from the implication of the *Menarini* judgment focused on whether or not the EU Courts really obtain 'full jurisdiction' in respect of the Commission's decisions to impose fines to cancel, reduce or increase the fines. In fact, executive institutions have some policy discretion, at least within the scope that they are granted by the legislature. By contrast, if the Commission exercises its discretionary power to decide a criminal penalty, this would be unacceptable from a perspective of fundamental rights. Subsequently, as the legality of a competition law fine relies on the full review by a court, an important issue arose: whether or not an appeal to the court should have an effect to suspend the obligation to pay the fine. More specifically, if an administrative criminal sanction is enforced without reviewing by a court, there is a question regarding whether this is consistent with the standard set out in Article 6 of the ECHR.

[152] KME (n12).
[153] Chalkor (n13).
[154] Graells (n 41) p4.
[155] Graells (n 41) p5.
[156] Bronckers and Vallery (n90) 283.

Following the opinion above, it takes issue with Graells' argument related to the lack of necessity for changes in the current enforcement scheme.[157] This position implies that certain aspects of the current set-up are difficult to accord with a fair trial. Regarding the high-fine imposition cases, some scholars argued that since the Commissioners are not judges and the Commission itself is not a tribunal, there seems no opportunity to carry out the right to cross-examine and other rights usually protected in criminal law proceedings.[158] Although Article 14(1) of the Implementing Regulation provides an oral hearing as an internal guarantee to avoid the Commission's manifest error, the issue is that this hearing is not compulsory. Moreover, the position of the Hearing Officer does not separate from the Commission. Given that the Commission actually has the competition policy to defend and to win the antitrust cases, it is thus difficult to accept that the Commission having such internal policy could set an effective brake on these inherent biases, while making decisions on fine sanction. Furthermore, suspected companies would face the fear of severe fines, and they are unable to appeal their case prior to the first-instance decision.[159]

As a result, should the Commission's power to issue criminal sanctions be condemned as contrary to the principles of a fair trial, and should a transfer of decision-making power to the courts be required, it would be impossible to distinguish between efficient and inefficient judiciaries in the EU. Prior to expanding this fundamental rights argument to the widest scope, it seems necessary to make sure that courts in the EU as a whole are ready to enforce competition law. In other words, an approximation of fairness for a transitional period might have to be accepted, with improvements being implemented to the administrative process, so as not to jeopardise the effectiveness of competition law.[160] Simultaneously, in those countries where courts operate effectively, a transfer of decision-making power from the competition authorities to the courts could have already been put in motion. Indeed, this is a change from the initial set-up of EU competition enforcement system.

[157] Ibid.
[158] Lianos and Andreangeli (n 48) 413.
[159] Ibid p297.
[160] Ibid.

It could therefore be concluded that changes in competition enforcement seem unnecessary. However, many academics have discussed the advantages of establishing a professional and independent competition law court.[161] The creation and development of the UK's Competition Appeal Tribunal, which is a specialised administrative body, has subsequently been evaluated. The decisions of the Competition and Markets Authority can be appealed to the Tribunal, which carries out a review on fines as well as a control of legality, of merger decisions.[162] Nonetheless, it may be contested that whether Article 257 of the TFEU empowers to establish an EU competition court.[163]

3. Balance between Effective Enforcement and Companies' Procedural Rights

Having regard to the analysis above, it might be admitted that companies' rights in competition proceedings are protected and this practice has met the requirement under Article 6(1) of the ECHR. The judicial deference may benefit the Commission's enforcement, yet an issue related to the maintenance of the current judicial review occurs.[164] Furthermore, one may need to think of the balance between the effective enforcement and the sufficient protection of fundamental rights. This article would support a more effective enforcement, which benefits the market and consumers.

Firstly, there is an emerging debate concerning the extent and intensity to which companies' rights have not been excessively protected in competition enforcement system.[165] Commentators have claimed that granting a complete due process guarantee to companies is not necessary, and the recognition of all due process safeguards would impair the effectiveness of competition enforcement. Furthermore, the opinion of Graells and Marcos argued that EU competition law nevertheless plays a key role in maintaining one of the

[161] Graells (n 39) 11.
[162] Laguna De Paz (n 84) 8.
[163] Lianos and Andreangeli (n 48) 438.
[164] Maciej Bernatt, 'The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights' Research paper in Loyola University Chicago School of Law 2013-2014.
[165] Graells, A & Marcos, F '"Human Rights" Protection for Corporate Antitrust Defendants: Are We not Going Overboard?' 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389715> accessed 26 September 2016.

fundamental safeguards of the undistorted market economy, and thus this excessive due process rights protections will lead to a less efficient market economy.[166]

With respect to the due process rights, although there are internal checks and balances, they do not constitute formal proceedings followed by stringent procedural protections. Consequently, these internal guarantees would still have to be examined by the EU competition enforcement system. It then caused a problem that the Commission's internal procedures cannot recover the inadequacies of the broader enforcement model. Accordingly, the kind of procedural rights protection would deteriorate the due process system.[167] Having addressed these problems, effective competition enforcement outweighs the further protection of fundamental rights.

V. Conclusions

This article has provided a framework of how the EU established its fundamental rights legal order and, to a further extent, analysed the current protection of companies' fundamental rights. In line with the case law, the ECHR is applicable to both natural and legal persons; therefore, companies are subject to the safeguards afforded by the ECHR. Companies' fundamental rights are particularly protected in competition proceedings, which are carried out by the Commission. As the justice and fairness in administrative proceeding becomes far more important in the EU, companies, as antitrust defendants, may defend their fundamental rights according to a strong basis of law and regulation. Moreover, the EUCFR is now bound to the EU, which means that the EU should show respect for the fundamental rights order and comply with the Charter. Accordingly, the critical points of companies' fundamental rights to a fair trial and a fair hearing in competition proceeding has generated a large number of legal debates.

The issues concerning the competition enforcement and its compliance with the ECHR have been examined in this work. In accordance with the results of Section II's assessments, it is clear that the current competition enforcement is compliant with Article 6(1) of the ECHR, and it is unnecessary to amend the enforcement procedures. In addition, with the recent creation of the Best Practice Package concerning antitrust cases, this internal check in the

[166] Ibid, 15-16.
[167] MacGregor and Gecic (n 134) 437.

Commission plays a key role in helping to maintain the fairness of competition proceedings. The Hearing Officer's new mandate as of 2011 strengthens companies' procedural rights and makes the procedures more transparent and reliable. The entire unprecedented competition policy seems to ensure the complete respect for a fair hearing, in spite of the contested independence of the Hearing Officer in the Commission.

With regard to the controversy of the judicial review involved in the matters of fines, the EU Courts are empowered by the legal basis derived from Articles 263 and 261 of the TFEU and Article 31 of Regulation 1/2003 to exercise their full jurisdiction. By contrast, while the Commission conducts an economic appraisal to investigate and judge the antitrust cases, the need for a complex economic assessment is undoubtedly part of the Commission's discretionary powers in deciding the finding of the infringements and the subsequent fines as sanctions. Accordingly, a legal question arose: whether EU courts truly have unlimited jurisdiction to review the antitrust cases. In view of the principle of separation of powers within EU law, it is argued that the EU Courts cannot substitute the Commission. Thus, the EU Courts can only exercise marginal review, and they are restricted in justifying whether the Commission's decisions are inappropriate and whether there is a manifest error of assessment or misuse of powers of the Commission.

In fact, as administrative bodies have some policy discretion in execution, they ought to comply with the framework and objectives of the policy. Regulation 1/2003 authorises investigation, prosecution and adjudicate powers to the Commission; hence, the Commission is the essential authority to deal with and penalise antitrust infringements. However, determining to what extent the Commission can exercise its discretion in the effective competition enforcement without violating the companies' fundamental rights is difficult. Usually, the solutions vary, due to the dissimilar and diverse facts of cases, and this makes the problem even more complicated. Some have discussed the advantages of a specialised and independent competition law court. The UK's Competition Appeal Tribunal would thus become a model. Nonetheless, due to the EU treaties' restriction, creating a specialised competition law court would be challenging.

In conclusion, the EU indeed has to provide sufficient respect to EU fundamental rights law, particularly due to the EUCFR's binding effects on

the EU. In other words, an intensive balance between an effective EU competition enforcement and companies' fundamental rights protection is required. As the fundamental rights protection is one of the general principles of EU law, the enforcement cannot be excessive and cause a violation of companies' fundamental rights. While there is a tension between an authority's powers and defendants' fundamental rights, the author argues that a powerful and effectively implemented enforcement system should prevail over the fundamental rights protection, which currently has considerable value in the EU. One reason is that a well-functioning internal market in the EU still requires complete and sound supervision from the Commission, which has a combination of various powers in dealing with antitrust infringements. Another factor to support this claim is that the enforcement scheme is ultimately beneficial to the entire society and consumers, and this perhaps demonstrates another aspect of fundamental rights protection.

TIE- IN AGREEMENTS: HOW THE C.C.I. GOT IT ALL WRONG?

Ravi Gangal & Deesha Dalmia[·]

This article examines the tryst of the Competition Commission of India with tie-in agreements in India, both, as an abuse of one's dominance which can only be perpetrated by a dominant entity (under section 4(2), Indian Competition Act, 2002) and as a vertical restraint (under section 3(4)(a)). Although, dominance is not a prerequisite in the latter, the Competition Commission has erred in distinguishing between these two circumstances and has introduced the prerequisite of dominance in an enquiry under section 3(4)(a) of the Act. This article attempts to highlight and mitigate the catch-22 situation that this has created for all the tie-in agreements that are to follow. It further suggests that akin to rule of reason, an 'effects-based' approach must be resorted to, with scope for objectively justifying tying under section 4(2). In doing so, a comparative analysis of Indian competition scenario with that of the U.S. and E.U. has been undertaken.

I. Introduction

Tying takes place *simpliciter* when a seller conditions the sale of a desirable product (tying) upon the sale of a not so desirable one (tied), thereby abusing the need of a consumer for the desirable product in order to facilitate sales of the not so desirable one.[1] What is inherent in this understanding of tying arrangements is that, (1) there should be in existence two products in order for conditioning the sale of one upon the other; (2) consumer must be dependent upon the seller for the desirable product and the seller must be in a position superior (dominance) to that of the consumer by virtue of the latter's

· The authors are 4th year B.A. LL.B. (Hons.) students, Dr. Ram Manohar Lohiya National Law University, Lucknow (UP), India. The authors are very grateful for the extremely helpful communications on these matters with Akansha Mehta, Associate, Jyoti Sagar Associates, New Delhi, India.

[1] J Dianne Brinson, 'Proof of Economic power in a Sherman Act Tying Arrangement Case: Should Economic Power be Presumed When the Tying Product is Patented or Copyrighted?', (1987) 48 La L Rev 29, 29, citing *Northern Pacific R Co v United States* [1958] 356 US 1.

need for the former's product; (3) and that such dependence or position of superiority is abused. Such abuse is condemned by antitrust laws for varied reasons, primary being the exploitation of the consumers[2] and the exclusion of competitors in the tied market by the seller.[3] It is facilitated by *leveraging* the dominance possessed in the tying market to foreclose the market for the competitors in the tied market.[4]

Therefore, in order for a seller to successfully tie, it must above all, possess dominance which may then be leveraged. Another assumption which is apparent and has become the most important point of contention is that tying is only used for such leveraging and it is never used as a means of achieving better standards of competition.[5] This is contentious since this position stands altered in the wake of the expanding scope of acknowledging efficiency defences in particular and shifting towards an 'effects-based' approach in general (Chicago School). Nevertheless, considering that the objective of antitrust laws is the subsistence of fair competition upon merits and proscription of activities having anti- competitive effects both actual (*ex post*) or potential (*ex ante*) what is implicit in this argument is the fact that once dominance is shown in a claim for tying, the seller would invariably be held liable, for such tie- in would be anti- competitive as it would lead to market foreclosure and the competition would not be on merit. It is for this reason that many jurisdictions have proscribed tying as an instance of abuse of one's dominance.[6]

Some jurisdictions have also proscribed tying as an instance of vertical restraint facilitated through an agreement without prescribing dominance as a prerequisite. What may be inferred here is that, a tie-in may still be illegal (as a vertical restraint), even if dominance as a prerequisite has not been established i.e. even if a seller may not be dominant in the tying market, tying

---

[2] Alison Jones and Brenda Suffrin, *EU Competition Law: Text, Cases and Materials* (4th edn, OUP 2014) 458.

[3] DG Competition Discussion Paper On The Application Of Article 82 Of The Treaty To Exclusionary Abuses, Brussels, December 2005, 55, paras 180, 181 (DG COMP Discussion Paper) <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf> accessed 1 September 2016.

[4] *Jefferson Parish Hospital Division 2nd v Hyde* [1984] 466 US 2, 14, fn 20.

[5] *Standard Oil Company of California v United States,* [1949] 337 US 293; *Northern Pacific R Co v United States* [1958] 356 US 1; Joseph P Bauer, 'A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis', (1980) 33 Vanderbilt L Rev 283, 286.

[6] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, (2nd edn, Hart Publishing 2011) 628, 629.

may still lead to anti-competitive effects. However, in such a scenario, market foreclosure will have to be depicted by the plaintiff and such foreclosure will have to be weighed against countervailing pro-competitive efficiencies if any exist similar to a rule of reason approach under Section 1 of the Sherman Act, 1890 in the United States ("U.S.") or as agreements having as their effect the "*prevention, restriction or distortion of competition*" are treated under Article 101 of the Treaty on the Functioning of the European Union ("TFEU") in the European Union ("E.U.").

A similar distinction exists in India as well, since tying has been proscribed as an abuse of one's dominance under section ("u/s.") 4(2) of the Indian Competition Act, 2002 ("Act") wherein it can only be perpetrated by a dominant entity and as a vertical restraint u/s. 3(4)(a), wherein it can be perpetrated by any entity irrespective of its standing in the market (dominance is not a prerequisite). However, this statutory distinction has been blurred by the C.C.I. by introducing the prerequisite of dominance in an enquiry u/s. 3(4)(a)[7] setting a bad precedent for subsequent tie-in related litigations in India.

This article is divided into three parts. In the first part of the article, the authors have traced the jurisprudential history behind tying arrangements in the U.S., considering that it was here that they were first realised as having anti-competitive effects and also because it was here only that the foremost observations with regard to them being treated under a rule of reason were made and therefore it ideally serves as the inception point for any enquiry into tying arrangements. This part also brings forth how the element of market power has been assessed by the U.S. courts and how the standards have changed so far. This is important for the mere fact that as per the authors it is essentially the distinction in the quantum of market power that is pivotal in determining whether a tie-in is to be proscribed *per se* or considered under a rule of reason.

The second part incorporates a detailed discussion on the position with regard to tie-ins in the E.U., for the Indian law is closer to the E.U. in text and in scope as compared to the U.S. The authors have specifically observed as to how the scope for objective justifications under Article 102 has been provided for by the European Commission and the European courts when textually none exists. This may give an insight into whether it is possible even for the

[7] *Shri Sonam Sharma v Apple Inc.* & *Ors*, Case No 24/2011 (CCI).

Competition Commission of India ("C.C.I.") to incorporate a similar 'effects-based' approach u/s. 4, thereby providing scope for proving pro-competitive efficiencies of a tie-in.

The third part is a critique on C.C.I.'s tryst with tying arrangements as documented in two of its verdicts in *Shri Sonam Sharma v Apple Inc. & Ors.*[8] and *Ramakant Kini v Dr. L.H. Hiranandani Hospital*[9], forming the bedrock of the analysis therein. Further, the authors highlight the possible ramifications that will ensue now that dominance is introduced as a prerequisite in an enquiry u/s. 3(4)(a). *Firstly*, in doing so the C.C.I. has incorporated a *per se* proscription of tie-ins u/s. 3(4)(a), although s. 3(4)(a) prescribes a rule of reason enquiry (based upon factors enumerated u/s. 19(3)) for treating tie-ins and thus has taken a step backwards rather than moving forward towards a rule of reason approach to be applied generally for tie-ins. *Secondly*, the distinction in scope for offence of *tying by a dominant firm* u/s.3(4)(a) and section ("s.") 4(2) shall be blurred to the extent that s. 4(2) would be rendered virtually otiose. *Thirdly*, a distinction in the standards for proscription of *tying by a non- dominant firm* u/s. 4(2) and s. 3(4)(a) shall be created i.e. different standard of proscription for the same offence would be created.

In conclusion, the article states that the C.C.I. has fundamentally misinterpreted the scope of tie-ins under the Act. As per the authors, tie-ins by dominant firms are *per se* proscribed as abuses u/s. 4(2), whereas u/s. 3(4)(a) the defendants who facilitate a tie-in and do not possess any position of dominance maybe tried under a rule of reason approach to deduce actual or potential Adverse Appreciable Effect on Competition ("AAEC") in the market. Any presumption of AAEC upon the existence of dominance would entirely vitiate this rule of reason approach u/s. 3(4)(a). Therefore, there simply exists no reason as to why the element of dominance should be introduced u/s. 3(4)(a) to identify "*anti-competitive*" tie-ins. Lastly, this article suggests a course for the inquiry into the claims of tie-ins which should be employed by the C.C.I. in order to successfully delineate the scope u/s. 3(4)(a) and s. 4(2) for their frictionless functioning. The authors are also mindful of the raging debate with regard to a rule of reason approach being met out to tie-ins even when they constitute unilateral abuse of dominance in

[8] *Ibid*.
[9] [2014] CompLR 0263 (CCI).

both these jurisdictions. Therefore, the article further suggests that the time has come for the C.C.I. to identify broadly the scope for objective justifications to be considered in claims of abuses u/s. 4(2) so as to shift to a more "effects-based" approach similar to article 102 of TFEU in order to streamline the Indian competition regime according to the international standards.

II. Tie-Ins in the US

As per the U.S. jurisprudence, claims against tying can be brought under any of the following provisions of the relevant antitrust laws:

> (1) section 1 of the Sherman Act, which prohibits contracts 'in restraint of trade', (2) section 2 of the Sherman Act, which makes it illegal to 'monopolize', (3) section 3 of the Clayton Act, which prohibits exclusivity arrangements that may 'substantially lessen competition', and (4) section 5 of the FTC Act, which prohibits 'unfair methods of competition'.[10]

However, since section 5 of the FTC Act is only limited for being invoked by the Federal Trade Commission[11], primary consideration under this article is limited to the Sherman Act and the Clayton Act. It was first considered, based upon the ruling[12] of the United States Supreme Court ("U.S.S.C."), that there existed a difference in the standards set by these legislations, with regard to tying agreements. However, position since then has been cleared to the extent that these standards, 'have become so similar that any differences remaining between them are of interest to only antitrust theologians'.[13] Moreover, 'whichever U.S. statute is invoked, the underlying economics of the relevant agreements is the same, and each statute effectively imposes the same requirement of proving the agreement is anticompetitive'.[14] Tying in the U.S.

[10] US Department of Justice, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008)' (September 2008) (US Department of Justice Report) <www.usdoj.gov/atr/public/reports/236681.htm> accessed 20 August 2016.

[11] Federal Trade Commission Act 1914, s 5; Elhauge and Geradin (n 6) 513.

[12] *Times-Picayune Publishing Co v United States* [1953] 345 US 594.

[13] US Department of Justice Report (n 10) 78, citing Robert H Bork, *The Antitrust Paradox* (2008).

[14] Elhauge and Geradin (n 6) 513.

since its known inception as an alleged attempt of extending patent monopoly over unpatented products[15] has plummeted from almost absolute *per se* illegality[16] to a rather modified approach, with various pre requisites and noted exceptions in place. The Chicago school thinkers must be credited for the same. The difference in opinion vests in the apprehension that the 'leverage theory'[17] as idealised by the Harvard school thinkers was not in sync with the economic reality and a tad too much dependent upon the empirical analysis of the 'industrial organization, the field of economics that [studied] monopoly questions'.[18]

This led to Chicago School thinkers[19] to conceptualise the 'single monopoly profit theorem' whereby, the apprehensions of the leverage theory were busted, upon critical analysis under the scrutiny of economic understanding of antitrust issues and called for a 'rule of reason' approach for treating the tie-in claims, 'pursuant to which a restraint is judged illegal only if a full consideration of the relevant facts establishes that the restraint is "unreasonable" because it suppresses or destroys, rather than regulates and thereby possibly promotes, competition'.[20] Nevertheless, the precedent set by the U.S.S.C. strongly favours a *per se* approach, with various alterations and modifications as it has deemed fit[21], even going to the extent of stating it to be, 'far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *per se.*'[22] In the same case

---

[15] *Henry v AB Dick Co* [1911] 224 US 1 in WL Baldwin, David McFarland, 'Tying Arrangements in Law and Economics', (1963) 8 Antitrust Bull 743, 744; Donald F Turner, 'The Validity of Tying Arrangements Under The Antitrust Laws', (1958- 1959) 72 Harv L Rev 50, 50-51.
[16] *International Salt Co v United States* [1947] 332 US 392; *Standard Oil Company of California v United States,* [1949] 337 US 293; WL Baldwin & David McFarland, 'Tying Arrangements in Law and Economics', (1963) 8 Antitrust Bull 743, 754.
[17] *International Salt Co v United States* [1947] 332 US 392; *Northern Pacific* (n 5); *Jefferson Parish* (n 4).
[18] Richard A Posner, 'The Chicago School of Antitrust Analysis', (1978) 127 University of Penn Law Review 925, 928-929.
[19] Ward S Bowman Jr, 'Tying Arrangements and the Leverage Problem', (1957- 1958) 67 Yale LJ 19.
[20] Macdonald Flinn, Willis B Snell, et al, 'The Per Se Rule, Report of Special Subcommittee of Sherman Act Committee', (1968-1969) 38 Antitrust LJ 731 (Special Subcommittee Report).
[21] Christopher R Leslie, 'The Commerce Requirement in Tying Law', (2015) 100 Iowa Law Review 2135, 2138.
[22] *Jefferson Parish* (n 4) 9.

however, it was also observed that, ‘not every refusal to sell two products separately can be said to restrain competition’.[23]

It should be mentioned here that some have claimed that such an approach with all its modifications, to not be a *per se* approach at all, at least in the literal sense of the term[24] and as *per se* rule applies to other anti-competitive practices.[25] This modified or the *quasi- per se* approach as it is now known, has also been endorsed by various academicians (Post Chicago school) who believe that market power in the market for tying product indeed leads to revenue over and above monopoly profits in the form of consumer surplus and thereby believe the ‘single monopoly profit theory’ to be too idealistic and requiring various restrictive assumptions[26], considering it to be a mere exception rather than the law by which the antitrust policy should be determined.[27]

However, they consider such modified *per se* rule as a, ‘structured rule of reason that correctly identifies the elements necessary to prove certain anticompetitive effects’[28] and not a *per se* rule at all. Perhaps it is true since such consistent application of this *per se* rule, has not stopped the U.S. courts from acknowledging economic efficiencies[29] and business justifications[30] *inter alia* as exceptions to this rule[31] or to employ the rule of reason itself whenever the modalities of a case such as when it involves ‘novel categories of dealings’[32] so demand.

---

[23] *Ibid* 11.
[24] WL Baldwin and David McFarland, 'Some observations on Per se and Tying Arrangements', (1961) 6 Antitrust Bull. 433, 435; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2158.
[25] *Jefferson Parish* (n 4) 33-34; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2158.
[26] Einer Elhauge, 'Tying, Bundled Discounts, and the Death of The Single Monopoly Profit Theory' (2009) 123 Harv L Rev 397, 400.
[27] *Ibid*.
[28] Einer Elhauge, 'Rehabilitating Jefferson Parish: Why Ties Without a Substantial Foreclosure Share Should Not be Per Se Legal', (2016) 60 Antitrust Law Journal 463, 464.
[29] *International Business Machines Corporation v United States* [1936] 298 US 131; WL Baldwin & David McFarland, 'Tying Arrangements In Law And Economics', (1963) 8 Antitrust Bull 743, 749-750.
[30] *United States v Jerrold Elecs Corp* 187 F Supp 545 (ED Pa 1960), affmd *per curiam*, [1961] 365 US 567.
[31] Einer and Geradin (n 6) 571.
[32] *United States v Microsoft Corporation,* 253 F 3d 34 (DC Cir. 2001), 84 (*Microsoft III*).

Therefore, it may be stated that the approach towards tie-ins in the U.S. is still in a phase of transition with the courts being open to acknowledging and employing economic analysis as the basis for forming judicial opinions wherever it seems justified, indeed there exists a need for an all-inclusive policy to be put in place which is both economically (theoretically) coherent and legally viable to serve as precedence for subsequent litigations. Nevertheless the position as of now is that even if a *quasi-per se* tying claim is not successfully proved, it can still be considered under the rule of reason under Section 1 of the Sherman Act,1890.[33] Since, 'Sherman Act §1 remains available to cover cases where defendants have some lesser amount of market power'[34] and rule of reason is also to be preferred over a simplistic *per se* enquiry when the latter carries 'undue risks of error and of deterring welfare-enhancing innovations'[35] usually in cases with 'no close parallel in prior antitrust cases'.[36]

1. The Per Se Rule

The application of the *per se* rule presupposes that certain practices shall always yield only anticompetitive effects[37] thereby making it imperative for the regulatory authorities to condemn the same upon their happening itself, 'without any consideration (or with very little consideration) of the amount of commerce involved, the effect of the particular restraint on competition, the motive of the participants, any social or economic benefits resulting from the restraint, or other surrounding facts.'[38] It generally, relieves the plaintiff from proving anticompetitive effects and only a probability of anticompetitive effects has to be shown.[39] The reasoning behind such approach may be understood from the following syllogism drawn from the various judicial pronouncements by some commentators:

---

[33] Einer and Geradin (n 6) 513-14; *Jefferson Parish* (n 4) 18; *Fortner Enterprises, Inc v United States Steel Corp ET AL* [1969] 394 US 495, 499-500; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2139.
[34] Einer and Geradin (n 6) 513-14.
[35] *Microsoft III* (n 32) 89-90.
[36] *Ibid* 84.
[37] *Northern Pacific* (n 5) 5-6.
[38] Special Subcommittee Report (n 20) 731.
[39] *Jefferson Parish* (n 4) 15-16.

> Major premise: it is illegal per se to foreclose competitors from a substantial market (*International Salt*). Minor premise: tying arrangements have 'hardly any purpose' but to foreclose competitors from a substantial market (*Standard Oil*). Conclusion: tying arrangements are illegal per se (*Northern Pacific*).[40]

Tie- ins lead to the foreclosure of the tied product market, whenever a seller in the tying product market is in a position such as to coerce the buyers in the tied product market to opt for his product (tied) rather than his competitor's product i.e. *leveraging* his position in the tying product market to distort market conditions in the tied product market. Based upon this, the probable anticompetitive results which are apprehended and sought to be prevented by employing this rule include, '(1) Buyers are deprived of the opportunity to select the '*best bargain*' in the tied product market; and (2) other sellers of the tied product are deprived of the opportunity to have their versions of the tied product compete '*on the merits*' with the tying seller's tied product'.[41]

Although, as already mentioned the application of the *per* se rule to tie-ins has been criticised extensively, the U.S.S.C. had justified its application stating that:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity of an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable- an inquiry so often wholly fruit-less when undertaken.[42]

However, how far do these reasons go in justifying the *quasi* application of this rule is debatable, as was pointed out by O'Connor J, that:

> The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangements. As a result, tying doctrine incurs the costs of a rule of reason approach

[40] Baldwin and McFarland, 'Some Observations on Per se and Tying Arrangements' (n 28) 436, citing *Standard Oil* [1949] 337 US 293.
[41] Brinson, 'Proof of Economic power in a Sherman Act Tying Arrangement Case' (n 1) 30, citing *Jefferson Parish* (n 4).
[42] *Northern Pacific* (n 5) 5.

> without achieving its benefits: the doctrine calls for the extensive and time consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.[43]

As already stated, the *per se* rule enunciated for tie-ins has been modified in its scope. In its current form, in order for a tie-in to invite *per se* condemnation, there should exist two separate products tied together[44], there must exist with seller market power (in the tying product market) which is being used to restraint competition in a separate market (tied product market)[45] by restricting the freedom of choice of the consumers to only purchasing the tied product[46] and a 'not insubstantial' dollar volume of commerce in the tied product market should be affected.[47] However, given the limited scope of this article, it is only the element of sufficient economic power which has been discussed in greater detail.

2. Economic Power

The application of leverage theory presupposes the existence of such power with the seller in the tying product market so as to facilitate market distortion in the tied product market. 'If there is no economic power or control over the tying product market, one seller's decision to sell two products as a package does not have any anticompetitive effects'[48] and therefore 'in the case of tying arrangements, leverage and price discrimination are both impossible without market power'.[49] Yet, the threshold for the realization of this requirement has generated much controversy over the time. Initially, the standard set was that legally acquired monopolies such as patents provided the requisite market power in order for an illegal tie-in to materialise.

[43] *Jefferson Parish* (n 4) 34.
[44] *Microsoft III* (n 32) 85, para 54.
[45] *Illinois Tool Works Inc ET AL v Independent Ink, Inc* [2006] 547 US 28, 13.
[46] *Jefferson Parish* (n 4) 12-13.
[47] Leslie, 'The Commerce Requirement in Tying Law' (n 21).
[48] Gary Myers, 'Tying Arrangements and the Computer Industry: Digidyne Corp v Data General Corp', [1985] Duke LJ 1025, 1034-35.
[49] *Ibid* 1037.

However, generally the position with regard to tie-ins involving non- patented products (or services) remained relatively unclear. In *International Salt*, although the claim pertained to a patented salt-dispensing machine(tying product), ‘the district court had assumed, for purposes of the summary judgment motion, that lessees could obtain competitive machines and equipment’[50], perhaps, treating patented and non- patented products to be at par and since the same was affirmed by the U.S.S.C. without any reservations, it was believed that may be the court had done away with the requirement of proving market power or at least had watered down the requirement to mean nothing more than ‘some element of distinctiveness- some unique aspect- which probably, though not necessarily, would be enough to cause some purchasers to prefer it over competing products at comparable prices’.[51] The same commentator advocated for this interpretation of the court's opinion since according to him there existed a dichotomy between distinctiveness and dominance, the latter entailing, ‘power over price and power to exclude competition’[52] whereas the former, ‘though likely to confer some slight power to vary price within narrow limits, may confer no power at all’.[53] He further contended that legal monopolies such as patents only imparted the element of distinctiveness (and nothing more), which was susceptible to ‘be wholly offset by other attractions of competing commodities’[54] and since the same satisfied the requirement of market power (in patented tie-in claims), the standard should not be any different in claims pertaining to unpatented products (or services).

Such analysis seems right in the perspective of the U.S.S.C.'s pronouncements since *International Salt*. Although, initially it raised the standard of economic power to mean ‘dominance’ in the relevant market[55], subsequently it limited its economic power analysis to unique attributes of the product (land[56] and copyrighted films[57]) that enhanced its desirability with the buyers. Thus by a process of evolution, the court had, ‘liberalised the

---

[50] Donald F Turner, 'The Validity Of Tying Arrangements Under The Antitrust Laws', (1958-1959) 72 Harv L Rev 50, 54.
[51] *Ibid* 53.
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Times-Picayune Publishing Co v United States* [1953] 345 US 594.
[56] *Northern Pacific* (n 5).
[57] *United States v Loew's Inc* [1962] 371 US 38.

economic power standard, once requiring "*market dominance*", but later declaring that a mere inference from the "*desirability*" or "*uniqueness*" of the product is sufficient'.[58] This led to the court to vacate a district court order rejecting a claim for tie-in agreement due to lack of seller's dominance in the tying product market (and remand the same for jury trial) wherein a 100% credit financing contingent upon purchasing prefabricated houses from the financing company's group company was alleged to be a tie-in arrangement.[59]

The court pointed out that, 'uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitor'[60] indicating 'that a seller's economies of scale and advantageous legal position may be indicia of economic power'.[61] As per the court, sufficient economic power existed with a seller, whenever the seller was in a position to either successfully raise prices or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market[62] (in the instant case, the houses were priced above market cost), invariably implying that economic power could be inferred whenever the seller was in a position to impose a tie-in upon an appreciable number of buyers.

This position was subsequently revisited in *Fortner II*[63], wherein the court firstly clarified that:

> [I]f the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit- or to incur greater risks- than its competitors, that kind of uniqueness will not give rise to any interference of economic power in the credit market.[64]

The court further rejected the claim that the acceptance of the tie-in by a significant number of customers in itself was sufficient to prove the seller's

---

[58] Aimee Frances Fisher, 'Antitrust: Per se Doctrine- Tying Arrangements and the Market Power Requirement', (1972) 8 Tulsa LJ 235, 238.
[59] *Fortner Enterprises Inc v United States Steel Corp ET AL* [1969] 394 US 495 (*Fortner I*).
[60] *Ibid* 505.
[61] Raymond J Brassard, 'Tying Arrangements: Requisite Economic Power, Promotional Ties and the Single Product Defense', (1970) 11 BC L Rev 306, 314, <http://lawdigitalcommons.bc.edu/bclr/vol11/iss2/10> accessed 10 September 2016.
[62] *Fortner I* (n 59) 503-504.
[63] *United States Steel Corp v Fortner Enterprises, Inc* [1977] 429 US 610 (*Fortner II*).
[64] *Ibid* 622.

economic power, clarifying that this approach depended upon the absence of other explanations for the willingness of buyers to purchase the package (as was the case in *Northern Pacific*).[65]

Fortner II could as well be considered to be a step in the direction of revitalizing the economic power requirement to its earlier standard (not merely an uniqueness), this becoming more obvious with *Jefferson Parish*[66] and *Illinois Tool Works Inc.*[67], whereas in the former the market share of the defendant hospital was considered far from being overwhelming to impart any 'dominance' in the market for 'hospital's sale of services to its patients'[68], in latter the court overturned its earlier stand[69] and stated that the possession of a legal monopoly by a seller did not raise any presumption of market power in the market for the tying product. However, whether this requirement of market power u/s. 1 is same as that required u/s. 2 of the Sherman Act or not is still shrouded with ambiguity.[70]

III. Tie-Ins in the EU

Tie-ins in the E.U. have been proscribed under the TFEU both as an instance of vertical restraint under Article 101(1)(e) and an instance of abuse under Article 102(d).[71] Article 102 proscribes tying only when committed by a dominant undertaking (in the tying market).[72] 'Thus while Article 81[now 101] prohibits anticompetitive tying regardless of the undertaking's market power, Article 82[now 102] prohibits tying by an undertaking in a dominant

[65] *Ibid* 620, fn 13.
[66] [1984] 466 US 2.
[67] [2006] 547 US 28.
[68] *Jefferson* (n 4) 18.
[69] *United States v Loew's Inc* [1962] 371 US 38.
[70] Myers, 'Tying arrangements and the Computer Industry' (n 48) 1040.
[71] Commission Guidelines on Vertical Restraints, [2010] OJ C 130/01, 43, para 214 (Guidelines on Vertical Restraint) < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:130:FULL&from=EN> accessed 1 September 2016.
[72] Commission Guidance On The Commission's Enforcement Priorities In Applying Article 82 Of The EC Treaty To Abusive Exclusionary Conduct By Dominant Undertakings, [2009] OJ C45/7, 15, para 50 (Guidance on Applying Article 82) <http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN> accessed on 1 September 2016.

position regardless of actual anticompetitive effect.'[73] Further under Article 101, tying is block exempted when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30 %.[74] Unlike the U.S., not much controversy has accrued with regard to the quantum of market power (dominance) which should justify a *per se* proscription of tie-ins in the E.U. as most claims of anti-competitive tying have been brought under Article 82.[75] However, it must also be pointed out that claims for tying are not limited to article 82(2) (d):

> [T]ying practices may also be caught by Article 82 where they do not fall within the precise terms of Article 82(2) (d); in *Tetra Pak v Commission* the Court concluded that there was an unlawful tie even though the products in question were connected by commercial usage, a situation not covered by the express wording of paragraph (d).[76]

Since, article 101 and 102 correspond to article 81 and 82 of the Treaty establishing the European Community ("TEC"), respectively, they have been referred to interchangeably.

1. *Per Se* or Rule of Reason (The United States' *Leverage* Problem)

Tying (under the E.U. law) is interpreted as analogous to what it entails in the U.S., it, 'usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis'.[77] What is also analogous is the debate as to what approach must be adopted while dealing with tie-in agreements i.e. a formalistic 'form- based' approach similar to a *per se* proscription or an 'effects- based' approach similar to the rule of reason, in the U.S. Initially:

> The European institutions tended to be doctrinaire in their approach to assess tying arrangements by reference to their form rather than

[73] James F Ponsoldt & Christohper D David, 'Comparison between US and EU Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted', (2006-07) 27 Northwestern J Int'l L & Bus 421, 441.
[74] Guidelines on Vertical Restraint (n 71), 43, para 218.
[75] Richard Whish and David Bailey, *Competition Law* (6th edn, OUP 2012) 681.
[76] *Ibid* 681-682.
[77] Guidance on Applying Article 82 (n 72), 15, para 48.

> their effects: the tendency [was] to say a tying [had] this form, therefore it [was] exclusionary- even if there [was] manifest evidence that this [was] not the case.[78]

The criticism levelled in this regard pertains to the fact that in being so formalistic, the Commission or the courts 'often fail to demonstrate how a particular practice could have significant effects on the market: too often they fail to articulate a convincing theory of economic harm and/or to produce evidence that adverse effects would follow from the practice under investigation.'[79] As in the U.S., even in E.U., 'a simplistic objection to tying is that it involves the dominant firm *leveraging* its position in relation to the tying product to achieve increased sales in the market for tied product, thereby extending its market power'.[80] In doing so:

> [A]n undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.[81]

This apprehension insinuated the Commission to proscribe tying claims in various cases[82] without first analysing their effects on the market in which the undertakings were dominant (tying market), including:

> [T]wo leading cases which concerned consumables in an aftermarket tied to a primary product, *Hilti* and *Tetra Pak II*, [establishing] tying as a *per se* abuse. In both cases the Commission found an abuse after very little analysis of the market. Once it had found dominance, separate products and no objective justification, the finding of abuse

---

[78] Christian Ahlborn, David Bailey, Helen Crossley, 'An Antitrust Analysis of Tying: Position Paper' in Damien Geradin (ed), *GCLC Research papers on Article 82 EC*, l, 166, 185-186 (GCLC, 2005) <https://www.coleurope.eu/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf> accessed 1 September 2016.

[79] Whish and Bailey (n 75) 195.

[80] *Ibid* 680.

[81] Elhauge and Geradin (n 6) 626.

[82] *Eurofix –Bauco v Hilti* OJ [1988] L 65/19; *Napier Ground v British Sugar* OJ [1988] L 284/41; *Société Alsacienne et Lorraine de Télécommunications et d'Electronique (Alsatel) v SA Novasum* [1988] ECR 5987; Case 333/94 P, *Tetra Pak Int'l SA v Commission* [1996] ECR I-5951; *De Post- La Poste* OJ [2002] L 61/32.

> followed almost automatically. In both cases the appeals to the Community Courts concentrated on the issues of market definition and objective justification.[83]

This was even considered to be a steady extension of the leverage theory in the E.U. Competition Law as against the U.S., where it had already lost considerable ground[84], with sufficient scope for justifying the conduct objectively.

2. What Constitutes a Condemnable Tie-In?

In light of the above, tie-ins under article 102 were condemned whenever market power was attributable to the undertakings in the tying market (not necessarily in the tied market[85]), there existed separate products which had been tied together (which were or were not connected by commercial usage[86]), and consumers were strong armed into purchasing the tied product in order for them to secure the tying product. Another prerequisite was added subsequently[87], namely, any foreclosure effect of the tie-in on the market. This was believed to be a step towards an 'effects- based' approach:

> While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclosure competition.[88]

This position was reaffirmed by the General Court in appeal[89] and subsequently was further substantiated with the Directorate-General for

---

[83] Jones and Suffrin (n 2) 459.

[84] Scott M Kareff, 'Tetra Pak International SA v Commission (Tetra Pak II): The European Approach to Monopoly Leveraging' (1996-97) 28 Law & Policy Int'l Bus 549, 549.

[85] DG COMP Discussion Paper (n 3), 55, para 184.

[86] Case C- 333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951 in Jones and Suffrin (n 2) 461-62.

[87] *Commission v Microsoft* (COMP/C-3/37.792) Commission Decision 2007/53/EC of 24 March 2004 [2007] OJ 32/23.

[88] *Ibid*, para 841.

[89] Case T-201/04, *Microsoft v Commission* [2007] ECR II- 3601 (*Microsoft*).

Competition, European Commission's ("DG COMP") discussion paper.[90] It stated that although tying was considered to be a common practice that generally did not have any anti-competitive effects[91], it could lead to possible anti-competitive effects such as ‘foreclosure, price discrimination and higher prices’[92] when the pre requisites including foreclosure effect as stated above were fulfilled.[93] However, considering this to be a half- baked effects- based approach of the Commission, it has been criticised *inter alia* for the following:

> [T]hat the rules on who bears the burden of showing efficiencies and the standard of proof that must be met to discharge this burden are weighted so heavily against the dominant firm that, as a practical matter, it is very questionable whether adequate consideration will be given to the efficiencies or other consumer benefits that may result from a particular tie or bundle. Indeed, the Discussion Paper adopts an approach in which certain proxies are used to measure anticompetitive effects, with certain older presumptions against tying remaining embedded in the analysis.[94]

3. Defences for Tying: Scope for Objective Justification and Economic Efficiency

Courts in the U.S. have always been open to acknowledging the scope for objective (business) justifications necessitated by economic efficiencies or otherwise[95] when it comes to addressing claims of anticompetitive tie-ins, generally with the rider that less restrictive alternatives to tying are not available.[96] Even the U.S. Dept. of Justice and the Federal Trade Commission

---

[90] DG COMP Discussion Paper (n 3).
[91] *Ibid* 54, para 178.
[92] *Ibid* 54, para 179.
[93] *Ibid* 55, para 183.
[94] The Computing Technology Industry Association, Inc, 'Competition, Competitors, and Consumer Welfare: Observations on DG Competition's Discussion paper on Article 82' (Brussels, February 2006), 18, <http://ec.europa.eu/competition/antitrust/art82/092.pdf> accessed 1 September 2016.
[95] *United States v Jerrold Elecs Corp* 187 F Supp 545 (ED Pa 1960), affmd *per curiam*, [1961] 365 US 567.; *International Business Machines Corporation v United States*, 298 US 131; *United States v Microsoft Corporation,* 253 F.3d 34 (DC Cir 2001); Myers, 'Tying arrangements and the Computer Industry' (n 48) 1047.
[96] Myers, 'Tying arrangements and the Computer Industry' (n 48) 1047- 48.

have acknowledged the same.[97] Position under the E.U. regime is no different. 'Hardly a case has gone by before the European Courts dealing with article 82 that has not made some mention of "objective justification".'[98] Moreover, although 'there is no Article 82(3), in the way that Article 81(3) provides an efficiency defence for agreements that infringe Article 81(1). However, it is clear that a dominant undertaking can raise a defence to an accusation of abuse where it can show that it had an "objective justification" for its behaviour.'[99]

The position therefore seems to be that the Commission and the courts do in fact acknowledge and consider objective justifications as an exception to abusive conduct, however, whether such practice is warranted as per the language of article 102 is contentious. What is not being suggested here is that abusive conduct should be condemned even in the face of countervailing objective or economic justifications as a *per se* violation rather what is being questioned is as to whether such approach can be implemented under the instant provision as it now stands. Even the Commission has acknowledged the same, claiming that, 'Article 82 does not expressly foresee the possibility of "exempting" abusive behaviour under Article 82 because of efficiencies.'[100] As per some commentators, the genesis for legally justifying the inclusion of objective justifications under article 102 resides in the Commission's own interpretation of abuse[101]. According to them, for a conduct to amount to an abuse, 'It must, (1) have the effect of hindering the maintenance or growth of competition on the market, and (2) be the result of methods different than "*normal competition*" in products or services'.[102] This

[97] 'U.S. Deparment of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property' (2005), 26 <https://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property> accessed 3 September 2016.
[98] Paul-John Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28(4) World Competition 455, 456.
[99] Whish and Bailey (n 75) 206.
[100] Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82', SPEECH/05/537 (New York, 23 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en> accessed 1 September 2016.
[101] Case 85/75, *Hoffmann La Roche & Co AG v Commission*, [1979] ECR 461, para 91.
[102] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 458.

is referred to as the '*two-tier*' analysis which must be carried out under article 102.[103]

The second part of the test thus provides scope to employ *non-normal* techniques in order to meet *non- normal* competition with abuse being merely a collateral effect. The idea seems to be to first assess the foreclosure of the concerned practice by either showcasing exclusionary (eliminatory) intent or potential effect (actual effect not necessary)[104] and then to assess whether such effect may be justified upon the instance of the party[105], somewhat analogous to article 101(3)[106] with difference in burden of proof as specified earlier. However, the same is contentious for:

> [A] defence does not exist in Article 102 TFEU and the fact that exception criteria exist in Article 101(3) TFEU but not the former strengthens the argument that they cannot simply be read into it by the enforcer. It has been argued elsewhere that this omission in Article 102 TFEU is not a silent refusal of efficiencies since efficiency was one of the main concerns, if not the main concern, of the drafters of Article 102 TFEU. Hence there is support inherent in Article 102 TFEU to include efficiencies in the assessment. Yet, this cannot be done by inserting an exception clause into Article 102 TFEU.[107]

Perhaps, then such justification should be considered as a factor while determining the abuse itself so that article 102 traps only actually abusive (in this context) practice without providing any exceptions (as mandated by the text of the provision).[108] Moreover, even intent as a factor[109] and the scope

---

[103] Luc Gyselen, 'Rebates: Competition on the Merits or Exclusionary Practice?' (8th EU Competition Law and Policy Workshop on What is abuse of dominance?, European University Institute, June 2003), 5-6, paras 11-12 (6 June 2003) <http://apps.eui.eu/RSCAS/Research/Competition/2003(papers).shtml> accessed 1 September 2016; Ibid 458.
[104] Gyselen, 'Rebates: Competition on the Merits or Exclusionary Practice?' (n 103).
[105] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 458.
[106] Ibid 459- 62.
[107] Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73 The Modern Law Review 605, 622 <http://www.jstor.org/stable/40865467> accessed 2 September 2016.
[108] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 463.
[109] Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses', (2005) 42 CM L Rev 129, 146, para 4.

for justifying it objectively[110] are debatable so to speak and lack considerable clarify.

Such objective justifications are only valid upon fulfilment of certain prerequisites: ‘It must pursue a legitimate aim, be reasonable and be proportionate to the aim sought’.[111] ‘Legitimate aim’ seems to refer to the intent of the undertaking while indulging in the alleged anti-competitive activity, reasonableness is a matter of facts and proportionality is to be determined upon the economic strength of the undertaking.[112] They may be in the form of a legitimate business behaviour: this is in sync with the objective of E.U. competition policy, namely, to protect the ‘competitive process and to this extent also the opportunities of competitors to compete on the merits’[113]; or for a legitimate public interest objective, it must however be pointed out that it is not the task of a dominant company 'to take steps on its own initiative to eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own product.’[114]

Therefore, the Commission had rejected the attempt of justifying the practice of tying the sales of nails and cartridge strips with the nail gun upon safety considerations claiming compatibility and quality concerns in *Hilti*[115] since the safety concern was for the local authorities (United Kingdom) to consider; or in the form of efficiency gains outweighing the alleged anti-competitive effects[116] as was claimed by Microsoft as *distribution efficiencies*, in the form of economies saved in not maintaining a distribution system for the second product (Windows Media Player)[117], and *technical efficiencies* in the form of its ‘*successful business model*’ providing for the integration of new functionality into operating systems in response to technological advances as per changing consumer demand leading to increasing use of digital media, were the *real benefits* that the Commission had not sufficiently considered[118], only to be rejected by the Commission (and the Court of First Instance) as a

---

[110] Loewenthal, 'The Defence of "Objective Justification' (n 98) 470.
[111] Ibid 465.
[112] Ibid 465- 66.
[113] Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC' (n 100) 133, para 2.2.
[114] Whish and Bailey (n 75) 207.
[115] *Eurofix –Bauco v Hilti* OJ [1988] L 65/19.
[116] *Microsoft* (n 89).
[117] Ibid, para 1095.
[118] Ibid, para 1108.

misinformed argument based on confusion between 'the benefits to consumers of having a media player pre- installed along with the client PC operating system, and Microsoft selecting the media player for consumers'[119] and upon failure to justify that it 'leads to superior technical product performance'[120] respectively.

IV. Tie-Ins in India

Tie-ins in India have since long been acknowledged as 'restrictive trade practices' finding mention both under the MRTP Act, 1969[121] and The Consumer Protection Act, 1986.[122] As per the newly established Competition regime in India, tie-in as a means of distorting competition has been acknowledged in the form of a vertical restraint to be facilitated by an agreement to this effect u/s. 3(4)(a) of the Competition Act, 2002. It has also been incorporated as means of unilateral abuse of one's dominant position u/s. 4(2)(c-e) of the Act. To this extend, the Indian competition law is in conformity with both the U.S. and the E.U. law since both have recognised a tie-in as a vertical restraint as well as an abusive conduct by a dominant firm.

As has already been highlighted that in both the U.S. and the E.U., immense jurisprudential controversy has accrued with regard to the presupposition that tie-ins invariably would lead to only anticompetitive effects and positions in both the jurisdictions have seen a significant shift with the consistent efforts of academicians on both sides of the debate, most of this controversy accruing in the U.S. However, this does not seem to be the case in India, primarily for two reasons. Firstly, the law makers in India had experiences of both the jurisdictions with tie-ins to begin with and therefore the Act was devised so as to incorporate the provisions which did not entail friction with either economic analysis or judicially set precedence (internationally). Secondly, there have not been very many instances wherein the C.C.I, has had an opportunity to adjudicate upon claims of tie-ins, for any controversy or contradictory view points to ensue.

---

[119] Ibid, para 1125.
[120] Ibid, para 1159.
[121] Monopolies and Restrictive Trade Practices Act, 1969, s 33 (1)(b).
[122] Consumer Protection Act, 1986, s 2 (nnn)(b).

However, the facts that the Act is well crafted and that the C.C.I. has not come under criticism, should not be construed to mean that the opinions rendered by the C.C.I. with regard to tie-ins are judicially accurate and in sync with the aspirations of the lawmakers as documented in the high level Committee report[123] and codified subsequently in the Act. Needless to say, this section is aimed at changing this position, i.e. to making tie-ins controversial even in India and explaining the immediately preceding paradox i.e. highlighting C.C.I.'s failure in respecting the mandate of the Act while dealing with tie-in agreements.

The inception point for this critique is the opinion of the C.C.I. in the case of *Shri Sonam Sharma v Apple Inc.*[124] followed by its rather contradictory (majority) opinion in the case of *Ramakant Kini v Hiranandani Hospital*[125] and the opinion of the Competition Appellate Tribunal ("COMPAT") in *Hiranandani*[126] (in appeal). Since it is in these cases that the C.C.I. has most comprehensively documented its understanding of the tie-in agreements. This is not to say that these are the only claims of tie-ins that have been brought before the C.C.I. and therefore references wherever necessary have also been made to such cases wherein the C.C.I. has substantially delved into claims of tie-ins. It must also be understood that this is not a critique of the output of these cases rather the reasoning of the C.C.I. leading to these outputs.

1. Scheme of Tie-In Arrangements under the Competition Act, 2002

The Competition Act, 2002 has different approaches towards horizontal and vertical agreements as u/s. 3. Whereas horizontal agreements as falling u/s. 3(3) are '*presumed*' to have an AAEC, thereby incorporating a *per se* proscription[127], vertical agreements as falling u/s. 3(4) on the other hand are proscribed only if it be shown that such agreements do in fact cause or are likely to cause AAEC in India[128], thereby incorporating a rule of reason

---

[123] Report of the High Level Committee on Competition Policy & Law (Chairman SVS Raghavan, 2000) (Raghavan Committee Report).

[124] *Sonam Sharma* (n 7).

[125] *Ramakant Kini* (n 9).

[126] *L.H. Hiranandani Hospital, Mumbai v Competition Commission of India, New Delhi and Anr* [2016] CompLR 0129 (CompAT).

[127] Raghavan Committee Report (n 123), para 4.3.8; D P Mittal, *Competition Law & Practice,* (3rd edn, Taxmann Publications 2011) 172-173.

[128] Raghavan Committee Report (n 123), para 4.4.0; DP Mittal, *Competition Law & Practice,* (3rd edn, Taxmann Publications 2011) 172-173.

approach as in the U.S.[129] It further provides u/s. 19(3), similar to the E.U. law in this regard[130], factors both positive and negative for evaluation of AAEC.[131] Thus, a tie-in agreement u/s. 3(4)(a) has to tested for its actual or probable adverse effect on the competition[132], this being the only determining factor as per the instant provision, to be calculated in light of the enumerations made u/s. 19(3) of the Act. It should be clarified here that as per the C.C.I., 'vertical agreements' as u/s. 3(4) do not include consumers[133] since, 'a manufacturer/service provider and the consumer cannot ever be said to be part of any "production chain" or even operating in "different markets" because a consumer does not participate in production…'[134] However, the same is not without dissent.[135]

A tie-in as a unilateral abusive act by a dominant firm has been proscribed *per se* u/s. 4(2)[136] by virtue of being prohibited u/s. 4(1).[137] Specific instances of tie-ins have been trapped under clauses (d)[138] and (e)[139] of s. 4 and if denial of market access *inter alia* as a consequence of a tie-in is also to be considered then even under clause (c).[140] Dominance has to be assessed on the factors enumerated u/s. 19(4) in the relevant market which comprises of the relevant product and the relevant geographic market[141] to be delineated upon consideration of factors as enumerated u/s. 19(7) and 19(6) respectively.

---

[129] Tilottama Raychaudhuri, 'Vertical Restraints In Competition Law: The Need To Strike The Right Balance Between Regulation And Competition', (2011) 4 NUJS L Rev 609, 609.
[130] Ibid.
[131] Abir Roy & Jayant Kumar, *Competition Law in India* (2nd edn, Eastern Law House 2014) 48.
[132] *Ajay Devgn Films Through Naik Naik Films v Yashraj Films Pvt Ltd*, Case No 66/2012 (CCI), 3, para 5.
[133] *Financial Software and Systems Pvt Ltd v M/s ACI Worldwide Solutions Pvt Ltd and Ors*, Case No 52/2013 (CCI), 57, para 10.67.
[134] *Consumer Online Foundation v Tata Sky & Ors*, Case No 02/2009 (CCI), 104, para 18.32.
[135] *Consumer Online Foundation v Tata Sky & Ors*, Case No. 02/2009 (CCI), 15, para 15 (Dissent). <http://www.cci.gov.in/sites/default/files/DissentingOrderConsumer250411_0.pdf> accessed 2 September 2016.
[136] Cyril Shroff and Nisha Kaur Uberoi, 'Unilateral Conduct: The Competition Commission of India's Enforcement Priorities', <http://xbma.org/forum/indian-update-unilateral-conduct-the-competition-commission-of-indias-enforcement-priorities/> accessed 5 September 2016.
[137] T Ramappa, *Competition Law in India: Policy, Issues and Developments* (3rd edn, OUP 2014) 157.
[138] D P Mittal, *Competition Law & Practice* 325 (3rd edn, Taxmann Publications 2011) 325.
[139] Ibid 329.
[140] Ibid 318-21.
[141] The Competition Act, 2002, s 19(5).

2. *Sonam Sharma* and *Ramakant Kini*: Relevant Facts

a. Shri Sonam Sharma v Apple Inc. and Ors

The allegations in this case pertained to distribution agreements entered into between Apple India Pvt. Ltd., Indian subsidiary of Apple Inc. U.S.A. ("Apple") and Vodafone Essar Limited ("Vodafone") and Bharat Airtel Limited ("Airtel"), by virtue of which Apple iPhones (3G/3GS) could only be purchased on the GSM network of Airtel or Vodafone and only through their respective distributors. iPhones purchased from other sources or 'unlocked' i.e. reconfigured to run on other GSM networks were susceptible to lose their warranty cover since they were not accepted for repair at the respective service centres. It was further alleged that both Airtel and Vodafone had also 'tweaked' their mobile internet services in order to make them incompatible to be used with iPhones and subsequently notified iPhone specific internet services at relatively higher price than what they charged for use on other smartphones. Further, Apple was also accused of allowing only applications approved by it and available on its online application store 'App Store' to be used on iPhones and if in case iPhones were 'unlocked' to make other third party applications workable with the same it rendered the warranty of such iPhones worthless, moreover any upgrade of the operating system of such iPhones caused for 'relocking' of such iPhones and deletion of all such unapproved, third party applications from the iPhones.

The allegations were compounded to have offended provisions both u/s. 4 i.e. provisions condemning abuse of dominance and u/s. 3 i.e. provisions condemning anti- competitive agreements likely to have AAEC in the market. The alleged tie-in as identified by the C.C.I. was a 'distribution/ sales arrangement between Apple and Airtel/ Vodafone is a case of "contractual tying" wherein the handset manufacturer and service provider have joined hands to offer a packaged product to the customer.'[142]
Upon an order of the C.C.I. u/s 26(1), the Director General ("DG") undertook an investigation into these allegations. Amidst various objections raised against the jurisdiction of the C.C.I. in the instant case, which included *inter alia* the fact that subject- matter of the dispute was better suited to be tried before the Telecom Regulatory Authority of India ("TRAI") rather than the

[142] *Sonam Sharma* (n 7) 24, para 70.

C.C.I.; that the informant did not have a *locus standi* in the instant case; that the Competition Act, 2002 did not have retrospective application and the concerned aberrations if at all happened, happened prior to the notification of sections 3 and 4 of the Act. Moreover, 'collective dominance' (assessing jointly the standing of Vodafone and Airtel in the market) was not recognised under the Act and thus the prerequisite of dominance with regard to Vodafone and Airtel was not made out.

As per the DG, the arrangement between Apple, Airtel and Vodafone of selling 'locked' iPhones was a Tie-in arrangement u/s. 3(4)(a). However given the miniscule market share of Apple in the 'smartphone' market in India (1%- 3% in terms of volume) at the time of the aberrations i.e. between 2008-2010, such tie-in could not have caused any AAEC in the said market in India. With regard to violations u/s. 4, the DG identified two relevant markets namely, '(i) relevant market for smartphones in India and (ii) relevant market for GSM cellular services in India'[143] and further deduced that Apple or Airtel and Vodafone (individually) were not dominant in these markets respectively.

b. Ramakant Kini v Dr. L.H. Hiranandani Hospital

In this case, an exclusivity agreement whereby Dr. L.H. Hiranandani Hospital ("Hiranandani") did not allow for any stem cell bank apart from Cryobanks International India ("Cryobank") to offer stem cells banking services (collection of umbilical cord at the time of birth and preserving it at sub- zero temperature for 21 years) on its premise was the cause for the dispute to arise. The informant in this case had already approached M/s Life Cells India Pvt. Ltd. ("Life Cell") for its services and then had engaged *Hiranandani* for maternity related services and delivery of her child. However, as was averred, she was not notified of the special arrangement that existed between *Hiranandani* and Cryobank at this point, it was only subsequently when she requested *Hiranandani* to allow Life Cell to collect the umbilical cord at the time of the delivery of her child that she was refused the same and Cryobank as an alternative was suggested to her. This caused for the Informant to engage another hospital for its maternal services.

[143] Ibid 12-13, para 26.

Based upon the above mentioned, allegations u/s. 3(4), s. 4(2)(a)(i) and 4(2)(c) were registered with the C.C.I., who instructed an investigation of the DG u/s. 26(1). As per DG's investigation, the agreement between *Hiranandani* and Cryobank was anti- competitive as u/s. 3(4) and the same was likely to have AAEC in the market. Further, *Hiranandani* was considered to be dominant in the market of 'provisions of maternity services by super speciality hospital in the geographic market of 0-12 km from the *Hiranandani* Hospital covering S, L, N, K/E, T & P/S wards of Municipal Corporation of Greater Mumbai as per Section 2(r) of the Act'[144] which it had abused by imposing unfair conditions on expecting mothers coming to it for maternity services. It must be clarified here that subsequently the Commission had assessed a violation only of s. 3(1) of the Act in the case as an agreement causing AAEC but not falling expressly within s. 3(3) or 3(4) i.e. the claim for tie-in did not materialise.

3. C.C.I.'s Assessment: A Critique

As per C.C.I.'s order in *Sonam Sharma:*

> A tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. In other words, a firm selling products X and Y makes the purchase of product X conditional to the purchase of product Y. Product Y can be purchased freely on the market, but product X can only be purchased together with product Y. The product that a buyer is required to purchase in order to get the product the buyer actually wants is called the tied product.[145]

Further in the order, C.C.I. acknowledges that tie-ins are not *per se* anti-competitive as 'economics literature suggests that there are pro-competitive rationales for product-tying. These include assembly benefits (economies of scale and scope), quality improvement as also addressing pricing inefficiencies'.[146] Thus, it seems clear that C.C.I. in essence acknowledges that tie-ins should be dealt with under the rule of reason approach as is the scheme u/s. 3(4) of the Act. Thereafter, C.C.I. very categorically goes on to

---

[144] *Ramakant Kini* (n 9) 0267, para 4.
[145] *Sonam Sharma* (n 7) 24, para 66.
[146] Ibid 24, para 69.

identify '*necessary and essential conditions*' in respect of '*anti-competitive tying*', these being:

> (1) Presence of two separate products or services capable of being tied; (2) The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competitions in the market for their product; (3) The tying arrangement must affect a not insubstantial amount of commerce,[147]

it then applies these standards cumulatively to the instant case to identify whether the (tie-in) arrangement in question i.e. tying of the sale of iPhones to the subscription of mobile network services of Airtel and Vodafone, is *anti-competitive* or not (as is the practice in the U.S. and the E.U.). The use of the phrase '*anti- competitive tying*' is of great import here, for it invariably leads to the conclusion that if in a situation the conditions as enumerated above are fulfilled the tie- in arrangement in question would become illegal or *anti-competitive*. This understanding of tie-ins is highly contentious and gravely problematic, for in doing so the C.C.I. has simply introduced the standards for *quasi- per se* proscription of tie-in agreements as prevalent in the U.S. (explained earlier) and documented in copious pronouncements of the U.S.S.C. including *Northern Pacific*[148] in the enquiries u/s. 3(4)(a) even though, s. 3(4) clearly envisaged a rule of reason approach wherein it was only the causing or the likelihood of causing of AAEC which determined the anti- competitiveness of a tie-in and not the fulfilment of any prerequisites as the C.C.I. seemed to have implied.

Moreover, 'dominance' as a factor *per se* cannot be considered while determining AAEC in a claim u/s. 3(4) since as per the C.C.I., 'whether an agreement restricts the competitive process [AAEC] is always an analysis of the balance between the positive and the negative factors listed under section 19(3)(a)-(f)'[149] and 'dominance' has not been included as a factor therein. It may further be argued that unlike clause (m) u/s. 19(4) which has rendered the list of factors enumerated therein (for determining one's dominance) as

---

[147] Ibid 23-24, para 69.
[148] [1958] 356 US 1.
[149] *Shri Ghanshyam Dass Vij v M/s Bajaj Corp Ltd and Ors*, Case No 68/2013 (CCI), 68, para 81.

open- ended (inclusive)[150], no such clause exists u/s. 19(3) thereby hinting at the legislative intent of self- sufficiency or exhaustiveness of the list of factors enumerated therein, thus vanquishing any scope for the C.C.I. to consider external factors. Perhaps, this is the reason why, it has also been suggested that instead of applying the same factors (u/s. 19(3)) for evaluating the different kinds of vertical restraints (for AAEC) mentioned in the Act, C.C.I. should have the liberty to consider and specify different standards for evaluation, suitable to the respective restraint.[151]

In contradiction to this, in the case of *Ramakant Kini*, while dealing with the alleged tie-in the C.C.I. at least opined (majority) in conformity with the scheme of s. 3 in general and s. 3(4) in particular, when it acknowledged the distinction with regard to the treatment to be met out to agreements u/s. 3(3) and 3(4) going on to further accept that 'Section 3(3) categories are examples of agreements which are considered in violation of Section 3(1) and the Commission, under law, has to presume that these agreements have an appreciable adverse effect on competition'[152] and 'in case of an agreement of the nature under Section 3(4), it has to be shown that an agreement covered under Section 3(4) has or is likely to cause an appreciable adverse effect on competition in India'[153] respectively. This was with no reference to 'dominance' being a prerequisite for a claim of anti-competitiveness u/s. 3.[154] However, in appeal before the COMPAT, the position was re-established to as it was in *Sonam Sharma*, namely that existence of a tie-in between two separate products by a dominant firm which involves a substantial amount of commerce in the market, would lead to a presumption of *anti-competitiveness* of the tie-in arrangement.[155]

a. Dominance as a prerequisite u/s. 3(4)

In *Sonam Sharma*, as per C.C.I., one of the prerequisites for an *anti-competitive tying* was '*sufficient economic power with respect to the tying*

---

[150] *Belaire Owner's Association v DLF Ltd, Haryana Urban Development Authority Dept of Town and Country Planning, State of Haryana*, Case No 19/2010 (CCI), 4, para 4(supplementary).

[151] Raychaudhuri, 'Vertical Restraints In Competition Law' (n 129) 622-23.

[152] *Ramakant Kini* (n 9) 0268, para 8.

[153] Ibid 0268, para 9.

[154] Ibid 0274, para 29.

[155] *Hiranandani* (n 126) 0175, para 35.

arrangement'[156], which was deduced upon factors enumerated u/s. 19(4) similar to 'dominant position' as defined under the explanation attached to Section 4.[157] C.C.I. based upon the investigation undertaken by the DG and upon the evidence adduced before it by the parties, firstly identified the relevant markets as '*Market for smartphones in India; and Market for mobile services in India'.* It then considered whether Apple was in a dominant position in the relevant market for smartphones or not. It acknowledged the business model employed by Apple in India, whereby Apple used to sell locked iPhones through Mobile Network Operators ("MNOs") and Authorized Premium Resellers ("APRs") by virtue of non- exclusive agreements, this arrangement being beneficial to both Apple and MNOs (Airtel and Vodafone) since 'the former did not have to incur establishment/ marketing expenditure while the latter were guaranteed of turf- client for the period of the lock- in'.[158]

However, it was further acknowledged that the customers could get their iPhones unlocked by paying some extra fees. It concluded that Apple was not dominant in the said market by stating that neither Apple's share in the smartphone marker in India nor any other factor as specified u/s. 19(4) imparted any dominance to Apple. The C.C.I. then considered the dominance of Airtel and Vodafone, and stated that neither of the two possessed the requisite market power or any other factor u/s. 19(4) which could have imparted dominance to them. The claim that they were collectively dominant since they collectively possessed 52% market share in the market for mobile services in India was considered untenable since, 'they are horizontal competitors who fight for greater market share'.[159] It further concluded that 'for a vertical agreement to be anti competitive requires the monopolization claim to hold, and given the miniscule market share of the tying party the monopolization claim will be contrived'.[160] Thus, it could be inferred from this approach that, although dominance as a prerequisite is not required u/s. 3(4)(a), it was considered to be so by the C.C.I. and it was only when the claim of dominance did not materialise that C.C.I. subsequently considered

[156] *Sonam Sharma* (n 7) 23, para 69.
[157] Ibid 20, paras 58- 59.
[158] Ibid 20, para 56.
[159] Ibid 20, para 59.
[160] Ibid 24, para 70.

the factors u/s. 19(3) to identify if the alleged tie-in caused or likely would have caused an AAEC in the market.

In essence, this approach of the C.C.I. is akin to the approach now generally employed by the courts in the U.S. and explained by a commentator as *The Two-Hurdle Doctrine*.[161] As per this practice, an alleged tie-in is to be first tested for the prerequisites of a *per se* proscription and if the same are absent it is to be then considered under the rule of reason to identify its foreclosure tendencies (if any) in the market.[162] At this point it may be argued, that in the instant case, had Apple or Airtel/Vodafone been found to be dominant in the respective markets, C.C.I. perhaps, would not have gone on to further consider the factors u/s. 19(3) in order to gauge their tendency of causing AAEC in the market, since the prerequisites of an *anti-competitive tying* would have been satisfied (assuming that the other two were fulfilled as well) and there existed a vertical relationship as required u/s. 3(4). It is interesting to note that, although mindful of the *leverage* theory of anti-competitiveness of tie-in arrangements[163], the C.C.I. has generally limited its enquiry to the factors u/s. 19(3) to a finding of actual or potential AAEC in the market and without enquiring about the market position of the defendants to establish a presumption of anti-competitiveness[164], this is not to say that leverage theory is not endorsed at all since it forms the basis for proscription u/s. 4(2).

b. Potential Ramifications of such Interpretation

Firstly, as already stated, in doing so C.C.I. is replacing the rule of reason approach as mandated u/s. 3(4) by a *per se* proscription. In doing so, the C.C.I. has not only contradicted the legal mandate of s. 3(4), it has taken the Indian competition jurisprudence to the wrong side of the ensuing debate with regard to the proscription of tying arrangements in various jurisdictions. Whereas in both the U.S. and the E.U. rapid changes have taken places and tie-ins are now more often than not found to be treated under a rule of reason or an

---

[161] Kenneth W Dam, 'Fortner Enterprises v United States Steel: "Neither a Borrower, nor a Lender Be"' [1969] The Supreme Court Review 1, 32- 36.
[162] Ibid.
[163] *Arshiya Rail Infrastructure Ltd v Ministry of Railways and Ors*, Case No 64/2010 (CCI), Case No 12/2011 (CCI) and Case No 02/2011 (CCI), para 4.2.5.
[164] *Consumer Online Foundation* (n 134) 100-01, paras 18.28- 18.29; *ESYS Information Technologues Pvt Ltd v Intel Corporation (Intel Inc), Intel Semiconductor Ltd and Intel Technology India Pvt Ltd* [2014] CompLR 0126 (CCI), 0138, para 7.3.8; *Ajay Devgn Films* (n 132) 3-4, paras 5-6.

'effects- based' approach, respectively (even when the seller possesses significant economic power in the tying product market) considering that 'most concerns about tying are misplaced'[165], in India where tie-ins irrespective of possession of dominance or not, ideally should have been subject to a rule of reason enquiry u/s. 3(4)(a) would now be presumed to be *anti-competitive* upon the proof of existence of dominance (*quasi per se* rule) which is both unique and textually unwarranted for the mere fact that under the Act either agreements are *per se* anti- competitive u/s. 3(3) or may be proscribed as anti- competitive u/s. 3(4)(a) after successfully showing of AAEC upon consider of factors u/s.19(3) (rule of reason), with no scope for incorporating this *quasi* rule within the existing scheme of the Act. Notwithstanding the role of s. 3(1) as a blanket cover trapping agreements causing AAEC but not falling within either s. 3(3) or s. 3(4), as was held by the C.C.I. in *Ramakant Kini*.

Secondly, in light of such interpretation, what remains of the scope of tie-ins u/s. 4(2) *vis-à-vis* s. 3(4)(a) has become ambiguous. As per the authors, there existed a clear distinction under the Act to the extent that tying by non-dominant firms was to be trapped u/s. 3(4)(a) and tendered a rule of reason approach whereas tying by dominant firms was to be trapped u/s. 4(2) and made subject to a *per se* proscription. Even as per the Raghavan Committee Report, in any case an agreement of tie-in imposed by a dominant firm was "likely to attract the provisions of the law relating to abuse of dominance".[166] This position has been endorsed by various practitioners.[167] Perhaps, it is for this reason that C.C.I. had stated that:

> [F]or the purposes of Section 3, the Commission is not supposed to enter into a discussion of market dominance, which exercise is necessarily to be done in respect of violation of Section 4…The Commission has to look into freedom of trade, consumer welfare aspects and adverse effect on competition of the agreement…[168]

---

[165] David S Evans, 'The Poster Child for Antitrust Modernisation', *Antitrust Policy and Vertical Restraints* (Robert H. Hahn (ed), Brookings Institution Press, Washington DC 2006).
[166] Raghavan Committee Report (n 123), para 4.4.0.
[167] Amitabh Kumar, Farhan Sorabjee and Amit Kapur, 'Getting the deal Through- Vertical Agreements 2012', *Global Competition Review*, 149 <http://www.jsalaw.com/wp-content/uploads/2015/09/VA2012-India.pdf> accessed 3 September 2016.
[168] *Ramakant Kini* (n 9) 0268- 0269, paras 10-11.

This position is analogous to the position in the U.S. wherein:

> [T]hey can be challenged under the Sherman Act §1 because they involve agreements that constitute restraints of trade if they are on balance anti-competitive. But they can also be challenged under the Sherman Act §2 if the defendant has monopoly power (or a dangerous probability of acquiring it) and the exclusionary agreements anti-competitively help obtain or maintain such monopoly power.[169]

No doubt s. 4(2) would remain open to trap unilateral instances of abuse absent a vertical relationship for instance when a firm imposes the tie-in directly upon the consumer. However, for tying claims involving vertical relationship and market dominance, s. 4(2) has for all practical purposes been rendered otiose. One may argue that the C.C.I. had incorporated the element of dominance within S. 3(4)(a) only as a factor in deducing the actual or potential AAEC to be considered along with other factors u/s. 19(3), and thus the scheme of a rule of reason approach u/s. 3(4) remains intact and to this extend a distinction still exists with regard to the standard of proscription of tie-ins under the two provisions. However, not only is this interpretation skewed, the distinction based upon the same is only likely to further complicate the situation. Since, as already stated, there is no scope for the C.C.I. to consider additional factors u/s. 19(3).

Moreover, such a distinction is only going to give rise to different standards of treatment for the same offence of *tying by a dominant firm*. This is so because u/s. 3(4)(a) *tying by dominant firm* would be treated under a rule of reason approach with scope for objective justification in light of countervailing pro-competitive efficiencies whereas *tying by a dominant firm* u/s. 4(2) shall be met with a *per se* condemnation with no scope for objective justification. If this may not be the case and it be said that uniform standard of rule of reason shall be applied to tie-ins under the Act generally, it will be unsuitable equally since s. 4(2) provides for an exhaustive list of instances of abuse by a dominant firm and no scope for objectively justifying them (apart from the exception provided therein[170]), however, a rule of reason based approach would open avenues for justifying tying even u/s. 4(2) objectively and upon the non- likelihood of it causing AAEC and since similar avenues would not be available for other instance of abuse mentioned therein, a

---

[169] Einer and Geradin (n 6) 513.
[170] The Competition Act, 2002, Explanation to s 4(2)(a).

different standard of proscription shall be created between tying as an instance of abuse *vis-à-vis* other instances of abuses enumerated u/s. 4(2).

Thirdly, such interpretation has further led to a distinction in the standards of proscription for *tying by a non- dominant firm* u/s. 4(2) and s. 3(4). A claim of tying as an abuse u/s. 4(2) shall not materialise if dominance is not proved since the C.C.I. shall not then delve into the allegation of tying as an abuse. However, in light of what C.C.I. has done in *Sonam Sharma*, if the prerequisite of dominance is not fulfilled u/s. 3(4)(a) the C.C.I. would then also subject the alleged tying arrangement to a rule of reason enquiry to gauge actual or potential AAEC in the market. Thus, for the same offence that is of *tying by a non- dominant firm*, there exists a single enquiry u/s. 4(2) whereas a dual enquiry u/s. 3(4)(a). One may argue that this may not be the case, since even if the C.C.I. records no finding of dominance u/s. 4(2), it can treat the same as *tying by a non- dominant firm* u/s. 3(4)(a) subjecting it to a rule of reason approach and therefore no such distinction exists. However, if this was true, then C.C.I. could very well have upon a finding of dominance treated the case as that of tying as an instance of abuse u/s. 4(2) rather than incorporating the element of dominance u/s. 3(4)(a) itself and vitiating its legal mandate.

V. Conclusions

The C.C.I. as an Indian antitrust regulator has to go a long way in streamlining the Indian competition practice along the internationally acclaimed standards. This is not to mean that it has to blindly incorporate foreign legal standards simply because they have been found to be relevant elsewhere, within the Indian scenario without justifying or apprising itself of the viability of doing so. It also has to be mindful of the limits that the law has set in place for it to do the same. Whish's rationale for not incorporating the American rule of reason under Article 81(1) of the TFEU may be relevant in this regard, for as per him, doing so is ‘misplaced’, since the ‘EC law is different in many ways from U.S. law, not least in that it has the “bifurcation” of Article 81(1) and 81(3)’[171] which is absent in the U.S. law.

---

[171] Whish and Bailey (n 75) 131.

Similarly, the Indian law is fundamentally different as compared to the US law (for different reasons). This was also acknowledged by the Supreme Court of India while comparing the Indian law on competition with that of the U.S. law (Clayton Act).[172] It is so since unlike the U.S. law's liberal literature providing immense scope for interpretation to the judges, the Indian law has clear textual guidelines to be followed as and when a situation so demands. It clearly provides for separate approaches to be incorporated while dealing with *tying by dominant firms* (*per* se) and *tying by non- dominant firms* (rule of reason) and the C.C.I. is duty bound to sustain the same. This is not to mean that the C.C.I. cannot incorporate international principles at all, for this would be absurd in the light of the fact that most of the jurisprudence behind the Indian Competition Act, 2002 has been borrowed from the relatively advanced jurisdictions of the U.S. and the E.U. This also does not mean that the authors support the existing *per se* proscription of tie-ins u/s. 4(2). However, this is how the law in the present day stands. The underlying assumption here is that the C.C.I. must do so only when the principle intended to be so incorporated would augment the position of the Indian law with regard to the issue that the principle deals with and not to shift it a step back in the process of evolution.

The rule of reason or the 'effects- based' proscription of tie-in has now internationally been recognised as the right way ahead. As seen, the nomenclature may vary, it may be considered to be *quasi per se* or a figment of a traditional rule of reason enquiry but the essence remains the same, i.e. to proscribe tie-ins only after confirming actual AAEC and weighing it against any pro- competitive tendencies that the tie-in may exude. To this extend it must be stated that it should not be an incorporation of foreign principles of law in abstract, rather a constructive incorporation aimed at painting the best suited antitrust regulatory scenario on the canvas of the Indian market (it maybe to provide scope for objective justifications u/s. 4(2)). C.C.I. in the cases discussed herein however, seems to have been lost upon this objective and rather solely has concerned itself with incorporating alien doctrines presuming for them to suit the Indian scenario perfectly even if it is in defiance of the express mandate of the law.

---

[172] *Competition Commission of India v Steel Authority of India Ltd and Anr*, Civil Appeal No 7779/2010 (Supreme Court of India).

In light of existing inconsistency in the law on tie- in arrangements, the authors believe that the C.C.I. must, analogous with the spirit of the Indian Constitutional Courts and the legislators of moulding international principles of law to suit the Indian ethos, mould this aspect of law in such a way so as to bridge the gap between the two provisions namely, s. 3(4)(a) and s. 4(2). To achieve the same, the authors suggest a course for the inquiry into claims of tie-ins which should be employed by the C.C.I. Firstly, irrespective of what provision has the Informant relied upon while challenging an alleged tie-in as being anti- competitive, the C.C.I. should at the very beginning assess the dominance of the defendant in the market for the tying product. If C.C.I. records a finding of dominance, then it must treat the claim as *tying by a dominant firm*, an instance of abuse of dominance u/s. 4(2). On the other hand, if the C.C.I. fails to record a finding of dominance, then it must treat the claim as *tying by a non- dominant firm* u/s. 3(4)(a) of the Act (if facilitated in vertical relationship) subject to a rule of reason enquiry with the help of factors u/s. 19(3). Moreover, even if the C.C.I. is unwilling in incorporating the same, the least it could do is to not consider the dominance of a firm in the market for the tying product as a factor leading to a presumption of anti-competitiveness u/s. 3(4) and the tying arrangement should nevertheless be considered for its AAEC in the market as per the factors u/s. 19(3). However, considering the general acceptance that tie-ins facilitated through dominance are generally anti-competitive, the likelihood of not presuming the same even when dominance is proved, seems rather unlikely.

It is sensible to suggest that the C.C.I. should, analogous to the European Commission (providing scope for objective justification and countervailing economic efficiencies under Article 102, which otherwise is suggestive of a *per se* proscription), also provide scope for objective justifications based upon economic efficiencies or otherwise to be made in support of the alleged activity. The idea is not novel, for authors have speculated possible defences which the C.C.I. may and ideally should acknowledge while dealing with tying.[173] It has also been asserted that the language contained u/s. 4(2)(d) suggests that 'tying of the two products would not violate [s. 4(2)(d)] if they are so integrated that they could be taken as components of a single product or service'[174], thereby also providing scope of justifying 'innovation' as an objective for tying. Such pragmatism is what is expected out of the C.C.I. and

[173] Roy and Kumar (n 131) 364- 367.
[174] Mittal (n 138) 328, para 4.18-3.

not an attempt at straight jacketing a foreign principle upon Indian laws. It has to be receptive to pragmatic changes in order for actual subsistence and protection of fair competition in India.

THE SHARING ECONOMY: REGULATION AND THE EU COMPETITION LAW

Deni Vitkovic[*]

This article addresses a phenomenon of the sharing economy regulation and the European Union competition law concerns its business models encounter or are likely to face in the foreseeable future. The first part of the paper examines the importance and relevance of the sharing economy for the regulators, whilst the second part reviews potential systems of the regulation, that is, through the governmental and self-regulation mechanisms, with a highlight on the role of innovation and the consumers' perspective. The third part deals with the identified competition law concerns arising from both the dominant position and the possible mergers of the sharing economy undertakings within the EU. It is overall argued that the sharing economy changes the way of doing business for good, providing an alternative to the traditional markets and a better utilisation of unused assets, what calls for an effective and carefully tailored regulatory framework.

I. Introduction

The sharing economy[1] – a term often used interchangeably, although inaccurately[2], with expressions such as 'collaborative consumption',

---

[*] Deni Vitkovic holds a Master of Laws (Mag. Iur.) from University of Rijeka and an LL.M. in Competition Law from Queen Mary University of London. His research interests include consumer protection, competition law and IT and innovation. The author wishes to thank Prof Anne Flanagan for the valuable inputs and supervision.

[1] "An economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet." *See* Oxford Dictionary, *Sharing economy* <www.oxforddictionaries.com/definition/english/sharing-economy> accessed 12 July 2016.

[2] Each of these terms describes a similar, yet different, business model. Author opts for the term 'sharing economy' as the most commonly used expression in the academia. It is also worth mentioning that the European Commission uses the term 'collaborative economy', whilst the other EU institutions use the 'sharing economy'. *See more* Rachel Botsman, *The Sharing Economy: Dictionary of commonly used terms* <www.collaborativeconsumption.com/2015/11/12/the-sharing-economy-dictionary-of-commonly-used-terms/> accessed 4 July 2016.

'collaborative economy', 'peer economy', 'on-demand economy', 'access economy', 'circular economy' or 'gig economy' – is used in this paper as an umbrella term for any economic system[3] in which businesses operate on online platforms which enable sharing of goods or services between private individuals whether for free or a fee.[4] The whole idea behind the sharing economy is that it allows individuals to create monetary or non-monetary benefits from often underused assets or skills.[5]

In many aspects, the sharing economy appears to be not efficiently regulated, or it is captured only by the traditional regulatory frameworks.[6] Within the discussions around the ongoing Digital Single Market Strategy[7], the European Commission ('Commission') believes that tearing down Member States' regulatory walls and moving to a single digital market could annually contribute €415 billion to the EU economy and create hundreds of thousands of new jobs[8]. In its communication, the Commission highlights that the sharing economy "*is small but growing rapidly, gaining important market shares in some sectors*"[9]. It estimates that the gross revenue sharing economy reached €28 billion in 2015, almost double than in the previous year and is set to expand robustly.[10]

Despite it being a phenomenon of the 21st century[11], case law related to the sharing economy in the European Union ('EU') is rather modest, with EU

---

[3] *See more* about the different sharing economy business models in Damien Demailly and Anne-Sophie Novel, *The sharing economy: make it sustainable* (2014) Studies N°03/14, IDDRI, Paris, France, 13-18.

[4] *See more* Alex Stephany, *The Business of Sharing: Making it in the New Sharing Economy* (Palgrave Macmillan 2015).

[5] PwC Publication, *Consumer Intelligence Series - The Sharing Economy* (2015) <www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> accessed 26 June 2016, 5.

[6] *See infra* III. Regulating the Sharing Economy.

[7] *See more* European Commission, *Digital Single Market* <http://ec.europa.eu/priorities/digital-single-market_en>; *Collaborative economy* < http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index_en.htm> accessed 30 June 2016.

[8] *See* Commission Staff Working Document, '*A Digital Single Market Strategy for Europe – Analysis and Evidence*', SWD(2015) 100, 06.05.2015.

[9] Communication from the Commission, *A European agenda for the collaborative economy*, COM(2016) 356 final, 02.06.2016., 2.

[10] ibid.

[11] Sharing economy started to appear in the literature in early 2000s. *See more* Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm* (2002) 112 The Yale Law Journal 369.

courts having not yet considered any competition law case involving the sharing economy business. To date, authorities and courts have dealt only with the limited scope of the legal issues occurring in the ride-sharing (e.g. Uber) and flat-sharing (e.g. Airbnb) sectors – arguably because these two sharing economy companies are most advanced, having become its poster children. Depending on the jurisdiction, they are facing diverse challenges – from a sector-specific regulation and various political initiatives coming from local authorities who are scrutinising the need for protection of 'traditional competitors' and consumers from the sharing economy's alleged undesirable effects – to strong, sometimes even violent, reactions of the market incumbents.[12]

The question of how should the sharing economy be regulated, to a great extent, reflects the 'unhappy marriage'[13] between the innovation and competition law.[14] Even though innovation in many ways promotes rivalry, as some point out – whilst the former may be seen to promote monopolies, the latter is designed to oppose them.[15] Notwithstanding, there are at least two main avenues available to regulate the sharing economy. One is through governmental regulation and the other through self-regulation. Along with the consumer's perspective, with an accent on the difficulty of establishing the liability for injuries or damages caused, these options are discussed below. It is generally argued that establishment of a modern and flexible framework for the sharing economy should be applauded since it would clarify much vagueness its innovative business models have brought to practice.

This paper further examines various sharing economy concerns in the context of the primary EU competition law rules, including articles 101 and 102 of the Treaty on the Functioning of the European Union[16] ('TFEU') and the European Union Merger Regulation[17] ('EUMR'). Article 101(1) TFEU seeks to prohibit agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition, whilst article 102

[12] *See infra* – II.II. Why is the Sharing Economy important?
[13] Lex Mundi Intellectual Property Practice Group, *Intellectual Property and Competition Law* (2012) p 1 <www.lexmundi.com/Document.asp?DocID=3911> accessed 13 July 2016.
[14] *See more infra* III.I. The Role of Innovation.
[15] ibid.
[16] *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU), OJ C 326, 26.10.2012.
[17] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (the EC Merger Regulation), OJ L 24, 29.1.2004.

TFEU is directed towards the unilateral conduct of dominant firms which act in an abusive manner.[18] The EUMR was introduced due to concern that certain mergers could lead to less competitive markets and adverse effects for consumers post-merger.[19]

The majority of legal concerns around the sharing economy that arose among the commentators across the board were largely founded on the predictions and analysis of the ongoing development of the sharing economy business models. It seems that these concerns first and foremost may arise from a position of dominance, which falls under the scope of Article 102 TFEU, even though some of them, such as contractual obligations and pricing restrictions, may as well be scrutinised as agreements under Article 101(1) TFEU. The concerns identified in this paper are, namely, the 'winner-takes-all' effect, imposing barriers to 'multi-homing', asymmetries of bargaining power, contractual obligations such as referencing rivals, 'most-favoured-nation' and 'meet-the-competition' clauses, and imposing of price restrictions, for instance, a resale price maintenance and predatory pricing.[20] The concerns further stretch to the merger control,[21] with issues such as escaping the scrutiny of competition authorities, vertical integration and leveraging and the use of big data.

As the sharing economy evolves rapidly – with its incumbents more and more likely to fall under some of these rules, this research should provide a useful overview of the credible EU competition law concerns. It is overall argued that even though competition law concerns are present, the existing tools of enforcement can be sufficient if the Commission appropriately approaches to the assessment of, in many ways specific, a phenomenon of the sharing economy.

II. The sharing economy

Due to its peer-to-peer nature[22], the sharing economy operates on a two-sided market. Two-sided markets arise when two different types of users may

[18] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015), 183.
[19] ibid.
[20] *See infra* IV.I. Concerns arising from a dominant position.
[21] *See infra* IV.II. Concerns under EU Merger Regulation.
[22] *See infra* II.I. What is the Sharing Economy?

benefit from interacting with each other through one or more platforms or mediators – and these are not a recent thing.

Two-sided markets have probably existed from at least medieval times[23], when franchises were granted by the crown or other authorities to entities such as towns or priories, etc., to run fairs and markets to generate commerce, bringing merchants to sell their goods to buyers who had likely originally come to worship on a Sunday or saint's feast day.[24] More merchants attracted more buyers and vice-versa, a virtuous cycle that in today's economic terms are called a 'network effect'[25]. Similar two-sided platforms can be found in newspapers, as an intermediary to link advertisers and readers, with greater value for advertisers the more readers a newspaper has. One of the most important innovations in financial services since World War II is the credit card, a platform linking consumers and merchants, again the greater numbers of each group creating more value for the other group in the network. More recently, computer operating systems connect computer users and application developers.[26]

The sharing economy functions on these same principles. In this case, the online platform is acting as an intermediary. In order to operate, that platform must get both sellers and buyers on board – and only if a transaction between them takes place the market exists.[27] Thus, there are at least three categories of actors in the sharing economy. First are providers or suppliers of goods and services. They share their assets, time, resources and/or skills, and can be private or professional undertakings operating on a temporary or permanent basis. Second are the platform operators who through their platforms offer access to such goods or services and facilitate transactions and other

---

[23] Ray Fisman and Tim Sullivan, *The Inner Lives of Markets: How People Shape Them—And They Shape Us* (PublicAffairs 2016) 99-120.

[24] *See* Samantha Letters, *Online Gazetteer of Markets and Fairs in England and Wales to 1516* (Last updated 16 December 2013) <www.history.ac.uk/cmh/gaz/gazweb2.html> accessed 13 July 2016.

[25] *See more infra* IV.I.a. Winner-takes-all effect; *See also* David S. Evans and Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* (2012) Coase-Sandor Institute for Law & Economics Working Paper No. 623; Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects* (1998) 86(3) California Law Review, art 7.

[26] *See* Thomas R. Eisenmann, Geoffrey G. Parker and Marshall W. Van Alstyne, *Strategies for Two-Sided Markets* (October 2006) Harvard Business Review 92.

[27] David S. Evans, *The Antitrust Economics of Two-Sided Markets* (September 2002) AEI-Brookings Joint Center for Regulatory Studies Related Publication 2, 2.

intermediary services between the providers and users. Third are the users of these goods and services – the consumers.[28]

Having these relationships in mind, the common features of business models employed in the sharing economy are discussed further in the below text as these are crucial to understanding what the sharing economy really is, why it is important and how it is relevant to the EU competition law.

1. What is the sharing economy?

As previously noted, 'sharing economy' is an umbrella term used to capture a wide range of similar business models that have emerged because of developments in information and communications technology, significantly lowering transactions costs.[29] The common features of these business models are considered below.

A primary underlying feature of sharing-economy businesses is that each is set up in the form of a multisided 'peer-to-peer' online platform that facilitates the exchange of goods or services. The business – a third-party platform operator – brings together providers of goods and services on one side, and users, who can access the platform over the internet, on the other. At the same time, the platform provider does not purchase or sell any goods or services itself.[30] The benefit of such business models is that being hosted through digital platforms enables "*a more precise, real-time measurement of spare capacity and the ability to dynamically connect that capacity with those who need it*"[31].

A further sharing economy characteristic is the mutual trust between providers of goods and services and users, since "*a standard and more intrusive regulation is often absent*"[32]. That trust is created through 'peer

---

[28] Commission Staff Working Document, *European agenda for the collaborative economy - supporting analysis*, SWD(2016) 184 final, 02.06.2016, 5.
[29] Deloitte Access Economics, *The sharing economy and the Competition and Consumer Act – Australian Competition and Consumer Commission* (2015) <www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf> accessed 3 July 2016, 1.
[30] Stephen P. King, *Sharing Economy: What Challenges for Competition Law?* (2015) 6(10) Journal of European Competition Law & Practice 729, 729.
[31] *PwC Publication* (n5), 15.
[32] João E. Gata, *The Sharing Economy, Competition and Regulation* (November 2016) Competition Policy International, 2

review' system incorporated into the platform. It is used to rate goods and services provided, often aiming to ensure minimum standards and to overcome consumer protection concerns. That system "*to some degree mimics the outcomes that more direct regulation would seek to achieve*".[33] Nevertheless, that trust is essential for individuals to connect and make a transaction[34], and consequently for the platform operators to make a profit out of it. A renowned sharing economy expert Rachel Botsman went even further, arguing that "*trust is the currency of the new economy*".[35]

Finally, for sharing economy platforms to be functional, ownership of an asset or skill is a prerequisite.[36] The ownership confers the right to use the asset or skill the way owner sees it fit, including allowing others to use or access it. Hence, literally anything underused or simply available to monetise – such as empty room, garage or office space, a spare work tool, bike or a space in a car – can create a new value for the owner. That facilitates mutually beneficial exchanges that might not otherwise have occurred.[37]

These three characteristics lead to probably the biggest incentive to engage in sharing economy business – the possibility for small and micro entrepreneurs to offer services without employing a large amount of capital, while also being able to easily create new employment, flexible working arrangements and new sources of income. It enables them reaching a wider market and customer base, creating more competitive and efficient markets by improving the matching between demand and supply[38] – and that seems to be the real essence of the sharing economy.

<www.competitionpolicyinternational.com/assets/Europe-Column-November-Full.pdf> accessed 30 June 2016.

[33] *Deloitte Access Economics* (n29) 3.

[34] "Economic agents perceive digital trust to be the key element of success in the digital economy: 83% of respondents to the Accenture Technology Vision 2016 Survey agreed that trust is the cornerstone of the digital economy. Given its important role the question arises how government policymaking can promote social trust in online platforms." *See* Ignacio De Leon, *Competition Policies in the Internet-based industries: Do we need to reboot the debate?* (2016), 19 < www.academia.edu/24719038/Competition_Policies_in_the_Internet-based_industries_Do_we_need_to_reboot_the_debate> accessed 2 July 2016.

[35] *See* Rachel Botsman, *The currency of the new economy is trust*, TED Talks (June 2012) <www.ted.com/talks/rachel_botsman_the_currency_of_the_new_economy_is_trust> accessed 13 July 2016.

[36] *Deloitte Access Economics* (n29) 2.

[37] ibid.

[38] *European agenda for the collaborative economy - supporting analysis* (n28) 5.

2. Why is the sharing economy important?

The sharing economy's significance is not only its rapid growth on a global scale but also its changes to the traditional ways of doing business. It is one of the key focus points of the EU Digital Single Market Strategy, being described as "*a new way to offer and use products and services through online platforms*"[39]. The sharing economy covers the whole spectrum of different sectors and is much more widespread than one might be aware. According to 'Mesh'[40], a website with the flattering subheading 'the pulse of the sharing economy', there are over 9.700 registered sharing economy companies across 133 countries. To illustrate, a few most well-known sharing economy companies are: *Airbnb*, *CouchSurfing* and *HomeAway* in a short-term rental sector; *Uber*, *Lyft* and *BlaBlaCar* in a transportation sector; *Taskrabbit*, *TaskAngel* and *Freelancer* in a personal services sector; *TransferWise*, *LendingClub* and *KickStarter* in a finance sector, and many, many more across the board.[41] The constant development of sharing economy is recognised by the EU which points out that "*many imaginative people in Europe are developing new business models*" on a daily basis.[42]

The British Government envisaged the potential in 2014, when Business Minister Matthew Hancock MP asked an independent researcher to write a report on the sharing economy and "*to make recommendations as to how the UK could become a global centre for this fast-growing sector*"[43]. In one of its Reports from Sessions on 'Online Platforms and the Digital Single Market' House of Lords recommended careful balancing of the need to protect competition and to promote innovation, which could "*facilitate increased*

---

[39] European Commission, *Factsheet on the collaborative economy* (2016) <http://ec.europa.eu/DocsRoom/documents/16955/attachments/1/translations/en/renditions/native> accessed 1 July 2016, 1.

[40] *See* 'Mesh – the pulse of sharing economy', < http://meshing.it/> accessed 12 July 2016.

[41] *See more* Mesh, *Companies* <http://meshing.it/companies> accessed 12 July 2016.

[42] *Factsheet on the collaborative economy* (n39) 1.

[43] Debbie Wosskow, *Unlocking the sharing economy - An independent review*, Report for the UK Minister of State for Business, Enterprise and Energy (2014) 8 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf> accessed 5 July 2016.

investment in digital tech firms, and—most importantly of all—create a scale market of 500 million consumers'.[44]

According to the PwC research[45] from 2014, by 2025, only the five sharing economy sectors could generate over half of overall sales in all ten examined sectors (sharing economy sectors: *peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music and video streaming*, and traditional sectors: *equipment rental, B&B and hostels, car rental, book rental and DVD rental*). An estimated potential revenue is worth $335 billion. PwC also estimates the UK's share could be worth around $15 billion by the same time.

Despite the key EU lawmakers' awareness of the phenomenal growth of the sharing economy across many new sectors, dealing with it is yet not that easy task. Not only that the sharing economy influences our overall economy, but it has an impact on the society as a whole. Indeed, conflicting interests were noted among the stakeholders involved, having "*made the 'sharing economy' a domain of conflictual rhetoric and public controversies, legal disputes, and even violent protests'*"[46]. French Government responded to such protests[47] in Paris with the introduction of the so-called *Loi Thévenoud*, a piece of legislation seen as a 'protectionist' in respect of taxi market incumbents, without having genuine interests of consumers at heart.[48] Such impact to our everyday lives, combined with the astonishing growth projections, definitely puts the sharing economy to a spotlight of the public and of the regulators.

---

[44] House of Lords (UK), Select Committee on European Union, *Online Platforms and the Digital Single Market*, 10th Report of Session 2015–16, HL Paper 129, April 2016, 89.

[45] *See more* PwC Publication, *The sharing economy – sizing the revenue opportunity*, <www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html> accessed 8 July 2016.

[46] Christian Codagnone, Federico Biagi and Fabienne Abadie, *The Passions and the Interests: Unpacking the 'Sharing Economy'*, JRC Science Policy Report, EUR 27914 EN, doi:10.2791/474555, 6.

[47] The rapid global expansion of Uber has sparked interventions from taxi drivers and authorities around the world. Among recorded incidents in Paris, London, Delhi, San Francisco, Hangzhou, Amsterdam, Madrid, Brussels, Montreal and Sidney, one on the most violent ones was in Paris – where over 3000 taxi drivers blocked main roads of Paris and burnt tires. *See more* Sean Farrell, *Uber expansion meets global revolt and crackdown*, The Guardian (26 June 2015) <www.theguardian.com/technology/2015/jun/26/uber-expansion-meets-global-revolt-and-crackdown> accessed 13 July 2016.

[48] Benjamin G. Edelman and Damien Geradin, *Efficiencies and regulatory shortcuts: How should we regulate companies like Airbnb and Uber?* (November 24, 2015 Forthcoming) Stanford Technology Law Review 239, 252.

That being said, it seems reasonable, if not necessary, to thoroughly assess the sharing economy from all perspectives – economic, social and legal. Despite the need of a wide and in-depth analysis, such an overview is beyond the scope of this paper which aims to explore the possibilities of the sharing economy regulation and to analyse the concerns of the sharing economy within the EU competition law framework.

3. How is the sharing economy relevant for the regulators?

It can be argued that there is less *ex-ante* regulation of sharing economy businesses in comparison to that often applied to traditional commercial suppliers, which can pose a threat to traditional markets. The suppliers of products and services via sharing platforms often do not have to comply with many laws as their traditional competitors have to. For example, Uber drivers do not have to obtain licences as traditional taxi drivers (e.g. they do not need a 'yellow medallion'[49] for taxicabs in New York City or a 'taxi vehicle licence'[50] for black cabs in London; even though 'for-hire'[51] and 'private hire'[52] licences are required respectively) and Airbnb renters are not the subject to extensive health and safety regulations as hotels usually are.[53] That enables individual suppliers to avoid potentially significant costs for compliance and to offer their supplies at lower prices. While this might benefit those individuals, it does disrupt underlying supply markets[54], which are under scrutiny to comply with the regulations in place in order to get or not to lose a certain licence granted. This regulatory aspect, in contrast to the need to promote innovation, will be examined in the following part on regulating the sharing economy.

Furthermore, the sharing economy businesses may respond to market failures by offering creative market-based solutions to resolving these market failures,

---

[49] *See* New York City, Taxi and Limousine Commission, *Current Licences*, <www.nyc.gov/html/tlc/html/industry/current_licensees.shtml> accessed 12 July 12 2016.
[50] *See* Transport for London, *Apply for a taxi vehicle licence*, <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/apply-for-a-taxi-vehicle-licence> accessed 12 July 2016.
[51] *See* Uber NYC, *Get a TLC licence*, <http://driveubernyc.com/tlc/> accessed 12 July 2016.
[52] *See* Uber London, *Licence requirements*, <www.driveuberuki.com/requirements/london/> accessed 12 July 2016.
[53] Guy Lougher and Sammy Kalmanowicz, *EU Competition Law in the Sharing Economy* (2015) Journal of European Competition Law & Practice, 15.
[54] ibid p 15; *See also* Alexandre de Streel and Pierre Larouche, *Disruptive Innovation and Competition Policy Enforcement*, OECD, DAF/COMP/GF(2015) 7.

just as traditional firms and markets often did.[55] For instance, the previously noted 'peer review' feature of the sharing economy businesses provides a valuable answer to the present information asymmetry. On traditional markets, when a customer buys or borrows something from the provider, they are often deprived of other customers' feedback about that good or service. By having that kind of information, it can be argued that the usual governmental intervention, which was necessary to ensure traditional businesses' minimum quality and safety standards, is ceasing to be of that high importance since the sharing economy reduces the information asymmetry.[56]

While such new solutions might be useful, they could also trigger some of the competition law concerns if companies' market power becomes significant.[57] Strong market power combined with attributes of sharing economy such as network effects, as it is discussed further on, might enable sharing economy businesses to fight their rivals on the anticompetitive grounds, thus hindering the EU competition law.[58] That hypothesis, consequently, raises a first question – how should the Commission and national competition authorities (hereinafter: 'NCA') cope with such behaviour?

It may seem that the answer is rather simple – like with any other EU competition law concern. Through the tools of competition enforcement, competition authorities may seek to prevent certain risks, such as a risk of foreclosure and discrimination. For example, such risks could arise where a sharing platform is, or could through a horizontal merger become, "*so significant to the matching of customers in an underlying supply market that access to it becomes indispensable in order to compete on the supply market"*[59], *de facto* becoming an obligatory trading partner or an essential

---

[55] David Stallibrass and John Fingleton, *Why Peer-to-Peer Businesses Should Be Supported* (2016) Journal of European Competition Law & Practice (Advance Access published March 29, 2016), 5.

[56] Molly Cohen and Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy* (2015) 82 The University of Chicago Law Review Dialogue 116, p120-121, *See also* Adam Thierer, Christopher Koopman, Anne Hobson, and Chris Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem"* (2016) 70 University of Miami Law Review 830.

[57] *See infra* IV. EU Competition Law in the Sharing Economy

[58] *See* German Monopolies Commission, *Special Report 68: Competition Policy: The Challenge of digital markets* (2015) <http://monopolkommission.de/index.php/en/reports/special-reports/284-special-report-68> accessed 15 July 2016.

[59] *Lougher and Kalmanowicz* (n53) 14.

facility. Nevertheless, it might be insufficient to just wait for the sharing economy businesses to gain such significant market power, or even a dominant market position, to take action. Thus, a second question which calls for the answer prior to addressing the competition policy concerns is this – Is the EU competition law framework alone sufficient to answer to the new challenges the sharing economy brings? From that perspective, the answer seems a little bit more complex. Therefore, it is useful to examine the very purpose of the competition regulation, especially in innovative markets, and the grounds on which the sharing economy regulation should rest on.

III. Regulating the sharing economy

When looking into the 'regulatory theory'[60], a vast majority of scholarship uses a 'market failure' framework as a normative. Duke University Professor Mathew D. Adler, summarises such concept, pointing out that "*regulation is justified only if certain failures of a free market occur, with externalities, public goods, monopolies, and imperfect information seen as the paradigmatic failures*"[61]. Not denying the central position of the market failure in the regulatory theory, it is argued that a purpose of regulation in practice often stretches far beyond the scope of a market failure. As noted above, when it comes to innovation, practices such as licensing[62] clearly move the centre of the gravity of regulation from promoting the competition to opposing it. Also, for example, the exercise of the regulatory power of the state (the police), is primarily founded in the public interest or general welfare, such as public health, morals, or safety.[63] Hence, the purposes behind diverse regulatory frameworks may significantly differ.

---

[60] Also known as a 'public interest theory'. *See* George J. Stigler, *The Theory of Economic Regulation* (1971) 2(1) Bell Journal of Economics and Management Science 3; Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (1971) 1 MIT Press; Richard A. Posner, *Theories Of Economic Regulation* (1974) 5(2) Bell Journal of Economics and Management Science 335.

[61] Matthew D. Adler, *Regulatory Theory*, p 595 in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory, ed. (*Forthcoming University of Penn Law School, Public Law Research Paper No. 10-07, Cambridge University Press 2009).

[62] Licencing can control market entry and can be used to shape market by limiting or not the number of players or the types of services that they are able to provide. *See* Ian Walden and John Angel, *Telecommunications Law and Regulation* (2nd edn, Oxford University Press 2005) 153.

[63] ibid 159.

Accordingly, this paper further examines the role of innovation, alternatives to regulation and the consumers' perspective in regulating the sharing economy.

1. The Role of Innovation

The objective of the competition policy is to enhance economic welfare, and it posits that rivalry among competitors prompts them to 'reduce waste' and offer products tailored to consumers at the lowest price possible.[64] In highly innovative industries, not all components of economic performance match those in traditional markets, and that explains why the debate about the validity of competition law procedures in innovative industries is so controversial.[65]

The sharing economy not only generates the innovation, but it also impacts traditional markets in a way that can be regarded as 'disruptive'. A Harvard Business School Professors Bower and Christensen distinguished two types of technological innovation – sustaining and disruptive innovation.[66] While a sustaining innovation "*takes place within the value network of the established firms and gives customers something more or better in the attributes they already value*"[67], disruptive innovation "*takes place outside the value network of the established firms and introduces a different package of attributes from the one mainstream customers historically value*"[68]. First is present on traditional markets, which tend to innovate in an evolutionary fashion, by enhancing their current technologies. That is – they introduce incremental improvements on their existing products. Conversely, new entrants such as the sharing economy players, are inclined to innovate more disruptively, as their incentive is purely to gain profit of creating a new market. They do not suffer from any loss of destroying old market as it would be the case if

---

[64] David Encaoua and Abraham Hollander, *Competition Policy and Innovation* (2002) 18(1) Oxford Review of Economic Policy 63, 64.
[65] ibid.
[66] *See* Joseph L. Bower and Clayton M. Christensen, *Disruptive Technologies: Catching the Wave* (January–February 1995) 73(1) Harvard Business Review 43; Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997) Harvard Business School Press.
[67] *De Streel and Larouche* (n54) 2.
[68] ibid.

traditional market players would employ the same strategy.[69] As such, the sharing economy became "*a disruptive force that facilitates exchanges involving underutilized assets, from spaces to skills to things, for monetary gain on a scale that would not be achievable without modern technology*"[70].

Nowadays, certain popular press commentators[71] summon the sharing economy as a 'regulatory evasion' instead of a 'disruptive innovation', claiming not all sharing economy businesses are truly innovative. Such characterisation, in author's opinion, seems to be justifiable only in the case where sharing economy companies are avoiding any regulation, including taxation. When it comes to paying taxes, that assumption is often not the case, but that depends on the jurisdiction and the point of view.[72] Some will argue that if we observe the well-known sharing economy firms, the taxes paid are significant.[73] Moreover, the UK Government introduced a £2,000 'tax break' in early 2016 – to boost the sharing economy, which is a clear evidence that sharing economy revenues are, or at least can be, documented and taxed.[74] To regulate how the sharing economy business models should operate is beyond what they can do themselves – it is on the society to regulate to do so. Imposing a governmental regulatory framework is one of the avenues to put an end to the undesirable connotations of regulatory evasion. However, a comprehensive regulation of the sharing economy so far appears to be extremely challenging.

---

[69] Jonathan Chan and Herbert Fung, *Rebalancing Competition Policy to Stimulate Innovation and Sustain Growth* (2016) Asian Journal of Law and Economics doi:10.1515/ajle-2015-0029, 12.

[70] Abbey Stemler, *Betwixt and between: Regulating the shared economy* (2016) VIII Fordham Urban Law Journal, 4.

[71] Izabella Kaminska, *No, regulatory evasion isn't 'disruptive innovation'*, Financial Times Alphaville (1 January 2014) <http://ftalphaville.ft.com/2014/01/31/1759062/no-regulatory-evasion-isnt-disruptive-innovation/#respond> accessed 16 July 2016.

[72] Some argue that Uber is one of the examples of extensive tax avoidance. There are concerns that sharing economy businesses are actually slipping the tax net and eroding the market by encouraging race to the bottom. *See more* David Kocieniewski, *The Sharing Economy Doesn't Share the Wealth*, Bloomberg (6 April 2016) <http://www.bloomberg.com/news/articles/2016-04-06/the-sharing-economy-doesn-t-share-the-wealth> accessed 20 July 2016.

[73] *See* Ryan Ellis, *Taxes And The Sharing Economy,* Forbes (5 July 2016) <http://www.forbes.com/sites/ryanellis/2016/07/05/taxes-and-the-sharing-economy/> accessed 17 July 2016.

[74] *See* Murad Ahmed, *'Sharing economy' boosted by tax break in Budget 2016*, Financial Times (16 March 2016) <https://next.ft.com/content/b99dae3c-eb81-11e5-bb79-2303682345c8> accessed 17 July 2016

The very relationship between the regulation and innovation has kept many people, and especially regulators and legislators, increasingly curious in recent years.[75] In dynamic and innovative markets, regulation often seems not to be able to keep up with the fast pace of innovation.[76] That occurs due to a fast development of new technologies whilst the regulatory frameworks are usually a way more static. To close that gap, on the line with author's reasoning, some commentators[77] suggest the introduction of a more 'innovation-friendly' regulatory frameworks which are subject to easier, yet responsible, amending and changing when new information or knowledge is available. Therefore, this paper further submits possible options on how to achieve that, since regulating the sharing economy so far proved to be remarkably resistant[78] to the orthodox regulation.

2. Systems of Regulation

In the available literature, there are two main groups of proposals on how to regulate the sharing economy. First is inviting for a comprehensive governmental regulation on a local, national or supranational level. The second one is proposing a path of self-regulation, calling for the introduction of some of the tried and workable self-regulation options. Both systems are succinctly laid out as follows.

a. Governmental regulation

Different local authorities have chosen different ways of dealing with the sharing economy[79], but there is no evidence that any of them have captured

---

[75] Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy* (2015) 16(1) Minnesota Journal of Law, Science & Technology 413, 440.

[76] Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation* (2015) 55 Jurimetrics J. 201, 202.

[77] ibid; *See also* Jennifer Kuzma, *Properly Paced? Examining the Past and Present Governance of GMOs in the United States* in Gary E. Marchant et al. eds, *Innovative governance models for emerging technologies* (176 2013).

[78] Daniel E. Rauch and David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy* (2015) 76(4) Ohio State Law Journal 901, 904.

[79] For the EU, s*ee* European Parliament study no. PE558.777, Gracia Vara Arribas, Bettina Steible and Anthony De Bondt, *Cost of non-Europe in the sharing economy: legal aspects* (February 2016) <www.eipa.eu/files/FINAL%20REPORT%20for%20EIPA%20web.pdf>; Pierre Goudin, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities* (January 2016)

the whole phenomenon in an efficient manner. Leaving the examination of the used regulatory frameworks for a further research, it seems useful to highlight the principles on how to regulate the sharing economy instead. Professor Stephen R. Miller, by using a short-term rental market (e.g. Airbnb) as an illustration, provided superb guidelines in 10 principles[80] on how regulation "*must be tailored to effectively respond to different aspects of the larger sharing economy*"[81]. The first principle essentially underlines the point made in the previous paragraph, stressing out the need for the understanding of the market segment being disrupted as well as the new markets being created by the sharing economy platform, in order to respond to the needs of all constituencies. It is emphasised that such regulation should be designed to address the new markets as a whole, and not only its dominant company (e.g. only Uber in a transportation sector).[82]

Next two principles further accentuate the need of 'daylighting' the sharing economy and providing 'the right information' (e.g. about the users on the both sides of the platform) in order to understand and regulate a new market better.[83] Within the fourth principle, Miller underscores that the sharing economy is here to stay – and that it is a good thing. It appears that despite the efforts of some authorities to ban sharing economy activities (e.g. in the US city of Boise, where the local ban was overridden by a consequent state-level regulation), the sharing economy will somehow find a way to legally resist to such pressures.[84] Hence, a regulation seems to be a much better response to the sharing economy than a prohibition.[85] For example, Berlin's local authorities, after two years of the transition period, on May 1st 2016 passed a legislation prohibiting short-term rentals of whole flats or apartments without a city permit, allowing only room rentals for non-city residents.[86] The

---

<www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU(2016)558777_EN.pdf> accessed 25 July 2016.

[80] Stephen R. Miller, *First principles for regulating the sharing economy* (2016) 53 Harvard Journal on Legislation 147.

[81] Ibid, 150.

[82] Ibid, 151-153.

[83] Ibid, 153-156.

[84] *See also Rauch and Schleicher* (n78) 904.

[85] *R. Miller* (n80) 156-160.

[86] Matt Payton, *Berlin stops Airbnb renting apartments to tourists to protect affordable housing,* The Independent (1 May 2016) <www.independent.co.uk/news/world/europe/airbnb-rentals-berlin-germany-tourist-ban-fines-restricting-to-protect-affordable-housing-a7008891.html> accessed 18 July 2016.

policy objective was to protect affordable housing, but it will be very exciting to observe how the short-term rental market will answer to such ban and whether it will lead to a grey economy instead of a regulated one. By simply browsing the ‘entire home/flat’ listings at the moment of writing this paper, it is worth noting that hundreds and hundreds of such listings are still offered to rent[87], despite the potential €100,000 fine for these renters.

The following proposed principle puts an emphasis on the aforementioned disruptive nature of the sharing economy – not only in respect of traditional markets but also in respect of other related markets. For instance, they disrupt the need for property managers and real estate bookers who were traditionally the only ones providing non-hotel tourist rentals.[88] Disrupting other markets also leads to an assumption that there must be ‘a new market’ the sharing economy creates, which is argued within the sixth principle. The scholar accurately observes that a turnaround revenue of Airbnb rentals by far surpasses any loss in market share seen by hotels, albeit they are affected.[89] And even more significantly, he points out that traditional markets want to enter these newly established markets.[90]

The final four principles[91] are focused on a unique nature of the sharing economy that requires a response beyond traditional regulation, often requiring changes in the long-established regulatory structures, the problem of determination of the harm caused, and the issue of necessity to address all of the parties involved.

---

[87] Browsing Berlin rentals at <www.airbnb.com>, with the 'entire home/flat' filter on, for the randomly selected one week periods during October and November 2016, the results show 300+ listings available to book, with the additional notification that 'only 19% of listings is available in the selected period'.
[88] *R. Miller* (n80) 160-163.
[89] The example of the State of Texas (US) short-term rental market shows that the impact of Airbnb on the hotel industry is negative and that Airbnb provides a viable alternative for certain traditional types of overnight accommodation. *See more* Georgios Zervas, Davide Proserpio and John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, Boston University School of Management Research Paper No. 2013-16, <http://ssrn.com/abstract=2366898> accessed 18 July 2016; *See also* Iis P. Tussyadiahl and Juho Pesonen, *Impacts of Peer-to-Peer Accommodation Use on Travel Patterns* (First published October 12 2015) Journal of Travel Research 0047287515608505.
[90] *R. Miller* (n80) 164-165.
[91] ibid 165-184.

These ten principles provide an excellent intersection of the most important features of the sharing economy any regulator should take into account when approaching to its regulation.

b. Self-regulation

The possible alternative way to regulate the sharing economy is a self-regulation. Self-regulation can be defined as "*groups of firms in a particular industry or entire industry sectors that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups is often voluntary, but could also be legally required*"[92]. Many features of the sharing economy are prone to (e.g. a peer review system) and could be more successful if self-regulated.[93] Choen and Sundararajan argue and emphasise that a self-regulation does not have to mean deregulation or no regulation – but merely a reallocation of the regulatory responsibility to parties other than the government.[94] They claim that self-regulation often emerges as "*a natural byproduct of economic exchange and has a long history of success*"[95] and propose utilisation of digital platforms as partners in the regulation of exchange rather than as subjects requiring governmental regulation.

The summary of their proposals contends that for self-regulation organisations ('SRO') to succeed, there are four essential factors which need to be satisfied. These four factors are noticed and singled out based on the experience in a variety of modern industries. The first factor is an early established credibility of the SRO through its performance. Second, a demonstration of strong enforcement capabilities. The third factor is a perception of SROs as a legitimate and independent body. And finally, it is pointed out that participants' reputational concerns and social capital must be taken into account and used as an advantage by the SROs.[96]

---

[92] *Arribas*, et al. (n79) 59.
[93] *See* Arun Sundararajan, *Trusting the 'Sharing Economy' to Regulate Itself*, Economix (3 March 2014) <http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/> accessed 18 July 2016; *See also* Christopher Koopman, Matthew Mitchell and Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* (2015) 8(2) The Journal of Business, Entrepreneurship & the Law, art 4, 542.
[94] *Cohen and Sundararajan* (n56) 116.
[95] ibid 132.
[96] ibid 128-129.

To illustrate what an SRO is, an example in law is a bar association[97]. Similar organisations exist in many sectors, such as the American Medical Organisation in medicine or the National Association of Realtors in real estate sectors.[98] It is argued that the sharing economy could be regulated on the same principles as these organisation, with a mere supervision by the state or local authority in contrast to an extensive regulation.

Both of the abovementioned concepts – either through governmental regulation or self-regulation – seem to be viable options for creating a workable legal framework for the sharing economy. To date, it is clear that regulators have struggled to adapt existing regulations to sharing platforms and that they face various challenges when it comes to the choice of the approach.[99] There is even an example of the *bona fide* initiative brought to the authorities by Airbnb, to regulate their business sector, which turned up against them – despite their "*heavy hand in passing the legislation in the first place*"[100].

Nonetheless, the sharing economy removes the need for regulation in many cases because of the expansion of the range of options and information available to consumers.[101] Consumer's point of view is, therefore, important, and some argue that "*application of outmoded regulatory regimes may actually harm consumers*"[102]. In author's view, consumers in the sharing economy are affected both directly – if their health, safety or consumer interests (arising from the contract law, i.e. contracts between consumers and providers concluded through online platforms) are jeopardised – and indirectly, as citizens, if the sharing economy is prone to tax evasion or it creates an unfair competition on the markets they are engaged with.

---

[97] *See more* Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?* (2008) Journal of The Professional Lawyer 53.
[98] *Cohen and Sundararajan* (n56) 125.
[99] Vanessa Katz, *Regulating the Sharing Economy* (2015) 30(4) Berkeley Technology Law Journal, Annual Review, Article 18, 1067, p 1084; *Goudin* (n79) 1084ff.
[100] After self-initiated call for better regulation, the Airbnb's hometown legislator, San Francisco, imposed a complex registration procedure for hosts and $1,000 fine a day for every unregistered listing. *See* Biz Carson*, Airbnb is a 'cautionary tale' on how not to work with governments, says Uber's political adviser*, Business Insider UK (30 June 2016) <http://uk.businessinsider.com/bradley-tusk-startup-political-strategist-airbnb-created-unfixable-mess-2016-6??r=US&IR=T> accessed 24 July 2016.
[101] Koopman, et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* (n93) 532.
[102] ibid.

Consequently, to better illustrate the desirable central purpose of regulating the sharing economy, the position of consumers is examined below.

3. Consumers' Perspective

Maybe the central reason why the sharing economy enjoys a lenient treatment in the public is the fact that it serves a positive role in society. It is more efficient than traditional businesses, it allows microbusinesses to profit from existing resources and it has the potential to bring unforeseen benefits.[103] On the other hand, the suppliers of goods and services via sharing economy platforms often do not have to comply with many laws regulating traditional commercial suppliers.[104] The fact that there is no level playing field can cause various troubles for the consumers.

As noticed by a group of prominent academics[105], "*the existing regulatory framework is primarily focused on 'bipolar' transactions between businesses and consumers*"[106]. Such framework does not offer adequate solutions for the growing number of transactions between the platform, businesses (or individuals often not established as businesses) and consumers (i.e. a 'triangular' transaction) arising in the sharing economy.[107] It appears that a result of concluding contracts through online platforms is often a lack of effective consumer protection.

The main issue of the EU consumer protection and the sharing economy seems to be the absence of addressing the relationship between the two peers – individuals (i.e. the supplier who is *de lege* not a business and the consumer) in a two-sided market.[108] It is also unclear whether a relationship between the platform and the consumer (i.e. a contract to which the platform is usually not a party to) falls under the scope of the EU consumer law directives.[109] Finally,

---

[103] *Stemler* (n70) p 35; *See also* Robert Cooter, et al., *The Importance of Law Promoting Innovation and Growth*, in *Rules for Growth: Promoting Innovation and Growth Through Legal Reform 1-2* (Ewing Marion Kauffman Foundation ed. 2011).
[104] *Lougher and Kalmanowicz* (n53) 15.
[105] Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?* (2016) 5(1) Journal of European Consumer and Market Law 3.
[106] *Busch, et al.* (n105) 3.
[107] ibid 4.
[108] Cf. the critical remarks of the European Parliament resolution *Towards a Digital Single Market Act*, 19 January 2016, (2015/2147(INI)), paras 77-81.
[109] *Busch, et al.* (n105) 4.

it is unclear whether the sharing economy suppliers of goods or services can be regarded as the employees of the platform operators.

a. Consumer-to-consumer transactions

As already noted, due to a two-sided market nature of the sharing economy platforms, it is very usual for the sharing economy to have individuals engaged on both sides of the market – either as suppliers/providers or as users of goods and services. Additionally, a research has shown that quite a few of them use the platform both as suppliers and consumers,[110] whilst involvement in the sharing economy is not their only income, but just a supplement to their regular income streams.[111] As non-businesses, those individuals may hence lack the awareness that they have obligations under consumer laws, let alone awareness of what those obligations are.[112] The distinction between individual suppliers and businesses is important since "*users will not have the benefit of protection under EU consumer rules, as this legislation only applies to contracts between businesses and consumers*"[113]. That puts the consumers in a delicate position, often not knowing what should happen in case something goes wrong.[114]

In other words, within the EU, many contracts, "*although concluded in the highly professional environment of an online platform, totally escape the scope of application of existing consumer contract law*".[115] That issue[116] was raised along the lines of Article 7(1) of the Proposal for a Consumer Rights Directive but was dropped in the course of the legislative process.[117] It seems indispensable, for the benefit of the consumers, that this issue gets properly

[110] Juliet Schor, *Debating the Sharing Economy* (October 2014) Great Transition Initiative, 4, <www.greattransition.org/publication/debating-the-sharing-economy> accessed 20 July 2016.
[111] ibid 3.
[112] *Deloitte Access Economics* (n29) 30.
[113] *A Digital Single Market for Europe: Analysis and Evidence* (n8) 54.
[114] *Wosskow* (n43) 19.
[115] *Busch, et al.* (n105) 4.
[116] "Prior to the conclusion of the contract, the intermediary shall disclose to the consumer that he is acting in the name of or on behalf of another consumer, and that the contract concluded shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive." *See* Article 7(1) of the Proposal for a Directive of the European Parliament and of the Council on consumer rights {SEC(2008) 2544} {SEC(2008) 2545} {SEC(2008) 2547}, COM/2008/0614 final - COD 2008/0196.
[117] *Busch, et al.* (n105) 6.

addressed by the EU legislators. Alternatively, as others argue, pointing to the way some of the sharing economy business models themselves reimage notions of consumer protection, there should be an option of self-regulation which would obviate the need for state intervention.[118]

That latter approach is more encouraged among the US scholars. In its comment before the US Federal Trade Commission, Koopman et al. argue that "*by trying to head off every hypothetical worst-case scenario, preemptive regulations actually discourage many best-case scenarios from ever coming about"*[119]. They conclude that ex-post remedies are often preferable to ex ante regulation since "*private insurance, contracts, torts and product liability law, antitrust enforcement, and other legal remedies can be utilized here when things go wrong, just as they are used in countless other segments of our economy*"[120]. Even some European commentators warn of 'the risk of acting prematurely' when regulating the digital markets ex-ante.[121] Instead, they propose clarifications of responsibilities around consumer protection, by creating such regulatory framework which would ensure that platforms provide clear information on their responsibility and how they operate, so consumers can make informed decisions.[122]

As a possible solution to the issue of the liability of individual suppliers, the author suggests that a compliance with the local legal health, safety and other standards in general, along with the sound and prudent owner diligence, should be the limit of their personal liability. Everything beyond that should be covered by the insurance schemes set up by the platform's operator, in which the suppliers can, perhaps when joining the platform, be prompted to. That might pose a barrier for new individuals to access the sharing economy platform, but it would shift a burden from both suppliers and platform's

---

[118] Joel Vanoverschelde, Charles Delancray and Louisa Bartolo, *Collaboration, Innovation... Regulation? The disruptive shifts taking our economy by storm*, Deloitte Publications, 6, <www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/lu_en_collaboration-innovation-regulation_122015.pdf> accessed 25 July 2016.

[119] Christopher Koopman, Matthew Mitchell, and Adam Thierer, *The Sharing Economy: Issues facing platforms, participants, and regulators* (2015) <http://ssrn.com/abstract=2610875> accessed 27 July 2016.

[120] ibid.

[121] Alex Chisholm and Nelson Jung, *Platform regulation — ex -ante versus ex -post intervention: evolving our antitrust tools and practices to meet the challenges* (Spring/Autumn 2015) 11(1) Competition Policy International, 5.

[122] ibid 7.

operator to the third party in insurance sector, and it would offer a clarity to the consumers.

Yet, it appears that many of the sharing economy businesses nowadays do provide, though very limited, a scope of protection to their platform users – evidently trying to restrict their liability to the very minimum, which is examined further.

b. Platform operator's role and liability

Between the two sides of the market, there is a platform operator – the intermediary in transactions between individuals. Or at least, exclusively 'the intermediary' is how the most of the online platforms tend to present themselves. That intention is usually stipulated in the platform operator's terms of service. Such statements are clearly present, for example, in the terms and conditions of TaskRabbit[123] and Uber[124]. From consumers' perspective, such interpretation is not auspicious, and some argue it is doubtful whether such a declaration is sufficient to reduce platform's role to just an intermediary[125] – hence excluding their liability for any misconduct and damages caused by the suppliers using the platform.

However, even if platform operators successfully limit their role only to the intermediation (i.e. only facilitating the conclusion of a contract between a consumer and a third party who supplies goods or services), they may still have various duties and obligations. Busch et al. distinguish at least four groups of such obligations – the pre-contractual information duties on goods and services offered, the attribution of communications made by the platform operator, the duties of the platform as a communication intermediary and certain duties of the platform provider towards suppliers.[126] Still, those

[123] "Clients and Taskers enter into a direct contract with each other in relation to the task to be performed. TaskRabbit and its affiliates are not a party to that contract so they are not responsible if Client or Tasker does not do what they have said they will do, or if a Tasker performs a task badly or incorrectly […]". *See* TaskRabbit, Inc, *Terms of service* <www.taskrabbit.co.uk/terms> accessed 20 July 2016.

[124] "Uber UK does not itself provide transportation services, and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider.". *See* Uber UK, *Terms and Conditions* <www.uber.com/de/legal/gbr/terms> accessed 20 July 2016.

[125] *Busch, et al.* (n105) 5.

[126] ibid 6-7.

obligations are not representing a 'secondary liability', what they suggest is one of the possible solutions to the liability issue.[127]

Despite the fact that many sharing economy businesses have some form of insurance for their users in place, that insurance is often not equally directed to both ends of the platform. For example, Airbnb offers a 'Host Guarantee'[128] to renters, protecting them with £600,000 for damages caused by the guests at no additional cost. The same protection is not offered to guests – the consumers – in case of whom Airbnb limits its liability only up to the amount paid by the consumer.[129] It seems that consumer's damage claims should, therefore, be directed towards the hosts, which gets us back to the point of consumer's vulnerability and it repeatedly calls for further consumer rights regulation within the sharing economy.

Behind the desire to restrict their liability and excluding themselves as parties to the contract, there is an understandable economic and business logic of the platform operators.[130] They seek to "*enter into a certain area of business activity and tap into a pool of revenue without being held responsible for the adequate performance of the contractual obligation rendered by a third party supplier.*"[131] As platforms are not regulated by the EU legislation in that respect, there is in principle no objections against this business model from the legal point of view – as intermediaries are not liable for the performance of the obligation by the supplier.[132]

c. Status of suppliers – independent contractors or employees?

In terms of liability, the situation would probably be 'easier' for both for the consumers and the regulators (not the platform operators!), had the sharing economy suppliers was regarded as the platform operator's employees instead

[127] ibid 8.
[128] *See* Airbnb, *The £600,000 Host Guarantee*, <www.airbnb.co.uk/guarantee> accessed 20 July 2016.
[129] "26. […] Except for our obligation to pay amounts to applicable hosts pursuant to these terms or an approved payment request under the Airbnb Host Guarantee, in no event will Airbnb's aggregate liability […], exceed the amounts you have paid or owe for bookings via the site […]". *See* Airbnb, *Terms of Service* (Last updated 29 March 2016) <https://www.airbnb.co.uk/terms> accessed 20 July 2016.
[130] Hein Kötz and Hans-Bernd Schäfer, *Judex oeconomicus*, Mohr Siebeck, 2003, 58-62.
[131] *Busch, et al.* (n105) 7.
[132] ibid.

of the independent contractors. This question was raised in multiple lawsuits[133], out of which the one involving Uber hauled the most interest. Even though the US Labor Commission in California ruled that an Uber driver was an employee and not an independent contractor in 2015[134], it is yet to be seen how the ongoing appeal process will culminate. The confirmation of such a finding would have as an advantage a better security for Uber drivers, as they would enjoy worker benefits such as wage protection, unemployment and health benefits.[135] On the other hand, that could be detrimental for Uber's concept of the sharing economy and it would put it outside of the definition of the sharing economy used in this paper.

The main argument why Uber drivers should not be regarded as employees is due to the platform's limited intermediary role[136] and the fact that drivers are free to set their own working hours. Those opposing such argument claim that Uber sets "*most of the terms of employment, and is involved from vetting of drivers through to terminating them if they have low ratings*"[137], arguing that such a policy *de facto* contributes to the company's status of an employer.[138] On the other hand, Professor Robert Sprague holds that "*the nature of work exemplified by the sharing economy requires a classification test that focuses not on the dependence of the workers on the employer, but the dependence of the employer on the workers*."[139] Hence, the freedom that workers enjoy in providing individualised tasks and services can be seen as a form of an existential dependence of the platform operator to these workers, and not the other way around. Ultimately, it is up to the courts to determine how far independent contracting can be strained, while the results might not be identical in every jurisdiction.

---

[133] *Katz* (n99) 1091.

[134] *See Barbara Ann Berwick vs. Uber Technologies Inc*, Case no. 11-46739 EK, Labor Commission of the State of California, US, June 3, 2015, available at <http://uberlawsuit.com/Decision.pdf> accessed 23 July 2016

[135] For summary of the arguments and legal decisions in cases involving Uber in front of US authorities, including the ongoing class actions, *see* <http://uberlawsuit.com/> accessed 23 July 2016.

[136] Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System* (December 2015) 90(2) Tulane Law Review 241, 263.

[137] *Deloitte Access Economics* (n29) 15.

[138] Dyal-Chand (n136) 263.

[139] Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes* (2015) 31 A.B.A. Journal of Labor & Employment Law 53, 76.

Even if Uber drivers were regarded as Uber's employees, the same finding could not be universally applied to other sharing economy businesses. It appears that Uber imposes restrictions to its drivers because that is inevitable to be able to comply with a heavily regulated traditional taxi markets regulations. However, if Uber would operate on the same way as traditional taxi operators do (with the only difference in having a modern online algorithm running the platform), it should be abiding by the same set of rules as the market incumbents – but it does not, for the reasons that follow.

In author's opinion, such finding would be farfetched, since Uber provides an alternative to traditional taxi services, connecting non-professional, part-time drivers with passengers. Therefore, it should be regulated as such, and not pushed under the 'taxicab' regulatory framework.[140] Not only that Uber created many new ridesharing markets across the world and lowered the costs of transportation, but it also influenced traditional taxi markets and decreased the level of the competition among them[141], and for that – it should be applauded, and not punished. Maybe the solution lays in the compromise. Some sharing economy businesses in recent months started to offer their suppliers or providers some form of workers benefits.[142] For example, TaskRabbit started offering access to discounted health insurance and accounting systems.[143] Instacart, a grocery delivery app, asked some of its workers to become part-time employees.[144] Such and similar steps prove that a fair treatment of workers does not necessarily have to twist the sharing economy business model.[145]

[140] *See more* Damien Geradin. *Should Uber be allowed to Compete in Europe? And if so How?* (Forthcoming 2015) Competition Policy International <http://ssrn.com/abstract=2615530 > accessed 20 July 2016.
[141] Scott Wallsten, *The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?* (June 2015) Technology Policy Institute, 19 <www.ftc.gov/system/files/documents/public_comments/2015/06/01912-96334.pdf> accessed 25 July 2016.
[142] *See more* Antonio Aloisi, *Commoditized workers: Case study research on labor law issues arising from a set of „on-demand/gig economy" platforms* (2016) 37 Comparative Labor Law & Policy Journal 653.
[143] *See more* TaskRabbit Perks, <www.taskrabbit.com/perks> accessed 27 July 2016.
[144] *See more* Brad Stone*, Instacart Reclassifies Part of Its Workforce Amid Regulatory Pressure on Uber*, Bloomberg Technology (22 June 2015) <www.bloomberg.com/news/articles/2015-06-22/instacart-reclassifies-part-of-its-workforce-amid-regulatory-pressure-on-uber> accessed 27 July 2016.
[145] *Aloisi* (n142) 684.

After addressing the identified key issues regulators should bear in mind when regulating the sharing economy, a further focus of this paper will be on the EU competition law perspective and its concerns with the sharing economy.

IV. EU Competition Law in the sharing economy

From a competition law perspective, there are some common characteristics of the sharing economy platforms that might cause harm and therefore should be regulated through common rules. The tools to tackle such harms are in the hands of the EU competition law enforcer – the Commission. Despite all the challenges in regulating the sharing economy, many experts agree that competition enforcers already got what it takes "*to adequately address potential abuses of dominance by online platforms*"[146], with the necessary adjustment on the enforcement level. The author breaks down all of the potential concerns identified in the available literature – although the list might not be exhaustive – with the main purpose to levy the discussion in attempt to raise the awareness of competition law threats posed by the sharing economy business models.

1. Concerns arising from a dominant position

The sharing economy businesses are developing at fast pace, using innovation as a disruptive force to enter or create different markets, reaching customers that market incumbents could not have reached before. As any other business, they have every incentive to expand and get their piece of a market pie, and there is nothing wrong in that. However, when they do it from a position of dominance – that might be detrimental for the competitors. Under article 102 TFEU and in the field of merger control, a firm is presumed to enjoy a

[146] Olga Batura, Nicolai van Gorp and Pierre Larouche (e-Conomics), *Online Platforms and the EU Digital Single Market*, Written evidence (OPL0066), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/24920.html> accessed 25 July 2016.

dominant position[147] where its market share reaches or exceeds 50%.[148] It is established above how rapidly the sharing economy grows and it is no wonder that such a growth attracts high rates of investment.[149] With such a potential, it seems to be a matter of time when the legal thresholds[150] will be satisfied and companies' market shares will exceed that 50% presumption.

However, regardless of the fact that the following sharing economy concerns are discussed in the context of a potential abuse of a dominant position under article 102 TFEU, some of those concerns may meet the requirements under Article 101(1) and they should, therefore, be examined as such. In that event, the Commission has the power to apply both articles 101(1) and 102 TFEU to the same facts, whereas the facts that amounted to the breach of Article 101, cannot be merely 'recycled' to prove the infringement of the Article 102.[151]

a. Winner-takes-all effect

Having established that two-sided markets are characterised by a presence of 'network effects', it is useful to highlight that these network effects increase the likelihood of 'winner-takes-all' effect (also known as 'snowball effect'). But before moving on to how network effects lead to winner-take-all scenarios, the illustration of network effects is provided. For instance, if someone wants to send money abroad using the money exchange service TransferWise, the platform operator will, instead of making an international transfer, make two local transfers – each from its own account in a different

[147] Dominance is a "position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers". *See* Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para 65; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 38.

[148] Case 62/86 *AKZO v Commission* [1991] ECR I-3359, para 60; *See also Horizontal Merger Guidelines* [2004] OJ C31/5, para 17.

[149] Investments in the sharing economy are at a record high – it is estimated that more than $12 billion has been invested in sharing economy start-ups, more than twice as much than for social networking start-ups such as Twitter and Facebook. *See more* Deloitte Study, *The Sharing Economy: Share and make money – How does Switzerland compare?*, 3, <www2.deloitte.com/content/dam/Deloitte/ch/Documents/consumer-business/ch-cb-shared-economy-share-and-make-money.pdf > accessed 27 July 2016.

[150] *See infra* IV.II.a. Escaping scrutiny

[151] That was established by a court practice. *See* Joined cases 6 and 7-73, *European Sugar Industry* [1974] ECR 00223; Joined Cases T-68, 77 & 78/89, *Flat Glass* [1992] ECR II-1043.

currency – in order to avoid paying high international fees and exchange rates imposed by the banks.[152] To be able to operate, the platform needs customers on both sides of the market to pay in the money in their own, different, currencies. Otherwise, there would not be enough resources for customers to retrieve their money in a designated currency and they would simply not be willing to use the platform anymore. The same is present if we observe Uber drivers' need for enough of passengers, Airbnb hosts' need for enough of guests and vice versa. Hence, the platform becomes more valuable as the number of user increases.[153] That is what is usually called a 'network effect'.

Such network effects create a 'tipping' point – "*a virtuous circle of positive feedback ensures that a winner becomes even more a winner as it continues to attract more and more customers*"[154], leading to a strong market power immune to entry.[155] Chisholm and Jung argue that once a market has "tipped*", "the platforms may have market power that could be used to discriminate against competitors or to the detriment of consumers and innovation*"[156]. Furthermore, Kadar stresses out that some of these strong positions are likely to be maintained and become entrenched while disabling competitors with potentially even better products to challenge the market position of a market leader.[157] The case *Microsoft II*[158], where Microsoft tied the Internet Explorer browser with its Windows operating system, is a good example of the use of a dominant position created on the network effects.

Therefore, if there is a will to ensure that the competition among rivals places on the merits and that even if a strong or dominant market position is achieved, such position is not abused – it seems to be necessary to closely monitor digital economy companies.[159] Notwithstanding, in regard to exclusionary conduct, some point out that it is relevant whether "*the firms*

---

[152] *See more* TransferWise, *What is TransferWise?* < https://transferwise.com/help/article/1567514/good-to-know/what-is-transferwise> accessed 25 July 2016.
[153] *Deloitte Access Economics* (n29) 21.
[154] Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business School Press 1998) 174.
[155] *King* (n30) 731.
[156] *Chisholm and Jung* (n121) 4.
[157] Massimiliano Kadar, *European Union competition law in the digital era* (4/2015) Zeitschrift für Wettbewerbsrecht 342, 351.
[158] Case AT.39.530 – *Microsoft tying.*
[159] *Kadar* (n157) ibid.

make effort to run faster than rivals or whether their effort is directed at slowing rivals"[160] when acquiring market shares.

Overall, it is argued that a winner-takes-all effect is likely to result in a creation of strong market positions in relevant industries.[161]

b. Barriers to multi-homing

In the two-sided sharing economy markets, participating users on one side of the market may choose whether to use only one platform or more alternative platforms simultaneously. If they choose to use only one platform, that is called single-homing (e.g. passengers may use only one ridesharing service whenever they need a ride). If they decide to use more alternative platforms, that is called multi-homing. [162] For example, a person renting a room or flat may, at the same time, offer it on more than one platform, in order to maximise its profits and fill the room of flat with guests at all available time slots. The problem may occur when one side of the platform users (especially the supply side) are left with no choice but to use one platform, what may amount to exclusive dealing.[163]

It seems that almost all of the concerns discussed above may give rise to barriers to switching between platforms or to 'multi-homing'. As additional concerning factors, Chisholm and Jung underline not only the already mentioned contractual restrictions imposed by online platforms, but also the inability of customers to 'transfer their reputation'[164] to a competing platform (thus making them 'invested' in their platform only) and 'the use of proprietary data'[165] a dominant platform may have access to (what could in principle create an unmatchable advantage over competitors).[166]

King argues that "*the ability of one or other set of participants to a peer-to-peer platform to multi-home can significantly alter the competitive dynamic*"[167]. He also points out that once a participant has chosen a particular

---

[160] Encaoua and Hollander (n64) 70.
[161] *Kadar* (n157) ibid.
[162] *King* (n30) 732.
[163] *Deloitte Access Economics* (n29) p 23.
[164] *See more* Andreas Diekmann, Ben Jann, Wojtek Przepiorka and Stefan Wehrlia*, Reputation Formation and the Evolution of Cooperation in Anonymous Online Markets* (2014) 79(1) American Sociological Review 65.
[165] *See more infra* IV.II.c. Use of data
[166] *Chisholm and Jung* (n121) 4.
[167] *King* (n30) 732.

platform, and platforms will compete vigorously to sign them up to single-home (i.e. exclusivity agreement), the platform becomes a 'gatekeeper' for the parties on the other side who wants to interact with those single-homing participants – making them more vulnerable to the exploitation of market power.

c. Asymmetries of bargaining power

A further concern expressed[168] in regard online platforms in general, but which is easily applicable to the sharing economy business models, is the one of discrepancy of bargaining power between platforms and users of platforms.

The example of the OTAs discussed above[169] can be used again to illustrate this concern. The OTAs such as Booking.com, acquired by Priceline in 2005[170], now represents over a half of the market in the respective industry, while Expedia has "*a considerable share of the remaining half of the sector*"[171]. On the other hand, over 86 percent of the hotel industry are small and medium-sized operators, and that makes negotiations of hotels with OTAs "*extremely difficult*"[172].

Another example can be found in online creative industries sector. YouTube allegedly threatened to remove content and block access to its services to the Independent Music Companies Association (IMPALA), thus creating artificial barriers to accessing the digital market.[173] IMPALA claimed that YouTube forced them to accept '*non-negotiable licensing conditions'* as well as that they tried to impose a *'least-favoured nation'* clause. Such clauses were supposed to ensure that the royalty rate of all independents is aligned with the lowest rate agreed with any label worldwide.[174]

---

[168] *Online Platforms and the Digital Single Market* (n44) 37.
[169] *See infra* VI.I.d.i. Most-favoured-nation clauses
[170] *See more* Priceline Group, <www.pricelinegroup.com/about/history/> accessed 30 July 2016.
[171] *Online Platforms and the Digital Single Market* (n44) 37.
[172] ibid.
[173] *See more* IMPALA, *IMPALA invites the European Commission to red card YouTube* (27 June 2014) <www.impalamusic.org/content/dispute-between-youtube-and-independent-music-companies-%E2%80%93-formal-process-starts-brussels> accessed 30 July 2016.
[174] *Online Platforms and the Digital Single Market* (n44) 39.

It overall seems that the fast-growing sharing economy champions may likely come in a position to impose similar requirements on its individual users, hence exploiting their position of a dominant market player.

d. Contracts that reference rivals

CRRs contracts are type of exclusivity arrangements which can be used by a platform operator to limit how participants will interact with other platforms.[175] King argues[176] they can be a particular concern in the sharing economy for two reasons. First, due to their anticompetitive nature in peer-to-peer networks when combined with the issue of 'tipping'. In that setting, they may create significant barriers to entry, as they deter participants on one side of the market from 'multi-homing'. Second, challenged by the new sharing economy business models, incumbent suppliers might want to seek to enter the sharing economy in order to compete and underpin their expansion. Such a behaviour may enhance competition, but not if the incumbent market players use CRRs. If they do, the use of CRRs might lead to leveraging of their traditional market position into a significant or dominant position in the sharing economy.

An example of the use of CRRs as a part of uncompetitive collusive agreement between a new platform and incumbent publishers is a recent *Apple e-books* case[177]. Their clause required that publishers offer the lowest e-book retail price on their iBookstore, compared to any other price of the same e-book on competitors' platforms, including Amazon. "*The effect of this clause was to force publishers to re-negotiate their supply arrangements with Amazon and to increase retail prices for e-books.*"[178]

It is overall argued that even if CRRs may be common and can be benign, in some settings they may be a key element of anticompetitive behaviour. Two types of clauses facilitate reaching CRRs – MFN and MTC clauses.

---

[175] *King* (n30) 732.
[176] ibid 733.
[177] *See United States of America v Apple Inc., et al.*, US District Court (Southern District of New York) 12 Civ. 2826 (DLC) (filed 7 October 2013); *United States of America v Apple Inc.*, US Court of Appeals for the Second Circuit, 13–3741-cv 30 June 2015.
[178] *King* (n30) 733.

i. Most-favoured-nation clauses

MFN clauses, also known as most-favoured-customer clauses, have been one of the key concerns of the competition authorities around the world in recent years.[179] They require the seller to always sets the price to a particular customer at the lowest price that it sells to any other customer, therefore "*preventing price discrimination in case the contracted firm would offer a lower price to another customer*"[180]. Such a policy is a guarantee to a particular customer that becomes effective only if the firm offers lower price in a specified future period.[181] That "*mutes the incentives of the seller to selectively price discount as this leads to rebates or equivalent discounts to other customers*"[182]. In the sharing economy, such clauses seem likely to occur, since platforms are employing various disruptive strategies, creating and entering new markets, and it sounds reasonable that some of them might try to attract new customers by offering them contracts on MFN terms. That restriction also represents a barrier to switching to the competitor's platform.[183]

An example of the anticompetitive use of CCRs involving MFN clauses in a traditional online market was addressed in 2014 by the UK Office of Fair Trading decision.[184] OFT accepted the commitments to remove certain discounting restrictions for online travel agents such as Booking.com and Expedia. In OFT's "*attempt to balance the pro- and anticompetitive effects*"[185], accepted commitments allowed hotels to discount only the particular repeat customers. It was undermining for the *Online Travel Agents*

[179] Pınar Akman, *A Competition Law Assessment of Platform Most-Favoured-Customer Clauses*, University of Leeds, CCP Working Paper 15-12, 1 <http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62> accessed 26 July 2016.
[180] Claude d'Aspremont and Rodolphe Dos Santos Ferreira, *Meet-or-Release and Most-Favored-Customer Clauses with Price-Quantity Competition Yield Cournot Outcomes* (2015/2) 17 Économie publique/Public economics [En ligne] 225, <http://economiepublique.revues.org/3040> accessed 28 July 2016.
[181] Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion* (Autumn 1986) 17(3) Rand Journal of Economics 377, 377-378.
[182] *King* (n30) 733.
[183] *Chisholm and Jung* (n121) 4.
[184] Office of Fair Trading, *Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents* (31 January 2014) OFT1514dec.
[185] *King* (n30) 734.

(hereinafter: 'OTA') business model if the customers could find best deals via OTAs, and then get offered the same or even better deals directly from the relevant hotels online.[186]

Akman points out that at least fourteen NCAs in Europe alone currently investigate or have recently investigated competition issues raised by MFN clauses.[187] On top of that, the Commission recently launched its own investigation into Amazon's practices, including MFN clauses. The Commission holds that clauses granting "*the right to be informed of more favourable or alternative terms offered to its competitors*" and/or "*the right to terms and conditions at least as good as those offered to its competitors*", "*seem to shield*" Amazon from competition from other e-book distributors.[188]

It is overall argued that such clauses may represent a competition law concern because they can facilitate a reduced intensity of competition, and potentially, higher prices for consumers.[189]

ii. Meet-the-competition clauses

MTC clauses, also known as meet-or-release clauses, state that if a customer receives a better price from an alternative seller, then the current seller will match that price.[190] That clause guarantees the customer a lower price or releases the customer from the contract after he informs the current seller about the competitor's lower price offered.[191]

King highlights that such clauses may lead to collusive behaviour because "*[i]f one participant to the collusion 'cheats' and lowers its prices, then the buyers inform its competitive rivals about the lower price"*[192]*,* which makes 'stealing' customers from competitors even harder. The sharing economy may easily get tempted to introduce such clauses since the core of many business models seems to be competing on lowest prices. Not only that such a clause can help stabilise a collusive arrangement, but also, as Motta argues,

---

[186] *See more Online Platforms and the Digital Single Market* (n44) 34-37.
[187] Akman (n179) 2.
[188] *See* European Commission, Press Release, *Antitrust: Commission opens formal investigation into Amazon's ebook distribution arrangements*, Brussels, 11 June 2015 (IP/15/5166).
[189] *King* (n30) 733.
[190] ibid.
[191] Aspremont and Santos Ferreira (n180) 225.
[192] *King* (n30) 733.

MTC clauses have so strong pro-collusive impact, they should probably be put under a *per se* prohibition rule.[193]

e. Price restrictions

Besides the above discussed anticompetitive concerns raised by the use of MFN clauses (i.e. the OTAs example) which may also be regarded as price restrictions, in its study for the Australian NCA, Deloitte addressed issues of resale price maintenance (hereinafter: 'RPM') and predatory pricing as further potential sharing economy concerns competition authorities should take under scrutiny.

RPM may pose a concern depending on "*whether the platforms actually engage in price setting, or whether they are merely 'information providers' that re-publish suppliers' prices*"[194]. Former scenario seems to be a feasible concern since platform operators in the sharing economy usually generate their profit by receiving a percentage of the price transacted, therefore having an incentive to maintain a certain price level. For example, Uber pricing algorithm may pose a challenge to competition law, especially its 'prices surges' feature. That algorithm's feature enables the increase of fare rates when the demand is higher than the supply (i.e. the lower number of drivers around the passenger), usually at peak times.[195] Gata highlights that if Uber drivers are treated as independent contractors and their prices are not determined independently, but by the pricing algorithm, then price fixing may be occurring.[196]

Predatory pricing represents a misuse of market power and it occurs when a company with "*substantial market power or share of a market sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market*"[197]. Deloitte emphasises two ways[198] the sharing economy platforms could likely engage in predatory pricing. First,

---

[193] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), 158

[194] *Deloitte Access Economics* (n29) 23.

[195] *See more* Uber Surge Pricing, <http://uberestimator.com/uber-surge-pricing> accessed 29 July 2016.

[196] Gata (n32) 4.

[197] Australian Competition & Consumer Commission, *Predatory Pricing*, <www.accc.gov.au/business/anti-competitive-behaviour/predatory-pricing> accessed 29 July 2016; *See also* Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000; Case C-62/*86 AKZO Chemie BV v Commission* [1991] ECR I-3359.

[198] *Deloitte Access Economics* (n29) 25.

by offering ‘so low’ listing fees to the users of the platform so they do not list with the competitors, and once the competitors are forced out of market – they raise their listing fees for platform users. Second, by reducing the commission it charges to platform users for each transaction, allowing them to achieve higher margins in comparison to the margin they can get on the competing platform, and once the competitors are forced out of market – they raise their commission.

The competition authorities, as well as the sharing economy companies, should be aware of these concerns in order to avoid anticompetitive effects on the relevant markets. These concerns seem to pose a credible threat and they should be thoroughly examined when dealing with a potentially problematic sharing economy business models.

2. Concerns under EU Merger Regulation

It appears that many of the previously discussed concerns may overlap, and the impact of these individual anticompetitive practices may enhance the effects of others. Therefore, same may also be relevant when assessing mergers. Some argue that winner-takes-all effect, for example, is “*the reason why competition authorities should be mindful not to allow the creation or strengthening of market power through anticompetitive mergers in the first place.*”[199] Furthermore, e-Conomics pointed to a list of, currently, 195 Google acquisitions[200], noting that some of those acquisitions may be interpreted as the elimination of competition, consequently foreclosing future markets and throttling innovation.[201] For instance, a leading ad-serving technologies provider *DoubleClick* was bought by Google, and even one of the US Federal Trade Commissioners in its dissenting statement[202] opposed that acquisition. Despite her concern that the merger might lessen the competition on the ad-serving market, the acquisition was eventually cleared.[203]

---

[199] *Kadar* (n157) 351.
[200] *e-Conomics* (n146) fn 21.
[201] ibid 56.
[202] Federal Trade Commission (US*), Dissenting Statement of Commissioner Harbour In the Matter of Google/DoubleClick* (20 December 2007) <www.ftc.gov/public-statements/2007/12/dissenting-statement-commissioner-harbour-matter-googledoubleclick> accessed 26 July 2016.
[203] Federal Trade Commission (US*), Statement of the Federal Trade Commission Concerning Google/DoubleClick* (20 December 2007) <www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick> accessed 29 July 2016.

Because of such phenomenon, when assessing the mergers in the digital economy, hence in the sharing economy, the concerns of escaping scrutiny, vertical integration and leveraging and the use of big data, seem to be the three most challenging issues and are therefore discussed under this caption.

a. Escaping scrutiny

It seems reasonable to assume that a vast majority of the sharing economy firms are still not reaching the existing turnover thresholds required under Article 1 EUMR, which are used to establish the Commission's jurisdiction over mergers. To be scrutinised by the Commission, merging parties' aggregate turnover needs to exceed at least €5000 million worldwide, and €250 million within the EU for at least two merging parties, out of which more than two-thirds have to be generated in more than one Member State.

Kadar argues that these thresholds should be complemented by additional notification requirements based on the transaction value.[204] His proposal is similar to the German Monopoly Commission's opinion[205], which called for such an amendment to close a legal gap. The Monopoly Commission holds that this issue is particularly important in the digital economy, as acquisitions of companies which did not achieve a high turnover in the past may give rise to competition policy concerns, arguing that the purchase price often better reflects the economic potential of an acquisition target than the turnover.[206]

It overall seems that the existing EUMR turnover thresholds test alone might not be sufficient to efficiently capture all competition policy concerns in the sharing economy.

b. Vertical integration and leveraging

The concern of vertical integration and leveraging was expressed within the Commission's analysis[207] of the Digital Single Market Strategy. The Commission stated that some platforms act as a marketplace and a retailer at

[204] *Kadar* (n157) 356-357.
[205] *See more* Daniel Zimmer (Monopolkommission), *Digital Markets: New Rules for Competition Law* (8 July 2015) Journal of European Competition Law & Practice.
[206] *Kadar* (n157) 357.
[207] *A Digital Single Market for Europe: Analysis and Evidence* (n8) 55.

the same time, what enables them to use the data obtained from the business users of marketplace to enhance their own retail arm.

An example of that concern is expressed in the Commission's' Statement of Objections in the *Google Search* case[208]. The Commission considered that Google abused its dominant position by systematically favouring its own comparison shopping product in its general search results pages. It pointed out that users do not necessarily see the most relevant results in response to their queries, what amounts to discrimination in listing between platforms' own services and third party services. That is considered to be detrimental to consumers and rival comparison shopping services, as well as stifling innovation, and is in breach of the EU competition law.

Albeit this issue was scrutinised as an abuse of dominance, this kind of competitive behaviour seems to be a potentially relevant factor in assessing mergers of companies with the similar online structure.

c. Use of big data

The sharing economy businesses collect users' data, and that use of data and data analytics are an integral element of any online platform. [209] The obtained data gives the platform operator a significant competitive advantage[210] over its rivals.

According to an estimate in OECD study, it appears that the number of big-data-related mergers more than doubled between 2008 and 2013 – from 55 to 134, which points to the increased interest in acquiring a "data advantage" over rivals.[211] Competition authorities already pursued evaluation of the concern of data utilisation for commercial purposes. For example, the European Commission recently examined potential data concentration, even though, "*only to the extent that it is likely to strengthen Facebook's position*

[208] *See more* European Commission - Fact Sheet, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*, MEMO/15/4781, 15.04.2015.
[209] *Online Platforms and the Digital Single Market* (n44) 47.
[210] As highlighted in the contributions by the UK CMA and Ezrachi and Stucke in *Online Platforms and the Digital Single Market* (n44) fns 243, 244.
[211] Ariel Ezrachi and Maurice Stucke, *Online Platforms and the EU Digital Single Market*, Written evidence (OPL0043), para 2.7 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23223.html> accessed 30 July 2016.

in the online advertising market or in any sub-segments thereof" in the case of *Facebook/WhatsApp*[212].

French Competition Authority, in its opinion on the cross-usage of customer datasets[213], sets three criteria which can be used to determine whether the use of such datasets could result in a restriction of competition.[214] Moreover, German Monopolies Commission highlights that in data-related markets, a merger between market incumbent and innovative newcomer, could result in "*differentiated data access and increase the concentration of data related to this market if the newcomer has access to a large database (gained on another market for instance)*", despite having a low impact on the market structure in many other markets.[215] Nevertheless, Lougher and Kalmanowicz points out the fact that 'network effects' and economies of scale and scope were frequently featured the Commissions' merger control decisions, whilst the possession or use of data has been less often considered as an important factor in such proceedings.[216]

Overall, the use of big data in the sharing economy appears to indeed be a sound concern, and it seems to be crucial to address this issue with the special attention in the future assessments of mergers and acquisitions of sharing economy business models under the EU competition law.

V. Conclusions

It appears that the sharing economy changes the way how many businesses are getting done – for good. It boosts the global economy and it provides an alternative to traditional markets. Most importantly, it employs individuals who would otherwise be unlikely involved in or profit from such exchange of goods or services. The utilisation of underused assets and skills should be

[212] European Commission, *Facebook/WhatsApp*, Decision of 3 October 2014, M.7217, para 164.
[213] French Competition Authority, Opinion n°10-A-13 of 1406.2010 (14 June 2010) <www.autoritedelaconcurrence.fr/pdf/avis/10a13.pdf> accessed 30 July 2016.
[214] *See more* French Competition Authority, *Competition Law and Data* (10 May 2016) <www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> accessed 30 July 2016.
[215] *Competition policy: The challenge of digital markets* (n58) 16.
[216] *Lougher and Kalmanowicz* (n53) 13.

praised, and it, therefore, deserves a carefully tailored, efficient regulation – the opposite of bans and unreasonably extensive restrictions.

The existing regulatory frameworks are giving the impression of being outdated – unable to effectively cope with the digital (r)evolution the sharing economy is part of. A possible answer to how to regulate the sharing economy is through governmental or self-regulation bodies. In doing so, it is essential to recognise and respect all the unique characteristics the sharing economy brings and promote the best of them. Despite its disruptive nature, there is a growing body of evidence that such impact on traditional markets improved their own efficiency. The author argues that in a pursuit to find the best way to regulate the sharing economy, consumer's interests should be held in the heart of all considerations. Consumers are and should be the ones benefiting the most – making sure they are protected from existing uncertainties such as a problem of liability in the event of injuries or damages, and of which rights they are entitled to as suppliers which use the online platforms.

When it comes to the EU competition law concerns, it is important to highlight that the vast majority of them arise from the potential abuse of a dominant position. The huge impact of network effects present on the two-sided markets may easily lead any sharing economy business model to a 'tipping' point, towards a strong market power. That produces outcomes such as winner-takes-all effects and asymmetries in bargaining power. In order to maintain their market strength, it is likely that many businesses will impose various barriers to multi-home to their users, especially on the supply side of the market. Furthermore, the sharing economy incumbents may engage in introduction of contracts that reference rivals, including MFN and MTC clauses, and enforce some of the price restrictions, such as RPM and predatory pricing. These latter concerns can be assessed not only under Article 102 TFEU but also as agreements under Article 101 TFEU.

Finally, many of the identified concerns are not scrutinised at all when it comes to merger control, as the undertakings merged often do not meet the thresholds criteria set in EUMR. When it comes to mergers of digital economy companies, it is argued that existing criteria should be complemented with the value of the transaction criteria. Regulators should also pay attention to concerns of anticompetitive vertical integration and leveraging as well as the use of big data.

Author's reasoning is clear – the identified concerns and unique features of the sharing economy deserve a greater attention from the regulatory and competition authorities. Effective regulatory framework for the sharing economy can only strengthen the innovative solutions 21st century has to offer.

DOMINANT UNDERTAKINGS IN THE DIGITAL ERA: A CALL FOR EVOLUTION OF THE COMPETITION POLICY TOWARDS ARTICLE 102 TFEU?

EVELIN HLINA*

In recent years, the impact of the ever-growing digitalisation received considerable attention by competition law enforcers. In particular, the strong market positions of certain 'digital market champions" lead to debates whether competition policy as it stands today is capable of facing the challenges of the digital era. Indeed, 90% of all internet search queries in Europe are processed by Google, and Facebook receives 15 times as many clicks as other social networks. But might the significant market power of those undertakings be explained by the characteristics of two- or multisided-platform markets, or rather by the fact that competition in the digital economy is different to the analogue world? This article examines whether there is a need to improve the current rules on abuse of dominance to face the challenges of digital markets, or whether competition policy has to be adapted regarding digital market champions.

I. Introduction

In the debate on how to face novel issues given rise by the digital economy, some believe that the European Commission (the 'Commission') should refrain from intervening in the fast-moving digital economy, since intervention would generally slow down innovation and outweigh possible benefits for consumers. Another group takes the view that the Commission might not be able to address issues on those markets efficiently enough and a stricter enforcement of competition law in digital markets in form of a new regulatory framework would be the best suited instrument to counteract market dominance in the digital economy. Yet others argue that the current

* Mag. Evelin Hlina LL.M. (Queen Mary University of London) is an associate at Schönherr Rechtsanwälte GmbH Vienna, Austria.

competition policy towards abuse of dominance cases has to be reassessed and potentially improved to face the challenges of digital markets. The different positions show that the digital economy has given rise to new challenges, which need to be faced by the Commission in order to ensure competition on the merits on digital markets.

This article weighs the claims made on which role competition policy should play in the digital economy and examines in which way the current policy on abuse of dominance might be improved to face the novelties of digital markets. It takes the view that the positions either to abstain from enforcement of competition law in the digital economy or to introduce an ex-ante regulatory framework are excessive and not necessary, and that the evolvement of the competition policy of the Commission towards Article 102 TFEU is not only completely adequate but rather best suited to face abusive conduct on digital markets.

The main aim of this article is to examine whether and how competition policy should evolve with the traditional tools at hand in the fast-moving and highly innovative digitalised industry without producing unacceptable false positive or negative outcomes for those markets. The position taken by the Commission on market definition and dominance was highly criticised in previous abuse of dominance proceedings in digital markets, such as *Microsoft* or *Google Search*. Therefore, the article focuses on market definition and dominance as the most crucial points in the enforcement of Article 102 TFEU in digital markets.

In order to discuss the primary question at issue, the article in section 2 first defines digital markets and outlines their main characteristics distinguishing digital markets from the analogue world. After having reflected on the current state of discussion and the proposed approaches how to handle the challenges given rise by the digital economy in abuse of dominance cases in Section 3, Section 4 outlines the current legal framework and policy considerations under Article 102 TFEU and concentrates on the improvement of the Commission's competition policy towards abuse of dominance cases in digital markets and discusses whether the policy as it stands is appropriate in dealing with the abuse of dominance in the web based economy and where adjustments are needed. Section 5 concludes.

II. Characteristics of Digital Markets

1. Introduction

This chapter provides an overview of industries coming under the definition of digital markets and the economic characteristics generally presented by them. Given that digitalisation profoundly changed the commercial behaviour in most markets, and nowadays practically every business is to a larger or smaller extent carried out in a digitalised manner, a uniform definition of digital markets is difficult to provide.

For the purpose of this article, digital markets are understood as industries which are characterised by the supply of digital goods or services. According to this definition, digital markets comprise operating systems for PCs or laptops (eg Windows), search engines (eg Google), apps for smart mobile devices (eg Whatsapp), websites or software for the distribution of digital content (eg YouTube or Spotify), or social networks (eg Facebook).[1] Furthermore, also industries where physical goods are distributed through a digital platform come under this definition, provided that the core business in question concerns the development and management of the platform (eg Amazon).

Despite the fact that a wide range of industries are covered under the umbrella of digital markets, most of these markets share common characteristics. These characteristics significantly influence both business decisions taken by the individual undertakings as well as competition on the market leading to business models quite different from those in conventional sectors.[2] In this context, it is particularly vital for competition policy to take into account the characteristics of two- or multi-sided platforms, since most features of one-sided businesses do not apply to those business models.[3]

---

[1] See Massimiliano Kadar, 'European Union competition law in the digital era' (2015) 4 Zeitschrift für Wettbewerbsrecht 342, 345.

[2] David S Evans and Richard Schmalensee, 'The antitrust analysis of multi-sided platform businesses' in Roger D Blair and D Daniel Sokol (eds), *Oxford Handbook on International Antitrust Economics* (OUP 2013) 404.

[3] This was also emphasised in OECD, 'Roundtable on Two-Sided Markets' (DAF/COMP(2009)20) 11 et seq <https://www.oecd.org/daf/competition/44445730.pdf> accessed 28 July 2016.

2. Dynamic and Innovative Markets

The main characteristic of the digital economy is its highly dynamic and innovative nature. The fast-moving pace and sometimes even disruptive nature of digital markets leads to immense innovation processes through which new products are launched rapidly or existing products are developed apace.[4] In this volatile playing field, market entrants may easily destabilise the competitive strength of an incumbent by way of introducing new products.[5] This can particularly be seen in the example of start-ups, since most of the highest valued start-ups in the world, such as Spotify, Snapchat or Airbnb, are active in the digital economy.[6]

Furthermore, since digital markets are evolving constantly, undertakings which are successful in one field often expand their activities either into neighbouring fields or even distant markets.[7] The best example of a broad portfolio expansion is Alphabet Inc. (the company behind Google), which extended its activities beyond its original function as a search engine into neighbouring areas, such as Maps, YouTube, Apps, Cloud, Android, Chrome or Google Play, as well as other – quite different – business fields, such as hardware products (Chromecast, Chromebooks and Nexus), home automation (Nest), internet or TV services (Google Fiber).[8] Besides Google, also other digital market champions, most notably Apple or Facebook, have chosen to expand their business operations into other fields by way of acquisition or development.[9]

The broadening of the business portfolio in the digital economy is moreover facilitated by low barriers to entry and expansion. In particular the internet

---

[4] See OECD, 'Hearing on disruptive innovation' (DAF/COMP(2015)3) 2 et seq <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)3&docLanguage=En> accessed 8 June 2016, for a definition of disruptive innovation inter alia in digital markets.

[5] German Monopolies Commission (*Monopolkommission*), 'Competition policy: The challenge of digital markets' (Special Report No 68 2015) 15.

[6] Scott Austin, Chris Canipe and Sarah Slobin, 'The Billion Dollar Startup Club' *The Wall Street Journal* (New York City, 18 February 2015) <http://graphics.wsj.com/billion-dollar-club/> accessed 8 June 2016.

[7] Monopolies Commission (n 6) 16.

[8] Alphabet Inc., 'Form 10-Q for the quarterly period ended 31 March 2016' (2 May 2016) 28 <https://abc.xyz/investor/pdf/20160331_alphabet_10Q.pdf> accessed on 27 July 2016.

[9] *Facebook/Whatsapp* (Case COMP/M.7217) Commission Decision [2014] OJ C297/13; *Apple/Beats* (Case COMP/M.7290) Commission Decision [2014] OJ C205.

leads to a reduction of costs, eg for the development, design and distribution of products, the provision of information, or the collection of consumer data.[10] An impressive example for taking advantage of the low cost structure in the digital economy is Whatsapp, which grew to more than 900 million users with less than 50 engineers working at the firm.[11]

Another characteristic resulting from the dynamic and innovative nature of digital markets is that competition on innovation in the digital economy may not only take place in the market but for the entire market. Since competition is not on the price, undertakings active in the digital economy might be forced to compete not only in but for the entire market.[12] This might lead to situations where the product becomes not only the leading, but the standard product, and therefore the undertaking not only market leader but market dominant.

3. High Fixed Cost and Low Marginal Cost

Another characteristic of a large number of digital markets is that their cost structure is characterised by high fixed cost and low (to virtually non-existent) marginal cost.[13] Normally, effective competition drives prices towards short-run marginal cost.[14] However, in digital markets, the opposite is generally the case since the creation and development of a digital infrastructure entails high costs, while the expenditures for the distribution are low.[15] For example, high fixed costs are needed in order to develop an operating system, while marginal costs for the provision of the software to both developers and consumers are low.

---

[10] Jonathan Levin, 'The Economics of Internet Markets' in Daron Acemoglu, Manuel Arellano and Eddie Dekel (eds), *Advances in Economics and Econometrics: Tenth World Congress on Economic Theory*, vol 1 (Cambridge University Press 2013) 48.

[11] Cade Metz, 'Why WhatsApp only needs 50 engineers for its 900m users' (New York City, 15 September 2015) *Wired Magazine* <http://www.wired.com/2015/09/whatsapp-serves-900-million-users-50-engineers/> accessed on 27 July 2016.

[12] See Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601.

[13] Herbert J Hovenkamp, 'Antitrust and Information Technologies' (2015) 68 Florida Law Review 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531689> accessed 21 June 2016. Please note that there are also some digital markets which are characterised by both low fixed and low marginal costs. In *Facebook/Whatsapp* (n 10) paras 119 and 124, the Commission held for instance that the launch, operation and distribution of social network apps, such as Whatsapp, entails rather low cost.

[14] Phillip Areeda and Donald F Turner, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act' (1975) 88(4) Harvard Law Review 697, 702.

[15] Kadar (n 2) 6.

4. Two- or Multi-Sided Platform Markets

Most digital players are not one- but rather two- or multisided businesses. Platforms in general have a great value for the economy, since transactional costs are minimised by the simplification of 'matchmaking' between two or more interdependent groups.[16] But also in the digital economy, intermediaries in the form of two- or multi-sided platforms play a vital role by enabling or facilitating economic or social interactions between distinct customer groups, eg in social networks, trading platforms or operating systems.[17]

The interaction between the platform sides with interdependent demand leads to direct or indirect network effects (or externalities).[18] Direct network effects arise when users of one side of the platform value a product or service more, the higher the number of users on their side.[19] Direct network effects are, for instance, particularly significant on social network platforms, such as Facebook, Skype or Twitter, which are more valuable to its users, the larger the number of users to communicate with on their side.

In contrast, indirect network effects arise when the users of one side value a product more, the more users 'from the other side' are using the platform.[20] Airbnb, for instance, is more valuable to consumers if a large number of rooms can be found on the platform, and it is more appreciated by lessors if a large number of customers searches and books rooms over Airbnb.

---

[16] David S Evans and Richard Schmalensee, 'Industrial Organization of Markets with Two-Sided Platforms' (2007) 3 Competition Policy International 150, 151.
[17] In Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (OUP 2011) 89, the economic concept of two- or multi-sided platforms is discussed. Platforms are not a novel phenomenon of the digital era but are also common in various analogue industries, such as advertising supported media, shopping centres or payment systems, particularly in the focus of the Commission in *Visa International* (Case COMP/29.373) Commission Decision [2002] OJ L318/17.
[18] John E Kwoka and Lawrence J White, *The Antitrust Revolution: Economics, Competition, and Policy* (6th edn, OUP 2013) 606; David S Evans, 'Two-Sided Market Definition' in ABA Section of Antitrust Review, Market Definition in Antitrust: Theory and Case Studies (American Bar Association 2012) 437, 438.
[19] Miguel Rato and Nicolas Petit, 'Abuse of dominance in technology-enabled markets: established standards reconsidered?' (2013) 9 European Competition Journal 1, 4.
[20] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 451.

5. Winner Takes It All Markets

Competition in digital markets is, due to disruptive innovation, high initial expenses and network effects, not exactly comparable to other markets, particularly because these characteristics make the digital economy prone to 'winner-takes-it-all effects'.[21] This means that once a digital market player has reached a certain 'tipping' point, positive feedback effects ensure that the winner gains more and more customers and it becomes very difficult for actual or potential rivals to compete with the dominant undertaking.[22] Thus, digital markets may easily be dominated by a (quasi-)monopolistic winner.[23]

For instance, in *Microsoft*, the proceedings against Microsoft for leveraging its market power on the market for client PC operating systems onto the market for media players, the Commission dealt with the characteristics of the digital economy.[24] Here the Commission considered that indirect network effects may lead to a 'positive feedback loop' on the market for client PC operating systems, since "the more popular an operating system is, the more applications will be written to it and the more applications are written to an operating system, the more popular it will be among users".[25] The Commission considered that the dynamics on the market for client PC operating systems protected the market power of Windows from competition, since most software developers – due to the 'positive feedback loop' – did not find it economically viable to develop to an alternative platform.[26]

Similarly, the Commission concluded in *Microsoft (Tying)* concerning the tying of Microsoft's Internet Explorer browser with the Windows client PC operating system that

---

[21] Fernando Diez, 'Promoting Competition in Digital Markets; a Case Against the Google Case, and the Futile Search of 'Neutrality' in On-line Searches' [2015] Competition Policy International <https://www.competitionpolicyinternational.com/promoting-competition-in-digital-markets-a-case-against-the-google-case-and-the-futile-search-of-neutrality-in-on-line-searches/> accessed on 27 July 2016.

[22] Carl Shapiro and Hal R Varian, *Information Rules* (Harvard Business School Press 1999) 174 et seq.

[23] Joshua Cooper Ramo, 'Why 'Network Power' is the Secret of Success for Apple, Facebook and Amazon' *Fortune* (19 July 2016) <http://fortune.com/2016/07/19/21st-century-network-power/> accessed on 27 July 2016.

[24] *Microsoft* (Case COMP/C-3/37.792) Commission Decision [2007] OJ L32/23.

[25] Ibid paras 449 et seq.

[26] Ibid paras 541 et seq.

> *It would be extremely difficult, time-consuming, risky and expensive to develop an alternative client PC operating system, with no application able to run on it, because users are very unlikely to buy an operating system without a wide range of applications already available, tested and used by other people.*[27]

III. Current State of Discussion

1. Introduction

This section outlines the current state of discussion of the role of competition policy in digital markets in the EU. In recent years, the discussion on the efficiency of the current policy towards abusive conduct in digital markets has been fuelled by proceedings against multinational undertakings provoking considerable media attention and the 'transatlantic dissent' between the enforcement of Article 102 TFEU in the EU and the enforcement of Section 2 of the American Sherman Act in the US. The different approaches towards abusive conduct by dominant undertakings are historically given: while the American antitrust law believes in the self-regulatory power of markets, Article 102 TFEU relies much more on the correctness of government intervention.[28] Although the different mind-sets on either side of the Atlantic Ocean clashed already in the past, the divergence in enforcement in digital markets widens when dealing with digital market champions, which became clear by the different outcomes of both *Microsoft* and *Google*.[29]

After discussing the position that competition law enforcers should refrain from intervention in digital markets, this section moves on to present another rather radical position, ie the introduction of ex-ante regulation in digital markets in order to counteract abusive conduct by digital champions. Lastly, the improvement of the current legal framework or the Commission's policy in order to tackle the challenges of the digital economy is outlined. The evolvement of competition policy is discussed in greater detail in Section 4,

---

[27] *Microsoft (Tying)* (Case COMP/C-3/39.530) Commission Decision [2009] OJ C242/04, para 28.

[28] Eleanor M Fox, 'Monopolisation and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness' (1986) 61 Notre Dame Law Review 981.

[29] Jose Gonzáles-Magaz and William Gordon, 'From Microsoft to Google – Continued Divergence in Transatlantic Antitrust Settlements?' (2013) 3 Competition Policy International <https://www.competitionpolicyinternational.com/from-microsoft-to-google-continued-divergence-in-transatlantic-antitrust-settlements/> accessed on 27 July 2016.

since this position seems best suited to path the way to an effective competition law enforcement in digital markets.

2. Intervention in Digital markets – More Harm than Good?

Starting with the US antitrust proceedings against Microsoft for bundling its Internet Explorer with the Windows client PC operating system, arguments were raised against the intervention of competition authorities in digital markets.[30] Since then, some believe that market imperfections in the digital economy are 'self-regulated' by its fast-moving nature and that intervention by competition law enforcers might only deter investments in innovation, which ultimately causes consumer harm.[31]

Similar arguments to those put forward in *Microsoft* were raised in *Google Search*, where Google allegedly abused its comparison shopping service.[32] Particularly in the light of the 'transatlantic gap' in the enforcement policy towards abusive conduct by dominant undertakings between the EU and the US, it was claimed that the Commission did not initiate the proceedings against Google based on genuine competition concerns, but was rather motivated by economic policy considerations regarding the lack of EU undertakings active in the digital economy. This led to claims that the Commission should rather be concerned with the liberalisation of digital markets as well as market integration in order to enable powerful undertakings to arise.[33]

---

[30] US Supreme Court *United States v Microsoft Corporation* 253 F.3d 34 (D.C. Circuit 2001).

[31] Stan J Liebowitz and Stephen E Margolis, *Winners, Losers and Microsoft: Competition and Antitrust in High Technology* (2nd edn, The Independent Institute 2001) 253 et seq; David J Teece and Mary Coleman, 'The meaning of monopoly: Antitrust Analysis in High-technology Industries' (1998) 43 Antitrust Bulletin 801, 853 et seq.

[32] Commission, 'Antitrust: Commission sends Statement of Objections to Google on comparison shopping service' Press release of 15 April 2015 (MEMO/15/4781) <http://europa.eu/rapid/press-release_IP-15-4780_en.htm> 27 July 2016.

[33] See eg 'Europe v Google: Nothing to stand on' *The Economist* (18 April 2015) <http://www.economist.com/news/business-and-finance/21648606-google> accessed on 27 July 2016; Alistair Barr, 'What Is at the Heart of Complaint Against Google?' *The Wall Street Journal* (15 April 2015) <http://www.wsj.com/articles/what-is-at-the-heart-of-complaint-against-google-1429112645> accessed on 27 July 2016; John Springford, 'How not to create a 'European Google' *Politico* (27 August 2015) <http://www.politico.eu/article/not-create-european-google-innovation-tech-monopoly> accessed on 27 July 2016.

Indeed, excessive intervention by the Commission would be unfortunate, since it is undoubtedly the case that consumers may benefit from digital champions such as Microsoft or Google. Therefore, the question arises whether the Commission is actually intervening too much in the digital economy. Looking at the Commission's enforcement figures, this is not the case. In recent years,[34] the figures show that out of 22 abuse of dominance prohibition decisions pursuant to Article 7 Regulation 1/2003 and commitment decisions pursuant to Article 9 Regulation 1/2003, only the decision in *Microsoft (Tying)* concerned digital markets.[35] Although this simplistic analysis might not take into account the relative commercial importance of the digital economy in the EU, it seems rather far-fetched to claim that the Commission is intervening excessively in digital markets.

However, even if intervention by the Commission is not disproportionate, is there more harm than good by enforcing competition rules in the digital economy? Turning a blind eye to a sector that important and fast-growing, seems grossly inadequate. As stated above, the digital economy has borne many 'winner takes it all'-markets, where market leaders are likely to be created and their strong market positions are easily maintained by network effects. These characteristics may indeed lead to barriers to entry or expansion and even more efficient competitors may not be able to successfully challenge digital champions. This can be seen, for instance, from Microsoft's long term market leadership in client PC operating systems, Facebook's strong market position in social networks, or Google's outstanding presence in search engines. Recent history has even shown that such positions once taken may not even be challenged by high-profile companies, for instance, in the example of the failed attempt of Google to challenge Facebook by entering into social networks with Google+.[36]

---

[34] The timeframe under analysis comprises the period from July 2009 until July 2016.

[35] *Microsoft (Tying)* (n 28). Please note that under a broader definition of digital or rather technology markets, the number of cases would increase from one to three and would further comprise *Samsung – Enforcement of UMTS standard essential patents* (Case AT.39939) Commission Decision [2014] OJ C350/8, and *Motorola – Enforcement of GPRS standard essential patents* (Case AT.39985) Commission Decision [2014] OJ C344/6. However, these cases do not fall under the definition chosen for the purpose of this article (see section 2 above).

[36] Seth Fiegerman, 'Inside the failure of Google+, a very expensive attempt to unseat Facebook' *Mashable* (2 August 2015) <http://mashable.com/2015/08/02/google-plus-history/#zYSaWuu3rPqU> accessed 4 July 2016.

Furthermore, as discussed above, digital markets may allow a dominant market player in one market to leverage its market power into other (even non-related) markets. While intervention by the Commission is not contested if a market leader abuses its dominant position in analogue markets, there is in principle no plausible reason for the Commission to abstain from applying competition rules to similar conducts in digital markets.[37] The Commission has rightly intervened in the attempts of Microsoft to abuse its dominant position by leveraging its dominant market position in client PC operating systems to other markets.[38]

In light of the above considerations, the Commission needs as a matter of competition policy to have the power to closely monitor digital markets and to intervene in cases where instead of competition on the merits, digital champions are abusing their market power. The importance of intervention is even more emphasised by the importance of the ever-growing digital economy and the benefits for consumers stemming from competition in those markets.

3. Stronger Intervention by Way of Regulation?

On the opposite front to the demand for abstaining from intervention in digital markets, there are calls for stronger and more efficient enforcement. Particularly in context of *Google Search*, the Commission was criticised for reacting too slowly and too late in the fast-moving digital economy, only after when the damage has already materialised.[39] In this context, even the European Parliament (the 'EP') proposed that the Commission should consider to unbundle search engines from other services in order to enhance competition.[40]

---

[37] Speech by Alexander Italianer, 'Competition Policy in the Digital Age' (47th Innsbruck Symposium on the Real sector economy and the internet – digital interconnection as an issue for competition policy on 7 March 2014) <http://ec.europa.eu/competition/speeches/text/sp2014_01_en.pdf> accessed on 27 July 2016.

[38] See *Microsoft* (n 13) and *Microsoft (Tying)* (n 28).

[39] On 30 November 2010, the investigation in *Google Search* (COMP/C-3/39.740) was opened, on 15 April 2015, the Commission sent Statement of Objections to Google (n 33), and on 14 July 2016, the Commission formally opened the proceedings.

[40] EP, 'Resolution of 27 November 2014 on supporting consumer rights in the digital single market' (2014/2793(RSP)) para 15

Whereas abovementioned figures demonstrate that the Commission did not enforce excessively Article 102 TFEU in the digital economy, this simplistic view does not reflect the whole reality, since it does, for instance, not include deterrent effects of the Commission's enforcement activities. According to a recent survey, 12 potential abuse of dominance infringements are deterred by one case pursued.[41] Therefore, the effectivity of the enforcement of the Commission must not only be measured based on the cases that are brought forward, but has rather to take into account the deterrent effect of the Commission's enforcement as well as its monitoring activities conducted without formal investigations.[42]

As can be seen from recent investigations, the Commission is pursuing abuse of dominance cases in the digital economy and it is to welcome that the Commission's approach to intervention in the digital economy focusses on appropriateness rather than rash decisions, as Margrethe Vestager rightly pointed out regarding enforcement in the digital economy: "Of course it is better to be fast than slow but it's even better to be just".[43]

Furthermore, even though an abusive conduct by a digital champion may raise issues in other areas of law, such as copyright, privacy or consumer protection law, competition law enforcers need to abstain from taking other than competition law considerations into account. This was also stated by the Commission in Facebook's acquisition of Whatsapp, where it held that whereas potential privacy-related issues stemming from the concentration of data within the control of Facebook were detected, those were not taken into consideration due to their non-competition related nature.[44] Generally, any

---

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2014-0071+0+DOC+PDF+V0//EN> accessed on 27 July 2016.

[41] Fabienne Ilzkovitz and Adriaan Dierx, 'Ex-post economic evaluation of competition policy enforcement: A review of the literature' 17 (DG Competition, June 2015) <http://ec.europa.eu/competition/publications/reports/expost_evaluation_competition_policy_en.pdf> accessed on 27 July 2016.

[42] Kadar (n 2) 11.

[43] Nicholas Hirst, 'Google's winning card against Europe: time' *Politico* (25 April 2016) <http://www.politico.eu/article/why-the-ec-may-ultimately-lose-the-android-case/> accessed on 27 July 2016.

[44] Commission, 'Mergers: Commission approves acquisition of WhatsApp by Facebook' Press release of 3 October 2014 (MEX/14/1003) <http://europa.eu/rapid/press-release_IP-14-1088_en.htm> accessed on 27 July 2016.

regulation by other areas of law in digital markets has to be kept completely separate from intervention by the Commission.[45]

Even in the enforcement of competition law, an ex-ante regulation was demanded (notably by Germany and France) in order to grant access to an 'essential digital platform' where significant market power on digital markets may not be contestable.[46] In order to allow competition on the merits, it was suggested that dominant undertakings in digital markets shall be obliged to present competing offers free of charge, to grant non-discriminatory access to the content provided by the platform and to allow users to run apps and services on essential platforms as well as to introduce and vigilantly monitor the principle of 'platform neutrality'.[47]

However, intervention by competition authorities in the competitive process shall generally be kept to a minimum. Thus, it is highly questionable whether the claim for an ex-ante regulation for essential digital platforms is required and appropriate. Particularly when the conduct can effectively be dealt with under the current legal framework of Article 102 TFEU.

Intervention in digital markets by way of ex-ante regulation already reaches its limits at the attempt of defining a digital market. Whereas many digital markets have abovementioned characteristics, there is no single business model for digital platforms.[48] Thus, a 'one-size-fits-all' blanket approach which would be administrable does not seem workable. The peculiarities of digital markets further negatively affect the introduction of a regulatory framework. In contrast to traditional industries subject to access regulation, such as telecoms or energy, the digital economy is subject to rapid change and innovation. The time-consuming administrative burden resulting from

[45] Speech by Johannes Laitenberger, 'The Digital Single Market, consumers and EU competition policy' (Competition and Consumer Day, Luxembourg Presidency event on 21 September 2015) <http://ec.europa.eu/competition/speeches/text/sp2016_01_en.pdf> accessed on 27 July 2016.
[46] Letter from Sigmar Gabriel, Thomas Maiziére, Heiko Maas and Alexander Dobrindt to Andrus Ansip, Günther Oettinger, Vĕra Jourová and Margrethe Vestager (Berlin, November 2014) 5 <https://www.bmjv.de/SharedDocs/Archiv/Downloads/Gemeinsames-Schreiben-Digitale-Agenda_EN.pdf?__blob=publicationFile&v=4> accessed on 27 July 2016.
[47] Ibid 6; Letter from Sigmar Gabriel and Emmanuel Macron to Andrus Ansip (28 April 2015) 2 <https://m.contexte.com/docs/6478/lettre-franco-allemande-a-andrus-ansip-et-gunther-oettinger.pdf> accessed on 27 July 2016.
[48] Speech by Laitenberger (n 46) 5.

ex-ante regulation would hit undertakings in the digital economy much harder than undertakings operating in the rather static telecoms or energy industries, since it is likely to slow down innovation, which is the most important competitive driver on digital markets.[49]

Furthermore, since digital platforms often compete with offline platforms or one-sided businesses in various markets, regulation of digital players facing non-regulated competitors leads to an unfair regulatory asymmetry and distortion of competition on the market. By way of asymmetrical regulation, even incumbents might be protected from new entrants, which was, for instance, attempted to be achieved by traditional taxi in order to be shielded from digitalised service providers, such as Uber.[50] The same picture appeared in consumer communication services, where large telecom network operators have been affected by the great success of digital competitors.[51] Unsurprisingly, companies active in telecoms fiercely supported the introduction of ex-ante regulation in digital markets.[52] However, the protection of incumbents against digital market players would run counter to the aim of competition law to maximise consumer welfare and most likely would also slow down innovation.

The proportionality of intervention by way of ex-ante regulation by the Commission appears, due to the likely reduction of the incentives to innovate, highly questionable. The negative consequences are further pronounced by the fact that digital markets are one of the key drivers of growth in modern economies.[53] At this stage, ex-ante regulation seems not only hardly

---

[49] Rato and Petit (n 20) 8.
[50] Speech by Joshua D Wright, 'Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC' (Big Ideas about Information Lecture at Clemson University on 2 April 2015) 23 et seq <https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf> accessed on 27 July 2016.
[51] *Facebook/Whatsapp* (n 10) paras 28 et seq.
[52] See eg Speech by Marc Lebourges (Conference of the Chair Innovation Regulation of Digital Services on 7 April 2015) <http://innovation-regulation2.telecom-paristech.fr/wp-content/uploads/2015/04/Régulation-des-plateformes-IRSN-7-avril-2015-FFF-EN-clean.pdf> accessed on 27 July 2016; or Speech by Vittorio Colao (28 Encuentro de Telecomunicaciones y Economía Digital: El Reto Europeo on 1 September 2014) <https://www.vodafone.com/content/dam/group/policy/downloads/challenges_and_opportunities_facing_digital_europe.pdf> accessed on 27 July 2016.
[53] See eg Commission, 'Communication: Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth' COM(2010) 2020 final.

workable, but harming competition and innovation in the economy as a whole by way over-regulation excessively risky. The Commission should therefore follow its approach chosen in other emerging markets, where it explicitly stated that in order to promote innovation it would have to be secured that newly emerging markets are not subject to inappropriate obligations and even if there would be a first-mover advantage, ex-ante regulation in those markets would be ill-suited to overcome challenges for competition law enforcement.[54]

4. Improvement of the Current legal Framework or Policy?

Between the two extreme positions on either abstaining from intervention in digital markets and the introduction of an ex-ante regulation lies the adaption of EU antitrust law or the evolvement of the or the Commission's policy in order to better deal with abusive conduct by dominant undertakings in digital markets.

Whereas the legal framework under Article 102 TFEU was principally found suitable to deal with abuse of dominance by digital champions, intervention by the Commission was criticised and a revision of the concept of market definition, notably the Commission's Notice on Market Definition, as well as the concept of dominance in order to better face infringements on digital markets was claimed.[55]

However, an amendment of the Commission's soft law seems premature, since the scope of action for the Commission is flexible enough to deal with abuse of dominance cases irrespective of the industry sector. Furthermore, besides the fact that sector specific amendments seem generally counterproductive to innovation and consumer welfare, a blanket solution for

[54] Commission, 'Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the EP and of the Council on a common regulatory framework for electronic communications networks and services' [2007] OJ L344/65, para 7.

[55] See eg Monopolies Commission (n 6); and European Parliament's Committee on Economic and Monetary Affairs, 'Challenges for Competition Policy in a Digitalised Economy' (15 July 2015, IP/A/ECON/2014-12) 52 et seq <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf> accessed on 27 July 2016.

the various types of digital markets seems currently not workable.[56] Besides that, the techniques used to assess market power have progressed and the Commission addressed the peculiarities of digital markets on several occasions in recent years, for instance network effects in proceedings under Article 102 TFEU in *Microsoft (Tying)*, or two-sided markets, consumer communication services as well as big data in merger control proceedings.[57] Thus, while legislative amendments seem unnecessary, it nevertheless has to be scrutinised whether some adoptions of the policy of the Commission towards Article 102 TFEU are appropriate and necessary to maintain effective competition in the digital economy.

IV. Improvement of the policy towards Article 102 TFEU

1. Introduction

Digital markets are of crucial importance for the economy. It is therefore of key significance for competition policy to ensure that competition is not distorted by dominant undertakings in these markets. In recent years, the Commission has shown that it is willing and capable to intervene in abusive behaviour by market dominant digital champions. However, it was harshly criticised for not adopting suitable tools to deal with abuse of dominance in the digital economy.

This chapter highlights the main elements of the substantive rules of the EU law on abuse of dominance and the Commission's policy towards market definition and the concept of dominance. No argument has yet been raised that Article 102 TFEU would not be capable of addressing abusive conduct of digital champions.[58] However, in particular the definition of the relevant market and the concept of dominance by the Commission was subject to criticism and revisions of the Commission's 'soft law instruments' were proposed.[59] Furthermore, since the enforcement of competition law in abusive conduct suffers from some shortcomings in the specific competitive

[56] See section 3.3.
[57] See amongst many other examples eg *Microsoft (Tying)* (n 28); *Facebook/Whatsapp* (n 10); *Microsoft/Skype* (Case COMP/M.6281) Commission Decision [2011] OJ C268/12; *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision [2010] OJ C20/32; or *Google/Double Click* (Case COMP/4731) Commission Decision [2007] OJ C230/12.
[58] Kadar (n 2) 15.
[59] See eg Monopolies Commission (n 6) 23 et seq.

environment of digital markets, the main procedural aspects are outlined in the below.

2. Article 102 TFEU

Article 102 TFEU provides that "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".[60] The provision therefore condemns certain unilateral (and collective) business practices of dominant undertakings which are acting in an abusive manner. The concept of dominance is defined by case law as

> *A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.*[61]

In order to assess whether an undertaking is dominant under above definition, first the boundaries of competition, ie the relevant product and geographic markets, have to be found.[62] Once the relevant markets are defined, it has to be analysed in a second step whether the firm in question enjoys a dominant position on these markets, which is heavily based on market shares and, among other things, barriers to entry or expansion, regulatory barriers or buyer power.[63]

3. Market Definition in Digital Markets

a. Introduction

The main purpose of the definition of a relevant market is to facilitate the assessment of market power by identifying a set of products exercising

[60] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Article 102.
[61] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 65.
[62] Ibid paras 10 et seq.
[63] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (4th edn, Hart Publishing 2014) 182.

competitive constraints on the undertakings involved.[64] In *Continental Can*, the first appeal on the application of Article 102 TFEU, the European Court of Justice (the 'ECJ') held that the definition of the relevant product market was of crucial importance when identifying a dominant position.[65] The legal benchmark for the definition of a relevant product market is interchangeability, ie whether the relevant products are only to a very small extent interchangeable with other products.[66]

The Commission set out the methodology it applies when defining the relevant product and geographic markets in its Notice on Market Definition.[67] The relevant product market is one which "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, their prices and their intended use".[68] The geographic market around the activities of the undertakings in turn comprises the area in which "the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas".[69]

In addition, the Notice on Market Definition identifies three main competitive constrains which undertakings are subject to, ie demand-side substitutability, supply-side substitutability as well as potential competition.[70] While demand-side substitutability is of greatest significance for the definition of the relevant market, supply-side substitutability is only relevant to market definition in exceptional cases and potential competition is according to the Notice on Market Definition only taken into account when a potential competitor is able to enter the market without incurring significant additional costs or risks.[71] Only where the restriction of competition is effective and immediate,

---

[64] Motta, *Competition Policy* (n 20) 102.
[65] Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, para 32.
[66] *United Brands* (n 62) para 22.
[67] Commission, 'Notice on the Definition of the Relevant Market for the purposes of Community Competition Law', OJ C372/5. The Notice was approved by the EU Courts; see eg Case T-321/05 *AstraZeneca AB and AstraZeneca v Commission* [2010] ECR-II 2805, paras 28 et seq.
[68] Ibid para 7.
[69] Ibid para 8.
[70] Ibid para 13.
[71] Ibid paras 20 et seq.

potential competition is given the same weight as demand substitution in the assessment of the relevant market.[72]

Demand substitution is assessed by way of determination of the set of products which are considered substitutes by consumers. In order to determine a set of interchangeable products, the Notice on Market Definition proposes the SSNIP test.[73] This test analyses, under the assumption that the prices of competing products remain stable, whether a hypothetical monopolist may profitably raise the price of its products permanently by a small but significant price increase of 5-10%.[74] For that purpose, a certain set of products is chosen as starting point, which is progressively increased as long as the hypothetical monopolist suffers a loss in profit by that price increase. This is repeated until the price increase is profitable for the hypothetical monopolist and the relevant market is found.[75]

Since most digital markets facilitate the interaction between two or more different groups, the links between the different sides of the digital platform have to be analysed when defining a relevant market for the application of Article 102 TFEU. A standard SSNIP analysis does not take into account the interrelated sides of digital platform markets.[76] Furthermore, digital markets are due to their peculiarities often more complex than traditional businesses and thus may pose problems for market definition. This became very clear, for example, in *Google Search*, where Google's advertising business, while being fairly traditional, was conducted in a novel medium, quite different due to technological and business innovations and whose economics are poorly understood.[77]

Before turning to the concept of dominance, this section first focusses on market definition, particularly the application of the SSNIP test in digital

---

[72] Cases T-191/98, 212 to 214/98 *Atlantic Container Line AB and others v Commission* [2003] ECR II-3275, para 834.

[73] Notice on Market Definition (n 68) para 14.

[74] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Thomson Reuters 2010) 110-15.

[75] Lapo Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10 Journal of Competition Law and Economics 293, 327.

[76] Only to a certain extent, the characteristics of a platform market can be taken into account by a standard SSNIP analysis. See for instance, US Department of Justice (“DOJ”) *United States v First Data Corp*, 03 Civ 02169 (D.D.C. 2003).

[77] Geoffrey A Manne and Joshua D Wright, 'Google and the Limits of Antitrust: The Case against the Antitrust Case against Google' (2011) 34(1) Harvard Journal of Law & Public Policy 10, 21.

platform markets and the role of potential competition when it comes to defining relevant markets in the digital industry. As regards market dominance, a closer look is then taken at frequent misconceptions influencing the assessment of market power in the digital economy.

b. SSNIP Test in Two- or Multi-Sided Platform Markets

The concept of a two- or multi-sided platform market affects not only the pricing strategy of the platform, but also impacts the competitive constraints to the platform and the dynamics on the market. For instance, if an online gaming platform raises the prices on the gamers' side, a reduction in sales will not only be noticeable on this side, but also on the game developers' side, since interrelated demand and indirect network effects make the platform more valuable, the more gamers are using the platform. The reaction of the game developer's side will in turn negatively affect the gamer's side, since this side also appreciates the platform more, the more games are available on it.

Indirect network effects have to be considered in market definition, since the groups are interlinked by externalities and a change in price or quality on one side also impacts the other side(s). However, the 'feedback loop' between the platform sides is not taken into account by traditional market definition tools, such as the SSNIP test.[78] Thus, since the profitability of a price increase by a digital platform is limited by indirect network effects, the application of the traditional SSNIP analysis without adaption to digital platforms would entail the risk of defining markets either too narrowly or too widely, which directly affects the overall outcome of the competitive assessment.[79]

A standard SSNIP analysis assesses only one side of the platform. Looking at above example of a gaming platform, the SSNIP test would only scrutinise either the gamers' or game developer's side, while ignoring the other sides respectively. However, looking eg only at the profits gained by a hypothetical monopolist by charging higher prices on the gamers' side or the losses induced by the price increase on this side, the SSNIP test ignores the effects on the game developer's side, such as the loss of developers due to the smaller number of users. In addition, looking only at the gamers' side of the market,

---

[78] Evans (n 16) 457.

[79] David S Evans and Michael Noel, 'The Analysis of Mergers That Involve Multisided Platform Businesses' (2008) 4(3) Journal of Competition Law and Economics 663, 667.

the SSNIP test misses to take into account the feedback effects deriving from the loss of game developers leading to a decrease in the number of users and so on. Thus, while looking only at the gamers' side, the SSNIP test may deem the price increase profitable, whereas an analysis under consideration of both sides may consider a price increase in this market unprofitable, which would lead to a wider market definition compared to the market defined under the one-sided SSNIP test.

In theory, the SSNIP test is a valid tool to define the relevant market in the digital economy, provided that the peculiarities of multi-sided platform markets are considered and the Commission takes into account the interrelation between the pricing structures on the platform sides when defining a relevant market in the digital economy. In practice, the application of the traditional SSNIP test has been limited to markets with single-sided externalities.[80] Yet, in all other cases, it has to be assessed whether a platform could raise the aggregate price profitably under consideration of the reduction in sales and the adjustment of prices on both sides in order to counteract a 'negative feedback loop'.[81] For that purpose the SSNIP test has to be expanded in order to enable it to take also into account the changes in the total profit of the platform as well as demand elasticities and indirect network effects.[82] In comparison to the standard SSNIP test, the expansion to multisided platforms, however, requires substantially more information and a much more complex economic evaluation.

Besides the SSNIP test, also other econometric models may be used to define the relevant market under consideration of the independence of demand of the platform's sides.[83] However, also these tools face some difficulties in practice in the same manner as the SSNIP test and may open the gate to errors without adaption to the peculiarities of digital markets. Furthermore, even

[80] Filistrucchi and others (n 76) 329.
[81] Evans (n 16) 458. For further information for the application of the SSNIP test in complex cases where a platform faces competition from both one- and two-sided businesses, see David S Evans and Michael Noel, 'Defining Antitrust Markets When Firms Operate Two-Sided Platforms' (2005) 3 Columbia Business Law Review 667, 669 et seq.
[82] Filistrucchi and others (n 76).
[83] See eg Lapo Filistrucchi, Tobias J Klein and Thomas Michielsen, 'Assessing Unilateral Effects in a Two-Sided Market: An Application to the Dutch Daily Newspaper Market' (2012) 8(2) Journal of Competition Law and Economics, 297 et seq.

under application of other econometric models, a significant amount of data is needed in order to define the market in complex multisided markets.

c. Potential Competition

In traditional market definition, the Commission focusses on demand substitution, while little to no weight is given to potential competition.[84] Yet, this is often inadequate to analyse competitive constraints in digital markets. The digital economy is fast-moving and characterised by disruptive innovation, as history has shown in many instances, such as the replacement of Myspace by Facebook, or Bing and Yahoo by Google.[85] Potential competitors discipline incumbents even by the threat of replacement. Microsoft, for example, faced potential competition from software developers threating to enter the market for word processing services, even before products such as Google Docs were actually available to consumers, and forced Microsoft to make its office software available to consumers free of charge.[86]

Entering into markets rapidly in a short period of time is easier in digital markets than for the brick and mortar economy due to the lack of physical constraints in form of capacity limits etc.[87] The Commission should therefore assess market power under consideration of potential competition by including potential competitors in the relevant market in their assessment of the relevant market.

---

[84] Ivo Van Bael and Jean-François Bellis, *Competition Law of the European Community* (5th edn, Kluwer 2010) 134 et seq.

[85] See eg Emma Barnett, 'Facebook dominance forces rival networks to go niche' *The Telegraph* (12 January 2011) <http://www.telegraph.co.uk/technology/myspace/8253091/Facebook-dominance-forces-rival-networks-to-go-niche.html> accessed on 27 July 2016; and Greg McFarlane, 'Google Vs Bing Vs Yahoo: The Search Engine Wars (MSFT, GOOG)' *Investopedia* (27 October 2015) <http://www.investopedia.com/articles/investing/070915/google-vs-bing-vs-yahoo-search-engine-wars.asp> accessed on 27 July 2016.

[86] Richard Waters, 'Microsoft office set to go free online' *Financial Times* (10 June 2010) <http://www.ft.com/cms/s/0/e167c556-74f4-11df-aed7-00144feabdc0.html?ft_site=falcon&desktop=true#axzz4ExVC5W00> accessed on 27 July 2016.

[87] Rato and Petit (n 20) 14.

4. Dominance in Digital Markets

a. Introduction

After the definition of the relevant market for the application of Article 102 TFEU, the assessment moves on to the analysis whether the degree of market power reaches a dominant position in the markets in question. Dominance is defined as economic strength which enables an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers.[88]

In most cases, market power concerns the possibility of charging prices above competitive level. However, the nature of fast-moving digital markets has a significant impact on the methods used to assess dominance and antitrust analysis under Article 102 TFEU should (or better must) also take into account characteristics of digital platforms, such as network effects, economies of scale, congestion, platform differentiation or multi-homing. The application of traditional tools used by the Commission to find market power in digital markets may lead to misconceptions and errors. In order to avoid false positive or false negative outcomes, the Commission's policy towards Article 102 TFEU has to adapt its approach to the new economy. Possible caveats in and improvements for the enforcement policy in abuse of dominance cases the digital economy are outlined below.

b. Market Shares and Dominance in Dynamic Markets

Under the current enforcement standard, the Commission puts a strong emphasis on market shares in order to determine market power or dominance.[89] However, market shares are not suitable to measure market power in the digital economy.

First, digital markets are characterised by their fast-moving, innovative and disruptive nature causing a high fluctuation in market shares.[90] Since a

---

[88] Commission, 'Communication: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' OJ C2009/45, 2, para 10.
[89] See eg Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para 60, where the ECJ held that "very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50%".
[90] Rato and Petit (n 20) 11.

dominant market position may not be held over time, a digital champion would according to settled case law not even be considered market dominant under Article 102 TFEU if it cannot maintain its market power.[91]

Furthermore, market shares may diverge widely on the sides of the platform it is active in, which makes a comprehensive market share analysis reflecting the market reality inconclusive.[92] Besides that, although this is self-explanatory, a value-oriented market share calculation, such as the SSNIP test, might be impossible to apply in the majority of digital platforms since services are often offered free of charge for at least one side of the platform. This issue also occurs to a lesser extent where the platform cross-subsidises its sides. Although the goods or services provided by the platform are in these cases not free of charge, the prices charged to the sides fail to reflect the value. In cases where a market share calculation is possible due to econometric methods, market shares should not be decisive in the assessment of market power without consideration of the competitive landscape of digital markets.

Lastly, the temporal and fragile digital monopolies borne by the dynamic environment of digital markets are somewhat comparable to the concept of creative destruction introduced by Schumpeter in 1942.[93] Under this concept it is assumed that innovative entry by undertakings sustains economic growth and enhances economic innovation, which leads to temporary monopolies whose social benefits exceed social cost by far.[94] Here, innovation is pushed forward by rivals exerting intensive competitive pressure on the dominant undertaking with intent to establish themselves on the market. This leads to temporarily dominant positions, which are regularly replaced, posing no threat but rather enhance competition on the merits on those markets.

---

[91] In Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para 41, the ECJ held that market shares should be held "for some time" since an undertaking is only considered as market dominant when it holds power over time.

[92] Monopolies Commission (n 6) 24.

[93] Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (3rd edn Harper & Row, 1950) 82 et seq.

[94] See J Gregory Sidak and David J Teece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) Journal of Competition Law and Economics 581, 604.

c. Profit Margins

Besides market shares, a wide range of other factors, such as monopoly profits, may indicate dominance.[95] This was also emphasised in *United Brands* and *Hoffmann-La Roche*, where the ECJ held that a combination of several factors determine a dominant position.[96] Yet, establishing whether an undertaking is in fact earning an increased profit by its dominance on the market, particularly under consideration of the specific cost structure of digital markets, may be difficult in practice.[97] In *Microsoft*, the ECJ nevertheless explicitly emphasised the fact that Microsoft has gained a profit margin of approximately 81% on its operating system.[98] However, high profit margins of digital champions should not be considered as evidence of market power.[99] The high profit margins result from the nature of the digital economy and, therefore, do not indicate market power.

d. Competition for the Market

Dominance according to Article 102 TFEU is an objective concept that excludes other factors, such as the 'road to dominance' and how it was acquired.[100] However, in the digital economy, it might be feasible to take into account competition for the market instead of competition on the market. This boils down to an analysis similar to an assessment of bidding markets, where it might be possible to argue that intense competition has taken place for the market and the market position of the successful undertaking on the market is just a competitive outcome of that process.[101]

e. Economies of Scale

Most digital markets are characterised by very high fixed costs and low variable costs. Thus, scale economies over output on either one, more or all

---

[95] Note that this does not countervail the fact that the lack of profits does not indicate that the undertaking is not dominant, since even if a dominant undertaking incurs losses, the losses may be recouped once competitors are squeezed out of the market.

[96] *United Brands* (n 62) para 66; *Hoffmann-La Roche* (n 92) para 39.

[97] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (5th edn, OUP 2014) 345.

[98] *Microsoft* (n 13) para 464.

[99] Rato and Petit (n 20) 12.

[100] *Hoffmann-La Roche* (n 92) para 91.

[101] Rato and Petit (n 20) 14.

sides of the market[102] can be expected.[103] In order to operate profitably, the prices charged by the digital player must be considerably above marginal cost in order to recover fixed costs.[104] For instance, Microsoft spent over $ 10 billion for R&D per year for the last three years.[105] Assuming that one tenth of this sum is spent on the development of a new product, Microsoft has to recover approximately $10 million by the sale of the product. While distribution costs in the digital economy are close to zero if the product is provided online to be downloaded by customers, Microsoft would have to recover the large investment by way of pricing considerably above marginal cost.

For these reasons, standard tools to measure market power produce false positives.[106] This shall be illustrated by the Lerner Index, which is one of the traditional methods to assess market power by way of analysing supply and demand elasticities.[107] Based on the assumption that competition drives the price towards marginal cost, the Lerner Index equates $\frac{P-MC}{P}$, where P is the observed price and MC the undertaking's marginal cost.[108] While the index presenting the margin between price and marginal cost is zero in perfect competition, ie where the price equals marginal cost, the index rises with increasing market power up to one.[109]

---

[102] For example, while the development of an operating system entails high fixed costs, the marginal cost of distribution to software developers or consumers is low. However, in the case of a search engine, economies of scale would only occur on the users' side, since the cost of providing the search service for users (but not advertisers) is negligible compared to the high investments necessary to develop a search engine.

[103] Evans and Noel (n 82) 688.

[104] Phillip E Areeda, Herbert J Hovenkamp and John L Solow, *Antitrust Law: An Analysis of Antitrust Principles and their Application*, vol 2B (4th edn, Kluwer 2014) 109.

[105] Microsoft, 'Annual Report 2015' (31 July 2015) 16 <https://www.microsoft.com/investor/reports/ar15/download-center/index> accessed on 27 July 2016.

[106] Daniel A Crane, 'Market Power Without Market Definition' (2014) 90(1) Notre Dame Law Review 31, 59 et seq.

[107] Emanuela Arezzo, 'Is there a Role for Market Definition and Dominance in an effects-based Approach?' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 21, 32.

[108] Abraham P Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power' (1934) 1(3) The Review of Economic Studies 157, 169.

[109] Hovenkamp (n 14) 7.

However, in scenarios where fixed costs are involved, the Lerner Index produces indifferent outcomes.[110] Since digital market players normally charge prices above marginal cost due to their initial investments, the Lerner Index would always point to market power, without consideration that in order not to be dominant according to this method, the undertakings would have to operate unprofitably since they would not be able to recover their fixed costs. The issue that significant market power detected by traditional antitrust tools based on the existence of high fixed costs is not only limited to the Lerner Index, but applies also to other examination methodologies.[111]

Furthermore, while economies of scale tend to limit competition on the market, diseconomies of scale may constrain market power. Diseconomies of scale lead at a certain size to cost disadvantages on one or more sides of a digital platform. An example for diseconomies of scale by limited capacities in the classical sense is the significant rise in cost for the development of features or improvements for an operating system, since investments in order to provide users with an updated version may be significantly higher when the operating system reaches a certain size or complexity. Besides that, a prominent example of the constraining effects of diseconomies of scale by way of a restriction of the number of users is the limited space for advertisements, since an overuse of advertisements by a search engine may reduce the attractiveness of the platform for users, which in turn might lead to a 'negative feedback loop' for advertisers.[112] The turning point between scale economies and diseconomies of scale has to be considered by the digital platform in its pricing structure and business strategy and may lead to a significant constraint of market power, which, in turn, has to be taken into account by the Commission in its assessment.

f. Network Effects

Network effects stemming from the interdependence of demand of the customer groups of a platform lead to price formations which differ

---

[110] Herbert J Hovenkamp, 'Response: Markets in IP and Antitrust' (2012) 100 Georgetown Law Journal 2133, 2140.
[111] Ibid.
[112] Kyle Bagwell, 'The economic analysis of advertising' in Mark Armstrong and Robert H Porter (eds), *The Handbook of Industrial Organisation*, Vol 3 (North-Holland 2007) 1755.

significantly from those of one-sided businesses.[113] In order to bring each customer side 'on board', a platform may find it commercially reasonable to choose an asymmetric pricing structure, where the group not as price sensitive subsidises the more valuable group to the platform.[114] Even pricing below cost or zero on one side of the platform might be an economically feasible option.[115] Most digital markets are financed through advertising.[116] Facebook or Google, for instance, can be used free of charge by consumers, while advertisers have to pay in order to place advertisements on these platforms.

In markets characterised by indirect network effects, undertakings generally compete for (not in) the market.[117] Once a market player reaches a certain level of market power, this position may easily be widened through positive feedback effects, which lead to a self-executing increase in the value of the platform.[118] Thus, in order to stay on the market, competitors are forced to innovate and offer products or services that have the potential to countervail the advantage of the incumbent platform.[119]

At a certain size, however, positive network effects may stagnate and may even turn into negative network effects.[120] Network effects adversely impact a platform, for instance if effective 'matchmaking' turns to be exponentially more complex to provide. The negative external effects limiting the capacity of a platform lead inter alia to congestion, ie the increase of the search or transaction costs for the platform.[121] In order to counteract congestion, a platform operator may limit the platform capacity. An online dating portal, for instance, may at a certain amount of users not be able to provide efficient

---

[113] Eric G Weyl, 'A Price Theory of Multi-Sided Platforms' American Economic Review (2010) 100 The American Economic Review 1642, 1646.

[114] Bernard Caillaud and Bruno Jullien, 'Chicken & egg: competition among intermediation service providers' (2003) 34(2) RAND Journal of Economics 309, 310; Robert O'Donoghue and A Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 139.

[115] Mark Armstrong, 'Competition in Two-Sided Markets' (2006) 37(3) RAND Journal of Economics 668, 682.

[116] Monopolies Commission (n 6) 20.

[117] Evans and Noel (n 82) 688.

[118] Evans and Schmalensee in Blair and Sokol (eds) (n 4) 421.

[119] David S Evans and Richard Schmalensee, 'A Guide to the Antitrust Economics of Networks' (1996) 10 Antitrust Magazine 36, 36.

[120] David S Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) Yale Journal on Regulation 325, 330.

[121] Marc Rysman, 'Competition Between Networks: A Study of the Market for Yellow Pages' (2004) 71(2) Review of Economic Studies 483, 484.

matchmaking services to its clients anymore. Since the capacity of the online portal is constrained by the size of its customer base, it may choose to limit access to certain users, eg academics. By doing so, the platform may provide its service more efficiently and users may also find it easier to find a suitable match. While reserving capacities to a homogenous user group may make the platform particularly attractive for the group of users the platform focusses on, the specialisation also opens the market for competitors counteracting platform concentration.[122] The dynamics of platform markets, such as its self-executing increase of market power if the market player reaches a certain 'tipping' point as well as adverse effects if the platform exceeds a certain size, have to be taken into account by the Commission as a matter of policy in the assessment of dominance under Article 102 TFEU.

g. Product Differentiation

Similar to a self-selected capacity limitation, a further characteristic of digital platforms counteracting concentration on the market is product differentiation. Competition on a market is enhanced, if a platform chooses to distinguish itself from other competitors on the market. This may be done either by addressing a certain customer group (so called 'horizontal differentiation'), or by way of differentiating the quality of its products or services from other products or services provided on the market (so called 'vertical differentiation').[123] Consequently, it can be assumed that markets characterised by heterogeneous customer groups or markets open to various product or service qualities are less concentrated. Product differentiation is even enhanced by the digital economy, since digitalisation enables to differentiate a platform with relatively few resources at low cost.[124] Furthermore, horizontal differentiation may also be facilitated by exclusive contracts, since even a relatively small market player may be encouraged to invest and enter the market as customers who value exclusivity may be easily attracted.[125]

While product differentiation in general enhances competition on a market, it may at a certain intensity also limit competition, if the products or services

---

[122] Monopolies Commission (n 6) 21 et seq.
[123] Jean Tirole, *The Theory of Industrial Organization* (MIT Press 1988) 96 et seq.
[124] Monopolies Commission (n 6) 21.
[125] Robin S Lee, 'Vertical Integration and Exclusivity in Platform and Two-Sided Markets' (2013) 103(7) The American Economic Review 2960, 2961.

do not exert any competitive pressure to the other players on the market, leading to different relevant markets for the purpose of the assessment under Article 102 TFEU.

h. Multi-Homing

Another factor which has to be considered in the assessment of market concentration in digital platform markets is multi-homing. Multi-homing is the possibility for customers to use several platforms at the same time.[126] Although, multi-homing is basically facilitated by the digital economy, and other providers are just 'one click away', barriers to switch to alternative providers may be high.

The possibility to use a variety of platforms depends on the extent of costs which users have to invest in order to switch between platform providers, ie monetary expenditures in form of subscription fees, or expenditures of time spent for searching, finding and familiarising with other platforms. For instance, there are virtually no switching costs for users changing between different online travel agencies. Multi-homing is simple for both sides of the market, since switching for travellers is simple and flight or hotel providers are able to provide their offers easily on various online travel agents platforms. However, in the example of Airbnb, switching costs are high, because both sides of the platform, ie travellers as well as private accommodation providers, acquire a reputation over time, which cannot be transferred to other platforms. This leads to a situation where virtually no multi-homing options are open for both sides. Also, changing between different social networks may incur high switching costs, since subscribing to another platform may heavily depend on the customer base for which the network is valued for.

The possibility for customers to engage in multi-homing is of significant importance for antitrust analysis as it heavily influences the degree of competition.[127] A platform which is just one among many is under significantly higher competitive pressure than one which does not suffer from competition at all. Yet, if one group is single-homing, while other groups are

[126] In contrast to 'multi-homing', customers are 'single-homing' if they do not switch platform providers, but rather stick to one platform, see eg Evans and Noel (n 82) 690.
[127] Marc Rysman, 'The Empirics of Antitrust in Two-Sided Markets' (2007) 3(1) Competition Policy Newsletter 196, 208.

multi-homing, the only possible way to reach the single-homing group is over the platform, which leads to a so called 'competitive bottleneck'.[128] In this situation, the platform gains market power, which naturally is expected to charge higher prices on the multi-homing group.[129] However, since the platform still has to compete for its single-homing group, the profits gained from the higher prices charged on the multi-homing group are generally used to subsidise its exclusive single-homing users.[130]

Besides network effects and product differentiation, multi-homing significantly influences the pricing structure chosen by the undertaking as well as competitive constraints on digital platforms. If high switching costs lead to a situation where users stick to a platform not of their first choice, innovative competitors would not be able to enter the market, even if their product or service would be superior to the one offered by the incumbent. These so called 'lock-in effects' would result in static and inefficient markets.[131] As can be seen from above, the nature of most digital markets being two-sided or multi-sided is an important factor for understanding competition on these markets as well as the assessment of market power conducted by the Commission.

i. Big Data

Big data can be described as "gigantic digital datasets held by corporations, governments and other large organisations, which are then extensively analysed using computing algorithms"[132] and may – besides of the factors

---

[128] Armstrong (n 116) 682.

[129] Commission, 'Note for the OECD Roundtable on Two-Sided Markets' (DAF/COMP/WD(2009)69) para 33 <http://ec.europa.eu/competition/international/multilateral/2009_jun_twosided.pdf> accessed 25 July 2016.

[130] Armstrong (n 116) 669.

[131] Joseph Farrell and Paul Klemperer, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' in Armstrong and Porter (eds) 967.

[132] European Data Protection Supervisor, 'Meeting the challenges of big data: A call for transparency, user control, data protection by design and accountability' (Opinion 7/2015, 19 November 2015) 7 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2015/15-11-19_Big_Data_EN.pdf>. See also French Autorité de la Concurrence and German Federal Cartel Office ('FCO'), 'Competition Law and Data' (10 May 2016) 4 <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> accessed on 27 July 2016 where big data was defined as "large amounts of different types of

mentioned above – be of significant relevance in the assessment of dominance. This was also emphasised by Margrethe Vestager when she was referring to antitrust issues arising from the collection of big data, saying that "what we need is to pay close attention to these markets and take action when it's necessary".[133]

While the Commission has dealt with competition concerns stemming from big data only in merger control cases yet,[134] national competition authorities, notably the German FCO and the French Autorité de la Concurrence, have recently taken the first steps in assessing the impact of big data in antitrust proceedings, particularly in abuse of dominance cases.

In March 2016, the FCO initiated proceedings against Facebook for allegedly abusing its dominant position in social networks through its privacy terms and conditions.[135] Although the FCO stated that the mere violation of privacy law by a dominant undertaking does not amount to an abusive conduct under competition law, it is currently examining whether Facebook's market power enabled it to impose unfair (privacy) terms and conditions on its users.[136] Andreas Mundt, President of the FCO, explained the connection between antitrust and privacy law as follows:

> *Dominant companies are subject to special obligations. These include the use of adequate terms of service as far as these are relevant to the market. For advertising-financed internet services*

---

data, produced at high speed from multiple sources, whose handling and analysis require new and more powerful processors and algorithms".

[133] Speech by Margrethe Vestager, 'Competition in a big data world' (DLD 16 in Munich on 17 January 2016) <https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world_en> accessed on 27 July 2016.

[134] In *Facebook/Whatsapp* (n 10), the Commission assessed whether the user data processed by WhatsApp would improve Facebook's advertising; in *Google/Double Click* (n 58), the Commission analysed whether the merger would impede effective competition by combining the databases of the parties; or in *TomTom/TeleAtlas* (Case COMP/M.4854) Commission Decision [2007] OJ C262, the Commission questioned whether data protection could be maintained after the merger.

[135] FCO, 'Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules' Press release of 2 March 2016 <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html;jsessionid=8E5857E7658E09C3C14B2DDA2B9FD57E.1_cid378?nn=3591568> accessed on 27 July 2016.

[136] The imposition of unfair trading conditions as an abuse of a dominant position is a well-established principle under Article 102(a) TFEU.

> *such as Facebook, user data are hugely important. For this reason, it is essential to also examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected.*[137]

While the imposition of unfair trading conditions might infringe Article 102(a) TFEU, it is questionable whether Facebook is dominant in the first place. Especially with view to the *Facebook/WhatsApp* proceedings on EU level, where the Commission considered that Facebook faced plenty of competition in the market for social networking services.[138] This case illustrates very clearly that digital markets and their peculiarities including big data raise many novel and complex issues, which have to be faced by competition law enforcers. For the sake of legal clarity, a decision by the FCO would be desirable. However, it is quite possible (although undesirable) that the FCO would rather choose to find a consensual agreement with Facebook under which Facebook agrees to change its privacy terms and conditions. Since competition authorities have a long way to go before the challenges by digital markets can be faced effectively, the procedural tools have to be chosen wisely by competition law enforcers in order to reach legal clarity and certainty in abuse of dominance cases in digital markets.[139]

5. Abuse of a Dominant Position in Digital Markets

a. Introduction

While the mere fact that an undertaking is holding a dominant position is not prohibited by Article 102 TFEU, abusive conduct infringes EU competition law. The concept of abuse was defined by the ECJ as follows:

> *The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market, where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of*

[137] FCO (n 136).
[138] See Facebook/Whatsapp (n 10).
[139] See section 4.6 below.

> *commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*[140]

The concept of abuse as established under the case law is to a certain extent ambiguous. In order to assess whether an undertaking is abusing its dominant position, two elements have to be fulfilled, ie first, whether the market structure is already weakened by the presence of a market dominant undertaking, and, second, whether the dominant undertaking engages in a conduct further restricting competition.[141] In this context, the ECJ clarified that for an infringement of Article 102 TFEU it is sufficient that the abusive conduct of a dominant undertaking is capable of restricting competition, rather than having an actual impact on the market.[142]

The concept of abuse has been interpreted that an abuse may manifest in two forms, ie that the conduct aims to maintain or strengthen the market power of the dominant undertaking by way of foreclosing competitors (exclusionary abuse), or that the conduct directly exploits the market power of the dominant undertaking for the detriment or discrimination of other market participants (exploitative abuse).[143] According to established case law, both, exclusionary as well as exploitative abuses of a dominant undertaking fall under the scope of Article 102 TFEU.[144]

Many decisions on the abuse of a dominant position under Article 102 TFEU taken by the Commission are among the most controversial and discussed competition law decisions. Most notably, the Commission's decision in *Microsoft* concerning the refusal to supply interoperability information to its competitors, for which Microsoft was fined € 497.2 million.[145] Furthermore,

---

[140] *Hoffmann-La Roche* (n 92) para 91.
[141] Ibid para 123.
[142] See eg Case T-203/01 Manufacture francaise des pneumatiques Michelin v Commission [2003] ECR II-4071, para 239; or Case T-301/04 Clearstream Banking AG and Clearstream International SA v Commission [2009] ECR II-3155, para 144.
[143] Massimo Motta and Alexandre de Streel, 'Exploitative and Exclusionary Excessive Prices in EU Law' in Claus-Dieter Ehlermann and Insabel Atanasiu (eds), *EU Law, European Competition Law Annual 2003: What is an abuse of a dominant position?* (Hart Publishing 2006) 91.
[144] Maria Ioannidou, Consumer Involvement in Private EU Competition Law Enforcement (OUP 2015) section 4.2.2.
[145] *Microsoft* (n 25); upheld by the General Court in *Microsoft Corp v Commission* (n 13).

the Commission and the EU Courts have been frequently criticised not to be primarily concerned with the maintenance of competition as such but rather with the protection of particular competitors.[146] Besides that, the criticism on the formalistic approach in Article 102 TFEU cases taken by the Commission and the EU Courts lead the Commission to launch a review of the application of Article 102 TFEU on exclusionary abuses in 2004[147] and the Commission's Guidance Paper.[148] By way of publication of the Guidance Paper, the Commission attempted to embrace a more effects-based approach under the focus on exclusionary conduct in its enforcement policy.[149] However, the EU Courts have not gone along with the Commission's attempt and retained a rather formalistic approach towards Article 102 TFEU.[150] The path chosen by the EU Courts, is especially problematic in digital markets, whose characteristics may not be taken into account in a formalistic analysis, leading to intervention by the Commission ultimately being to the detriment of innovation and consumers.

b. Abuse in Digital Markets

The examination of an abusive conduct in digital markets does not require any adaption of the legal framework to the digital economy, or to put it differently, Article 102 TFEU theoretically provides a sufficient legal framework in order to deal with abuse of dominance in digital markets. However, the identification of abusive conduct may encounter some difficulties in the digital economy.[151] As discussed above, an abusive conduct may be categorised in exclusionary and exploitative abuses. As can be seen from previous cases in the digital economy, exclusionary conduct may arise in form of access foreclosure, leveraging of market power by favouring own services, creating an artificial advantage, or by tying products or services.[152]

---

[146] Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 185.
[147] Commission, 'DG Competition discussion paper of December 2005 on the application of Article 82 of the Treaty to exclusionary abuses' <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed on 27 July 2016.
[148] Guidance Paper (n 89).
[149] According to ibid, para 3, it cannot be understood as set of guidelines on the law.
[150] Ezrachi (n 64) 191.
[151] Rato and Petit (n 20) 22.
[152] For a discussion on the special responsibility of dominant undertakings in digital markets see speech by Joaquín Alumnia, 'Competition in the Online World' (LSE Public Lecture on 13 November 2013) <http://europa.eu/rapid/press-release_SPEECH-13-905_en.htm> accessed on 27 July 2016.

An abuse of a dominant position in digital markets may also show exploitative elements, for example, by artificially raising switching costs for user, by limiting advertising space, or simply by exploiting third-party content and data.[153]

The selective focus on exclusionary conduct, as advocated by the Commission in its Guidance Paper,[154] is particularly important in digital markets, where due to the high number of complaints against digital champions, resources have to be effectively utilised only where appropriate.[155] While it has to be refrained from assessing an abusive conduct by a digital champion based on a form-based analysis not suited to deal with the peculiarities of digital markets, an effects-based approach based on theories of harm and economic thinking needs to be implemented, in order to maintain effective competition on digital markets.[156] Also the fact that it is sufficient for an abusive conduct to simply be capable of restricting competition on the market seems too formalistic and not appropriate without further clarification.[157]

6. Consequences of Infringing Article 102 TFEU

a. Introduction

The Commission has extensive powers to investigate a suspected abuse of a dominant position under Regulation 1/2003.[158] Where the Commission has found a breach of Article 102 TFEU, it has the power to impose a fine on the infringing undertaking of up to 10% of the total worldwide turnover of the preceding business year.[159] Besides that, Article 7(1) Regulation 1/2003 provides that the Commission has the power to adopt a formal decision in order to bring the infringement to an end, as well as to impose behavioural

---

[153] Monopolies Commission (n 6) 114.
[154] Guidance Paper (n 89).
[155] See also Rato and Petit (n 20) 17.
[156] Abbott B Lipsky, 'Antitrust Economics – Making Progress, Avoiding Regression' (2003) 1 George Mason Law Review 163, 167 <https://www.lw.com/upload/pubcontent/_pdf/pub3990_1.pdf> accessed on 27 July 2016.
[157] Rato and Petit (n 20) 19.
[158] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 on the Treaty [2003] OJ L 1/1.
[159] Article 23 Regulation 1/2003. For the methodology used by the Commission in setting fines see Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003' [2006] OJ C210/2.

remedies to order the dominant undertaking to cease and desist from the infringement and, where necessary, to impose structural remedies to order the dominant undertaking to actively adopt positive measures to end the unlawful conduct.[160]

Furthermore, according to Article 8(1) Regulation 1/2003, "in cases of urgency due to the risk of serious and irreparable damage to competition", the Commission may order interim measures on basis of a preliminary finding of an antitrust infringement. The Commission's right to grant interim relief was established by the ECJ in *Camera Care*,[161] but it never made use of this power ever since Regulation 1/2003 was adopted.[162]

As an alternative to adopt a formal finding of an infringement under Article 7(1) Regulation 1/2003, the Commission has also the power to close the file on basis of legally-binding commitments made by the undertaking under investigation according to Article 9 Regulation 1/2003, in course of which no fines are imposed and an infringement does not have to be proven by the Commission. The idea behind commitment decisions stems from procedural economy considerations to rapidly bring otherwise highly complex cases to an end.[163] This is supported by the fact that undertakings voluntary entering into a commitment agreement with the Commission are highly unlikely to appeal against a decision taken under Article 9 Regulation 1/2003.[164] Commitment decisions are regularly used in Article 102 TFEU cases due to their complexity and bring benefits for both parties, ie a rapid completion of a complex case on the side of the Commission and no formal decision on the side of the undertaking under investigation.[165]

---

[160] Article 7(1) Regulation 1/2003.
[161] Case 792/79 R *Camera Care Ltd v Commission* [1980] ECR 119.
[162] Whish (n 147) 268.
[163] See Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949, para 35.
[164] See Wouter P J Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 (3) World Competition: Law and Economics Review 335.
[165] See Commission, 'To commit or not to commit? Deciding between prohibition and commitments' Competition policy brief of March 2014 (Issue 3) <http://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf> accessed on 27 July 2016.

b. Procedural Shortcomings in Digital Markets

The policy adopted by the Commission towards abuse of dominance cases suffers from some serious shortcomings when it comes to digital markets. First, the duration of the proceedings takes too long for the dynamic nature of these markets. For instance, the investigation in *Google Search* is pending since November 2010, while antitrust proceedings have been formally opened in July 2016 and the Commission has yet to face a long way down until a decision will be reached.[166] Competition policy has to secure effective competition. Competition on the merits, however, cannot be guaranteed if proceedings against digital champions last for years (or nearly decades) during which competition may be supressed by the dominant undertaking.[167]

This might be countered, for instance, by interim measures according to Article 8(1) Regulation 1/2003. While the power to order interim relief is not used by the Commission, it might be especially useful in the digital economy which is characterised by rapid and disruptive innovation. Here, the action based on a preliminary finding may be particularly justified, since the risk of serious and irreparable damage to competition is quite likely, given the risk of eliminating or foreclosing innovative competitors over years.[168]

Secondly, commitment decisions according to Article 9 Regulation 1/2003 do not seem suitable in the digital economy. Digital markets are of significant relevance for the economy, and the specific market features of digital markets raise complex and novel issues. Thus, it is of crucial importance that formal decisions are adopted to develop the law, for the sake of legal certainty, instead of shortening proceedings based on commitments offered by digital champions. In general, it seems that competition authorities may also use commitment proceedings in order to achieve outcomes which would have probably not been reached by way of formal proceedings.[169] This is aggravated by the fact that commitment decisions have never been appealed

[166] For details see *Google Search* (n 40).
[167] The shortcomings of the efficiency of the antitrust enforcement leading to lengthy procedures were particularly pronounced in *Microsoft (Tying)* (n 27) or *Microsoft* (n 13).
[168] In Monopolies Commission (n 6) 116, it is also argued that interim measures might be used in order to test remedies on the market before they are declared binding.
[169] Monopolies Commission (n 6) 115.

by the parties addressed by the commitment decision in practice.[170] Furthermore, reaching a commitment agreement might prove difficult in fast-changing digital markets. This has been shown in *Google Search*, where Google submitted several commitment offers, which – based on the market reactions obtained from March 2013 to February 2014 – were preliminarily regarded as suitable, but no decision on the commitments was reached and in the end statement of objections have been issued and formal proceedings according to Article 7(1) Regulation 1/2003 were opened by the Commission.[171] However, it is fair to acknowledge that these proceedings were quite special due to the political pressure exerted by the EP on the Commission to take a harsher stance in the digital economy and to use the opportunity of *Google Search* to "clarify some aspects of competition law with regard to digital practices and to close the difficult gaps between the rights of market dominant companies, free competition and consumer protection",[172] which could most probably only be done by confrontational proceedings according to Article 7(1) Regulation 1/2003.

Lastly, political pressure and high publicity is another aspect which has to be considered in the enforcement policy of the Commission in digital markets. Digital markets attained more interest from the media than any other industry. However, the Commission would have to be conscious not to protect competitors not as innovative or efficient as the incumbents just because complaints attracted strong media attention.[173]

V. Conclusion

Digital markets are a key economic driver. Thus, it is of significant importance for competition policy on EU level to maintain and protect competition on the merits, which leads to innovation and consumer welfare. In the past years, the Commission has shown that, where appropriate, it is willing to intervene in abusive conduct on digital markets.

---

[170] See Manuel Kellerbauer, 'Playground instead of playpen: The Court of Justice of the European Union's Alrosa judgement on Article 9 of Regulation 1/2003' (2011) 32(1) European Competition Law Review 1.
[171] See *Google Search* (n 40).
[172] See eg EP, 'Google antitrust proceedings: Digital business and competition' Briefing of July 2015 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI(2015)565870_EN.pdf> accessed on 27 July 2016.
[173] Monopolies Commission (n 6) 115.

However, the challenges faced by the Commission have to be overcome in order to maintain and protect competition on the merits in the digital economy in the future. The positions taken in the discussion on how to proceed with the enforcement of Article 102 TFEU, on the one hand to abstain from intervention in digital markets at all, and on the other hand to introduce an ex-ante regulation in order to secure effective competition are considered excessive.

There is little reason for thinking that competition cannot work in digital markets and may not be protected by the current legal framework under Article 102 TFEU. Nevertheless, effective competition policy design requires careful thought. Characteristics of digital markets need to be taken into account when dealing with abusive conduct, particularly in the definition of relevant markets and the assessment of market dominance in those markets. The policy goals have to be aligned with innovation and consumer welfare. In this regard, the adoption of an effects-based approach by the Commission and the EU Courts is more necessary than ever, in order to achieve predictable legal standards and coherent outcomes.

Furthermore, the complexity and fast-moving nature of digital markets shall not lead to commitment decisions according to Article 9 Regulation 1/2003. Especially in novel economies such as digital markets it is of crucial importance to build legal certainty.

Queen Mary
University of London

Aim

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

Scope

The *ICC Global Antitrust Review* is intended to become a leading international electronic forum within which students engage in debate and analysis of the most important issues and phenomena in the global competition law scene. The *Review* welcomes contributions dealing with competition law and policy in all jurisdictions as well as those addressing competition policy issues at regional and international levels. In particular, it welcomes works of interdisciplinary nature discussing and evaluating topics at the interface between competition law and related areas such as economics, arbitration, information technology, intellectual property, political science and social geography. Only scholarship produced by students – whether at undergraduate or postgraduate level (taught and research) – will be considered for publication in the *Review*.

Form and Output

The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors*.

Editorial Board 2016

Editors Dr Eda Sahin
Anja Naumann

Interdisciplinary Centre for Competition Law and Policy (ICC)
67-69 Lincoln's Inn Fields
London WC2A 3JB
United Kingdom
Tel: + 44 (0)207 882 8122
Fax: + 44 (0)207 882 8223
Email: gar-icc@qmul.ac.uk
www.icc.qmul.ac.uk