UNIVERSITY OF HELSINKI
FACULTY OF LAW

EU COMPETITION LAW FOR SOCIAL MEDIA PLATFORMS NOW AND IN THE FUTURE

University of Helsinki
Faculty of Law
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Anniina Henna Juulia Kananen
014983249
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Supervisor: Professor Antti Aine

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Tiivistelmä:

Sosiaalisen median palvelut, kuten Facebook, ovat kiinnittäneet viime aikoina maailmanlaajuisesti kilpailuviranomaisten huomion määräävän markkina-aseman väärinkäytön näkökulmasta. Sosiaalisen median palvelut ovat yksi kaksipuolisten ja monensuuntaisten markkinoiden ilmentymä. Euroopan unionin tuomioistuin ei ole toukokuuhun 2021 mennessä suoranaisesti tulkinnut, miten kaksipuolinen tai monensuuntainen markkinarakenne tulee ottaa huomioon SEUT 102 artiklan alaisessa määräävän markkina-aseman väärinkäytön arvioinnissa merkityksellisiä markkinoita määriteltäessä tai markkinavoimaa arvioitaessa. Tutkielmassani vastaan tähän kysymykseen lainopillisen tutkimuksen kautta. Lainopin ohella hyödynnän tutkielmassa (oikeus)taloustieteellisiä näkökulmia kaksipuolisista ja monensuuntaisista markkinoista täyttämään oikeuslähteistä jääviä aukkoja. Tutkielman pääasiallisia lähteitä ovat unionin tuomioistuimen ja unionin yleisen tuomioistuimen oikeuskäytäntö sekä akateemiset julkaisut kaksipuolisista ja monensuuntaisista markkinoista. Tältä osin tutkielman lopputulemana on, että sosiaalisen median palveluiden eri puolille tulee määritellä omat markkinat, mutta markkinoita määritellessä ja markkinavoimaa arvioitaessa on syytä ottaa kaikki puolet huomioon riippumatta siitä tarjotaanko palveluja rahallista vai muuta vastiketta vastaan.

Tutkielman toinen tutkimuskohde on erilaiset muutosehdotukset. Ehdotuksista analysoidaan erityisesti merkityksellisten markkinoiden määrittelemistä koskevan tiedoksiannon päivittämistä, jäsenvaltioiden ehdottamaa mahdollista digitaalisia markkinoita koskevaa komission tiedoksiantoa, ja primäärioikeuden muuttamista. Analyysissä otetaan pääsääntöisesti huomioon muutosehdotusten mahdolliset vaikutukset EU-kilpailuoikeuteen. Ehdotuksia analysoitaessa kiinnitetään muun muassa huomiota siihen, miten ne vaikuttavat oikeusvarmuuteen sekä siihen, millaisia oikeudellisia haasteita ehdotuksien toteutuessa voisi nousta. Lopuksi tutkielmassa arvioidaan ehdotetun Digital Markets Act -asetuksen vaikutuksia kilpailuoikeuden soveltamiseen sosiaalisen median palveluiden markkinoilla.

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Case T-62/98 Volkswagen AG v Commission of the European Communities [2000] ECLI:EU:T:2000:180

Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] ECLI:EU:T:2003:50

T-219/99 *British Airways plc v Commission of the European Communities* [2003] ECLI:EU:T:2003:343

Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* [2004] ECLI:EU:C:2004:257

Case T-177/04 *easyJet Airline Co. Ltd v Commission of the European Communities* [2006] ECLI:EU:T:2006:187

T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECLI:EU:T:2007:289

Case T-446/05 *Amann & Söhne GmbH & Co. KG, Cousin Filterie SAS v European Commission* [2010] ECLI:EU:T:2010:165

Case T-111/08 *MasterCard, Inc. and Others v European Commission* [2012] ECLI:EU:T:2012:260

Case T-491/07 *Groupement des cartes bancaires (CB) v European Commission* [2012] ECLI:EU:T:2012:633

Case T-79/12 *Cisco Systems Inc., Messagenet SpA v European Commission* [2013] ECLI:EU:T:2013:635

Case T-491/07 RENV *Groupement des cartes bancaires (CB) v European Commission* [2016] ECLI:EU:T:2016:379

Case T-699/14 *Topps Europe Ltd v European Commission* [2017] ECLI:EU:T:2017:2

National Case Law

Aktenzeichen VI-Kart 2/19 (V) Oberlandesgericht Düsseldorf ECLI:DE:OLGD:2021:00324.KART2.19V.00

Applications

Action brought on Case T-612/17 – Google and Alphabet v Commission (Case T-612/17) [2017] OJ C 369/37

Action brought on 9 October 2018 – Google and Alphabet/Commission (Case T-604/18) [2018] OJ C 445/21

Action brought on 15 July 2020 – Facebook Ireland v Commission (Case T-451/20) [2020] OJ C 287/39

Communications, Notices & Guidelines

Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ 45/7

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' [2016] COM(2016) 288 final

Legislative Proposals

European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC COM(2020) 825 final

European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final

National Competition Authority Decisions

Decision under Section 32(1) German Competition Act (GWB) B6-22/16 (Public Version, English Translation) accessible at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5

Communications from governments to national parliaments

State Secretary of Economic Affairs and Climate (Netherlands), 'Future-proofing of competition policy in regard to online platforms' (Letter to the House of Representatives, 17 May 2019)

U 6/2021 vp Valtioneuvoston kirjelmä eduskunnalle komission ehdotuksesta Euroopan parlamentin ja neuvoston asetuksesta (digitaalisia markkinoita koskeva säädös) (Union Communication, Finland)

Reports published by EU or Member State institutions

Crémer Jacques, de Montjoye Yves-Alexandre, Schweitzer Heike, *Competition policy for the digital era* (European Commission, Directorate-General for Competition 2019)

Commission 'Competition Law 4.0', *A new competition framework for the digital economy* (Federal Ministry for Economic Affairs (BMWi) 2019)

Report of the Digital Competition Expert Panel, Unlocking digital competition – Report of the Digital Competition Expert Panel (Crown 2019).

'Dutch position on competition policy in relation to online platforms' (Factsheet, Ministry of Economic Affairs and Climate Policy, 11 October 2021) accessible at https://www.government.nl/documents/publications/2019/10/11/dutch-position-on-competition-policy

Steenbergen Jacques, Snoep Martin, Barthelmé Pierre, 'Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world' (Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, 2 October 2019) accessible at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf

'Digital platforms and the potential changes to competition law at the European level: The view of the Nordic competition authorities' (September 2020) date accessed 17 May 2021 accessible at https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2020-digital-platforms-and-the-potential-changes-to-competition-law-at-the-european-level.pdf

Konkurrensverket, ‘Market Study of digital platforms’ (website, last updated 26 February 2021) date accessed 12th May 2021, accessible at http://www.konkurrensverket.se/en/Competition/--ovrigt--/market-study-of-digital-platforms/

LIST OF ABBREVIATIONS

AG – Advocate-General

Benelux – Belgium, Netherlands, Luxemburg

Charter - Charter of the Fundamental Rights of the European Union

CJEU - Court of Justice of the European Union

Commission – European Commission

Courts – Court of Justice of the European Union (including both the Court of Justice as well as the General Court)

Digital Markets Act - European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector, COM(2020) 842 final

ECJ – Court of Justice

EU – European Union

GAFA – Google, Amazon, Facebook, Apple

Guidance on the Commission's Enforcement Priorities - Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings

Market Definition Notice - Commission Notice on the definition of relevant market for the purposes of Community competition law

Merger Control Regulation/Regulation 139/2004 - Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

NCA – National Competition Authority

Regulation 1/2003 - Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

SSNDQ - Small but Significant Non-transitory Decrease in Quality

SSNIC – Small but Significant Non-transitory Increase in Cost

SSNIP – Small but significant and non-transitory increase in price

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UK - The United Kingdom of Great Britain and Northern Ireland

US – United States of America

1. INTRODUCTION

1.1 Background and purpose of the research

During 2019 a number of institutions, including the European Commission, published reports on EU competition policy and law in the digital era. It is not only the institutions, but also academics, who have discussed a variety of topics centered around the grand theme of whether EU competition law is apt for the digital era.[1] A key question within the debates concerns the two- or multi-sided nature of online platforms and market definition of these platforms.[2] The Commission has given a number of decisions concerning two- or multi-sided platforms, however, the Court of Justice or General Court is yet to provide a clear and definitive answer to how, and when, the two- or multi-sided nature of a platform should be taken into consideration in the assessment of anti-competitive conduct under Article 102of the Treaty on the Function of the European Union[3] (TFEU). This thesis sets out to provide an answer to how the two-sided nature should be taken into account at the moment.

It should be noted that based on the Applicant's pleas in law there is a possibility that the General Court might touch this question in the Google Android-appeal.[4] The Commission continues to investigate possible infringements of anti-trust law which concern online platforms; three ongoing investigations that the Commission has opened are towards the conduct of Apple in relation to its App Store[5] and Apple Pay[6]. These investigations may

[1] Some of the specific questions outside the topic of this thesis which have been raised in recent years include self-preferencing, the essential facilities doctrine in relation to data, the relation between competition law and data protection, killer acquisitions etc.
[2] See for example: Gunnar Niels, 'Transaction versus Non-transaction Platforms: A False Dichotomy in Two-sided Market Definition' (2019) 15(2-3) Journal of Competition Law & Economics 327; Mandrescu Daniel, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41(3) World Competition 453; Thépot Florence, 'Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets' (2013) 36(2) World Competition 195; Lapo Filistrucchi, Damien Geradin, Eric Van Damme, Pauline Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10 J Comp L & Econ 293
[3] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47
[4] Action brought on 9 October 2018 – Google and Alphabet/Commission (Case T-604/18) [2018] OJ C 445/21; first plea in law.
[5] AT.40437 (Apple – App Store Practices - music streaming); AT.40652 (Apple – App Store Practices – e-books/audiobooks)
[6] AT.40452 (Apple – Mobile Payments – Apple Pay)

address conduct under both Article 101 and 102 TFEU.[7] As concerns App Store Practices in relation to music streaming the Commission sent, in April 2021, a Statement of Objection to Apple. According to the information available, the investigation regards whether Apple's conduct is contrary to Article 102 TFEU.[8]

To this day the European Commission has only completed one competition law investigation towards the conduct of social media platforms: the investigation into whether the acquisition of WhatsApp by Facebook[9] could be approved or not. The Commission approved the merger and the case was not appealed to the Courts.

The German competition authority *Bundeskartellamt*, on the other hand, has given a decision concerning the conduct of Facebook.[10] The Bundeskartellamt's Facebook-decision has been heard by national courts and the Higher Regional Court of Düsseldorf has referred a preliminary reference question to the Court of Justice.[11] Unfortunately from a competition law perspective, the questions referred by the Higher Regional Court of Düsseldorf only concern the interpretation of the GDPR[12] and Article 4(3) of the Treaty on the European

[7] The Commission announced the formal opening of the investigations on 16th June 2020. European Commission, 'Antitrust: Commission opens investigation into Apple practices regarding Apple Pay' (Press Release, 16 June 2020), date accessed 12 May 2021, accessible at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075

[8] European Commission, 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (Press Release, 30 April 2021), date accessed 12 May 2021 accessible at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061

[9] Case M.7217 – Facebook/WhatsApp Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 C(2014) 7239 final

[10] Decision under Section 32(1) German Competition Act (GWB) B6-22/16 (Public Version, English Translation) accessible at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5

[11] Case C-252/21 Facebook and Others, by 12th of May 2021 the case has been registered by the Court of Justice of the European Union, but no documentation such as the application or preliminary reference are accessible.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

Union (TEU)[13].[14] The case was decided on the basis of German competition law, although in relation to a national provision that corresponds to Article 102 TFEU, and academics have argued that the case should have been decided both based on national and Union law. In academic literature, it has been considered that Facebook's terms of conduct are also contrary to Article 102 TFEU.[15]

This raises the importance of understanding how the two-sided nature of social media platforms should be taken into consideration. The European Commission is also currently undertaking a preliminary investigation into the conduct of Facebook in relation to the undertakings data-related practices. Little is known about the nature and scope of these investigations – the investigation, however, does appear to concern the abuse of a dominant position.[16] Further, outside the EU in the United States both the Federal Trade Commission and the Attorney Generals of the vast majority of states are conducting investigations into the potential antitrust violations.[17]

[13] Consolidated version of the Treaty on European Union [2016] OJ C 202/1.
[14] Therefore, the Court of Justice will not have the possibility of addressing the competition law side of the case, unless it considers it necessary to address that issue in order for the national court to be able to solve the case in front of it. "[A]ccording to settled case-law, the fact that the referring court's question refers to certain provisions of EU law does not mean that the Court may not provide the referring court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court of Justice to extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute." Case C-157/15 *Samira Achbita an Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] ECLI:EU:C:2017:203, [33]. For the referred questions: Aktenzeichen VI-Kart 2/19 (V) Oberlandesgericht Düsseldorf ECLI:DE:OLGD:2021:00324.KART2.19V.00
[15] Marco Botta, Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition Law & Practice 465, 471-472.
[16] The investigation into Facebook is Case AT.40628 – Facebook Data-related practices, but no official documentation of the case is available. The case number – as well as its focus on the abuse of dominant position – is found in the Action brought by Facebook Ireland Ltd against the European Commission concerning a request for partial annulment of a decision concerning Commission Decision C(2020) 3011 final, which according to Facebook requests internal documents that are manifestly irrelevant to the investigation and include personal information thus breaching the right to privacy. Case T-451/20: Action brought on 15 July 2020 – Facebook Ireland v Commission [2020] OJ C287/39
[17] Letitia James NY Attorney General, 'Attorney General James Gives Update on Facebook Antitrust Investigation' (Press Release, 22 October 2019) date accessed 12th May 2021, accessible at https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation

The Commission[18] along the German,[19] Dutch[20] and UK[21] governments have published reports, which propose different solutions to how (EU) competition law should be amended to make it more fit for a digital era/economy. Further, in some Member States, (competition) authorities have conducted further studies on digital platforms/markets.[22]These solutions also touch upon multi-sided markets and the role of market definition. A next step has been taken in this field as the Commission has started an evaluation concerning market definition; in April 2020 the Commission opened stakeholder feedback to the planned roadmap, and in June 2020 a public consultation was opened.[23] Further, in December 2020 the Commission published its proposed Digital Services Act[24] and Digital Markets Act[25], which may impact the need for adjustments to competition law.

This thesis also aims to evaluate and analyze these different initiatives from a legal perspective to see what would they possibly change and how would they change the current situation. Due to the topical nature of how the multi-sided nature of platforms should be taken into account as well as the lack of an authoritative interpretation on the matter, there is still room and a need for this research.

[18] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, *Competition policy for the digital era* (European Commission, Directorate-General for Competition 2019)
[19] Commission 'Competition Law 4.0', *A new competition framework for the digital economy* (Federal Ministry for Economic Affairs (BMWi) 2019)
[20] State Secretary of Economic Affairs and Climate (Netherlands), 'Future-proofing of competition policy in regard to online platforms' (Letter to the House of Representatives, 17 May 2019)
[21] Report of the Digital Competition Expert Panel, *Unlocking digital competition – Report of the Digital Competition Expert Panel* (Crown 2019). The report was published during the time period that the UK was still subject to EU competition law. The report, however, will not be analyzed in depth due to the UK having left and the transition period having elapsed by the time of submission of this thesis.
[22] Konkurrensverket, 'Market Study of digital platforms' (website, last updated 26 February 2021) date accessed 12th May 2021, accessible at http://www.konkurrensverket.se/en/Competition/--ovrigt--/market-study-of-digital-platforms/; 'Digital platforms and the potential changes to competition law at the European level: The view of the Nordic competition authorities' (September 2020) date accessed 17 May 2021 accessible at https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2020-digital-platforms-and-the-potential-changes-to-competition-law-at-the-european-level.pdf
[23] European Commission, 'Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law' (website) accessed 12th of May 2021, accessible at https://ec.europa.eu/competition/consultations/2020_market_definition_notice/index_en.html
[24] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC COM(2020) 825 final
[25] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final

1.2. Research question and scope of research

How, and when, should the two-sided nature of (online) social media platforms be taken into consideration in assessing possible abuses of a dominant market position under Article 102 TFEU?

What type of measures should be taken to address possible concerns relating to defining relevant markets and assessing dominance?

The abovementioned questions are the main research question that have been researched for and answered in this thesis. A number of articles have been written about two-sided markets in general, but the focus of this thesis – social media platforms – has not been the main focus of the majority of these articles. Therefore, the scope of platforms considered was limited to social media services, which have common specific characteristics such as a gratuitous nature on one side, the collection of data and the monetization of said data, and the existence of both direct and indirect effects. Market definition and dominance assessments are by no-means the prerogative of abuse of dominant market position cases; markets are also defined in the context of Article 101 TFEU and merger investigations.[26] The research question has been limited to Article 102 TFEU as there is a lack of case law concerning market definition and dominance assessments of two- or multisided platforms in this context. Further, as indicated above two- and multisided platforms, including social media services, have been and currently are subjected to a number of competition authority investigations. The topical nature of the broader research topic also guided in setting the scope of the research.
Regardless of this limitation, important case law concerning Article 101 TFEU and merger control are also used as sources and comparisons are made to those cases. While the two-sidedness of social media platforms may also impact the finding of abusive behavior,[27] the abusive conducts are left outside the scope of this research as each of them would warrant comprehensive research and space.

[26] Alison Jones, Brenda Sufrin, Niamh Dunne, *Jones & Sufrin's EU competition law: text, cases, and materials* (7th edn, Oxford University Press 2019, 101.
[27] See with regard to predatory pricing: Petri Kuoppamäki, 'Määräävän aseman väärinkäyttö digitaalisilla markkinoilla – mikä muuttuu?' (2018) 7-8 Lakimies 996, 1002; Amelia Fletcher, 'Predatory Pricing in Two-Sided Markets: A Brief Comment' (2007) 3(1) Competition Policy International 221.

The first research question, *how, and when, should the two-sided nature of (online) social media platforms be taken into consideration in assessing possible abuses of a dominant market position under Article 102 TFEU?,* is answered in Chapter 3 according to the status quo under EU law. Aiding questions, which have been considered during the research and writing process are:

i. How are markets defined and dominance found in general?
ii. How does the multi-sidedness impact market definition?
    a. Should one or two markets be defined?
        i. Does the type of the two-sided market impact the assessment?
    b. How should the two-sided nature be taken into consideration, if two-markets are defined?
iii. How does the gratuitous nature of one side of the market impact market definition?
iv. What are some of the special characteristics of social media platforms that should be taken into account, when assessing dominance?

To clarify, these questions have been used as aiding questions to answer the primary research question and have not been considered as specific research questions that this thesis aims to comprehensively answer and contribute to.

Chapter 4, on the other hand, answers *what type of measures should be taken to address possible concerns relating to defining relevant markets and assessing dominance?* The focus is on different proposals and recommendations made by Member States and the European Commission on the future of EU competition law. In addition to the proposals and recommendations, the thesis also considers other possibilities such as the revision of the Treaties and taking a segmented approach to online platforms. Lastly, some of the possible impacts of the proposed Digital Markets Act are considered. While the Digital Markets Act would not alter existing competition law[28], it could significantly impact social media gatekeepers, such as Facebook, and have connections to abuse of dominant market position.

Aiding questions, that have been considered while researching and writing Chapter 4 are:

i. Is there need for the proposals?
ii. What would be the impact of the proposed measure?

[28] Proposed Digital Markets Act (n25), Article 1(6).

iii. What are some of the challenges of the proposed measure?

1.3. Previous research on the topic

This thesis is by no means the first piece of academic writing, which tackles the question of competition law and two-sided markets, and it is probably not going to be the last one. A number of academic articles and books have been written on the topics of market definition and two-sided markets as well as the general topic of competition law in a digital era. What this thesis attempts to do is to look at both the current situation as well as analyze the recommendations made in different reports. This thesis utilizes the research conducted by academics such as Lapo Filistrucchi, Damien Geradin, Eric van Damme, Pauline Affeldt, Miguel Sousa Ferro, Daniel Mandrescu and Gunnar Niels, in relation to two-sided markets, market definition and market power, to present how the situation is at the moment. Relatively little has been written on the views taken in the different recommendations, the Commissions instigation of the re-evaluation of the Market Definition Notice or the proposed Digital Markets Act. The results from the first rounds of consultations on the re-evaluation of the Market Definition Notice have been published.

Some central academic publications, which concern the very essence of this thesis, are the 2019 book *Market Definition in EU competition law*[29] by Miguel Sousa Ferro, a 2014 article *Social Media and Competition Law*[30] by Aleksandra Gebicka and Andreas Heinemann. Sousa Ferro's book differs from this thesis in that it only focuses on market definition, whilst this thesis has a more holistic point of view to how and when the two-sided nature should be taken into account. Gebicka and Heinemann's article on the other hand has been written prior to important rulings in which the ECJ addresses the two-sided nature such as *Groupement des Cartes Bancaires* were given. During the time of writing this thesis an article *Facebook, the Attention Economy and EU Competition Law: Established Standards Reconsidered?*[31] by William Spence was published in the European Business Law Review, which addresses many of the same questions as does Chapter 3 of this thesis. The article has

[29] Miguel Sousa Ferro, *Market definition in EU competition law* (2019 Edward Elgar Publishing); the book contains highly relevant chapters on both *Two-sided markets* and *Free products*.
[30] Aleksandra Gebicka, Andreas Heinemann, 'Social Media and Competition Law' (2014) 37(2) World Competition 149
[31] William Spence, 'Facebook, the Attention Economy and EU Competition Law: Established Standards Reconsidered?' (2020) 31(4) European Business Law Review 693

been taken into consideration and referenced in this thesis. This thesis, however, includes elements which are neglected in Spences article such as the analysis of different propositions put forward.

The topic of competition law and online platforms has been researched in Finland by individuals such as *Tom Björkroth, Tuomas Mylly and Jarkko Vuorinen*[32], *Petri Kuoppamäki*[33], *Maria Wasastjerna*[34] and *Beata Mäihäniemi*[35]. Additionally a few LL.M. theses have been published in Edilex on the topics of market definition and market power in respect to digital platforms within the last few years.[36]

1.4. Method and Sources

The primary method utilized in this thesis is the legal doctrinal method. The doctrinal method is focused on the existing law. The gaps are filled by systemizing relevant rules and analyzing the relationships between those rules.[37] In addition to systemizing legal norms, doctrinal research "should produce information on the law".[38] The legal norms are systemized through analyzing judgments of the Court of Justice and the General Court on Article 102 TFEU, other relevant case law, primary and secondary legislation, and soft law. Academic literature, in the form of journal articles and (chapters in) books, on competition law in the digital fora has widely been taken into consideration. Academic textbooks and handbooks on general EU-law have primarily been utilized to find relevant case law and other sources as well as to provide an understanding of the EU competition law framework.

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[32] See for example Tom Björkroth, Tuomas Mylly, Jarkko Vuorinen, 'Alustatalous, kilpailuoikeus ja kilpailun taloustiede – hienosäätöä vai paradigman muutos? (2018) 3-4 Lakimies 311

[33] See for example Petri Kuoppamäki (2018), 'Määräävän aseman väärinkäyttö digitaalisilla markkinoilla – mikä muuttuu?' (2018) 7-8 Lakimies 996.

[34] Maria Wasastjerna, Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy? (Kluwer Law International 2020)

[35] Beata Mäihäniemi, Competition Law and Big Data: Imposing Access to Information in Digital Markets (Edward Elgar Publishing 2020)

[36] See Nora Hietanen, *Digitaalisen verkkoalustan määräävän markkina-aseman määrittäminen digitaalisilla sisämarkkinoilla* (Pro Gradu/LL.M. thesis, University of Lapland 2019) accessible in Edilex (www.edilex.fi/opinnaytetyot/19810), published 11 September 2019; and Mikko Mononen, *Market Definition of Multi-Sided Platforms in European Union Competition Law: Theory and Practice* (Pro Gradu/LL.M. Thesis, University of Turku) accessible in Edilex (www.edilex.fi/opinnaytetyot/21227), published 5.8.2020; See *Joachim Wik*, Markkinavoima ja sen arviointimenetelmät EU:n kilpailuoikeudessa – Miten menetellä digitaalisilla alustamarkkinoilla? (Pro Gradu/ LL.M. Thesis, University of Helsinki) accessible in Edilex (www.edilex.fi/opinnaytetyot/20722), published 3.4.2020.

[37] Jan M. Smits, 'What is Legal Doctrine?' in Rob van Gestel, Hans-W. Micklitz (eds), Edward L. Rubin (ed), *Rethinking Legal Scholarship* (Cambridge University Press, 2017), 210.

[38] Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer Netherlands, 2011), 19.

While the research is primarily conducted through a legal doctrinal approach, this approach is supplemented with economic considerations. The research does not attempt to make use of the law and economics method in analyzing how proposed legislation would impact the behavior of individuals, companies or the economy,[39] but rather it uses different economic theories related to two-sided markets to the fill gaps and comment on the existing case law. In regard to the possible impacts of proposed measures, which are analyzed in Chapter 4, the focus of the commentary is on how the measure would change the legal framework and what legal problems could possibly arise instead of analyzing the legislative proposals' efficiency or their possible impacts on society at large. Thus, for a large part, the principles of systemization and interpretation will be used also for the already made proposals. The thesis comments on the legal implications that the existing proposals could have instead of proposing what should be done on the basis of economic or societal considerations.

Further, while references are made to non-EU legislation or proposals these are made as side-notes, used to support an argument or provide examples of how the topic has been dealt with elsewhere. This thesis does not aim to be a comparative study and does not purposefully utilize any comparative research methods.

1.5. Structure

This introduction is followed by Chapter 2, which briefly discusses the EU Competition law framework for the relevant parts. Chapters 3 and 4 form the core of this thesis. Chapter 3 answers the question of how, and when should the multi-sided nature of social media platforms be taken into consideration in assessments under Article 102 TFEU, based on the current legal framework. Chapter 3 is structured along the lines of a Commission decision concerning an infringement of Article 102 TFEU. First the question of the impact of the two-sided nature is examined in relation to market definition followed by market power to assess the evaluation of dominance. Chapter 4 on the other hand looks into the future. It concerns the different initiatives proposed by both EU Member States in various policy papers as well as actions taken by the European Commission, which may impact the situation in the future. This thesis attempts to address what will change and how will it change, if these initiatives

[39] Robert Cooter, Thomas Ulen, *Law and economics* (online version, Berkeley Law Books 2016), 3-4.

are passed. This analysis is conducted as a legal analysis of the proposed measures rather than an economic or political analysis. Chapter 5 summarizes the main findings of Chapters 3 and 4.

1.6. Key Concepts and Terms

As this thesis discusses abuse of dominant market position in the context of *social media platforms*, it is important to understand what is meant with the central non-legal terms. While no one single agreed upon definition is found for the terms *social media*, *online platforms*, and *two-* or *multi-sided market,* the following will provide an insight into how these terms can be understood and are understood in this thesis.

Social media is present in the daily lives of many individuals in different forms;[40] for example social media site *Facebook* had around 2.7 billion active users in October 2020[41]. Globally 53% of the world's population are using social media services.[42] Other well-known and widely-used social media sites include Twitter, LinkedIn, Instagram, and Snapchat. Some social media sites are new and upcoming or are popular within a specific demographic – examples of such are Chinese social media platforms TikTok and Weibo.[43] TikTok has, within a short period of time, become vastly popular; the social media application had 689 million active users in October 2020,[44] while in November 2018 it had a mere 154 million active users.[45] However, it should be noted that with new and upcoming platforms, the amount of active users may shift quickly; in the case of TikTok, it already reached 800 million active users earlier in 2020. Most social media platforms are open to anyone who creates an account, but some sites require an invitation from an existing user.[46]

Social media is a broad category, which can be divided into smaller fragments depending on the features that the service in question offers; *Laura Scaife* has divided the types of media

[40] Simon Kemp, 'Digital 2020: October Statshot' (Datareportal, website, 20 October 2020) accessed 17 December 2020, accessible at https://datareportal.com/reports/digital-2020-october-global-statshot.
[41] Digital 2020: October Statshot (n40).
[42] Digital 2020: October Statshot (n40).
[43] Yuan Ren, 'Know Your Chinese Social Media' (The New York Times, 19 November 2018) accessed 12 May 2021, accessible at https://www.nytimes.com/2018/11/19/fashion/china-social-media-weibo-wechat.html
[44] Digital 2020: October Statshot (n40)
[45] Know Your Chinese Social Media (n43).
[46] For example users can join Clubhouse only after they have been invited by a user.

into 5 different categories – blogs, social and business networking sites, digital media sharing sites, massively multiplayer online role-playing game sites, and virtual worlds. While virtual worlds, massively multiplayer online role-playing sites, and blogs may be considered as social media, the focus of this thesis will be on the social and business networking sites and digital media sharing sites.[47] The other forms of social media are outside the scope of this study due to their different nature as well as the focus of national competition authorities as well as the EU institutions having recently been on networking and digital media sharing sites. In addition to divisions between different features offered, some social networks/communities are focused on particular topics – such as Goodreads is a social media platform/community focused on literature.[48]

European Competition authorities have defined social media, and social networking, services in a number of different ways. In 2014 the European Commission attempted to define social networking services as services that have as essential characteristics a (semi-)public profile and a list of friends/contacts. Other non-cumulative features the Commission pointed out to include messaging, information sharing, commenting on postings and recommending friends.[49] Similar definitions are found in academic literature.[50] In 2019 the German Bundeskartellamt took a broader approach in its *Facebook* decision by defining social media as: "all media used by internet users for the purpose of communication, with interactivity playing a key role".[51] A multitude of services were considered to fall within the scope of social media services.[52] The European Commission has in its new proposal for a Regulation on contestable and fair markets in the digital sector defined 'Online social networking services' as

[47] Scaife Laura, *Handbook on Social Media and the Law* (Routledge 2014), 8-9.
[48] Scaife (n47), 15.
[49] Case M.7217 – Facebook/WhatsApp (n9), [51].
[50] Spence (n31), 699.
[51] Decision under Section 32(1) German Competition Act (GWB) B6-22/16 (Public Version, English Translation) (n10), [168]. In paragraph 169 of the Decision the Bundeskartellamt sited a more extensive definition of social media provided by German Association for the Digital Economy according to which social media can be defined as "a multitude of digital media and technologies enabling users to exchange information between themselves and to design media contents either individually or as a community. The interactions include mutual exchanges of information, opinions, impressions and experiences, and the participation in content creation. Users actively refer to contents through comments, ratings and recommendations. In doing so, they establish a social connection to each other."
[52] Decision under Section 32(1) German Competition Act (GWB) B6-22/16 (Public Version, English Translation) (n10), [168-178]

> ‘a platform that enables end users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations’.[53]

The Commission makes a distinction between online social networking services and video-sharing platform services.[54]

Two-sided and multi-sided markets have been discussed in economic literature since the early 2000s, when the first papers on the economic concept were published by among others Rochet and Tirole.[55] While the concept of two-sided markets emerged at the beginning of the 21st century, two-sided markets have existed for a long time. It should also be noted, that while in this thesis the two-sided markets considered are online, also non-digital/online two-sided markets exist.[56] Outside the realm of online platforms, important and prominent two-sided markets include stock exchanges.[57]

Even though almost 20 years have passed since the concept of two-sided markets was introduced, a commonly agreed upon definition is yet to be found.[58] It is not only the economists who disagree on the definition; legal researchers and academics tend to base their writings on market definition in relation to two-sidedness on different definitions.[59] Some legal academics and economists argue that terms such as multi-sided firm should be preferred instead of multi-sided market to not cause confusion between the economic concept and the legal concept of a relevant market.[60] Multi-sided markets are also referred

[53] Digital Markets Act (n25), Article 2(7).
[54] Video-sharing platform services refer to audiovisual commercial communication.
[55] Andrei Hagui, Julian Wright, ‘Multi-sided platforms’ (2015) 43 International Journal of Industrial Organization 162, 162; David Evans, Richard Schmalensee, ‘The Antitrust Analysis of Multisided Platform Businesses’ in Roger D. Blair, D. Daniel Sokol (eds), *The Oxford Handbook of International Handbook of Antitrust Economics, Volume 1* (Oxford University Press 2014), 405; Jean-Charles Rochet, Jean Tirole, ‘PLATFORM COMPETITION IN TWO-SIDED MARKETS’ (2003) 1(4) Journal of the European Economic Association 990.
[56] The first economic literature on two-sided markets predates the emergence of social media and online platforms giants: the paper by Rochet and Tirole (n55) was published in 2003, with the current social media leader Facebook launching online a year later in 2004. Petri Kuoppamäki, ‘Tying and two-sided digital platforms’ in Paul Nihoul, Pieter van Cleynenbreugel (eds) *The Roles of Innovation in Competition Law Analysis* (2018 Edward Elgar Publishing), 308.
[57] David S Evans and Michael Noel, 'Defining Antitrust Markets When Firms Operate Two-Sided Platforms' (2005) 2005 Colum Bus L Rev 667, 668.
[58] Hagui, Wright (n55), 163.
[59] Sebastian Wismer, Christian Bongard, Arno Rasek, ‘Multi-sided Market Economics in Competition Law Enforcement’ (2017) 8(4) Journal of European Competition Law & Practice 257, 258.
[60] Sébastien Broos, Jorge Marcos Ramos, ’Competing Business Models and Two-Sidedness: An Application to the Google Shopping Case’ (2017) 62(2) The Antitrust Bulletin 382, 386-388.

to in academic literature as two-sided markets, intermediary markets, two-sided platforms, two-sided strategies and multi-sided markets.[61] The main terms used in this thesis are two-sided markets/platforms and multi-sided markets/platforms.[62]

Broos and Ramos have for example utilized the definition by *Hagiu and Wright*.[63] *Hagiu and Wright* consider that the fundamental idea behind multi-sided platforms is that the platform enables direct interaction between different distinct sides of the platform, while each side is affiliated with the platform. In this definition, the key terms of the interaction are to be controlled by the sides and not the platform.[64] Hagiu and Wright have further elaborated on their definition of a multi-sided platform by requiring that "users on each side consciously make platform-specific investments that are necessary in order for them to be able to directly interact with each other."[65]Alongside these basic characteristics of multi-sided platforms other possible non-essential characteristics include indirect network effects or non-neutrality of fees.[66]

Common characteristics of different definitions include the platform serving at least two different groups of customers/users with distinct needs by selling different products or services to these groups.[67] When it comes to the requirement of indirect network effects, the definitions differ from each other. Indirect network effects in themselves refer to the value of the service for one group of users being dependent on another group of users.[68]

The early research on two-sided markets require bilateral indirect network effects, with further requirements leading to requiring that the transaction could not occur without the involvement of the platform.[69] Later contributions have broadened the definition by only requiring unilateral indirect network effects, i.e. only one side needs to exert indirect network effects to the other side. Evans, who supports the unilateral indirect network effects approach, has added the requirement of the platform adding efficiency compared to the

[61] Jian Li, 'Is online media a two-sided market?' (2015) 31 Computer Law & Security Review 99, 100.
[62] There is no distinct difference in the situation, where reference is made to which term.
[63] Broos, Marcos Ramos (n60), 284.
[64] Hagui, Wright (n55), 163.
[65] Hagui, Wright (n55), 163.
[66] Hagui, Wright (n55), 163-164.
[67] Jian Li (n61), 100.
[68] Diane Coyle, 'Platform Dominance: The Shortcomings of Antitrust Policy' in Martin Moore, Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook and Apple* (Oxford University Press, 2018), 53-54.
[69] Jian Li (n61), 101.

situation without the platform. Filistruchhi et al.'s, whose research is referred to in more detail later on, definition also belongs to this category.[70] The previously mentioned definition of Hagui and Wright, belongs to this same group, which does not require bi- or multilateral indirect network effects.[71] While indirect network effects are a core characteristic of two-sided platforms, direct network effects may also be present as is the case with social media platforms.[72] This thesis utilizes the later approach, where only unilateral indirect network effects are required.

Multi-sided markets are typically divided into different categories; one division is between matching platforms and audience-providing platforms (also known as advertising platforms); matching platforms can further be divided into transaction and non-transaction markets.[73] Others referring to multi-sided markets only distinguish between transaction and non-transaction platforms.[74]

Online platforms, on the other hand, typically are two- or multi-sided by nature. In a 2019 publication by the OECD defined the concept of online platform as

> " -- digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet."[75]

When comparing this definition to that of a multi-sided market/platform, it seems evident that online platforms are a subset of two-/multi-sided platforms/markets, which also include offline markets such a market square or shopping mall. The Commission has in its 2016 Communication on Online Platforms stated that a characteristic of online platforms is that they operate multi-sided markets.[76]

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[70] Jian Li (n61), 101-102.
[71] Hagui, Wright (n55), 164.
[72] Coyle (n68), 54.
[73] Mandrescu), 'Reflections on the Definition of the Relevant Market(s)' (n2) , 459-460.
[74] See for example Filistrucchi et al. (n2).
[75] OECD, An Introduction to Online Platforms and Their Role in the Digital Transformation (OECD Publishing 2019) https://www.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_53e5f593-en, 21.
[76] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' [2016] COM(2016) 288 final

2. EU COMPETITION LAW FRAMEWORK

2.1. Competition policy and Competition law

Competition policy can be contrasted with competition theory and it also differs from competition law. According to *Olli Wikberg*, competition theory is more focused on the abstract level of analysis, while competition policy sets out aims to be achieved and the ways they can be achieved through.[77] Competition policy includes the issuance of new legal provisions within the competition law framework, and in the broad sense also the application of existing provisions by the competition authorities and the relevant courts.[78] This is the case even though in such cases the authorities are applying the legal norms without political discretion.[79] Taking this into consideration, the focus of this thesis is on competition policy in the broad meaning.

The ECJ has stated that the competition rules laid down in the Treaties, which include Article 102 TFEU, aim to protect i) the interests of competitors, ii) interests of the consumers, as well as iii) "the structure of the market and, in doing so, competition as such".[80] In early case law, the Court noted that the prohibition on abuse of dominant position seeks to achieve the aim of "maintenance of effective competition within the [internal] market".[81] This further connects to the EU's general objective of a functioning internal market.[82] This so called single-market imperative is specific to the European Union's competition policy and cannot be found in other jurisdictions such as the United States.[83]

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[77] Olli Wikberg, *Johdatus kilpailuoikeuteen*, (Talentum 2011), 24.
[78] Wikberg (n77), 24.
[79] Wikberg (n77), 24.
[80] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited(C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P) [2009] ECLI:EU:C:2009:610, [63]; see also Case C-8/08 T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECLI:EU:C:2009:343, [38].
[81] Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] ECLI:EU:C:1973:22, [25].
[82] The objective of a functioning internal market is found in Article 26(1) TFEU (n3): "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties."
[83] Richard Whish, David Bailey, Competition Law (8th edn, Oxford University Press 2015), 54.

2.2. Sources of law

The European Union only has those competences that the Member States have conferred to it.[84] The Union can have either exclusive[85], shared,[86] supporting,[87] or special competences[88] with regard to different policy areas. "[T]he establishing of the competition rules necessary for the functioning of the internal market"[89] belongs to the first category, *inter alia* the Union has exclusive competence. It should be noted that while Member States are allowed to have their own competition legislations for cases concerning situations that fall outside the scope of Union law,[90] the majority of these provisions are to a large extent identical to the EU provisions.

Competition law, on the Union level, is found in a number of sources. Out of these sources the most important ones are the Treaty on the Functioning of the European Union (TFEU), case law of the Court of Justice (ECJ) and the General Court (GC), and soft-law instruments such as Commission Notices and Guidelines. In the following, the role and value of the different sources of law, including Treaty provisions, case law and soft law documents, will be shortly explained.

2.2.1. Primary and Secondary law

European Union primary law consists of the founding treaties, the annexed protocols, and the Charter of Fundamental Rights (Charter)[91].[92] While the Treaty on the European Union

[84]TEU (n13), Article 5(1)-(2).
[85] TFEU (n3), Article 3.
[86] TFEU (n3), Article 4.
[87] TFEU (n3), Article 6.
[88] For example with regard to the common foreign and security policy the competences of the EU are found in Article 24 TEU (n13).
[89] TFEU (n3), Article 3(1)(b).
[90] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 3.
[91] Charter of the Fundamental Rights of the European Union [2016] OJ C 202/389
[92] Juha Raitio, Tomi Tuominen, *Euroopan unionin oikeus* (2nd edn, Alma Talent 2020), 189.

(TEU) as well as the Charter are to some extent relevant for competition law,[93] the core of competition law can be found in Title VII, Chapter 1 of the Treaty on the Functioning of the European Union as it includes the main substantive rules.[94] The essence of this thesis is based on Article 102 TFEU on the abuse of dominant market position. The general prohibition of abuse of a dominant market position is found in the primary law, but due to the open and flexible nature of the provision[95], the scope of the provision is found in other sources of law. The prohibition on the abuse of a dominant position was already included in Article 86 of the Rome Treaty.[96] The Article prohibiting abuse of a dominant position has been renumbered twice, but the only change to the wording of the provision was done for the Lisbon Treaty, when the common market was replaced by the internal market.[97] The core

[93] TEU includes among others Article 3(3), according to which the EU shall establish and internal market. As the Court has clarified in C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, that in line with Protocol 27 the internal market shall "include a system ensuring that competition is not distorted". The Charter on the other hand is addressed to Union institutions and bodies including the Commission and Court of Justice of the European Union. These institutions thus need to respect the rights guaranteed in the Charter, which include among others the right to an remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), and the right of access to documents (Article 42). Further, in certain circumstances specific rights guaranteed under the Charter, such as the right to conduct business (Article 15) or the right to property (Article 16), may need to be weighed against Article 102 TFEU. C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, [20]; Consolidated version of the Treaty on European Union – Protocol (No 27) on the internal market and competition [2016] OJ C 202/308; Charter (n91), Article 51(1).

[94] Wouter Devroe, Caroline Cauffmann and Ulf Bernitz, 'Competition Law' in Hartkamp Arthur, Sieburgh Carla, Devroe Wouter (ed), *Cases, Materials and Text on European Law and Private Law* (Hart Publishing 2017), 24.

[95] Pinar Akman, 'An Agenda for Competition Law and Policy in the Digital Economy' (2019) 10(10) Journal of European Competition Law & Practice 589, 589.

[96] Treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 01 January 1958) 298 UNTS 3.

[97] The wording of the (unofficial) English translation published in 1957 differs from the one found in Article 102 TFEU, however, for example the 1957 French language version is identical to that of Article 102 TFEU with the exception of "le marché commun" being changed to "le marché intérieur". Renato Nazzini, *The foundations of European Union competition law: the objective and principles of Article 102* (Oxford University Press 2011), 105.

characteristics of EU law – primacy of EU law [98] and direct effect[99] – apply to Article 102 TFEU.[100]

Alongside the aforementioned sources of primary law, general principles of EU law are also considered to be a primary source of law with constitutional status.[101] General principles of EU law include both the autonomous EU legal principles and doctrines, such as primacy and direct effect, as well as more general principles of law such as legal certainty, which are also found outside the EU legal system.[102] General principles are binding on both the Union institutions and Member States. The Court of Justice may, on the basis of Article 263 TFEU, consider an act of the Union to be invalid due to it being contrary to a general principle of law such as legal certainty or prohibition of retroactive effect. The principles may also affect the interpretation of Union acts and national law transposing Union acts.[103]

European Union secondary law is set out in Article 288 TFEU and includes regulations, directives, decisions, recommendations and opinions. While, generally, in EU law directives and regulations have an important role, within competition law this role is limited.[104] A few

[98] The principle of primacy (or supremacy) of EU law was established by the Court of Justice in the *Costa v E.N.E.L.* -judgment in 1964. According to the principle, national measures, even constitutional provisions, cannot override EU law such as directly applicable treaty provisions. Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66; Michal Bobek, 'The effects of EU law in the national legal systems' in Catherine Barnard, Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017), 161-165.

[99] Direct effect of a provision of EU law in practice refers to the ability to invoke it in proceedings before the national courts and to the national authorities ability to apply the provision. The possibility for direct effect of Treaty provisions was established by the Court of Justice in *Van Gend en Loos*. Each provision, however, needs to assessed individually and all treaty provisions do not have direct effect. Directly effective treaty provisions can be invoked in both vertical and horizontal relationships. Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1; Bobek (n98), 146-156; Raitio, Tuominen (n92), 245.

[100] The direct horizontal effect of Article 102 TFEU's predecessor Articles have been confirmed among others in C-282/95 *Guérin Automobiles v Commission* and C-453/99 *Courage and Crehan*, whilst from the more recent judgments the Court has confirmed the direct horizontal effect of Article 102 TFEU in C-595/17 *Apple Sales International and Others*. Case C-724/17 *Vantaan Kaupunki v Skanska Industrial Solutions Oy and Others* [2019] ECLI:EU:C:2019:204, [24]; Case C-595/17 *Apples Sales International, Apple Inc., Apple retail France EURL v MJA* [2018] ECLI:EU:C:2018:854, [35]; Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317, [20]; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage*, [23]; Case C-282/95 P *Guérin automobiles v Commission of the European Communities* [1997] ECLI:EU:C:1997:159, [39].

[101] Anthony Arnull, 'What is a General Principle of EU law' in Rita de la Feria, Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU law?* (Hart publishing 2011), 12; see for example Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECLI:EU:C:2009:669, [42]

[102] Arnull (n101), 7-8.

[103] Arnull (n101), 12.

[104] Devroe, Cauffmann, Bertnitz (n94), 28.

key regulations exist; especially in the field of enforcement[105] and merger control[106]. Another new and central regulation for online platforms is the Platforms-to-business regulation[107], which does not directly alter competition law as such, but does concern online platforms the focus of this thesis.[108] One, however, cannot say that the role of secondary law in assessing the abuse of dominance is minute, as decisions of the Commission are an important source of law.[109] The infringement decisions as such are only binding to the addressees[110] and can be subject to a review by the General Court.[111] However, the decisions indicate how the Commission understands and applies competition law in a particular context. Further, through appeals of the infringement decisions to the General Court (and later the Court of Justice) the meaning of EU competition law is clarified through the Court's interpretation of the provisions.

2.2.2. Case law

While no *stare decisis* -principle is found in EU law,[112] the Courts have developed EU competition law by continuously referring to and citing past judgments in following cases. The understanding of different forms of abuse of dominant market position, as well as the concepts of market definition and market power, have been clarified in the case law of both of the EU courts.

Due to the structure of the appeal procedure and the divisions of jurisdictions between the GC and ECJ, a number of antitrust cases are heard by the GC, which is the court of first instance for actions for annulment of antitrust decisions given by the Commission, when the

[105] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1
[106] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1
[107] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57
[108] Regulation (EU) 2019/1150 (n107), Article 1(5).
[109] Wikberg (n77), 156.
[110] TFEU (n3), Article 288.
[111] Article 263(4) TFEU allows for individuals, to whom the decision is addressed to, to institute proceedings for the judicial review of that decision. Article 256 TFEU grants the General Court the competence to hear the proceedings under Article 263(4). Certain Article 263 TFEU proceedings are reserved for the Court of Justice, however, Article 263(4) proceedings are not listed as such in Article 51 of the Statute of the Court Justice of the European Union. Consolidated version of the Treaty on European Union – Protocol (No 3) on the statute of the Court of Justice of the European Union [2016] OJ C 202/210, Article 51.
[112] Tamás Szabados, ''Precedents' in EU law – The problem of overruling' (2015) 1 ELTE Law Journal 125 accessible at https://eltelawjournal.hu/wp-content/uploads/2016/03/2015_1_09_Tamas_Szabados.pdf, 127-128.

proceeding is initiated by a natural or legal person.[113] The Court of Justice considers competition law cases mainly in two different situations: 1) appeals on points of law regarding judgments given by the General Court,[114] and 2) preliminary reference questions from national courts on the interpretation (or validity) of EU law provisions[115].[116] This limits the issues that the ECJ addresses to those that have been appealed or referred to the Court; i.e. the ECJ does not have powers to address GC-judgments it considers problematic unless the case is appealed.[117] According to Article 261 TFEU read together with Article 31 of Regulation 1/2003, the Courts are empowered to cancel, reduce and even increase the fines and penalty payments issued by the Commission.[118]

As stated a number of competition law cases are heard by the General Court as appeals to infringement decisions issued by the Commission. Undertakings have, under Article 263 TFEU, the possibility to institute proceedings to review the legality of acts addressed to them. Within the infringement decisions that have been appealed to the GC and the GC-judgments that have been appealed to the ECJ, the Courts are only able to address those points that have been raised by the applicants, i.e. if for example market definition has not been contested the Court cannot examine it.[119] Additionally, the Courts cannot replace the Commission's reasoning with their own under Article 263 TFEU proceedings.[120]

[113] Koen Lenaerts, Kathleen Gutman, Ignace Maselis, *EU Procedural law* (Oxford University Press 2015), 43.
[114] TFEU (n3), Article 256(1).
[115] TFEU (n3), Article 267.
[116] Wikberg (n77), 156.
[117] Jones, Sufrin, Dunne (n26), 82.
[118] Jones, Sufrin, Dunne (n26), 951, 990-991; Case C-123/16 P *Orange Polska SA v European Commission* [2018] ECLI:EU:C:2018:590, [106].
[119]Jones, Sufrin, Dunne (n26), 82; Marc van der Woude, 'Judicial Control in Complex Economic Matters' (2019) 10(7) Journal of European Competition Law & Practice 415, 417; Case C-123/16 P *Orange Polska SA* (n118), [105].
[120] Case C-123/16 P *Orange Polska SA* (n118), [105]; Joined Cases C-247/11 P and C-253/11 P *Areva and Others v Commission* [2014] ECLI:EU:C:2014:257, [56].

Article 267 TFEU awards the possibility, and in certain circumstances obliges,[121] national courts to refer questions regarding the interpretation of EU law, including Article 102 TFEU, to the Court of Justice.

The Court of Justice does not take the majority of judgments without other impartial views. The ECJ utilizes Advocate Generals, who are to give reasoned submissions to cases heard before the Court of Justice.[122] If the Court considers that no new points of law are raised in a case, it may decide after hearing the Advocate General, that the case does not require an opinion of the Advocate General.[123] The Advocate General's opinion is given prior to the judgment and the judgment may refer to the opinion. Opinions of Advocate Generals are not binding to the Court or anyone else.[124] Regardless of the lack of a binding nature, the Court may refer to the points brought up in the Opinion. The opinion may have a more detailed explanation of the point of view brought up by the Court in the judgment.

2.2.3. Soft law instruments

Within the field of competition law, the European Commission has issued a number of soft law instruments. A few of these are worth mentioning here: in 1997 the Commission (EC) issued its Market Definition Notice[125], which will be dealt with extensively within this thesis, and in 2009 the EC issued a communication 'Guidance on the Commission's enforcement priorities in applying Article [102] to abusive exclusionary conduct by dominant

[121] National courts of last instance are required to refer questions concerning the interpretation of EU law to the Court of Justice unless i) the question is irrelevant, ii) the question has already been interpreted (acte éclairé) or iii) "the correct application of [Union] law is so obvious as to leave no scope for any reasonable doubt." (acte clair) (Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1984] ECLI:EU:C:1984:91). These criteria, however, might be subject to revision, if the Court of Justice agrees with the AG's opinion in Case C-561/19. The AG recommended the following criteria for when the court of last instance would be required to refer a preliminary question: "first, that case raises a general issue of interpretation of EU law, which may, second, be reasonably interpreted in more than one possible way and, third, the way in which the EU law at issue is to be interpreted cannot be inferred from the existing case-law of the Court of Justice." Opinion of AG Bobek in Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, [2021] ECLI:EU:C:2021:291, [181].
[122] TFEU (n3), Article 252.
[123] Statute of the Court of Justice of the European Union (n111), Article 20.
[124] Albertina Albors-Llorens, 'Judicial Protection before the Court of Justice of the European Union' in Catherine Barnard, Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press, 2017), 264.
[125] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5

undertakings'[126]. According to ECJ case law, the Commission is itself bound to the Notices and Guidelines it issues, but other actors, such as courts and national competition authorities, are not.[127] National legislation can, however, alter this situation by requiring national courts and authorities to take the soft law instruments into consideration, when applying the national counterparts of EU provisions.[128] However, national competition authorities also tend to rely on the soft law instruments.[129] According to the General Court, the Commission has limited its own discretion on how to define the relevant market, through the publication of the Market Definition Notice. Further, if the Commission would depart from the Market Definition Notice it would risk breaching fundamental principles of Union law such as equal treatment and protection of legitimate expectations.[130] The Guidance on the Commission's Enforcement Priorities differs slightly from the Market Definition Notice in that the ECJ has confirmed that the Guidance paper merely sets out the enforcement priorities of the Commission.[131]

[126] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ 45/7.
[127] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795, [29], [31]; Devroe, Cauffmann, Bernitz (n94), 29.
[128] Giorgio Monti, 'Article 102: sources of interpretation' in Pier L. Parcu, Giorgio Monti, Marco Botta (eds) *Abuse of Dominance in EU Competition Law* (Edward Elgar Pub. 2017), 40-41.
[129] 'Future-proofing of competition policy in regard to online platforms' -letter (n20), 7.
[130] Case T-446/05 Amann & Söhne GmbH & Co. KG, Cousin Filterie SAS v European Commission [2010] ECLI:EU:T:2010:165, [137].
[131] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651, [52]; Monti (n128), 39.

3. ABUSE OF DOMINANT MARKET POSITION

3.1. General Comments on Article 102

Competition law, in the broad sense, can be grouped into 4 main categories; cartels and other forms of collusion, mergers, state aid, and, the focus of this thesis, abuse of a dominant market position.[132]

The substantive foundation of abuse of dominant market position is found in Article 102 TFEU, which reads as follows:

> *"**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.*
> *Such abuse may**, in particular**, consist in: […]."*[133]

Important questions, that rise from the wording of Article 102 TFEU, include *what qualifies as abuse?, what is considered as an undertaking?, when does an undertaking have a dominant position?*. Another relevant question is: *how does one define the market, where the undertaking acts?*

In the assessment of whether a specific unilateral conduct is considered an abuse of a dominant market position market definition and market power are important concepts and aids.[134] Article 102 TFEU consists of 5 broad elements, which need to be fulfilled in order for Article 102 TFEU to be infringed:

> "(a) one or more dominant undertakings;
> (b) a dominant position;

[132] Petri Kuoppamäki, Uusi kilpailuoikeus (2nd edn Sanoma Pro 2012), 1.
[133] TFEU (n3), Article 102 (emphasis added).
[134] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016), 639.

(c) the dominant position must be held within the internal market or a substantial part of it;
(d) an abuse; and
(e) an effect on inter-State trade."[135]

These elements are sometimes rephrased differently to include for example separate elements for the relevant product and geographic markets or the permanence of the dominant position.[136]

3.1.1. Concept of Undertaking

Article 102 TFEU is addressed to *undertakings* holding a dominant position. Within the framework of the social media platforms it is important to understand that one undertaking may operate several different platforms. This is the case with Facebook Inc., which operates a number of social media platforms/services including Facebook, WhatsApp, and Instagram.

As the concept of 'undertaking' found in Article 102 TFEU is not defined in the treaties, one must turn to the case law of the Courts to find an answer to what is considered an undertaking.[137] *Undertaking* has the same meaning under both Article 101 TFEU and Article 102 TFEU.[138] The Courts have developed the interpretation of what is considered an undertaking in case law regarding both collusion/cartels and unilateral conduct.

According to the Court of Justice "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed […]".[139] Economic activity on the other hand consists of "offering

[135] In *Commercial Solvents* the Court identified 5 necessary questions for the application of Article 86 EEC Treaty (now 102 TFEU). These questions were "(A) Whether there is a dominant position within the meaning of Article 86, (B) Which market must be considered to determine the dominant position, (C) Whether there has been any abuse of such a position, (D) Whether such abuse may affect trade between Member States and (E) Whether the applicants in fact acted as an economic unit." Joined Cases 6 and 7/73 *Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECLI:EU:C:1974:18, [8]; Sufrin, Jones, Dunne (n26), 280.
[136] Juha Raitio, *Euroopan Unionin oikeus* (2016 Talentum Pro), 725-726 referring to Pekka Aalto, Kari Joutsamo, Heidi Kaila, Antti Maunu, *Eurooppaoikeus* (3rd edn, Kauppakaari 2000), 553–554.
[137] Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8(2) European Competition Journal 301, 302.
[138] Whish, Bailey (8th edn) (n83), 188.
[139] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, [21].

goods and services on a given market".[140] The Court has taken the view that for the purposes of competition law, an undertaking is to be understood as an "economic unit even if in law that economic unit consists of several persons, natural or legal".[141] In the case of a subsidiary and a parent company, if the subsidiary 'does not decide independently upon its own conduct' the parent company and the subsidiary are to be considered a single economic unit.[142]

If the parent company has 100% ownership of the subsidiary in question, there is a rebuttable presumption that the parent company exercises decisive control over the subsidiary. Thus, the Commission can regard the parent company jointly and severely liable for the payment of any fines imposed due to anti-competitive conduct.[143] As of now there is, however, a gap in case law, which discusses the possible impact of a parent subsidiary relationship to finding dominance.

3.1.2. Abuses

Article 102 (a) to (d) TFEU contain examples of conduct that may be considered as abusive. The wording of Article 102 indicates that the list of situations provided in it is not exhaustive., i.e. also other forms of conduct may fall under the scope of Article 102.[144] Abuses can be divided broadly into three different categories – exclusionary abuses, exploitative abuses and price discrimination.[145]

3.1.3. Nature and structure of investigations

The investigation into an alleged abuse of dominance is focused on two central topics i) the power that the undertaking exercises on the market, and ii) the behavior of the undertaking

[140] Case T-319/99 Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities [2003] ECLI:EU:T:2003:50, [36-37].
[141] Case C-97/08 P Akzo Nobel NV and Others v Commission of the European Communities [2009] ECLI:EU:C:2009:536, [55].
[142] Case C-97/08 P *Akzo Nobel* (n141), [55].
[143] Case C-97/08 P *Akzo Nobel* (n141), [60-61].
[144] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603, [173].
[145] Damien Geradin, Anne Layne-Farrar, Nicolas Petit, *EU competition law and economics* (Oxford University Press 2012), 206.

investigated.[146] Investigations under Article 102 TFEU are *ex post* in nature,[147] i.e. investigations are into actions (currently being) taken and are not 'preliminary' in nature.[148]

To find whether an undertaking – within the meaning of Article 102 TFEU – holds a dominant position on the relevant market a two-step analysis should be taken. First, the relevant market needs to be defined. This is followed by an analysis into what is the market power of the undertaking under investigation.[149] The outcome of this analysis is a decision as to whether the undertaking is considered to be an 'undertaking of a dominant position within the internal market or in a substantial part of it' within the meaning of Article 102 TFEU.

In the following chapters, I will explain the concepts of market definition and market power and analyze how are they applied to online platforms and in particular in relation to social media platforms.

3.2. Market Definition

3.2.1. The purpose of Market Definition

Market definition is a tool used in competition law analysis to determine whether harm has occurred.[150] Market definition is used when using the 'indirect' way of measuring market power. The direct method would require the availability of data to utilize econometric methods. Often this data is unavailable and instead of utilizing the econometric methods to measure market power, authorities resort to the 'indirect' way, which focuses on the structure of the market.[151] In other words, market definition is the first step of the two-step test for determining market power.[152] The importance of market definition has been emphasized by the EU Courts in case law by stating that *" -- the definition of the relevant*

[146] Mika Oinonen, EU:n ja Suomen kilpailuvalvonta (Talentum Pro 2016), 148-149.
[147] Oinonen (2016) (n146), 150; Marjo Ojala, *EU-kilpailuoikeus* (2nd edn, Edita 2011), 258.
[148] An undertaking cannot receive *authoritative* examinations into whether certain conduct is allowed or prohibited under Article 102 TFEU from the European Commission prior to taking a measure.
[149] Richard Whish, David Bailey, *Competition Law* (9th edn, Oxford University Press 2018), 188.
[150] Cyril Ritter, 'Antitrust in Two-Sided Markets: Looking at the U.S. Supreme Court's *Amex* Case from an EU perspective' (2019) 10(3) Journal of European Competition Law & Practice 172, 174; Whish, Bailey (8th edn) (n83), 28; Market Definition Notice (n125), [2].
[151] Sufrin, Jones, Dunne (n26), 98-99.
[152] Robert O'Donoghue, Jorge A. Padilla, *The Law and economics of article 82 EC* (Hart Publishing 2013), 94.

market, in the application of Article 102 TFEU, is, as a general rule, a prerequisite of any assessment of whether the undertaking concerned holds a dominant position […]"'.[153]

Market definition is an umbrella term that combines the more specific concepts of the product and geographical markets together.[154] In the definition of the relevant market, the product market is defined first, which is followed by a consideration of the geographic market for that product.[155] Market definitions are typically defined for a relevant time period; when examining whether conduct was contrary to Article 102 TFEU that time period is usually the time period when the possible abuse occurred.[156] In certain specific cases, however, a temporal market could be defined alongside the product and geographic market.[157] There is, however, no case law of the Court, where separate markets have been established due to differing temporal markets.[158]

The proper definition of the market is important for a number of reasons, with some claiming it to be "the most important question in the legal analysis."[159] The inadequate definition of the market (and the failure to state reasons) can lead to the annulment of a decision finding infringement.[160]

Market definition sets the parameters in which the existence of dominance is considered;[161] if the market is too narrowly defined it may lead to an undertaking being falsely considered as dominant,[162] and on the other hand, a too broad market definition may lead to a 'dominant' undertaking being excluded from the scope of Article 102 TFEU. In the case of a too narrow definition this does not automatically lead to the 'wrong' end result, since dominance is not prohibited,[163] but only anti-competitive conduct is. Thus, if the wrongly classified

[153] Case C-307/18 Generics (UK) Ltd and Others v Competition and Markets Authority [2020] ECLI:EU:C:2020:52 [127].
[154] Market Definition Notice (n125), [9].
[155] Case C-307/18 Generics (UK) (n153), [128].
[156] Sousa Ferro (n29), 232.
[157] Sousa Ferro (n29), 239-242.
[158] Sousa Ferro (n29), 244.
[159] Roger J. van den Bergh, Peter D. Camesasca, *European Competition Law and Economics: A comparative perspective* (2nd edn, Sweet & Maxwell 2006), 106.
[160] See for example: Case 6/72 Continental Can (n81), [32-37]; Whish, Bailey (9th edn) (n149), 29.
[161] Case C-307/18 Generics (UK) (n153), [127]; Case T-62/98 Volkswagen AG v Commission of the European Communities [2000] ECLI:EU:T:2000:180, [230]; O'Donoghue, Padilla (n152), 94.
[162] Sousa Ferro (n29), 111.
[163] Case 322/81 NV Nederlandsche Baden-Industrie Michelin v Commission of the European Communities [1983] ECLI:EU:C:1983:313, [57].

undertaking has not taken any measures, which would be anti-competitive if dominant, they will not face any consequences. The situation is more dire, when considering the risks of too broad market definitions. Since the result of the too broad market definition is that an undertaking is falsely not considered dominant, the companies which are abusing their dominant position on the narrower market are able to escape any possible consequences for their actions and the 'abuse' cannot be stopped by the competition authorities, since Article 102 TFEU does not apply to those undertakings.

When it comes to social media services in academic literature some suggest that

> "no borders can be drawn between different categories of social networking websites as most of them share the commonality of enabling people to connect via their specific interests."[164]

However, this attitude towards a broad market definition cannot be seen in the decisional practice of NCAs; the Bundeskartellamt concluded that a number of platforms commonly considered to be social media platforms such as Instagram and Twitter are not potential substitutes to Facebook due to them being only partial substitutes.[165]

3.2.2. Market Definition in Two- and Multi-sided platforms

When it comes to two- and multi-sided markets, the most problematic part is with the product market. In some situations the geographic or temporal market may also pose difficult questions, but these are due to different reasons than the multi-sided nature of the market.

Cases concerning undertakings operating a two- or multi-sided market have been considered by the ECJ and GC,[166] however, there are only a few cases, which have even remotely addressed the question of market definition in relation to a two- or multi-sided business model. The two leading cases are *MasterCard*[167] and *Groupement des cartes bancaires*[168]

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[164] Thépot (n2), 208.
[165] Decision under Section 32(1) German Competition Act (GWB) B6-22/16 (Public Version, English Translation) (n10), [307-308], [328].
[166] Sousa Ferro (n29), 253.
[167] Case T-111/08 MasterCard, Inc. and Others v European Commission [2012] ECLI:EU:T:2012:260; Case C-382/12 P MasterCard Inc. and Others v European Commission [2014] ECLI:EU:C:2014:2201
[168] Case C-67/13 P Groupement des cartes bancaires (CB) v European Commission [2014] ECLI:EU:C:2014:2204; Case T-491/07 Groupement des cartes bancaires (CB) v European Commission [2012] ECLI:EU:T:2012:633; Case T-491/07 RENV Groupement des cartes bancaires (CB) v European Commission [2016] ECLI:EU:T:2016:379.

both of which concern conduct under Article 101 TFEU, rather than Article 102 TFEU, within the payment card system.

MasterCard concerned the multilateral fallback interchange fees which Mastercard had implemented within its system. In the appeal to the General Court the applicants complained "that the Commission failed to take the two-sided nature of the market into account in its reasoning, and challenge the definition of the product market." The Court stated in its judgment that, despite the complementarity of the issuing and acquiring sides, the services offered to cardholders and merchants could be distinguished from each other. Therefore, along with other considerations, the Commission was right in defining the market to only the acquiring market.[169] The General Court also pointed out that the definition of the relevant market differs between Article 101 and Article 102 cases.[170] Under Article 101 TFEU market definition's purpose is to establish whether or not the conduct is i) "liable to affect trade between Member States" and ii) "has as its object or effect the prevention, restriction or distortion of competition within the [internal] market".[171] The Court in MasterCard further continued to state that "[…] the objection to the relevant market is of no consequence provided that the Commission has rightly concluded […] that the agreement in question distorted competition and was liable to have an appreciable effect on trade between Member States."[172] Within abuse of dominant position cases the role of market definition is rather to define the market, where the company is considered to hold a dominant position, which is required for Article 102 TFEU to be applicable.[173] Thus, not examining the market definition would not be an option under Article 102 TFEU cases.

The General Court's judgment in MasterCard was appealed to the ECJ, but the appeal did not challenge the General Court's view of the definition of the relevant product market. Arguments made by interveners before the ECJ as to the fact that the two-sided nature was neglected in defining the market were considered ineffective by the ECJ.[174] The ECJ was, however, able to comment on two-sided markets in *Groupement des cartes bancaires*, which was delivered on the same day.

[169] T-111/08 MasterCard (n167), [175-177], [332].
[170] T-111/08 MasterCard (n167), [171].
[171] T-111/08 MasterCard (n167), [171]
[172] T-111/08 MasterCard (n167), [171]
[173] Case C-307/18 Generics (UK) (n153), [127].
[174] C-382/12 P MasterCard (n167), [159-160].

Groupement des cartes bancaires, on the other hand, concerned a claimed 'secret anti-competitive agreement' concluded by undertakings taking part in the CB system.[175] While the case concerns a payment card system, which has a multi-sided nature,[176] the Commission had identified the issuing side of the system as the relevant market in the contested decision.[177] The ECJ set aside the judgment of the General Court.[178] While the main gist of the judgment concerns the assessment of whether there was a restriction by object and the division between restriction by object and restriction by effect,[179] the judgment mentions the effect of the two-sided nature for the evaluation of the restriction. The ECJ stated in the context of whether the General Court could have considered the CB system as a restriction by object:

> *"In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary […] to take into consideration all relevant aspects […] of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market. That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market […] and, all the more so, when, as in the present case, there are interactions between the two facets of a two-sided system."*[180]

The ECJ seems to state that the two-sided nature should be taken into consideration in the assessment of anti-competitive behavior. The ECJ does not, however, directly take a stand on whether the market was defined correctly. The ECJ's view on the necessity to take the two-sided nature of the payment card system into consideration in the assessment of the anti-competitive behavior should thus not be read as a strict denial of the possibility to define a

[175] C-67/13 P *Groupement des cartes bancaire*s (n168), [3], [5].
[176] For example Filistrucchi et al. use the payment card sector as an example of multi-sided transaction markets. Filistrucchi et al. (n2), 297-298.
[177] C-67/13 P Groupement des cartes bancaires (n168), [8].
[178] C-67/13 P *Groupement des cartes bancaires* (n168), [94]; in T-491/07 RENV the GC changed its position an stated that the conduct was prohibited since in resulted in a constraint on competition by effect rather than by object. T-491/07 RENV did not alter the market definition. Damiano Canapa, '*Groupement des Cartes Bancaires (referral to the General Court)*: Finding of a Restriction by Effect in the Absence of a Restriction by Object' (2016) 7(9) Journal of European Competition Law & Practice 611, 611-612.
[179] Ariel Ezrachi, EU competition law: an analytical guide to the leading cases, (6 edn, Hart 2019), 113-114.
[180] C-67/13 P *Groupement des cartes bancaires* (n168), [78-79] (emphasis added).

market including both sides of the system. This argument, however, is weakened by the fact that the ECJ specifically refers to the *relevant* market and *a different related* market in connection to the *two facets* of the system.[181] *Miguel S. Ferro* interprets the ECJ-judgment in *Groupement des cartes bancaires* as a confirmation that the different sides should be defined as separate markets and the two-sidedness should be taken into account in the later stages.[182] In the case of Article 101 TFEU this later stage would be the assessment of the anti-competitive conduct, but in the case of Article 102 TFEU this could either be the assessment of dominance or the assessment of the abusive conduct in question.[183]

The view that the two facets of a platform need to be defined separately is supported by the case-law regarding products belonging to different markets. Already in the 1970s in *Hoffmann-La Roche* the court considered:

> *"If a product could be used for different purposes and if these different uses are in accordance with economic needs, which are themselves also different, there are good grounds for accepting that this product may, according to the circumstances, belong to separate markets which may present specific features which differ from the standpoint both of the structure and of the conditions of competition. […]"*[184]

From this it can be read that since on social media platforms the different sides of the market use the platform for different purposes two different markets should be defined. The need private users of social media platforms is use them to interact with a select group of people (their friends, followers etc.) and follow pages/accounts that they are interested in. This interaction can occur through viewing, reacting, commenting, sharing and publishing posts as well as using the messaging services provided by the platforms for their users. Depending on the platform the content and type of posts differs. The advertising side utilizes the platform to promote their business. This is achieved through both organic and promoted/boosted/paid posts, buying advertisements, and embedding Facebook's

[181] C-67/13 P Groupement des cartes bancaires (n168), [79].
[182] Sousa Ferro (n29), 255.
[183] Sousa Ferro (n29), 254.
[184] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36, [28]; Alvaro Pliego Selie, 'Article 102 TFEU' in Weijer VerLoren van Themaat, Berend Reuder (eds), *European Competition Law: a case commentary* (2014 Edward Elgar Publishing), 147.

functionalities outside the platform itself.[185] The main economic need here is not interaction within your own side, but with the private users.

Based on the Court's case law discussed above, it should be concluded that the different sides of the market should be defined separately. While the markets should be defined separately from each other and not as a single market, the two-sided nature may still impact how the relevant markets are to be defined, i.e. what tools and measures are appropriate. This will be discussed in the following paragraphs.

3.2.3. The SSNIP-test

The *Small but Significant and Non-transitory Increase in Price* -test (SSNIP-test) is a tool, which can be used in determining the relevant market. The SSNIP-test is constructed around the hypothetical permanent increase in prices of 5 to 10 %. New substitutes are included to the analysis until the permanent increase in prices becomes profitable. Once the increase becomes profitable the relevant market is found.[186] While the test was developed in the US for the purposes of merger control, in the EU it is used also when defining the relevant market for the purposes of Article 101 and 102 TFEU.[187] The SSNIP-test is a possibility, but based on ECJ case law, it is not the only means nor a prerequisite for determining the relevant market.[188] The Commission has in its Market Definition Notice centered demand-side substitutability around the SSNIP-test, indicating that it is central within the process of how the Commission defines the relevant market, when taking into consideration the emphasis placed on the role of demand substitutability.[189] The General Court shares the Commission's view that demand substitutability is the 'most effective assessment criterion'.[190]

[185] Thépot (n2), 203.
[186] Market Definition Notice (n125), [15-17].
[187] Whish, Bailey, (9th edn) (n149), 31; Market Definition Notice (n125), [1] read together with [15-19].
[188] Case T-699/14 *Topps Europe Ltd v European Commission* [2017] ECLI:EU:T:2017:2, [82]; Daniel Mandrescu, 'The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms' (2018) 2(4) CoRe: European Competition and Regulatory Law Review 244, 245.
[189] Market Definition Notice (n125), [13-19].
[190] Case T-177/04 easyJet Airline Co. Ltd v Commission of the European Communities [2006] ECLI:EU:T:2006:187, [99].

3.2.4. Impact of the type of platform

All multi-sided markets are not similar; there are platforms in which both sides are paying a monetary price for the service they receive, whilst others offer the service to at least one side for free.

Another key difference is whether the market may be considered as a transaction or non-transaction market. The distinction between transaction and non-transaction markets was made for the first time in report written for the Netherlands Competition Authority in 2010 and elaborated on by Filistrucchi, Geradin, van Damme and Affeldt in their 2014 article on market definition in two-sided markets.[191] In said article the authors argued that "market definition should always take into account both sides of the market, but that whether one or two relevant markets need to be defined depends on the type of two-sided market".[192] The suggestion by Filistrucchi et al. is that "in two-sided non-transaction markets, two (interrelated) markets need to be defined", whilst for transaction markets one market including both sides should be defined.[193] Traditional media markets, such as newspapers, have been considered to be a form of two-sided non-transaction markets.[194] Some individual commentators have challenged this view, by claiming that advertising supported media markets do not fall within the scope of two-sided markets but rather resemble retailers.[195] As Florence Thépot has pointed out social media platforms can, however, be differentiated from other advertising supported media in that the content, which attracts users, is user-generated content rather than content published by the media itself. This on the other hand attracts the advertisers.[196] Thépot claims that social media platforms "intermediate the *transactions* between users and advertisers"[197], which would suggest that he supports an uncommon view of social media platforms belong to transaction markets. William Spence has added to this discussion on the nature of social media platforms by commenting that

> "[u]nlike traditional two-sided intermediaries, however, Facebook does not only facilitate transactions between unrelated parties. It actually harnesses

[191] Filistrucchi et al. (n2), 297-298.
[192] Filistrucchi et al. (n2), 295.
[193] Filistrucchi et al. (n2), 302.
[194] Filistrucchi et al. (n2), 315.
[195] Jian Li (n61).
[196] Thépot (n2), 201.
[197] Thépot (n2), 202.

value (in the form of attention) by curating content and then sells this to third parties."[198]

Spence, however, views Facebook as part of the attentional economy.

Regardless of recommending the definition of two separate markets for non-transaction markets, Filistrucchi et al. suggest that both sides of the market should be taken into account when defining interrelated markets. The only exception to this are situations in two-sided markets, where only one externality exists. If this is the case then the market which does not exert an externality on the other could be defined without considering the other side.[199] In this regard, it should be remembered that the externality may either be positive or negative.[200] In relation to zero-priced products Filistrucchi et al. consider that there is a high-risk of overlooking an zero-priced market.[201] While this may be true for the examples brought up by the authors in 2014, given the focus nowadays placed on the intersections of data protection and competition law and the wide acknowledgement of the impact of social media platforms, it seems unlikely that there is a risk of overlooking the zero-priced side in defining the market for the paying side. The authors do not go in depth into how they consider that the other side should be taken into consideration, while defining the markets.

With two-sided non-transaction markets being differentiated from transaction markets by the lack of a transaction and an observable interaction which would allow for a per-transaction fee or two-part tariff,[202] social media platforms could fall within the classification of two-sided non-transaction markets. The boundaries between transaction and non-transaction markets are, however, blurred with regard to online platforms. An important question to ask is: what is considered a transaction?[203] Could, for example, viewing or reacting to a boosted post on Facebook be considered as a transaction and observable interaction as one side has paid to reach a certain amount of individuals? In so-called 'traditional' media markets, such as radio- or newspaper advertising, one-side buys a certain spot or placement without a guarantee of how many individuals will interact with that ad. While the pricing of those advertisements may differ based on the quality (time slot, place

[198] Spence (n31), 696.
[199] Filistrucchi et al. (n2), 322.
[200] Thomas Hoppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' (2015) 38(3) World Competition 349, 350.
[201] Filistrucchi et al. (n2), 321.
[202] Filistrucchi et al. (n2), 298.
[203] Niels (n2), 348-349.

in the newspaper, size or length of advert), the customer does not pay for receiving a certain quantity of an audience that can be observed, which it does while boosting a post on a social media channel. As Facebook, at least in certain circumstances, charges a fee per click,[204] it is not a too far stretch to argue that Facebook is not like the majority of advertising-supported media and could be considered to be a transaction market instead of a non-transaction market.

Thus, based on the suggestions made by Filistrucchi et al., one must conclude that in the case of social media platforms, such as Facebook, at least two separate markets should be defined instead of one all-encompassing market, but while defining all sides of the market, other sides exerting externalities should be taken into consideration. The suggestions made by Filistrucchi, Geradin, van Damme and Affeldt in 2014 are, thus, in the case of non-transaction markets in line with the EU courts views that separate markets should be defined for the different sides of the two-sided platform.[205] In the case of transaction markets, such as the market for payment cards, their standing differs from that of Court.

While the above described approach is the main starting point found in academic research as well as NCA decisions and reports,[206] everyone in the legal community does not share this point of view. There seems to be agreement that transaction and non-transaction markets have different characteristics, but these characteristics might not justify the different treatment in terms of market definition.[207] *Gunnar Niels* proposes that one should not make, for the purposes of market definition, a distinction between transaction and non-transaction markets.[208] One of his main points is that pricing decisions are based on the externalities exerted between the different sides and therefore one market definition should be performed.[209]

One argument often raised by those arguing for the definition of two separate markets in the case of non-transactions markets is that, unlike in transaction markets, in non-transaction

[204] Spence (n31), 696.
[205] While reading this analysis it should be remembered that the only phrasings from the Court of Justice on two- or multi-sided markets are made in the context of transaction markets.
[206] Niels (n2), 329.
[207] Niels (n2), 330.
[208] Niels (n2), 355.
[209] Niels (n2), 338.

markets the undertakings also compete against one-sided markets.[210] The Commission, however, has considered several times that online and offline advertising do not belong to the same market.[211] This is because demand-side substitutability does not exist due to differences such as the ability to target advertising in the online market.[212] Further search advertising, which for example Google provides, is usually considered to be a separate market from non-search advertising, which is present for example on Facebook.[213] On the one hand, this would point towards the preferability of defining one relevant market instead of two-separate markets in the case of social media services regardless of how the platform is defined. On the other hand, all social networking sites, that display online non-search advertising, are not substitutable on the other side of the market due to differences in their functionalities from a user's point of view. While from an advertising point of view the differences in functionalities between Facebook and Twitter might not be that significant, the differences between the functionalities and use of the platforms for individuals are more profound.[214]

3.2.5. Market Definition and "Zero-Price" services

A common feature of two- and multi-sided platforms is that one side of the platform receives a *service* at a substantially reduced price point, which may even be at 0 or in some cases negative.[215] When talking about "zero-price" services, the gratuitousness refers to a monetary price, since users may pay for the service in other than monetary forms such as through the data they provide to the platform.[216] A two- or multi-sided business model is not the only business model found that is associated with offering products without a monetary price. Other models include direct-cross subsidies and 'freemium' services, where 'premium' subscriptions include extra services. The extra services may for example be access to more material or the deletion of advertising.[217]

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[210] Niels (n2). 332.
[211] Thépot (n2), 210 referring to Commission decisions Case IV/JV.1 *Telia/Telenor/Schibstedt*, Case IV/M.1439 *Telia/Telenor*, Case IV/M.00048 *Vodafone/Vivendi/Canal Plus*, COMP/M.4731 *Google/DoubleClick*, and COMP/M.5727 *Microsoft/Yahoo! Search Business*.
[212] Hoppner (n200), 358.
[213] Thépot (n2), 212-214; Hoppner (n200), 359-360.
[214] Facebook for example has functionalities such as groups and the ability to write long posts, which are not present in Twitter.
[215]Friso Bostoen, 'Online platforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products' (2019) 35 Computer Law & Security Review 263, 265.
[216] Bostoen (n215), 266.
[217] Bostoen (n215), 265.

Some academics tend to argue that a market, for competition law purposes, cannot exist for free products.[218] In today's digital economy, the data collected by social media companies can be seen as a tradeable good in the sense that a good has monetary value and may be subject to commercial trade.[219] The Court of Justice has stated in case law that "any activity consisting in offering goods or services on a given market is an economic activity".[220] A dominant undertaking within the meaning of Article 102 TFEU on other hand needs to be engaged in an economic activity.[221] *Hoppner* has brought up that in online platforms, unlike in 'traditional' media, "[a]n individual commercial relationship and thus a market in the […] legal sense exists in particular if a user is required to provide data in order to use a platform's services."[222] He further points out, that selecting a two-sided market structure, where one service is offered free of charge, is a commercial decision aimed at improving the commercial success. [223] This all would suggest that conduct by undertakings who are providing social media services for free in monetary terms are subject to Article 102 TFEU, if they are considered to be dominant.

While Member States have similar domestic provisions to Article 102 TFEU, there might be differences in how the national provisions take into consideration the gratuitousness of a product. The most striking example is found in the German Competition Act, which clearly states that the fact that a product is offered for free does not impact the definition of the market.[224]

As *Mandrescu* has pointed out, when the abuse may occur on the side of a subsidized group of customers, a market definition for the free product needs to be performed. Also in situations where bi- or multilateral indirect network effects exist a market definition may also need to be performed on the zero-priced side, even if the alleged abuse occurs on the paying side.[225]

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[218] Wasastjerna (n34), 143; Hoppner (n200), 353.
[219] Wasastjerna (n34), 43.
[220] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio [2008] ECLI:EU:C:2008:376, [22], Joined Cases C-180/98 to C-184/98 Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECLI:EU:C:2000:428, [75].
[221] Case C-41/90 *Höfner* (n139), [21].
[222] Hoppner (n200), 354.
[223] Hoppner (n200), 353.
[224] Act against Restraints of Competition (Competition Act – GWB) Federal Law Gazette I p. 1151, § 18(2a); Sousa Ferro (n29), 257-258.
[225] Mandrescu, Zero-Pricing (n188), 247.

One issue which arises is whether it is appropriate to use the SSNIP-test in relation to social media platforms, which typically, offer one-side of the platform free of a monetary charge. The Commission seems to think that it would not be appropriate as evidenced by its decision in Google Search (Shopping).[226] While Google Search (Shopping) is currently being heard before the General Court in Luxembourg, it is unlikely that the Court would address the Commission's decision to not make use of the SSNIP-test, since pleas in law put forward by the applicants do not include pleas concerning market definition.[227] The *Google Android*-appeal, on the other hand, does include a plea in law concerning the assessment of the market definition and dominance, however, the focus of that plea is on the finding of dominance and not directly on how the markets were defined.[228]

3.2.6. Alternatives for the SSNIP-test

Academic literature has proposed some alternatives for the SSNIP-test such as the a Small but Significant Non-transitory Increase in Cost-test (SSNIC-test) or a Small but Significant Non-transitory Decrease in Quality-test (SSNDQ-test).[229] These alternative tests overcome some of the problems associated with how to deal with the zero-pricing of one side of the market. There are problems with using the SSNIP-test both on the side of the platform for which the product is offered for free and the side of the platform that is charged.[230]

For social media platforms, which offer their services in exchange of the data collected rather than a monetary transaction, the SSNIC-test could be applied in such a way that the increase in cost would be an increase in the data collected or the length of how long the data is kept. Alongside costs associated with the data provided by the users, the information costs, the cost may also take the form of an attention cost, which is the subsidized users exposer to advertisements.[231]

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[226] Jones, Sufrin, Dunne (n26), 121; AT.39740 – Google Search (Shopping) Commission Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area C(2017) 4444 final, [157-160].
[227] Action brought on Case T-612/17 – Google and Alphabet v Commission (Case T-612/17) [2017] OJ C 369/37.
[228] Action brough on Case T-604/18 – Google and Alphabet/Commission (n4).
[229] Mandrescu, Zero-Pricing (n188), 250-255.
[230] Björkroth, Mylly, Vuorinen (n32), 319-320.
[231] Mandrescu, Zero-Pricing (n188), 250.

An equivalent to the *Cellophane fallacy*, however, could become an issue here. The Cellophane fallacy refers to situations where the test is applied to a price level, which is not competitive, i.e. either to too high prices in the case of a monopolized product/service or to too low prices in the case of the product/service being subject to predatory pricing.[232] The risk with the cellophane fallacy is that the market would be defined either too broadly (higher than competitive level pricing) or narrowly (lower than competitive level pricing). With social media platforms the same could occur with a monopolized product obtaining already so much data from its users that they would be willing to move to a new competitor, who is not a true competitor for the services provided by the dominant undertaking. The problematic question then becomes: how would the 5-10% increase in either information or attention costs be measured?

3.3. Dominance

Dominance / Dominant position is often equated with the concept of significant or substantial market power.[233] This equation is found not only in academic literature, but also in the Guidance on the Commission's Enforcement Priorities, where the definition of market power to a large degree reflects the definition of dominant position.[234] A social media platform can either be found to have a dominant position, and thus be subject to Article 102 TFEU, or to not hold such a position; there are no degrees of dominance in this relation. The Court has referred to the concept of *super dominance*; however, this does not affect the analysis of whether Article 102 is applicable, but rather the degree of market power affects the effects of the abusive conduct.[235] As the Court has clarified in its case law, dominance itself is not prohibited under EU law, but instead the undertaking with a dominant position has special responsibilities.[236] Thus the below described assessment of dominance in relation to social media platforms does not make all actions taken by an undertaking that holds a dominant position contrary to Article 102 TFEU. Further, a fresh analysis of the dominant position needs to be made in each case; the finding of dominance in previous decisions

[232] Whish, Bailey, (8th edn) (n83), 32-33.
[233] Andrea Coscelli, Geoff Edwards, 'Dominance and market power in EU competition law enforcement' in Ioannis Lianos, Damien Geradin (eds), *Handbook in European Competition Law* (Edward Elgar Pub. Ltd. 2013), 352.
[234] Coscelli, Edwards (n233), 352.
[235] Case C-549/10 P *Tomra Systems ASA and Others v European Commission* [2012] ECLI:EU:C:2012:221, [39]; C-52/09 *TeliaSonera* (n93), [81-82].
[236] Case 322/81 NV Nederlandsche Baden-Industrie Michelin v Commission of the European Communities (n163), [57]; O'Donoghue, Padilla (n152), 141.

cannot override the need to evaluate (again) whether the social media platform holds a dominant position in the relevant product, geographical and temporal market.[237] If the conclusion is that the social media platforms holds a dominant position in the relevant market then the investigation should move to examine whether the conduct in question is abusive.[238]

Market power is defined in most text books in the line of "market power exists where a firm has the ability profitably to raise prices over a period of time, or to behave analogously for example by restricting output or limiting consumer choice."[239] As dominance has not been defined in the wording of Article 102 TFEU, two different models for dominance have emerged: a structuralist model and a behavioral/dynamic model. Of these models the behavioral model reflects the position that the Court of Justice has taken in its early case law. The behavioral model is in essence the idea that dominance is the ability to harm instead of a substantial and durable market power as seen in the structuralist model.[240]

According to the settled case law of the Court of Justice, in determining whether an undertaking holds a dominant position, it is important to not only define the relevant market but also "to define the substantial part of the [internal] market in which the undertaking may be able to engage in abuses which hinder effective competition."[241] This thesis will not discuss the question of substantial part of the internal market in detail as being online most social media services are accessible from different Member States, and are commonly used in a number of Member States. The Commission concluded in 2014 in the *Facebook/WhatsApp*-merger decision that "social media networking services market is EEA-wide, if not worldwide."[242] On the contrary, according to that decision, for the online advertising market, the geographic market should be delineated in line with national or linguistic borders.[243] While the assessment of what is considered to be a substantial part of

[237] Joined Cases T-125/97 and T-127/97 The Coca-Cola Company and Coca-Cola Enterprises Inc. v Commission of the European Communities [2000] ECLI:EU:T:2000:84, [81-82].
[238] Daniel Mandrescu, 'Applying EU competition law to online platforms: the road ahead – Part 2' (2017) 38(9) European Competition Law Review 410, 414.
[239] Whish & Bailey (8th edn) (n83), 43.
[240] Nazzini (n97), 327-329.
[241] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Me- diaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998] ECLI:EU:C:1998:569, [32]; Case C-242/95 GT-Link A/S v De Danske Statsbaner [1997] ECLI:EU:C:1997:376, [36].
[242] Case M.7217 – Facebook/WhatsApp (n9), [68].
[243] Case M.7217 – Facebook/WhatsApp (n9), [83].

the internal market should be done on an case-by-case basis,[244] a single Member State may be considered to constitute a substantial part of the internal market.[245] Thus, determining whether the condition of substantial part of the internal market is fulfilled should pose no or minimal legal difficulties, when making concrete assessments in relation to social media platforms.

3.3.1. Guidance on the Commission's Enforcement Priorities

The Commission has mentioned three factors which it will specifically take into account in assessing market power: i) market position and competitors, ii) future expansion and potential competitors, and iii) countervailing buyer power.[246] These factors or steps reflect those set out by the ECJ in case law.[247]

With market position and competitors the Commission is mostly referring to the market shares of the undertaking in question and the market shares of competitors. Market shares are a starting point, but typically the Commission also considers all other factors which may impact the undertakings ability to act without constraints.[248] Market shares below 40 % are, however, indicative of lack of market power and thus a dominant position.[249] Market shares can be measured either in value or in volume.[250] The Commission has used in the past for example the number of subscribers and units shipped to calculate market shares.[251] While the Commission often relies on high market shares, when assessing dominance, nothing in theory prevents the commission from making its assessments solely based on other factors, if calculating market shares is difficult for social media services due to their nature.[252]

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[244] Rhodi Thompson QC, Christopher Brown, Nicholas Gibson, 'Article 102' in David Bailey, Laura Elizabeth John (eds), *Bellamy & Child European Union Law of Competition* (8th edn Oxford University Press 2018), 863.
[245] See for example: Case 7/82 Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities [1983] ECLI:EU:C:1983:52, [44-45]; Thompson, Brown, Gibson (n44), 863.
[246] Guidance on the Commission's enforcement priorities (n126), [12].
[247] O'Donoghue, Padilla (n152), 143.
[248] Guidance on the Commission's enforcement priorities (n126), [13-15].
[249] Guidance on the Commission's enforcement priorities (n126), [14].
[250] Market Definition Notice (n125), [53-55].
[251] Jones, Sufrin, Dunne (n26), 333.
[252] Ninette Dodoo, Frances Dethmers, 'The abuse of Hoffmann-La Roche: the meaning of abuse of dominance under EC competition law' (2006) 27(10) European Competition Law Review 537, 542.

The assessment of dominance should not be restricted to the existing market situation, but rather the possible expansion of actual competitors and possible entry by potential competitors should also be taken into consideration. One matter considered by the Commission is barriers to entry and expansion. The barriers of entry and expansion can be either legal barriers or advantages that the dominant undertaking enjoys. According to the market definition notice these can include among others significant investments made by the undertaking or "impediments […] resulting from network effects faced by customers in switching to a new suppliers."[253]

Countervailing buyer power refers to the 'constraints imposed by the bargaining strength of the undertaking's customers".[254] The countervailing buyer power can occur in a monopsony situation, in which the market has only one buyer, or in a situation, where there are several customers. The constraints imposed may either be related to the price of the product or to the other terms of condition.[255] The General Court has referred to the need to consider the economic power of purchasers, which could counterbalance the power of the supplier, already in 1992 in the *Italian Flat Glass* case.[256]

3.3.2. CJEU's interpretation of 'dominant position'

The definition of 'dominant position' (or dominance) was set out in *United Brands*, and has since been repeated in case law.

> *"The dominant position […] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."*[257]

[253] Guidance on the Commission's enforcement priorities (n126), [16-17].
[254] Guidance on the Commission's enforcement priorities (n126), [12].
[255] O'Donoghue, Padilla (n152), 166-167.
[256] Joined Cases T-68/89, T-77/89 and T-78/89 Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities [1992] ECLI:EU:C:1992:38, [366].
[257] Case 27/76 United Brands Company and United Brands Continentaal BV v Commission of the European Communities [1978] ECLI:EU:C:1978:22, [65]; see also Case 85/76 Hoffmann-La Roche (n184), [38]; C-52/09 TeliaSonera (n93), [23].

While the abovementioned phrasing is a settled formulation, the Court has elaborated on the meaning of dominant position later on. In *Hoffmann-La Roche*, the Court clarified that a dominant position does not require a monopoly or a quasi-monopoly but instead that the undertaking in question has "*an appreciable influence on the conditions under which […] competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."*[258] Thus a dominant position can exist in markets, such as the market for social media, that has more than one undertaking.

3.3.3. Role of Market Shares in social media markets

While assessments of dominance and market power are made on a case by case basis,[259] market shares of over 50%, save in exceptional circumstances, lead to the presumption of dominance.[260] Regardless of this presumption of dominance the Commission takes into account other factors than market shares,[261] as it did in *Google Search (Shopping)*. In *Google Search (Shopping)* the market shares by volume in the general search services, with the exception of Czechia and Slovenia, were above 85% between 2008 and 2016.[262] High market shares have, however, been considered to be more important than other factors, even though the importance of market shares in assessing dominance has declined in recent years.[263] *William Spence* proposes that when measuring the market shares of social networking services, such as Facebook, attention should be given to three different sub-sections: the user market, the advertising market and the data market.[264] Among others, *Mäihäniemi* has suggested that for zero-priced products information and attention costs can be used as a substitute for prices in determining the market shares of the undertaking.[265]

The traditional means of measuring market power, such as market shares, are not necessarily well suited for social media platforms, which offer some of their products for free. Using

[258] Case 85/76 *Hoffmann-La Roche* (n184), [39].
[259] Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission (*n237*)*, [81-82].
[260] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359 ECLI:EU:C:1991:286, [60].
[261] Guidance on the Commission's Enforcement Priorities (n126), [15].
[262] AT.39740 – Google Search (Shopping) (n226), [283].
[263] Ashti Battê, 'The case of Google: assessing market power in the digital economy through big data' (2020) 41(8) European Competition Law Review 416, 416-417.
[264] William Spence (n31), 700.
[265] Beata Mäihäniemi, Imposing access to information in digital markets based on competition law: in search of a possible theory of harm in the EU Google search investigations (PhD Thesis, University of Helsinki 2017), 51-52; Beata Mäihäniemi (2020) (n35), 66.

stock-values instead of market shares could be a possibility, but is not a perfect solution for determining market position. Stock-values reflect the company as a whole and therefore are not necessarily indicative of the power that the company has in the market in consideration.[266] Many undertakings have a number of different services, including the online platforms, that they provide, but the undertaking's market position in the different markets may differ.[267] While the information concerning the different sides of the platform are relevant for finding dominance, information concerning an unrelated market is likely to have minimal or no impact on the finding of dominance. Further, as was seen during the spring of 2021, stock prices may fluctuate without any reason relating to the operations of the company or changes in their market share, but rather due to speculations and encouragements to purchase the stock of the company on social media sites. Further, drops in stock values may be temporary reactions to scandals, as illustrated by the Facebook Cambridge Analytica scandal,[268] during which the value of Facebook's share decreased by 24%, but within less than 2 months the stock value was back to the level dating prior to the scandal.[269] This makes the use of stock values an unreliable alternative to other forms of calculating market shares.

3.3.4. Barriers to entry and expansion

Legal barriers can take a number of forms from state monopolies to granting exclusive rights to particular undertakings.[270] Within the relevant markets for social media platforms, intellectual property rights may be a barrier to entry of a legal nature.[271] As an example

[266] Antonio Capobianco, Anita Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2018) 9(1) Journal of European Competition Law & Practice 19, 24.
[267] For example while Microsoft has held a dominant position in the client PC operating systems market, it has not achieved such dominance in the general search engine services market with its Bing search engine. For client PC operating systems market COMP/C-3/37.792 Microsoft Commission Decision relating to a proceeding under Article 82 of the EC Treaty C(2004)900 final, [471-472], the assessment of dominance was held in T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECLI:EU:T:2007:289, [387]; for the lack of dominance in the general search services market AT.39740 – Google Search (Shopping) (n226)
[268] Spence (n31), 708.
[269] Anthony Mirhaydari, 'Facebook stock recovers all $134B lost after Cambridge Analytica data scandal' (CBS News, 10 May 2018) date accessed 16 May 2021, accessible at https://www.cbsnews.com/news/facebook-stock-price-recovers-all-134-billion-lost-in-after-cambridge-analytica-datascandal/.
[270] Jones, Sufrin, Dunne (n26), 346.
[271] O'Donoghue, Padilla (n152), 156.

Facebook has been granted over 1300 patents in 2019 in the US.[272] Besides patents, which need to be applied for and thus examined in more detail, the copyrights of dominant social media platforms may create a barrier to entry for new entrants. Social media platforms are also likely to benefit from superior technology, reputation, opportunity costs, and network effects to an extent that the benefit becomes a barrier to entry and expansion.

Bedre-Defolie and Nitsche have identified 6 factors that foster the tipping of markets and 6 factors that mitigate the tipping of markets.[273] Market tipping refers to the situation, where the dominant undertaking has at least almost all of the market to themselves.[274] In a tipped market the market leader thus has a dominant position, but all markets with a dominant undertaking cannot be considered as tipped markets. The factors identified by Bedre-Defolie and Nitsche are thus also important to take into consideration when assessing dominance of any firm. According to Bedre-Defolie and Nitsche positive network effects, single-homing and switching costs, free services, data-enabled learning, trust and platforms' complementary offerings are fostering factors,[275] while negative network effects, user heterogeneity, 'local' network effects, multi-homing, horizontal differentiation, and innovation are mitigating factors.[276]

The high market shares may also be counterbalanced, especially in digital markets, by other aspects such as innovation competition. Through new innovations and improvements to products by competitors an undertaking with high market shares may quickly see those reduced if it cannot keep up with its competitors.[277] In *Cisco*, the General Court considered that *"the fact that the services are offered free of charge is a relevant factor in assessing the market power of the new entity."*[278] While acknowledging that in that case users did not face any technical or economic constraint to switch providers, the Court elaborated that new

[272] H. Tankovska, 'Number of patents granted to Facebook in the U.S. 2013-2019' (Statista, 27 January 2021) accessed 14 May 2021, accessible at https://www.statista.com/statistics/897785/facebook-patents-usa-registered/.
[273] Özlem Bedre-Defolie, Rainer Nitsche, 'When Do Markets Tip? An Overview and Some Insights for Policy' (2020) 11(10) Journal of European Competition Law & Practice 610, 611, 616.
[274] Bedre-Defolie, Nitsche (n273), 610.
[275] Bedre-Defolie, Nitsche (n273), 611.
[276] Bedre-Defolie, Nitsche (n273), 616.
[277] Coscelli, Edwards (n233), 359.
[278] Case T-79/12 Cisco Systems Inc., Messagenet SpA v European Commission [2013] ECLI:EU:T:2013:635, [73].

entrants are *de facto* restricted from freely choosing their pricing policy and that making users pay for the service would run the risk of losing users to competitors.[279]

While the focus is on the market share of the undertaking in question, the Commission, and the Court, take into consideration the market shares of competitors, when assessing dominance.[280] The General Court has accepted the Commission's findings of dominance for undertakings with market shares below 50%, when the competitors' market shares have been significantly lower.[281] Even in cases, where the undertaking has a significant market share, the Commission has investigated the market shares of competitors.[282]

In *Google Search (Shopping)* the Court considered that a number of barriers to entry were present in the market for general search services. The Commission considered significant investments of time and resources[283], the number of queries and the data collected through it[284], matching investments to improve the product,[285] the existence of positive feedback effects on both sides of the two-sided platform[286] to be barriers to entry and expansion in the general search services market. A number of the abovementioned factors are also relevant with regard to the social media services.

Among others factors, the Commission considered indirect network effects, when assessing dominance in the general search services market:

> "The indirect network effects stem from the link between the attractiveness of the online search advertising side of a general search engine platform and the revenue of that platforms. The higher the number of advertisers using an online search advertising service, the higher the revenue of the general search engine

[279] Case T-79/12 *Cisco* (n278) [73]. It should be noted that the *Cisco* judgment considered the assessment of market power in relation to a merger case and not an Article 102 TFEU case.
[280] Thompson, Brown, Gibson (n244), 875-876.
[281] See for example Case T-219/99 *British Airways plc v Commission of the European Communities* [2003] ECLI:EU:T:2003:343, [211], [225]. British Airways held a market share of 39,7%, whilst its nearest competitors market shares in the relevant market were between 5,5% and 3,3%.
[282] In the *Google Search (Shopping)* decision the Commission has noted the market shares of Yahoo! and Bing, which are competitors of Google in the market for general search services. AT.39740 – Google Search (Shopping) (n226), [279] table 2.
[283] AT.39740 – Google Search (Shopping) (n226), [286].
[284] AT.39740 – Google Search (Shopping) (n226), [287-288].
[285] AT.39740 – Google Search (Shopping) (n226), [291].
[286] AT.39740 – Google Search (Shopping) (n226), [292].

> platform; revenue which can be reinvested in the maintenance and improvement of the general search service so as to attract more users. […]"[287]

The same logic could be applied to social media platforms with replacing the general search services platform by the users of the social media platform and the online search advertising side of a general search engine platform with the advertising side of the social media platform.

In *Cisco* the General Court considered that due to the lack of technical and economic constraints network effects did not constitute a barrier to entry.[288] As has been pointed out in papers addressing market power and the impact of the General Court's Cisco judgment, this means that in markets with zero-priced services, such as social media services, multi-homing needs to be taken into consideration.[289] The Commission also considered multi-homing in Google Search (Shopping), but came to another conclusion than the General Court in Cisco despite the lack of technical and economic constraints for switching and therefore multi-homing. The Commission's finding was supported by studies on the infrequency of multi-homing by those, who use Google as their prevalent search engine, and the trust that users have towards the relevance of Google's research results.[290] Depending on the scope of the market definition with regard to social media services multi-homing is likely to reduce the barrier formed by network effects to minimal. This is due to the fact that unlike in the general search services the vast majority of users multi-home. According to data from 2020 96% of Facebook's 16-64 year old users also use another social media service and thus multi-home.[291]

In the sphere of social media services barriers to entry and expansion have an important role as many of the services are currently being offered free of charge for at least one side of the market. If the market is defined to include multiple sides – for example the users and the advertisers – then the partly gratuitous nature of the market should be taken into

[287] AT.39740 – Google Search (Shopping) (n226), [296].
[288] Case T-79/12 *Cisco* (n278), [75-84].
[289] Ashti Battê (n263), 418.
[290] AT.39740 – Google Search (Shopping) (n226), [306-315].
[291] Egidijus Barcevičius, Dovydas Caturianas, Andrew Leming, Gabija Skardžiūtė, 'Study on "Support to the Observatory for the Online Platform Economy" Analytical Paper #7 "Multi-homing: obstacles, opportunities, facilitating factors"' (Observatory on the Online Plaform Economy, 2021) accessible at https://platformobservatory.eu/app/uploads/2021/01/AP-7-Multihoming-Jan-2021-EC-final-for-pbl.pdf, p. 29.

consideration based on the abovementioned *Cisco* case law. On the other hand, if multiple markets are defined – i.e. a market for social media services and a separate but related market for targeted advertising, the gratuitous nature of the social media market influences the market for targeted advertising as the vast amount of data obtained by the platform forms a barrier to entry for potential competing undertakings. The data forms a barrier to entry and expansion as competing undertakings would need to make massive investments in order to obtain the same amount of users on the other side of the platform in order to obtain the same amount of data, which is required for the efficient targeted advertising.

While users would be able to switch to using a new platform – or multi-home by using several different platforms – the market may have already 'tipped' and users would not receive as much from the new platforms to create new accounts. Creating a new social media platform in most cases takes only a few clicks and no monetary contributions. Also, for those users, who do not wish to multi-home, deleting an existing profile is relatively easily done on most platforms. While the creation of the new account is a relatively quick and easy process, the new account on the other platform does not automatically have the same settings, content, followings, and page likes etc. that the previous profile already had. This on the other hand increases the switching-costs, which at first glance seem to be minimal.[292] With regard to markets tipping, it has been found in academic literature that "many social media markets have tipped for Facebook" in Europe.[293]

'Costs and impediments […]faced by customers in switching to a new supplier' are also identified by the Commission as one group of barriers to entry and expansion.[294] Here, one issue to consider is, with privacy considerations being brought increasingly more to the public's attention, whether users have preferences as to whether they prefer to continue to grant more data to one undertaking or using several different platforms and giving fragments of their data to the new undertakings entering the market. If the users are more willing to grant their data to one company, users could possibly be inclined to stay on the social media sites that they are already using due to the switching costs associated with the creating a new profile. Another question in these lines, which will not be addressed in more detail here, is

[292] Bedre-Defolie, Nitsche (n273), 613-614.
[293] Bedre-Defolie, Nitsche (n273), 610.
[294]Guidance on the Commission's enforcement priorities (n126), [17].

how likely users are going to trust the data policies of new entrants,[295] even if they promise an improved quality of data protection. If users have a lack of trust towards all social media platforms, due to the past conduct of existing platforms, this gives an competitive advantage for the already established undertakings.

3.3.5. Dominance in which market?

As Mandrescu has pointed out, it is unclear what the outcome should be in situations, where the market power of the undertakings differ. Both using an average of the undertakings market power in the relevant markets or requiring dominance on all sides pose problems. Using the average can lead to enforcement prior to dominance, whilst requiring dominance on all sides can lead to the underenforcement of anticompetitive conduct.[296]

While the concern raised by Mandrescu is important and clarification is required, the situation is not necessarily as grave as it might seem at first. The Court has interpreted the requirement of dominance for the application of Article 102 TFEU so that the dominance does not always need to be found in the market where the abusive conduct takes place or where the effects of that conduct are felt.[297] In *TeliaSonera* the Court stated the following:

> *"[…] in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated, market and having effects on that associated market can be justified by special circumstances*"[298]

In *TeliaSonera* the 'distinct, but associated, markets' in question, where the wholesale market for ADSL input services and the retail market for broadband connection services to end users.[299] In that case TeliaSonera was characterized as a 'vertically integrated dominant undertaking',[300] and in *Tetra* Pak, where the rule emerges from,[301] the two distinct markets

[295] For more on the role of trust and data in EU competition law in general: Wasastjerna (n34), 139-140.
[296] Mandrescu, 'Applying EU competition law to online platforms: the road ahead – Part 2' (n238), 414.
[297] Thompson, Brown, Gibson (n244), 864-865.
[298] C-52/09 *TeliaSonera* (n93), [86].
[299] C-52/09 *TeliaSonera* (n93), [86].
[300] C-52/09 *TeliaSonera* (n93), [87].
[301] Case C-333/94 P Tetra Pak International SA v Commission of the European Communities [1996] ECLI:EU:C:1996:436, [27].

in question[302] were very similar to each other and the products "were used for the same basic liquid products"[303] making them to some extent substitutes of each other. The Court's statement is, however rather open and could be understood so that in the case of multi-sided platforms, the conduct on the non-dominant side (such as advertising) could be scrutinized under Article 102 TFEU by virtue of its connection, through *inter alia* network effects, to the dominant market (such as the provision of social media services). Thus all conduct by dominant social media platforms could be assessed in light of Article 102 TFEU even if distinct markets are defined instead of one market.

[302] *Tetra Pak* was concerned with the markets for carton packaging for liquid and semi-liquid food products. A division was made between the markets for aseptic and non-aseptic packaging.
[303] Case C-333/94 P *Tetra Pak* (n301), [29].

4. THE DIGITAL ERA – A NEW FUTURE?

A number of different reports and recommendations have been published in the past years by Member State governments, the European Union, and various national competition authorities. The reports have had a broad focus to the topic of EU competition law for the digital era, but have also included recommendations relevant to the focus of this thesis. Therefore, some of these reports and in particular the proposals and recommendations put forward in them have been selected to be at the focus of this thesis. In addition to these reports, the this Chapter will also analyze the impact of other measures, such as the Digital Markets Act, and possibilities some of which have been raised by prominent European politicians.

4.1. Review of reports and relevant recommendations

The German contribution to the discussion on the discussion is the final report of the Commission 'Competition Law 4.0.'[304], published in September 2019. The report includes a total of 22 recommendations. Two of the recommendations are particularly relevant for how the two-sided nature should be taken into account. In essence, the Commission 'Competition Law 4.0' recommends that 1) the Market Definition Notice should be updated[305] and 2) "a separate Notice on market definition and the definition of market power with respect to digital platforms be published."[306]

Another EU Member State that has actively engaged in the discussion on the modernization of EU competition law is the Netherlands. During the spring of 2019 the State Secretary for Economic Affairs and Climate Policy[307] Mona Keijzer issued a Letter to the House of Represenatives which concerned policy proposals on 'Future-proofing of competition policy in regard to online platforms'. This Letter to Parliament was followed by the publication of

[304] "The Commission 'Competition Law 4.0' was set up by the Federal Minister for Economic Affairs and Energy in September 2018, and tasked with drawing up recommendations for the further development of EU competition law in light of the new challenges of the digital economy." Commission 'Competition Law 4.0' report (n19), 5.
[305] "The Commission 'Competition Law 4.0' recommends that the Commission Notice on the definition of the relevant market be updated." Commission 'Competition Law 4.0' report (n19), 30.
[306] Commission 'Competition Law 4.0' report (n19), 31.
[307] The State Secretary is a junior member of the government.

'Dutch Position on competition policy in relation to online platforms', which reflects the content presented by State Secretary Keijzer in her Letter to Parliament.[308]

The Dutch position is that Article 102 is suited for the digital markets due to its flexible nature and therefore there is no need to amend Article 102 TFEU.[309] The Dutch government considers, similarly to the German report, that the Commission guidelines, including the Market Definition Notice, should be amended or new guidelines should be published.[310] While the Commission 'Competition Law 4.0'-report is detailed and extensive in length, the Dutch documents do not go into the same depth of analysis.

The Benelux Competition authorities also issued a joint memorandum in October 2019 in which, among other things, they requested updated guidelines on "how e.g. the role of data, consumer behaviour and network effects should be taken into account".[311] In addition to the Benelux Competition authorities, the Nordic Competition Authorities[312] issued a Joint Memorandum in September 2020, where they joined the views of other by stating "the current competition law framework is capable of handling most anti-competitive behaviour in the digital economy".[313] The Nordic report also calls for guidance from both the Courts as well as the Commission.[314] Specific guidance is asked on for example market tipping.[315]

The European Commission has also taken an interest in this topic and then Commissioner for Competition Margarethe Vestager requested a report from Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer[316]. In the so-called Crémer-report,

[308] Future-proofing of competition policy in regard to online platforms -letter (n20); 'Dutch position on competition policy in relation to online platforms' (Factsheet, Ministry of Economic Affairs and Climate Policy, 11 October 2021) accessible at https://www.government.nl/documents/publications/2019/10/11/dutch-position-on-competition-policy
[309] Future-proofing of competition policy in regard to online platforms -letter (n20), 6.
[310] Future-proofing of competition policy in regard to online platforms -letter (n20), 8; 'Dutch position on competition policy in relation to online platforms' (n308), 1.
[311] Jacques Steenbergen, Martijn Snoep, Pierre Barthelmé, 'Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world' (Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, 2 October 2019) accessible at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf , 6.
[312] Konkurrensverket (Swedish Competition Authority), Samkeppniseftirlitid (Icelandic Competition Authority), Danish Competition and Consumer Authority, Kilpailu- ja kuluttajavirasto (KKV), Konkurransetilsynet (Norwegian Competition Authority).
[313] Nordic NCA-report (n22), 11-12.
[314] Nordic NCA-report (n22), 12.
[315] Nordic NCA-report (n22), 12.
[316] Competition policy for the digital era -report (n18), 2.

Competition policy for the digital era, the authors do not see a need to amended Article 102 TFEU or introduce new provisions to the TFEU.[317] The report puts forward the idea that the role of market definition should be minimized and more emphasis should be added to the assessment of the conduct.[318] The European Commission has already moved forward with some of the initiatives put forward in the different reports as it has begun the process of re-evaluating the Market Definition Notice.

4.2. Analysis of the proposed measures

4.2.1. General Comments

One issue, which arises with the proposed measures, is the nature of notices. As already stated above in section 2.2.3 Soft law, Commission notices and guidelines are not binding on other actors than the Commission itself. So while the new notices might give some clarity into how the Commission understands for example market definition in cases involving two-sidedness, it does not provide complete legal certainty to undertakings, who are evaluating whether they are considered to have a dominant position or not and make an assessment of their planned conduct in that light.

The need for a clear understanding of how the two-sided nature should be taken into account under Article 102 TFEU is important due to the de-centralized enforcement of competition law[319] as well as the direct horizontal effect, which Article 102 TFEU has.

Regulation 1/2003 introduced a decentralized method of European Union competition law enforcement by granting the NCAs powers to apply Article 102 TFEU.[320] Through this decentralization a NCA can apply Article 102 TFEU, alone or alongside equivalent national provisions.[321] If the decision given by the NCA is contested, it should be appealed according to the relevant domestic procedures, i.e. the European Court of Justice does not have the powers to hear judicial review cases from the NCAs even if they concern the application of

[317] Competition policy for the digital era -report (n18), 3.
[318] Competition policy for the digital era -report (n18), 46.
[319] Regulation 1/2003 (n90), Article 5; Katalin J Cseres, 'Rule of Law Values in the Decentralized Public Enforcement of EU Competition Law' in András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member State Compliance* (2017 Oxford University Press), 183-184.
[320] Regulation 1/2003 (n90), Article 5; Katalin J Cseres (n319), 183-184.
[321] Regulation 1/2003 (n90), Article 3(1) and 5.

EU law.[322] Thus, the NCAs should have a clear and uniform understanding of how the two-sided nature of social media platforms should be taken into account, to ensure the correct application of Article 102 TFEU. Further, national courts should also know how the two-sided nature is to be taken into account during the judicial review. National courts are able to ask preliminary reference questions from the Court of Justice on the interpretation of EU law. However, only the court of last instance on the national level,[323] is obliged to send a preliminary reference question, if the matter of EU law is unclear.[324] This possibility, or obligation, to refer questions concerning the interpretation of Article 102 TFEU is not available to the NCAs.[325] The NCAs are able to instead consult the Commission.[326]

Regulation 1/2003 also includes provisions on the division of tasks and cooperation between the NCAs and the Commission. These include the obligation to inform the Commission "prior to or without delay after commencing the first formal investigative measure" when applying Article 102 TFEU.[327] This in combination with the fact that once the Commission initiates proceedings under Article 102 TFEU the NCAs no longer have the competence to apply Article 102 TFEU to the same case,[328] would suggest that NCAs would not conduct investigations concerning social media platforms due to the Commission's interest in them as well as their EU-wide geographic market. This is not necessarily the case. National Competition Authorities have issued fines against undertakings for abusive conduct on two-sided markets. The Italian Competition Authority issued in May 2021 a fine against

[322] In Article 288 TFEU decisions are classified as legislative acts and on the basis of Article 263 TFEU the CJEU shall review the legality of acts issued by the EU institutions. Article 263 TFEU nor any other provision does not grant the CJEU powers to review the legality of NCA decisions regarding the application of Union law.
[323] The precise formulation in Article 267 TFEU is: "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law".
[324] TFEU (n3), Article 267.
[325] The Court has extensive case law for what can be considered as 'court or tribunal' within the meaning of Article 267 TFEU. According to settled case-law, "the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent" when assessing whether the body sending a reference for a preliminary ruling is a 'court or tribunal'. (Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413, [23]) The Court has twice considered the nature of competition commissions and has twice concluded that they are not 'courts or tribunals' within the meaning of Article 267 TFEU. See Case C-53/05 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECLI:EU:C:2005:333 (Greece), and Case C-462/19 *Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco) and Others* [2020] ECLI:EU:C:2020:715 (Spain).
[326] Regulation 1/2003 (n90), Article 11(5).
[327] Regulation 1/2003 (n90), Article 11(3).
[328] Regulation 1/2003 (n90), Article 11(6).

Alphabet and Google for abuse of dominant position in relation to practices in the Google App Store. The abusive conduct by Google was the refusal to allow an Italian undertaking to develop a compatible app with Google Auto.[329] This demonstrates how, while platforms may be multinational, their conduct may still be the concern of national competition authorities rather than the European Commission.

National courts in Member States may need to assess conduct of social media platforms, and other undertakings who have chosen a two-sided business model, regardless of whether the NCAs issue infringement decisions. While EU competition law is centered around public enforcement,[330] private enforcement of EU competition law is not unheard of.[331]Article 102 TFEU has direct horizontal effect meaning that it can be relied upon by private parties against other private parties in national court proceedings.[332] Thus for example in deciding whether an injunction or damages should be granted the national judge(s) need to assess whether the conduct is contrary to Article 102 TFEU.[333]

4.2.2. Revision of the Market Definition Notice

The Commission opened an evaluation into whether the Market Definition Notice from 1997 is accurate and up-to-date, as well as whether the approach it sets out is clear, consistent, and accessible regardless of the industry in question. The Commission has by May 2021 published summaries of stakeholder consultations and NCAs contributions to the Evaluation

[329] Autorità Garante della Concorrenza e del Mercato, 'A529 - ICA: Google fined over 100 million for abuse of dominant position' (Press Release, Italian Competition Authority, 13 May 2021) date accessed 16 May 2021, accessible at https://en.agcm.it/en/media/press-releases/2021/5/A529.
[330] Tânia Luísa Faria, Guilherme Neves Lima, 'Abuse of a dominant position in the digital economy in the EU and the US: the Big Four and the war of the worlds' (2020) European Competition Law Review 41(3) 144, 147; Geradin, Layne-Farrar, Petit (n145), 321-322.
[331] Preliminary references have been made in national proceedings concerning the private enforcement of Article 102 TFEU. The proceedings can either be follow-on cases or standalone actions. As an example of a follow-on case see Case C-637/17 *Cogeco Communications Inc. v Sport TC Portugal SA, Controlinveste-SGPS SA, NOS-SGPS SA* [2019] ECLI:EU:C:2019:263.
[332] The direct horizontal effect of Article 102 TFEU's predecessor Articles have been confirmed among others in C-282/95 *Guérin Automobiles v Commission* and C-453/99 *Courage and Crehan*, whilst from the more recent judgments the Court has confirmed the direct horizontal effect of Article 102 TFEU in C-724/17 *Skanska Industrial Solutions and Others* and C-557/12 *Kone and Others*. Case C-724/17 *Skanska Industrial Solutions Oy and Others* (n100), [24]; Case C-557/12 *Kone and Others* (n100), [20]; Case C-453/99 *Courage and Crehan* (n100), [23]; Case C-282/95 P *Guérin Automobiles* (n100), [39].
[333] Devroe, Cauffmann, Bernitz (n94) , 96-99.

of the Market Definition Notice.[334] In these contributions the majority of the NCAs had stated that the Market Definition Notice is a "useful tool for companies and their advisers as well as for competition authorities, when considering how to define relevant markets in antitrust and merger assessments."[335] The stakeholders provided similar comments. The stakeholders especially emphasized the legal certainty brought by the Market Definition Notice.[336] Thus, despite the restricted bindingness of the Notice,[337] those impacted most by the Notice seem to agree that it provides legal certainty.

While two-sided markets have already existed in 1997 – for example in the form of shopping malls and media – the economics of two-sided markets had yet to be brought to the forefront. More importantly in 1997 two-sided platforms found online had not yet intruded the daily lives of EU citizens nor had undertakings operating such platforms become some of the largest companies world-wide. The current Market Definition Notice is silent as to the question of, whether a market can exist for a free service, and how should such a market be defined. Taking the discussion covered in Chapter 3 into consideration, the market definition should clarify the Commission's approach to zero-priced markets. While considering the Market Definition Notice to be a useful tool, a significant number of NCAs pointed out that the Market Definition Notice should give guidance on both multi-sided platforms as well as zero-priced products.[338]

[334] European Commission, 'Evaluation of the Commission Notice on the definition of the relevant market for the purposes of Community competition law' (European Commission) accessed 16 May 2021 accessible at https://ec.europa.eu/competition-policy/public-consultations/closed-consultations/2020-market-definition-notice_en.
[335] 'Summary of the contributions of the National Competition Authorities to the Evaluation of the Market Definition Notice' (European Commission, 22 December 2020) date accessed 16 May 2021 accessible at https://ec.europa.eu/competition/consultations/2020_market_definition_notice/summary_of_contributions_NCA.pdf, 3.
[336] 'Summary of the stakeholder consultation to the Evaluation of the Market Definition Notice' (European Commission, 22 December 2020) date accessed 16 May 2021, accessible at https://ec.europa.eu/competition/consultations/2020_market_definition_notice/summary_of_contributions_stakeholders.pdf, 28.
[337] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* (n127), [29], [31]; Devroe, Cauffmann, Bernitz (n94), 29.
[338] Summary of the contributions of the National Competition Authorities to the Evaluation of the Market Definition Notice (n335), 4.

4.2.3. Issuance of a New Notice

Commission Notices are in their nature such that they elaborate on the practices of the Commission.[339] As the Notices do not need to go through any lengthy legislative procedure, which takes up time and resources from other institutions, the issuance of a new Notice on the definition of the relevant market and assessment of dominance with respect to digital platforms is an option worth considering.

While a number of issues regarding the definition of the relevant market are likely to be included in the revised market definition notice, it would be helpful for undertakings, national competition authorities, legal practitioners and academics to know how the market is defined when the market has characteristics such as two-sidedness, services offered without monetary payment, and network effects are present.

With issuing a new Notice on how to define markets and assess market power/dominance in cases concerning digital platforms, in addition to the revised Market Definition Notice, the Commission could go more into depth as regards its views to how different types (transaction vs. non-transaction, free-of-charge vs. monetary compensation) of digital platforms should be treated. Further, the Commission could open its approach to when the market needs to be defined, taking into consideration that the Crémer -report[340] proposed diminishing the importance of market definition in assessing dominance.

4.3. Other possibilities

This section includes approaches not envisioned in depth (to the knowledge of the author) in public discussions as well as legislative action taken outside the competition framework, which still may impact the necessity of the proposed new initiatives.

4.3.1. Revision of the Treaties

[339] Devroe, Cauffmann, Bernitz (n94), 28-29; Market Definition Notice (n125), [1]; Guidance on the Commission's enforcement priorities (n126), [2-3].
[340] Competition policy for the digital era -report (n18), 46.

While reports on EU competition law categorically state that the treaty articles on competition law do not need to be altered, in different contexts the idea of treaty revision has arisen.[341] Even if the prompt for Treaty revision arises outside the framework of competition law, that opportunity should be used to consider, whether there is a need to alter Chapter VII of the Treaty on the Functioning of the European Union. As Article 102 TFEU does not define the concept of a dominant undertaking nor relevant market, the treaty article is currently flexible enough to accommodate different approaches to market definition and dominance. Treaty revision is a difficult and lengthy process requiring unanimity of all member states on all matters. The process is governed by Article 48 TEU, which provides for two different mechanisms. If the reform proposal would lead to increased competences of the EU an ordinary revision procedure would be required. There is no legal possibility of revising only specific Articles or Chapters of the Treaties. Instead, the entire treaties would need to be opened for re-examination. Considering the frictions between the Member States in the past years in other aspects of EU law,[342] this process could take considerable time and be unfruitful.

Pinar Akman is among those, who suggest that Article 102 TFEU does not need to be overhauled or rewritten, but instead some of the concepts such as market definition and market power should be rethought.[343] This rethinking of concepts should be done by the Commission (and national competition authorities) and confirmed by the Courts either through appeals to Commission decisions or through preliminary references after decisions of NCAs are considered by national courts.

One of the problems with rewriting the TFEU's competition law provisions or including new provisions concerns legal certainty during the first years after entry into force. Legal certainty under EU law requires that provisions are "clear and precise, and aim to ensure that situations and legal relationships are governed by [Union] law remain foreseeable"[344] and

[341] The latest public comment concerning the possibility of treaty revision was made by German Chancellor Angela Merkel in April 2021 in relation to the EU requiring more competences for health care. In the same speech, Chancellor Merkel referred to previous calls to reform EU competition provisions. Hans von der Burchard, 'Merkel: EU 'probably' needs treaty changes, especially for health policy' (Politico, 21 April 2021) accessed 17 May 2021, accessible at https://www.politico.eu/article/angela-merkel-coronavirus-europe-treaty-changes-health-policy/

[342] For example differences in views of Member States in relation to rule of law.

[343] Pinar Akman (2019) (n95), 589.

[344] Herwig C H Hofmann, 'General Principles of EU law and EU administrative law' in Catherine Barnard, Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press, 2017), 210.

"individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly."[345] Article 102 is rather flexible and open; thus, its scope and boundaries have continued to be defined in the case of the Court of Justice over the past 60 years. While the treaties have changed, the competition law provisions have remained similar allowing the interpretations from previous treaties to carry on into succeeding treaties. If the competition law provisions would be altered drastically or new provisions would be introduced, the legal certainty brought by the extensive case law could be diminished.

4.3.2. *A Segmented Approach*

One alternative is to return back to the times, when the applicable EU competition law rules differed from sector to sector. Until October 2008 varying degrees of the transport section were outside the enforcement regime for competition law. While Article 102 TFEU has always been applicable to the transport sector,[346] the rules concerning enforcement of Article 101 TFEU were different compared to the main rules.[347] Article 103 provides the Council a legal basis to issue regulations or directives, which define 'in the in the various branches of the economy, the scope of the provisions of Articles 101 and 102'.[348] Per usual the Commission is vested with power the to propose such measures to the Council. The Council needs to agree in unanimity on the proposed action under the procedure provided for in Article 103 TFEU.[349] Article 103 TFEU has been used as a legal basis for example to exclude

[345] Hofmann (n344), 210.
[346] Joined cases 209 to 213/84 Criminal proceedings against Lucas Asjes and others, Andrew Gray and others, Andrew Gray and Others and Léo Ludwig and others [1986] ECLI:EU:C:1986:188, [45].
[347] Instead of Regulation 17/62, which preceded Regulation 1/2003, Council Regulation 4056/86 gave the Commission powers to enforce competition law provisions to the maritime transport sector. Certain conduct was excluded from the scope of competition law enforcement until October 2006, when the exclusion for cabotage and 'international tramp vessel services' provided for in Article 32 was deleted. Whish, Bailey (8th edn) (n83), 1025; Regulation 1/2003 (n90), Article 32; Council Regulation (EC)) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJ L 269/1; Council Regulation (EEC) 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJ L 378/4.
[348] TFEU (n3), Article 103(2)(c).
[349]'Special legislative procedure' (Eur-lex) accessed 16 May 2021, accessible at https://eur-lex.europa.eu/summary/glossary/special_legislative_procedure.html

the conduct of liner shipping companies with a combined market share below 30% from the scope of Article 101 TFEU.[350]

Examples of a segmented approach can also be found in the national legislation of Member States. The Finnish Competition Act has a specific provision for defining a dominant market position in the daily consumer goods trade. According to Article 4a of said Act, undertakings with a minimum of 30% market share "shall be deemed to occupy a dominant position"[351], automatically without other factors being weighed in.[352]

What could such a segmented approach be in relation to social media platforms – or in general online platforms? If the legislators would want to have GAFA-type platforms to be automatically subject to Article 102 TFEU without further assessments being carried out, the legislators could consider a provision according to which a sufficiently high market share over a lengthy time period would automatically mean that the undertakings are considered dominant. A lengthy time period would be warranted in the context of online platforms as "high market shares are not necessarily indicative of market power" in markets, which are characterized by short innovation cycles.[353] The criteria could be based on the number of active monthly users, which is an objective criteria, that can be measured equally in all platforms regardless of the pricing structures that the company has implemented.

These segmented approaches could also have anti-competitive consequences. Depending on the possible content and scope, this type of legislation could put those undertakings, who have chosen to conduct their business through an online platform under scrutiny earlier than their offline counterparts would be based on Article 102 TFEU. Platforms, such as AirBnB or the Dutch rental platform Kamernet, that offer (short-term) rental services online could possibly be considered to belong to the same market as traditional rental agencies, which operate through realtors instead of direct interactions between the different sides. In the context of social media platforms this problem is less likely to arise, since the user side of

[350] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L 256/31; Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L 79/1.
[351] Competition Act (No 948/2011) (Finland), 4a§.
[352] Oinonen (n146), 156.
[353] Case T-79/12 *Cisco* (n278), [69].

social media networks does not have true counterparts in the offline world, and offline and online advertising have consistently been considered to belong to separate markets.[354] However, it would seem unproductive to legislate solely on social media platforms due to the wide range of functions currently, and possibly in the future, available on these platforms, which might compete in different markets with other online platforms.

Another option for the segmented approach would be to model it after the German Competition Act.[355] The German Competition Act has two specific features, which could be useful for EU competition law. Firstly, in § 18(2a) the question of whether a market can exist for zero-priced products and services can exist is clearly confirmed in the affirmative. Similarly, what needs to be taken into consideration in assessing dominance in multi-sided markets is stated in § 18(3a). Unlike the EU approach, which expands on the measures required in non-binding measures, the German approach states the factors in binding legislation and thus creates more legal certainty. Secondly, the German Competition Act has a broad prohibition to abuse of dominant market position, similar to that of Article 102 TFEU, in § 19. This is accompanied by sector specific prohibitions of certain conduct by dominant undertakings.[356] Provisions, such as these, would not raise similar problems as legislation, which by objective criteria automatically place an undertaking as a dominant undertaking within the meaning of Article 102 TFEU.

4.3.3. Moving outside the competition law framework – the Digital Markets Act

Similar to the abovementioned sector approach is the choice to combat the problems that the internal market is facing through actions taken outside of the (normal) competition framework. The European Commission has published on 15th of December 2020 two regulation proposals, which deal with issue concerning the digital sector. Proposal for a *Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC* focuses more on questions of liability of intermediary service providers and due diligence obligations, and its aims include "to […] set out uniform rules for a safe, predictable and trusted online

[354] Thépot (n2), 210 referring to Commission decisions Case IV/JV.1 *Telia/Telenor/Schibstedt*, Case IV/M.1439 *Telia/Telenor*, Case IV/M.00048 *Vodafone/Vivendi/Canal Plus*, COMP/M.4731 *Google/DoubleClick***,** and COMP/M.5727 *Microsoft/Yahoo! Search Business*.
[355] Act against Restraints of Competition (Competition Act – GWB) Federal Law Gazette I p. 1151.
[356] German Competition Act (n355), § 29.

environment, where fundamental rights enshrined in the Charter are effectively protected."[357] While these rules are addressed to intermediary service providers, they do not seem to have a particular impact on competition concerns. The other proposal the European Commission published is Proposal for a *Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. Both of these measures have as their legal basis Article 114 TFEU, which allows for the approximation of laws concerning the establishment and functioning of the internal market, and not Article 103 TFEU, which is the appropriate legal basis for measures, which "give effect to the principles set out Articles 101 and 102".[358] This, alongside the wording of the proposals, indicates that in the Commission's eyes these measures are outside the framework of competition law.

The focus of the Digital Markets Act is on "ensuring contestable market and fair markets in the digital sector across the Union where gatekeepers are present."[359] It is clearly stated in the proposed regulation that the "regulation is without prejudice to the application of Articles 101 and 102 TFEU."[360] Even if the Digital Markets Act does not as such impact the assessment of abuses under Article 102 TFEU, it does provide for an alternative for the European Commission to combat harmful conduct by those undertakings it concerns. The Digital Markets Act is still only a proposal and it will take time before some version of it can become effective[361]; the average time from proposal to signature is around one and a half years for those measures, which are decided upon the first reading.[362] In the near future, the Commission will, thus, have to suffice with its existing toolbox.

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[357] Proposed Digital Services Act (n24), Article 1.
[358] TFEU (n3), Article 103; It can be read from the Court's case-law that a dual-legal basis is possible only, when the legislative procedure is identical (Case C-300/89 *Commission of the European Communities v Council of the European Communities* [1991] ECLI:EU:C:1991:244, [17-21]). Thus, even if the new proposed measures cover issues concerning competition within the internal market, a dual legal basis of Articles 114 TFEU and 103 TFEU would not have been possible, as Article 114 TFEU relies on the ordinary legislative procedure whilst Article 103 TFEU requires the use of the so-called consultative legislative procedure.
[359] Digital Markets Act (n25), Article 1(1).
[360] Digital Markets Act (n25), Article 1(6).
[361] Patrick van Ecke, Enrique Gallego Capdevila, 'The Proposed Digital Services Act Package – what you need to know' (2021) 21(3) Privacy & Data Protection 13, 15.
[362] The average time during 2014-2019 was around 18 months with 89% of files being accepted in the first reading, if the file was agreed upon during the second readings the average time from publication to signature was 39-40 months. 'Ordinary Legislative Procedure' (European Parliament) date accessed 16 May 2021, accessible at https://www.europarl.europa.eu/infographic/legislative-procedure/index_en.html#step5-statistics

As the Regulation applies to "core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union […]"[363] and the criteria for an undertaking to be considered as a gatekeeper are

> a) significant impact on the internal market,
> b) operating "a core platform service which serves as an important gateway for business users to reach end users", and
> c) enjoying "an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future"[364],

it can be seen that these criteria are, to some extent, reflective of the criteria used to determine whether an undertaking has a dominant position on the internal market. However, instead of market shares, the presumptions for the significant impact are related to annual turnovers, average market capitalization, and fair market value.[365] Thus, the significant impact assessment takes a similar approach to that within the Merger Control Regulation in relation to "Community Scope".[366] In addition to taking into account economic considerations, the second criteria presumes over 45 million monthly active users and more than 10 000 yearly active business users.[367] By setting these presumptive criteria in this manner, the Commission overrides the need to the delineate the market. In the case of an online social networking service, which is considered to be a 'core platform service',[368] there is no need to distinguish between the different sides of that service.

The Digital Market Act is not a fully encompassing solution to the problems faced. As pointed out in early commentaries, the obligations present in the Digital Markets Act – such as the obligation to transfer data – could be hindered by data protection or intellectual property concerns.[369]

[363] Digital Markets Act (n25), Article 1(2).
[364] Digital Markets Act (n25), Article 3(1).
[365] Digital Markets Act (n25), Article 3(2)(a).
[366] Council Regulation (EC) No 139/2004 the EC Merger Regulation (n106), Article 1.
[367] Digital Markets Act (n25), Article 3(2)(b).
[368] Digital Markets Act (n25), Article 2(2)(c) read together with Article 2(7).
[369] Björn Lundqvist, 'The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?' (2021) 52(3) International Review of Intellectual Property and Competition Law 239, 240.

With regard to access to data, if problems arise due to the intellectual property protection, the business users could initiate public enforcement proceedings for violation of Article 102 TFEU. The Courts have developed criteria for gaining access to essential facilities/resources, that are protected by intellectual property rights. The cumulative criteria are established in cases such as *Magill*,[370] *IMS Health*[371] and *Microsoft*.[372] According to the criteria, there is an obligation to provide access / contract, when

> 1) the competitor seeks to offer new products or services not offered by the IPR owner, or technically improved products, and potential consumer demand exists for the products,
> 2) no objective justification is provided, and
> 3) the refusal to supply leads to the elimination of all competition in the Member States concerned.[373]

In the case that IPR-protection is not relevant to the situation, the criteria from *Oscar Bronner* could be relied upon instead. The Bronner-criteria are to a large extent similar to the IPR-related criteria with the only difference being in the first criterion. According to the Bronner criteria the "the access must be indispensable or essential for carrying out the applicant's business."[374]

While this may seem as a tempting route to take, one comes back to the question of market power in the meaning of Article 102 TFEU and whether the undertaking concerned has a dominant market position in the *relevant market*. This, yet again, demonstrates the need to have an (authoritative) statement on how two-sided markets need to be defined.

One of the limits that the Digital Markets Act, as drafted, would pose on gatekeepers is that gatekeepers are not without the consent of the end user allowed to combine personal data from the core platform service with data from the platform's other services[375] This is

[370] Joined Cases C-241/91 and C-242/91 Radio Telefis Eireann and Independent Television Publi- cations Ltd v Commission [1995] ECLI:EU:C:1995:98
[371] Case C-418/01 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. [2004] ECLI:EU:C:2004:257
[372] Case T-201/04 *Microsoft* (n267).
[373] Geradin, Layne-Farrar, Petit (n145), 255-256.
[374] Geradin, Layne-Farrar, Petit (n145), 254.
[375] Digital Markets Act (n25), Article 5(a).

particularly important for the current leading social media platform Facebook as it also owns and operates also Instagram and WhatsApp. As explained above in Chapter 3 data forms a barrier to entry and, thus, the Digital Markets Act is likely to reduce the barrier. However, one should be realistic, and realize that the data, which Facebook has only through Facebook, is already significantly higher than other existing platforms or possible newcomers would have. Further, one point for consideration is, how likely are users to accept the terms of condition regardless of their possible negative perceptions, to have continued access the platforms.

According to the Proposed Digital Markets Act, the European Commission is going to be given investigative, enforcement and monitoring powers.[376] Thus, the European Commission has the investigative and enforcement powers both under Digital Markets Act -related infringements as well as Article 102 infringements. Based on the supporting materials provided by the Commission, it seems like Directorate-General for Competition, together with other Directorate-Generals, will be involved to some extent in dealing with Digital Markets Act-related matters.[377] The Finnish Government, in its Union Communication to the Parliament, raised an important point about clarification being required about what the information received (by the Commission) on the basis of the Digital Markets Act can be used for; can the authorities use said information for competition law purposes and vice versa?[378] If the information acquired can be used for also competition law purposes the Digital Markets Act can make competition law assessments more efficient and the criticized long time period it takes for infringement decisions to be given after the anticompetitive conduct has started might shorten. While the authorities might have easier access to information or become aware of possible misconduct, the Digital Markets Act does not provide assistance to this thesis' research question: *how, and when, should the two-sided nature of social media platforms be into consideration in assessments under Article 102 TFEU?* The need to consider such questions might become less frequent as the Commission can act *ex ante* in certain circumstances instead of waiting for the harmful conduct to occur.

[376] Digital Markets Act (n25), Chapter V.
[377] Digital Markets Act (n25), ANNEX to the LEGISLATIVE FINANCIAL STATEMENT, 7-8.
[378] U 6/2021 vp Valtioneuvoston kirjelmä eduskunnalle komission ehdotuksesta Euroopan parlamentin ja neuvoston asetuksesta (digitaalisia markkinoita koskeva säädös).

5. CONCLUSION

Throughout the previous chapters this thesis has aimed to contribute to the academic discussion on the effects of the two-sided nature of platforms to the definition of the relevant market and the assessment of dominance under Article 102 TFEU. This thesis has also added new perspectives to the debate surrounding these topics by analyzing different proposals made by the Member States of the European Union, institutions, politicians and academics.

Social media platforms are a type of online platform as well as a two- or multi-sided platform. Taking into consideration the market position of Facebook, this thesis could have focused solely on Facebook. Instead the thesis looked at the question from a broader perspective since depending on the broadness of the market definition also different social media platforms could be assessed under Article 102 TFEU.

Market Definition

As has been described in length in the previous chapters, the type of multi-sided platform may impact on how the market should be defined. The prevailing view within academia is that two different markets should be defined in the case of non-transaction markets. Advertising supported media markets have often been used as the prime example of a two-sided non-transaction market. While the question of whether social media platforms could be considered as transaction markets was raised in Chapter 3, it is under the current legal framework insignificant. The leading case, where the Court of Justice has commented on two-sided markets, *Groupement de Cartes Bancaires* suggests that the Court of Justice interprets EU competition law so that separate relevant markets should be defined. Since *Groupement de Cartes Bancaires* concerned transaction markets and in light of the views in academia, the most plausible conclusion is that for social media platforms separate markets need to be defined. It needs to be stressed that the Court of Justice, nor the General Court, have not yet explicitly commented on how the two-sided nature needs to be taken into account in defining the relevant market for the purposes of Article 102 TFEU.

Gunnar Niels' argumentation, that regardless of whether a platform is a transaction or a non-transaction platform one all-encompassing market should be defined, would be a simple

solution to the question how should the two-sided nature of social media platforms be taken into consideration under Article 102 TFEU assessments. If only one market would be defined, then the following steps of assessing dominance and abusive conduct automatically take the two-sided nature into consideration as the definition of the relevant market is a building block for these steps. Nothing strictly prohibits the Court of Justice from coming to this conclusion in the future, if, and when, they are given an opportunity to address this question.

One feature related to the two-sided business model utilized by the social media platforms is that in one side the services are offered free-of-charge. This poses a number of questions which need to be addressed while defining the relevant markets. First, as regards the question whether a market can be defined for the zero-priced side, the answer is yes. While the services are offered for free in monetary terms, the data that users give can be seen as a tradeable good and thus be considered as an economic activity. The lack of a monetary price makes the definition of the relevant market more difficult as one cannot simply apply the SSNIP-test due to any increase in price leading to a undefined increase. Alternatives for the SSNIP, such as SSNDQ and SSNIC have been put forward in academia. As of now, there is still too little information on how these tests would work for them to be a reliable method for defining the relevant market. If such tests are considered as realistic alternatives to the SSNIP-test, the revised Market Definition Notice should clearly state how the Commission is going to apply these tests. One of the important questions currently left open is: how is a change in quality or cost going to be measured?

Market Power and Dominance

While separate markets may need to be defined, the two-sided nature of social media platforms still also needs to be taken into consideration in assessing the dominance of the platform. The data collected by social media platforms, the direct and indirect network effects, the possibility of users multi-homing, and the economic resources of the social media platforms are examples of factors that impact the dominance of social media platforms on both sides of the market. The value of a social media platform to an advertiser is dependent on the active users of the platform. On the other hand, the users benefit from having more advertisers on the site, since the advertisers bring revenue, which enables the platform to function and improve its quality. As the case law of the Court suggests barriers to entry and expansion, such as indirect network effects, may be cancelled out by other factors such as

the possibility to multi-home. Therefore, it is necessary to take into consideration *all relevant* circumstances and factors on the markets and to evaluate dominance as a whole. Currently, the relevance of each barrier to entry and expansion is scattered in the Commission's decisional practice and the case law of the Courts. Therefore, codifying the Commission's views on what elements are to be taken into consideration, in which type of two-sided markets, would be beneficial for the sake of clarity. The Commission should also provide guidance on how market shares should be measured with regard to online platforms as current guidances do not provide an answer to this.

Measures

Firstly, to address the gaps in the case law on how, and when, should the two-sided nature of social media platforms be taken into consideration in assessments under Article 102 TFEU, there is no need to revise the Treaties. There are more efficient and suitable ways to address the underlying gaps. If, however, legally binding clarifications would be preferred, the Commission could propose to the Council a regulation on the basis of Article 103 TFEU. While this approach would also require unanimity within the Council, the scope of the discussion can be limited to only competition law. Further, nothing has changed in the Courts tasks; they are still required to interpret Article 102 TFEU, when asked to do so through appeals of Commission decisions as well as preliminary references from the national courts.

The Commission can only be applauded for the initiative to re-evaluate the Market Definition Notice from 1997. The current Market Definition Notice is silent as regards a number of issues such as whether a market can exist for zero-priced products and how the multi-sidedness should be defined. The views expressed in the reports of selected Member States, that in addition to the revision of the Market Definition Notice, a separate notice should be issued, is a preferred approach. The general principles should be stated in the general Market Definition Notice and reference could be made to the other Notice for more detailed provisions. This approach would in practice require that the Commission would issue both notices at the same time. The Notice specific to online platforms would be useful also in that it could bring together and update the elements found in different notices.

The possibility of a segmented approach was brought up in Chapter 4.3.2. The segmented approach has its benefits with allowing the Union to legislate on the particularities specific to online platforms. However, as discussed above, significant problems might arise from

segmented legislation. Therefore, if a segmented approach is to be taken, in depth assessments should be conducted prior to setting the scope of those measures.

As a last point, it needs to be remembered that competition law is not surrounded by shields and that other legislation in the EU can alter the needs for competition law enforcement. While the proposed Digital Markets Act clearly states that it does not impact the competition law provisions, the digital markets act can possibly prevent some of the future abuses from occurring. The Digital Markets Act is still not a solution to the main problems addressed in this thesis.

While the provisions on abuse of dominant market position have been drafted over 60 years ago, the meaning of Article 102 TFEU is still being elaborated on to this day. This thesis, and particularly Chapter 3, has been a reflection of how the law stands on 16 May 2021. The General Court is at that time hearing cases concerning multi-sided platforms' abuse of dominant position and, when those judgments are issued, the answers might change.