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Despoina Mantzari

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CLES Research Paper Series
4/2021

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April 2021

Centre for Law, Economics and Society (CLES)
Faculty of Laws, UCL London,
WC1H 0EG

The CLES Research Paper Series can be found at
https://www.ucl.ac.uk/cles/research-papers

ISBN 978-1-910801-38-3

2021
Centre for Law, Economics and Society
Faculty of Laws, UCL
London, WC1H 0EG
United Kingdom

Forthcoming in I. Kokkoris (ed), *Research Handbook in Competition Enforcement* (Edward-Elgar 2021)
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Despoina Mantzari*

Abstract

Power imbalances between online marketplaces and business users have come under increased scrutiny, both from a regulatory as well as from a competition law perspective. The chapter delves into two distinct tools which have received less attention so far in the quest of addressing such imbalances: a) the national rules on the abuse of economic dependence adopted by some Member States in Europe and their relevance and potential application to online marketplaces, and, b) the adoption of the Regulation on fairness and transparency in platform-to-business relations. Though both instruments lay outside the boundaries of EU competition law as such, they may provide an alternative set of lenses through which to appreciate and ultimately address the power asymmetries between platforms and businesses stemming from the hybrid nature of online marketplaces. Finally, it offers some preliminary thoughts on the recently announced Digital Markets Act and its potential in addressing issues of economic dependence in online marketplaces.

Keywords: economic dependence, platform-to-business relations, relative market power, platform dependence, online marketplaces, Digital Markets Act

I. Introduction

It is undeniable that online marketplaces bring about immense benefits to consumers as well as being powerful engines for growth and innovation. Acting as intermediaries between merchants and consumers they allow a host of producers and retailers to reach consumers and enable the development of new and disruptive business models.[1] But at the same time such platforms typically enjoy a superior bargaining position in relation to their business users. This

* Associate Professor in Competition Law and Policy, University College London, Faculty of Laws. Email: d.mantzari@ucl.ac.uk. I thank Ioannis Kokkoris, Claudia Lemus and Andriani Kalintiri for helpful comments and discussions. Any views expressed, omissions or mistakes are mine.

[1] B. Williamson and M. Bunting (2018) 'Reconciling Private Market Governance and Law: A Policy Primer for Digital Platforms' available at: http://static1.1.sqspcdn.com/static/f/1321365/27906937/1526370882887/Reconciling+private+market+governance+and+law+-+a+policy+primer+for+platforms+May+2018.pdf (last accessed 18 January 2021).

superior bargaining position may in turn result in power imbalances between the interests of platforms and those of business users potentially leading to unfair practices. Such unfair practices may have exclusionary effects on the relevant market. This is particularly the case when platforms act as both intermediaries by facilitating market access for businesses and compete with these businesses by offering their own products to consumers on their marketplaces.[2] They may also have exploitative effects, for example in cases where a non-vertically integrated platform treats more favourably one or more non-affiliated customers over others in a market in which the platform itself is not active.[3] Finally, power imbalances between platforms and business users may also result in sellers becoming dependent on those platforms to reach buyers. In some cases, platforms may have such a strong position in the market, that there are no real alternative options for businesses to reach consumers. In such situations, strong incentives are presented to platforms to extract excessive profits from business users by wielding their superior bargaining power vis-à-vis the latter and/or imposing unfair terms and conditions.[4]

Against this backdrop, the relationship between online marketplaces and business users has come under increased scrutiny, both from a regulatory as well as from a competition law perspective. Many within academic and policy circles call for a muscular competition enforcement policy in this area and/or regulation[5] to prevent, inter alia, discrimination and lock-in. Besides the risk of discrimination and lock-in, there is also the risk of 'appropriation': 'Because dominant platforms monitor with unrivalled precision the business activity of third parties while also competing with them, a platform can harvest insights gleaned from a

[2] European Commission, 'Online Platforms and the Digital Single Market; Opportunities and Challenges for Europe' (Communication) COM(2016) 288 final, 12.
[3] Case C-525/16, MEO, ECLI:EU:C:2017:1020, Opinion of Advocate General Wahl, para. 79; P. Ibanez Colomo, 'Exclusionary discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review, 141, 145.
[4] I. Lianos, 'Competition Law for a Complex Economy' (2019) 50 International Review of Intellectual Property and Competition 643-648, 647; I. Lianos, V. Korah with P. Siciliani, *Competition Law: Analysis, Cases and Materials* (OUP 2019), Chapter 8.
[5] See the Commission's initiatives of 2 June 2020 for a 'Digital Services Act package—ex ante regulatory instrument of very large online platforms acting as gatekeepers' and for a 'New Competition Tool' available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 (last accessed 18 January 2021); European Commission, 'Competition Policy for the Digital Era'. A report by Jacques Crémer, Yves Alexandre de Montjoye & Heike Schweitze (March 2019); J. Furman, D. Coyle, A. Fletcher, D. McAuley and Ph. Marsden, 'Unlocking Digital Competition' (March 2019); FTC Hearings on Competition and Consumer Protection in the 21st Century, (2018); F. Scott Morton, Bouvier, P., A Ezrachi, Jullien, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, Stigler Center for the Study of the Economy and the State (May 2019).

producer at the producer's expense'.[6] It is the latter practice that is at the core of the European Commission's (hereinafter 'Commission') investigations of Amazon.[7]

On 17 July 2019, the Commission opened a formal antitrust investigation under both Article 101 TFEU and 102 of the Treaty on the Functioning of the European Union (TFEU) to assess whether Amazon's use of competitively sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules. While Amazon provides a host of different services, from online marketplace, to cloud computing service, to media producer and distributor to name but a few, the focus of the investigation is the online marketplace service, where Amazon serves as a bottleneck facility and competes with those reliant on its bottleneck, i.e. other online retailers. In addition to serving as a major marketplace for third-party sellers, Amazon also sells Amazon-branded goods on its platform. It is the hybrid nature of Amazon's platform that prompted the antitrust investigation. In particular, the Commission is concerned with whether the firm obtains an unfair (informational) advantage from third-party's merchants' data to shape its own retail strategy. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information about third-party sellers, their products and transactions on the marketplace to the benefit of Amazon's own retail business, which directly competes with those third-party sellers. On 10 November 2020, the Commission informed Amazon of its preliminary view that it has breached EU antitrust rules by distorting competition in online retail markets.[8]

The Commission's preliminary view is that the use of non-public marketplace seller data allows Amazon to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany, i.e. the biggest markets for Amazon in the EU. If confirmed, this would infringe Article 102 TFEU. The Commission also opened a second formal antitrust investigation into the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers that use Amazon's logistics and delivery services.

[6] L. Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 980.
[7] European Commission, 'Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon' (Press release, 17 July 2019) available at: <http://europa.eu/rapid/press-release_IP-19-4291_en.htm>.
[8] European Commission, 'Antitrust: Commission sends statement of objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (Press Release, 10 November 2020), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (last accessed 18 January 2021).

Broadly, the relationship between platforms and businesses is at the core of various past and ongoing competition investigations at the EU[9] and national level,[10] the emphasis being on differentiated treatment by platforms[11] in terms of self-preferencing (otherwise referred to as 'unequal treatment'[12] or 'exclusionary discrimination').[13] Briefly, self-preferencing refers to 'giving preferential treatment to one's own products or services, or one from the same ecosystem, when they are in competition with products and services provided by other entities'.[14] Self-preferencing can take place in a number of ways, including, as in the Amazon investigation, through preferential access to data. This, in turn, enables a better monitoring of consumer behaviour and market trends that coupled with the platform's larger scale of operation can lead to the platform offering a product at a lower price and/or giving its own offering a more prominent placement in the ranking.[15] The platform may also start selling a product in competition with business users based on information about sales made by the latter. In the literature there has been some empirical support of this proposition: Andrei Hagiu and Julian Wright have argued in their paper, 'Marketplace or Reseller?'[16] that 'once Amazon reaches information parity with its sellers, it switches[from the marketplace] to the reseller mode in order to exploit its scale advantage'.[17] Feng Zhu and Qihong Liu have also used data from Amazon to study the latter's entry pattern into third-party product spaces.[18] They find that 'Amazon's entry discourages affected third-party sellers from subsequently pursuing growth on the platform, [but] increases product demand and reduces shipping costs for consumers'.[19]

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[9] See e.g. Case AT.39740 *Google Search (Shopping)*, 27 June 2017; European Commission, 'Antitrust: Commission opens investigation into Apple's App Store rules (June 2020), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 (last accessed 18 January 2021).

[10] Netherlands Authority for Consumers and Markets, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (Press release, 11 April 2019) <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>; Italian Competition Authority, 'A528—Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services' (Press release, 16 April 2019) <https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services> (last accessed 18 January 2021).

[11] See Google Search (Shopping) (n 9) above.

[12] R. Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google', GCLC Annual Conference Series (July 2016).

[13] See Colomo (n 3) above.

[14] See European Commission, Competition Policy for the Digital Era. A report by Jacques Crémer, Yves Alexandre de Montjoye & Heike Schweitze (March 2019), p.66.

[15] See Wall Street Journal, 'Amazon scooped up data from its own sellers to launch competing products' available at: <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015?mod=searchresults&page=1&pos=1> (last accessed 18 January 2021).

[16] A. Hagiu and J. Wright, 'Marketplace or Reseller?' (2015) 61 (1) Management Science 184.

[17] Ibid.

[18] F. Zhu and Q Liu, 'Competing with Complementors: An Empirical Look at Amazon.com' (2018) 39 (10) Strategic Management Journal 2618.

[19] Ibid.

The affected business users are then left with a choice to either accept significant losses of sales or to reduce their prices in order to remain competitive. Naturally, most commentary on the Commission's investigation into Amazon's practices has sought to identify the potential theory of harm guided mostly by the similarities between the former and the Commission's previous investigations into Google's behaviour.[20] Indeed, the Commission may look into establishing an exclusionary abuse drawing inspiration from the *Google Search (Shopping)* case,[21] currently under appeal before the General Court.[22] In this decision, the European Commission established that Google had treated its own comparison-shopping service more favourably than the services of rivals.[23] To remedy the abuse, the Commission required Google to engage in equal treatment of its own as well as rival comparison shopping services.[24] As Amazon allegedly uses its platform to favour its products in the downstream market, its conduct is similar to that of Google. However, notwithstanding their similarities, the abusive practice of self-preferencing remains a controversial theory of harm.[25]

Without underestimating the significance of the ongoing debate on differentiated treatment by platforms as one manifestation of power imbalances,[26] the chapter delves into two distinct tools which have received less attention so far in the quest of addressing the power imbalances between online marketplaces and their business users: a) the national rules on the abuse of economic dependence adopted by some Member States in Europe and their relevance and potential application to online marketplaces, and; b) the adoption of the Regulation on fairness and transparency in platform-to-business (P2B) relations ('the P2B Regulation').[27] The Commission, but also the National Competition Authorities' ('NCAs') (most prominently the German Bundeskartellamt) investigations into Amazon's practices and the issues they raise

[20] See e.g. A. Lamadrid, 'The Amazon investigation: A prime example of contemporary antitrust' (July 2019) available at: https://chillingcompetition.com/2019/07/19/the-amazon-investigation-a-prime-example-of-contemporary-antitrust/; F. Bostoen, 'The Commission's Amazon Probe: Overcoming the Antitrust Paradox' (2018) 4 CoRe 312-315 available at: https://core.lexxion.eu/data/article/13435/pdf/core_2018_04-015.pdf (last accessed 18 January 2021).
[21] See (n 9).
[22] T-612/17 *Google and Alphabet*.
[23] See P. Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2017) Journal of Law, Technology & Policy 301.
[24] See (n 9), para. 334.
[25] For a criticism see N. Dunne, 'Fairness and the Challenges of Making Markets Work Better' (2020) Modern Law Review, advance access at: https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12579; P Ibanez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43, 4 World Competition 417.
[26] To this effect see I. Graef, (2019), 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' 38 Yearbook of European Law 448.
[27] Regulation 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, OJ [2019] L 186/55.

provide a useful case study through which one can explore the interaction of these two instruments with EU competition law. Though both instruments lay outside the boundaries of EU competition law as such, they may provide an alternative set of lenses through which to appreciate and ultimately address the power asymmetries between platforms and businesses stemming from the hybrid nature of online marketplaces. As section II will discuss, economic dependence is a different concept than dominance in competition law with a wider scope of application. It is relevant in the sense that Amazon uses extracted data directly against the commercial interests of its online marketplace business users and the latter do not leave the platform. This raises the issue whether small and medium-sized merchants have become so dependent on using the Amazon Marketplace to reach shoppers that they cannot easily withdraw from the platform. Subsection A will discuss the concept of economic dependence drawing on the Belgium, French and German provisions, before exploring its relevance and application to the challenges raised by online marketplaces (Subsection B). The common characteristic of all national provisions on the abuse of economic dependence is that they may potentially impose competition law related duties to undertakings not possessing a dominant position for unilateral conduct, which would have otherwise not been subject to competition law related duties under the traditional rules of abuse of a dominant position. Hence, they could address situations such as that of refusal to provide access to data to undertakings with limited bargaining power by powerful data holders or online marketplaces that do not enjoy a dominant position. The ineffectiveness of the current competition law tools for addressing the unfair practices resulting from the dependence on online marketplaces has been acknowledged by the Commission. But instead of expanding the contours of Article 102 TFEU, the Commission opted for a regulatory alternative, that of the P2B Regulation.[28] The legislation, which came into effect on July 12, 2020 establishes a set of normative behaviour in terms of transparency vis-à-vis customers with insufficient bargaining power and in terms of discriminatory behaviour. Section III will discuss the origins and main provisions of the P2B Regulation and its relationship with EU competition law. It will be argued that the Regulation provides a starting point for a platform-specific intervention to target unfair practices resulting from the dependence of businesses on platforms, as envisioned in the recently proposed Digital Markets Act (DMA).[29] Section IV will offer some concluding thoughts on the DMA's potential in addressing issues of economic dependence in online marketplaces.

[28] Ibid.
[29] See European Commission, Digital Markets Act: Ensuring fair and open digital markets, (15 December 2020) available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 (last accessed 18 January

2021); 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; Brussels, 15.12.2020

II. Abuse of Economic Dependence in Online Marketplaces

In November 2018, the German Bundeskartellamt opened a formal investigation into Amazon's operation of the so-called 'Amazon Marketplace,' its internet sales platform for retailers.[30] Amazon is the largest online retailer and operates by far the largest online marketplace in Germany. Many retailers and manufacturers depend on the reach of Amazon's marketplace for their online sales, especially in terms of access to customers. The authority investigated whether a number of the general terms and conditions primarily contained in the 'Amazon Services Business Solutions Agreement' with merchants constituted an abuse of dominant position by virtue of the German abuse control regulations, with particular regard to provisions and case law on qualitative exploitative abuse (Section 19(1) (2), nos 2 and 3, Act against Restraints of Competition-ARC 2013/2018) and the so-called *Anzapfverbot*, i.e. the prohibition to demand unjustified benefits from suppliers (Section 19(2) no. 5 ARC). An application of European competition law (A. 102 TFEU) was also considered.

The Bundeskartellamt also referred to the concept of relative market power/dependency enshrined in Section 20 (1) ARC. As will be discussed in Subsection A below, the former is a specificity of German competition law and refers to the prohibition of exclusionary abuses of relative market power (and superior market power) vis-à-vis small and medium sized competitors dependent as a customer (or supplier). It provides for a lower intervention threshold than the provisions on the abuse of dominant position and it can be useful in addressing some kinds of anticompetitive behaviour in online marketplaces that would fall short of a competition law violation, particularly because they would not lead to anticompetitive exclusion of as efficient competitors. In the investigation the authority did mention Amazon's relative market power and sellers' dependence on its marketplace, but left these issues open for the purposes of the case.[31] It emphasised, however, the relevance of

[30] Bundeskartellamt, 'Bundeskartellamt initiates abuse proceeding against Amazon' (Press release, 29 November 2018) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html;jsessionid=28428957AB1B6DED02C51B292680654A.2_cid387?nn=3591568> (last accessed 18 January 2021).

[31] According to the Bundeskartellamt, Amazon plays a significant role in providing access to customers, but the fact that there are smaller sellers who only entered the online business in the first place because of the presence of Amazon's marketplace also has to be taken into account in such an assessment. See Case summary 'Amazon amends its terms of business worldwide for sellers on its marketplaces—Bundeskartellamt closes abuse proceedings', 17 July 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob.publicationFile&v.4 (last accessed 18 January 2021).

Amazon's role in providing access to customers, which motivated small sellers to enter e-commerce. It then delved into the terms of business and related practices which might be considered abusive. These were: a) liability provisions to the disadvantage of sellers; b) combination with choice of law and jurisdiction clauses; c) rules on product reviews; d) non-transparent termination and blocking of sellers' accounts; e) withholding or delaying payments; f) clauses assigning rights to use the information material which a seller has to provide with regard to the products offered; g) terms of business on pan-European despatch; and, h) terms for delivery for sellers.

The German Bundeskartellamt did not consider these terms and conditions individually, but rather analysed whether, based on an overall assessment, these terms and conditions, as a whole, unduly restricted the merchants in their competitive activity on the Amazon Marketplace, and therefore, may constitute an exploitative or exclusionary abuse. Under the settlement, Amazon agreed to modify the contractual terms and trading practices under which it sold other retailers' products on the Amazon Marketplace. Although the jurisdiction of the Bundeskartellamt is limited to Germany, Amazon decided to amend the terms and conditions for all of its 15 marketplaces worldwide. Because of Amazon's early cooperation and the voluntary removal of the competitive concerns that had been expressed, the Bundeskartellamt did not issue a formal decision and closed the investigation. Due to the nature of such settlement, Amazon's 'commitment' to refrain from similar measures is not legally binding,[32] and the Bundeskartellamt must closely monitor Amazon's future conduct. But in the event that Amazon does not comply, the authority may take up the case again and continue its investigation, thus even without any formal commitments declared binding by decision as foreseen in Section 32b of the ARC. Similarly, the Austrian Competition Authority investigation into Amazon, which commenced in February 2019, looked into the company's

[32] See:< https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4> (last accessed 18 January 2021). The Bundeskartellamt adopted similar strategy into two previous investigations into Amazon's business practices. In 2012, the Bundeskartellamt opened proceedings into price parity clauses employed by Amazon for the sale of consumer goods on the Amazon marketplace. Such clauses prevented merchants from offering their goods elsewhere online and at a lower price. In August 2013, Amazon announced it will abandon such clauses from Terms and Conditions on an EU-wide basis, and the Bundeskartellamt terminated its proceedings shortly thereafter without any formal decision. Likewise, in January 2017, the Bundeskartellamt closed its administrative proceedings against Audible.com, a subsidiary of Amazon, with regard to an agreement with Apple involving audiobooks. The investigation focused on the exclusive purchase of digital audiobooks by Apple from Audible for sale in Apple's iTunes Store, and the obligation of Audible not to supply digital music platforms other than iTunes. Amazon deleted the exclusivity agreement and the Bundeskartellamt there too closed the case without any formal decision.

dual role as a marketplace and a seller in relation to allegations of unfair trade practices in the form of discrimination against Austrian retailers on the platform.[33]

Economic dependence is a different concept than dominance in competition law with a wider scope of application. Arguably the most comprehensive legal definition of dependency is found in the new Belgian legislation, which specifies that economic dependency is characterised by: 'the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it for each of them to impose services or conditions that could not be obtained under normal market conditions'.[34] Thus, the overriding principle behind the application of the doctrine is the absence of sufficient and reasonable possibilities of switching to other undertakings. According to the OECD, three factors should be considered when testing for bargaining power: 'the outside option of the buyer, the outside option of the seller, and relative bargaining effectiveness'.[35]

While not regulated by EU Competition Law, the concept of economic dependence is found in the Court of Justice case law in *British Leyland*[36] in 1986, where it was closely related to legal monopoly rights granted to a trade partner. The concept made again its appearance in *Deutsche Bahn* or *Aéroports de Paris* in 1997 and 2000 and was also related to legal monopoly issues.[37] The concept of dependency identifies a range of relationships which can trigger public intervention, including relationships based on product ranges or strong brands (e.g., 'must have' products),[38] large volumes of business, product shortages, the strength of the buyer, and technical standards or specifications set by undertaking in question (e.g. for spare parts).[39]

Contrary to the assessment of a position of dominance, which takes place in the context of a given relevant market involving multiple actors, the assessment of a state of economic dependence focusses on a bilateral relationship. The primary concern is not whether a dominant

[33] Federal Competition Authority, 'BWB informs: Amazon modifies its terms and conditions' (July 2019), available at: < https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/> (last accessed 18 January 2021).
[34] Loi du 4 avril 2019 modifiant le Code de droit economique en ce qui concerne les abus de dependance economique, les clauses abusives et les pratiques du marche de loyales entre entreprises, M.B., 24 mai 2019, art 2.
[35] OECD Roundtable on Monopsony and Buyer Power (2008) <https://www.oecd.org/daf/competition/44445750.pdf>, 39 (last accessed 18 January 2021).
[36] Case 226/84, *British Leyland Public Limited Company v Commission*, ECR [1986] 3263.
[37] C-82/01, P *Aéroports de Paris v Commission*, EU:C:2002:617; C-177/16, *AKKA/LAA v Konkurences padome*, EU:C:2017:689.
[38] Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings, O.J. [2009] C 45/7.
[39] Section 20(2) of the German Act against Restraints of Competition.

undertaking has the market power to behave independently of other actors on the market, but whether an undertaking is dependent on its bilateral relationship with a (non-dominant) undertaking in order to operate. Refusal to sell or buy and arbitrary interruption of commercial relations are widely recognized as conducts abusing economic dependence.

But why should we bother about economic dependence at all? After all, bargaining power imbalances and 'coercion' as a consequence of the imbalance in the economic powers are regarded a normal part of the free and competitive market system based on freedom of contract and free trade.[40] It can be, however, problematic when owing to the exercise of the superior bargaining power, the very foundations of a contract are undermined or the effective market mechanism is adversely affected[41] (market power or economic dependence on the part of the supplier being the explanation behind superior bargaining power). While the former scenario is reserved to the field of contract law, in the latter scenario, competition law can form an external constraint on the operation of private parties' contractual arrangements.[42] But EU competition law, with its focus on 'substantial market power', defined as power over price according to the Neo-classical Price Theory economics paradigm, excludes outright from consideration exclusionary or exploitative conduct resulting from a situation of bargaining power.[43] It overlooks the fact that undertakings may have superior/relative market power even without being dominant from the perspective of EU competition law, in situations where customers/suppliers are economically dependent on the undertakings. Furthermore, enforcement focus on the size and market share or concentration of the negotiating parties may not adequately reflect their power relations. Taking into account a wider set of factors, however, may unveil situations of dependency. For example, purchasing volumes may have a strong impact on the negotiating conditions between parties and therefore may constitute one of the main advantages of major retailers vis-à-vis their smaller competitors in negotiations. Scholarly studies on contracts and negotiations take a game/bargaining theory approach for addressing situations of economic dependence whereby 'for the outcome of negotiation, even more important than market shares or the size of negotiating parties is the existence of "threat points" enabling one of the parties to seek a "best alternative to a negotiated agreement"

[40] M. Bakhoum, 'Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance' (2015) Max Planck Institute for Innovation and Competition research paper no. 15-15, pp. 4-5.
[41] K. J. Cseres, 'Competition and Contract law' in Arthur S. Hartkamp, et al. (ed.), *Towards a European Civil Code* (4th rev. and exp. ed. 2011), p.206 in S. Lee and J. Schibler (2019), 'Platform Dependence and Exploitation' available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403002 (last accessed 18 January 2021).
[42] Ibid. at 208.
[43] I. Lianos, 'Global Food Value Chains and Competition Law - BRICS Draft Report' (2018), p. 38-44.

(BATNA)'.[44] For example, the delisting of branded products may evidence a stronger bargaining position in the sense that the retailer has no BATNA. Developing appropriate metrics for measuring superior bargaining power constitutes one of the main challenges for competition law authorities when integrating this concept in the competition law framework.

A number of Member States, including Germany, France, Italy,[45] Greece,[46] and recently Belgium[47] have adopted specific rules on the abuse of economic dependence and *relative market power*.[48] For example, the German ARC recognises that undertakings can have relative market power even without a high market share, in situations where 'small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist'.[49] While some of these national regimes also require commercial conduct to affect the functioning or structure of competition in order to be considered unlawful, their objective complements competition law that mainly protects the welfare of consumers and not the ability of businesses in a weaker bargaining position to compete. Such laws on abuse of economic dependence derive from the possibility provided in Regulation 1/2003 for Member States to apply stricter national laws prohibiting unilateral conduct.[50] Recital 8 refers specifically to national provisions 'which prohibit or impose sanctions on abusive behaviour

[44] A. Renda and others, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, Final Report (2014) DG MARKT/2012/049/E 25, available at <http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf>; I. Ayres and B. J Nalebuff, 'Common Knowledge as a Barrier to Negotiation' (1996) 44 UCLA L. Rev. 1631 in I. Lianos, 'Competition Law for the Digital Era: A Complex Systems' Perspective' (2019), available at https://www.ucl.ac.uk/cles/sites/cles/files/cles_6-2019_final.pdf>, p. 132 (last accessed 18 January 2021).

[45] Art.9(3-bis), Legge 18 giugno 1998, n. 192, Disciplina della subfornitura nelle attività produttive.

[46] See E. Truli, 'Relative Dominance and the Protection of the Weaker Party; Enforcing the Economic Dependence Provisions and the Example of Greece', (2017) 8(9) Journal of European Competition Law & Practice 579. The provisions regarding economic dependence formed part of the former Competition Act, Law No. 703/1977. In particular, Article 2a stated that 'the abuse by one or more undertakings of a relationship of economic dependence connecting an undertaking having the quality of a client or supplier to the undertaking(s) mentioned above, […], and lacking any equivalent alternative, is prohibited. This abuse of a relationship of economic dependence may particularly consist in imposing arbitrary trading terms, applying a discriminatory treatment, or suddenly and unjustifiably terminating longtime commercial relations.' The provision was abolished from the Competition Act in 2009 and was transferred was transferred to Law 146/1914 on Unfair Competition Practices, as Section 18a thereof without any change in the substance of the provision.

[47] Loi du 4 avril 2019 modifiant le Code de droit economique en ce qui concerne les abus de dependance economique, les clauses abusives et les pratiques du marche de loyales entre entreprises, M.B., 24 mai 2019, art 2.

[48] For a comparative analysis of the legislations in the Member States, see A. Renda et al., 'The impact of national rules on unilateral conduct that diverge from Article 102 TFEU', Study for the European Commission, (2012).

[49] Act Against Restraints of Competition, available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0066 (last accessed 18 January 2021). See also I. Kokkoris, *Is there a Gap in the Enforcement of Article 82*?, BIICL, 2009, ch. 3

[50] Article 3(2) of 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.

toward economically dependent undertakings'; a provision that sought to accommodate those Member States whose national competition laws went beyond the types of abuse of dominance covered by Article 102 TFEU. Although such national laws have been controversial ever since the introduction of Regulation 1/2003, their application seems to have inspired the proposed DMA[51] considering the increasing dependence of businesses on online platforms. As will be discussed in subsection B below, such national regimes may provide redress to businesses who are dependent on a platform in cases, for example, of abusive refusals of access to data by non-dominant undertakings which are not caught by the EU competition rules.[52]

While such rules on economic dependency were developed and have so far been applied to condemn abuses of economic dependence in the physical retail sector mainly, they can be relevant in the context of online marketplaces. Before exploring the latter point, the next section will briefly explore the Belgium, French and German provisions on abuse of economic dependence so as to gain a better understanding of their operation. Two main conditions for the application of these provisions are common to the three Member States, namely the need to show a state of economic dependence, and the need to show an abuse of this state of economic dependence. However, they differ significantly in scope and hence it is worthwhile comparing them.

A. National Regimes on Abuse of Economic Dependence

(i) Belgium

The concept of 'economic dependence' was introduced by law in April 2019.[53] The new provision is reflected in Article IV.2/1 of the Code of Economic Law (CEL), which prohibits non-dominant undertakings from using their stronger market position to impose unfair conditions on smaller trading partners. The introduction of this new legislation was originally inspired by the alleged abuses in the food distribution sector and aims at protecting smaller trading partners from vertical abuses. It enables the Belgian Competition Authority to establish and sanction abuses without the need to establish market dominance, i.e. when a supplier is economically dependent on buyer or vice-versa. In order to prove an infringement of the new Article IV.2/1 CEL, the Belgian Competition Authority will need to demonstrate the fulfilment

[51] See (n 29).
[52] T. Thombal, 'Economic Dependence and Data Access' (2020) 51 International Review of Intellectual Property and Competition Law 70-98.
[53] Loi du 4 avril 2019 modifiant le Code de droit economique en ce qui concerne les abus de dependance e´conomique, les clauses abusives et les pratiques du marche de loyales entre entreprises, M.B., 24 mai 2019.

of three cumulative conditions, namely: (i) the existence of a relationship of economic dependence between two companies; (ii) an abuse; and (iii) an effect on competition on the Belgian market or a substantial part of it. Economic dependence may be established where: (i) company A does not have alternative trading partners that are reasonably equivalent ('reasonably' requiring that they are available timely, at reasonable conditions and costs); and (ii) as a result, company B is able to impose trading conditions that could not be obtained in normal market circumstances. The types of abuses covered by the provisions on abuse of economic dependence closely mirror those caught by the prohibition of abuse of dominance under Article IV.2 CEL and Article 102 TFEU including for example refusal to deal, tying or bundling, imposing unfair trading conditions, or applying dissimilar conditions to equivalent transactions. But an alleged abuse of economic dependence will only be prohibited if it is capable of affecting competition on the Belgian market or a substantial part thereof. Though the fines are significantly lower than those applying for violations of the general competition rules, they are still significant (a fine of up to 2%).

(ii) France

In France, Art. L. 420-2, al. 2 of the French 'Code de Commerce' provides that: 'The abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings is also prohibited, if it is likely to affect the functioning or structure of competition'.[54] In other words, this Article prohibits abusing a position of relative dominance. The provision continues by stating that this abuse of economic dependence 'may include a refusal to sell, tie-in sales or discriminatory practices'.[55] Four conditions need to be fulfilled in order to determine a position of economic dependence: (1) the notoriety of the trading partner; (2) the significance of its market share; (3) the importance of the part of turnover achieved with this trading partner in the total turnover of the business affected; and (4) the difficulty for the business affected to find alternative commercial partners offering similar commercial solutions.[56]

Similar to the Belgian legislation, the French law explicitly states that the abuse has to be likely to affect the functioning or the structure of competition. However, an abuse of

[54] Official translation of the French 'Code de Commerce' available at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrancetranslations.
[55] Ibid.
[56] As referenced in the 2008 ICN Report on Abuse of Superior Bargaining Position, footnote 18 on p. 8 <https://centrocedec.files.wordpress.com/2015/07/abuse-of-superior-bargaining-position-2008.pdf> (last accessed 18 January 2021).

economic dependence may affect only a single undertaking and not have spill-over effects on any relevant markets. Although this requirement can be explained by the need to balance between the private interests of dependent businesses and the public interest in market efficiency, it does make the provision difficult to satisfy, and thus may undermine the interests of small businesses with limited scale of operation. As a result, the provision has been underutilised in practice because of these strict conditions and the restrictive interpretation by the French courts.

(iii) Germany

Unlike the French and Belgian systems, the German rules on abuse of economic dependence do not stipulate that the practices covered have to affect overall competition thus rendering the regime on abuse of economic dependence more effective. The ARC 2013/2018 provides for two separate categories of alleged 'market power' below the threshold of dominance, the so-called 'relative market power' in a vertical relationship between an undertaking and either its suppliers or customers; and 'superior market power' in the horizontal relationship between a large undertaking and its SME competitors, stipulated in Article 20 (3) and 20 (4).

The first category of relative market power that concerns us here is addressed in Articles 20(1) and 20 (2). 'Relative market power' refers to a differential in power in the vertical relationship between a 'powerful' undertaking on the one hand and its 'dependent' suppliers or customers on the other. The crucial question is what outside options are considered to be sufficient and reasonable from the perspective of the allegedly dependent undertaking. The abuse of economic dependence in Germany also covers situations of differentiated treatment as Article 19(2) no. 1 ARC (in conjunction with Article 20(1) ARC) refers to an undertaking treating 'another undertaking differently from other undertakings without any objective justification'.

More precisely, Article 20(1) of the ARC makes part of the prohibition on abuse of dominance also applicable to situations where 'small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power)'.[57] Article 20 (2) protects small, medium-sized and large dependent suppliers against requests for advantages by customers with relevant market power. Whether

[57] Official translation of the Act Against Restraints of Competition 2013/2018 available at <http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0066>.

any particular conduct constitutes an unfair impediment or unjustified differential treatment is decided in a comprehensive interest-balancing exercise with particular regard to the goals of the ARC, which pursues freedom of competition.

Undertakings with relative market power may be limited in their freedom to choose their trading partners: they may have a duty to deal with dependent undertakings, for example in cases of must-stock items. In principle, however, even dominant undertakings and those with relative market power have the freedom to choose their trading partners. The legislative history shows that Articles 20 (1) ARC and 20 (2) ARC which deal explicitly with demand-side market power, were animated by concerns about the relationship between large retailers and their suppliers. One could also argue that such rules allow for the emergence of a particular market structure, for example the viability of SMEs in certain areas of commerce and the protection of small stores against supermarket chains. Such an outcomes-based approach to market regulation would not be possible under the more economic approach to dominance that pervades mainstream antitrust analysis.

The above lend themselves to the conclusion that the main objective of national regimes on abuse of economic dependence is the protection of businesses in a weaker bargaining position, whereas the EU competition rules focus on protecting the welfare of consumers. But by protecting the party in a weaker position, the rules on the abuse of economic dependence may protect the 'not efficient competitor'. While this contravenes EU Competition Law and its current focus on protecting as-efficient competitors, the precise context of competition law enforcement in platform-to-business relations may prescribe that the ' "not as yet efficient" competitor needs protection in order to prevent damage to competition and ultimately consumers'.[58] The Court of Justice has already acknowledged the limits of the as efficient competitor test in *Post Danmark II* by stating that 'applying the as-efficient competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.[59] The Court considered Post Danmark's 'very large market share' and the 'structural advantages conferred, inter alia, by that undertaking's statutory monopoly' in the distribution of letters including direct advertising mail.[60] Other factors mentioned by the Court were the high barriers to entry in the market that in 'the presence of a

[58] J. Laitenberger, Director-General for Competition, 'Competition Enforcement in Digital Markets: Using our Tools Well and a Look at the Future' (Speech at the 14th Annual Conference of the GCLC on 'Remedies in EU Competition Law: Substance, Process & Policy', Brussels, 31 January 2019), p.5 available at: http://ec.europa.eu/competition/speeches/text/sp2019_03_en.pdf (last accessed 18 January 2021).
[59] Case C23/14 *Post Danmark* II, ECLI:EU:C:2015:651, para. 59.
[60] Ibid.

less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking'.[61] In a similar vein, as will be discussed below, network externalities and returns to scale facilitated by data may have a similar impact on the market structure lending themselves to the protection of the 'not yet as efficient competitor'.

B. Abuse of Economic Dependence in Online Marketplaces

Although the legal framework governing economic dependence has been developed and applied to Business-to-Business (B2B) relations in the physical retail sector, it can be applied to P2B relationships as well. In fact, competition concerns in P2B relationships may surpass those of the physical retail world, due to direct and indirect network effects[62] of a significant magnitude and scale. Network effects describe how the use of a good or service by one user affects the value the product has for other users. Direct network effects refer to the benefit gained by users of one group due to using a specific service which in turn depends on how many other users of the same group use the service. The more customers there are, the more valuable the service becomes for other users. Indirect network effects exist where the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) depending on the number of users of another group. Network effects may spur a self-reinforcing positive feedback loop, i.e. a situation where success feeds success; this is an important factor in strengthening a company's market power and might even create a lock-in effect for its customers. Accordingly, the risk of 'market tipping' is related to the occurrence of network effects. Tipping can be understood as a process which ultimately results in a market being served by only one provider while other providers leave the market.

The more successful a platform is and the more users it has on each side of the market, the larger the scale and the higher the quality of the collected data, profiles and preferences, will be. Amazon, for example matches two different groups: sellers and buyers and enables transactions between them. The transaction gives effect to positive indirect network effects as the value to users on one side of that platform indirectly benefits from the additional participation on the other side of the platform. Such indirect network effects contribute to the

[61] Ibid, para. 60.
[62] On the role of network effects for intermediation platforms, see P. Belleflamme and M. Peitz, *Industrial Organisation: Markets and Strategies*, (2nd edn., Cambridge University Press 2015).

formation of the platform's significant market/bargaining power via the positive feedback loop formed because of the interrelatedness between the two sides of the platform.[63] Furthermore, economic dependence may be reinforced by through the collection of Big Data and the use of algorithms.[64] In fact, 'algorithmic power'[65] can become a source of market power stemming from the gatekeeping role of online marketplaces as important gateway of businesses to consumers coupled with their ability to store, control and process important data. The possibility for data leverage across markets may strengthen market concentration even further, leading to a 'winner-takes-most' dynamic'.[66] The economic actors possessing this new form of power may be in a position to exploit their superior 'algorithmic power' and even acting as choice architects and 'manipulate' the choice and eventually the preferences of their suppliers and buyers.[67]

The economic dependence of business users on online marketplaces is also owing to the high switching costs that may preclude comparative alternatives from being explored in P2B relations. Of course, if sellers multi-home business users become more independent vis-à-vis the platform incumbent. Thus, multi-homing can be a countervailing factor against the self-reinforcing feedback effect of network effects and reduce the risk of market tipping, especially if multihoming is performed to a great extent. However, when multi-homing and switching are obstructed, then business users become more economically dependent on the platform and in the course of time their subordination becomes more entrenched. This, in turn, reinforces the economic dependence of business users on a single platform, which assumes the characteristics of a gatekeeper. Such a platform is the main bottleneck to its customer bases and is in a position to leverage this gatekeeper function to its advantage. In that case, platforms may be able to impose unfair trading practices[68] against business users in order to extract and maximise profits so as to recoup costs of competition from the seller's side. Worse, those practices may not be contested by the weaker party due to fear of retaliation. Consequently,

[63] David S. Evans and Richard Schmalensee, 'Markets with Two-sided Platform' in ABA Section of Antitrust Law (ed.), *Issues in Competition Law and Policy* 667 (2008), p. 678.
[64] See, F. Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Havard Univ. Press 2015), Chap. 2.
[65] Ibid.
[66] Regarding the characteristics and structural challenges of the digital economy see: Federal Ministry of Economic Affairs and Energy, A new competition framework for the digital economy, Report by the Commission 'Competition Law 4.0', (2019), chapter 2; https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competitionframework-for-the-digital-economy.html (last accessed 18 January 2021).
[67] J.D. Hanson & D. A. Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 Harvard Law Rev. 1420.
[68] European Commission, 'Communication, A Digital Single Market Strategy for Europe' COM(2015) 192 final, p.11; (n 2) above, pp. 12-13..

online intermediary marketplaces may acquire a superior bargaining position – relative dominant position – and have a relative market power that enables them to extract excessive value from captive business users.[69]

There are various reasons why sellers may find it difficult to adopt different online trading platforms or to switch from one to the other. Haucap & Heimeshoff[70] single out the following four: First, small producers often sell 'unique items' which may increase the difficulty in finding willing buyers. They, hence, turn to influential marketplaces with large group of consumers which increases their dependency, but also the chances of becoming vulnerable to harmful trading practices. Second, sellers can develop more easily a good reputation by using a single trading platform. Third, the risk of matching failure and the concomitant risk of selling products at low prices or even below market value discourages sellers from adopting smaller platforms. Finally, the switching costs arising out from the buyer side may also contribute to the seller side's dependency: When buyers, individual consumers, single-home on a platform due to the significant switching costs, it may negatively impact the seller's possibility of switching to different platforms. However, multi-homing does not necessarily increase business users' bargaining power with the online intermediaries on which they are present, because business users may be subordinated to several platforms at the same time.

The 10th amendment to the German ARC, dubbed the ARC Digitalisation Act, already addresses the possibility of applying abuse of economic dependence to online relations, specifying that 'dependence may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities' (Art. 20, 1a) or on access to markets provided by intermediary services when reasonable alternatives do not exist.[71] Furthermore, the rules on relative market power contained in section 20 (1) will in the future no longer protect SMEs alone. Major corporates are also protected if they need access to data and thus depend on digital platforms.

Two main aspects of the abuse of economic dependence could effectively address some of the challenges posed by the hybrid nature of online marketplaces. First, precisely because

[69] See Lianos (n 44) p. 34.
[70] J.Haucap and U. Heimeshoff, ' Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11(1), International Economics and Economic Policy 49-61.
[71] Government's Draft Proposal for the 10th Amendment to the German Competition Act: https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html(in German only); digitalisierungsgesetzzusammenfassung.pdf?__blob=publicationFile&v=4 (in German only) The proposal became law and entered into force on 19 January 2021.

abuse of economic dependence is found through the relative and subjective test of reasonable/sufficient alternatives, it could serve to avoid the difficult process of defining fast-changing, multi-sided markets[72] and the assessment of market dominance.[73] Indeed, although rules on economic dependence led to a massive caseload before competition authorities an explanation for their continuous existence may be that they relieve enforcers from the need to establish dominance. Establishing dominance can be a daunting task, especially for private plaintiffs. Pursuing the abuse of economic dependence may thus minimise the risk of false negatives stemming from the prohibitions against abuses of dominant positions in situations where the undertaking in question is actually dominant but could not be proven to be.

Second, pursuing the abuse of economic dependence in situations of platform dependence does not only avoid the need to define complex markets, but also represents a suitable enforcement tool to capture abusive refusals to access by non-dominant undertakings, which are likely to become more and more prevalent in our digitalised economy. For instance, they could allow third party sellers to be given access to aggregate data about transactions on the marketplace in order to provide them with better opportunities to compete with digital conglomerates such as Amazon. Indeed, pursuing the abuse of economic dependence may provide an alternative to the very strict conditions required for finding a refusal to deal under Article 102 TFEU. According to the EU courts, refusal to deal must meet the following requirements so as to qualify as an abuse of dominance: a) the indispensability of the input; b) the prevention of the introduction of a new product due to the refusal to deal; c) the exclusion of effective competition; d) the absence of an objective justification for the refusal to deal.[74] The Courts, however, have interpreted the indispensability requirement in a strict manner. It does not capture cases where the holder of the essential input does not operate in the downstream market. In such situations, abuse of economic dependence could represent a viable alternative. This is even so bearing in mind the difficulty in assessing whether and which data are 'indispensable'.[75]

[72] Which raises the question of whether anti-competitive harm is to be measured by reference to one, all or many sides of the relevant market which embraces the digital platform in question. Case T-11/08 *MasterCard*, EU:T:2012:260, para 176-177 and Case C-67/13P *Cartes bancaires*, EU:C:2014:2204 paras. 78-7.
[73] See J-U. Franck and M. Peitz, 'Market Definition and Market Power in the Platform Economy', CERRE Report (May 2019).
[74] Relevant cases include: Joined cases C-241/91 and C-242/91 *Magill*, ECLI:EU:C:1995:98; Case C-7/97 *Bronner*, ECLI:EU:C:1998:569; Case C-418/01 *IMS Health GmbH*, ECLI:EU:C:2004:257; Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289.
[75] C. Colangelo and M. Maggiolino, 'Big Data as Misleading Facilities' (2017) (2-3) European Competition Journal 249.

A recent judgment of the Paris Commercial Court casts some light on how the law prohibiting abuse of relative dominance may be applied to online marketplaces.[76] Following a two-year investigation, the French Ministry of Economic Affairs and Finance, which acts as a quasi-prosecutor in these cases, lodged its complaint in the Paris Commercial Court, which found that Amazon had subjected its trading partners to obligations that created a significant imbalance between their rights and obligations. Article L420-2 which prohibits the abuse of relative dominance provides that: 'the abusive exploitation by one (or more) undertakings of the state of economic dependence in which its suppliers or customers find themselves is prohibited insofar as it can affect the functioning or structure of the market'. The provision continues by stating that this abuse of economic dependence 'may include a refusal to sell, tie-in sales or discriminatory practices'. One such practice is 'to subject or attempt to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the contracting parties', found in Article L. 442-6-I, 2. This Article contains a blacklist of unfair trading practices, including the 'subjection of trading partners to obligations that create a significant imbalance between the rights and obligations of the contracting parties', upon which the judgment was based on.

While the judgment primarily concerns the exploitation by Amazon of third-party sellers on its platform, it is interesting to note that the Court also discussed how Amazon, by examining the offerings of third-party sellers, can start selling similar products, which it can then algorithmically promote over the products of the latter, e.g. through placement in the 'Buy Box'. The market was defined as that for Business-to-Consumer (B2C) online sales and the court demonstrated Amazon's significance in that market. The court described how Amazon, by virtue of indirect network effects, has grown into a quasi-gatekeeper of the access to the markets and consumers contributing thus to increasing the dependence of small third-party sellers on its platform, many of which don't have a website or physical store. The court attaches particular importance to the estimate that third-party sellers would lose 15-35% of their sales if they withdrew from the platform.

[76] For a detailed analysis see F. Bostoen, 'Abuse of relative dominance in the platform economy: A French court finds Amazon's contracts with third-party sellers significantly imbalanced' (12 November 2019) available at: https://www.lexxion.eu/en/coreblogpost/amazon-case-france/ The judgment is available at: https://cdn2.nextinpact.com/medias/jugement-tribunal-commerce-paris-amazon-2-sept-2019.pdf (last accessed 18 January 2021).

Having established the imbalance in power between Amazon and third-party sellers, the court went on to assess whether Amazon actually abuses that power by imposing significantly imbalanced contract clauses. The Court delved into 11 different clauses between Amazon and third-party sellers. The Court acknowledged that the non-negotiability of such clauses is inherent in the functioning of a marketplace hosting third-party sellers. Some of the clauses are justified, so as to protect consumers, such as the fact that Amazon has wide discretion to annul transactions to combat credit card fraud. But the Court concluded that 7 out of the 11 clauses complained create a significant imbalance at the expense of third-party sellers.

Firstly, the court scrutinised a clause that gives Amazon the right to 'amend any contractual provision … at any time and at its entire discretion', without being obliged to alert the sellers concerned of such amendments'. Sellers faced serious sanction for not complying with amended provisions such as suspension of access to the website and termination of contract. Secondly and relatedly, Amazon is allowed to suspend or terminate contracts at its sole discretion without having to justify its decision. Finally, the courts looked into the clauses on performance indicators. While the court considered the usage of performance indicators legitimate in itself, it highlighted that the specific criteria used to assess performance are imprecise and opaque, and/or outside of the sellers control. Furthermore, the criteria could be changed at any time without alerting sellers or providing them with a notice period and the consequences for not meeting the criteria can be serious. Other clauses which were significantly imbalanced included the 'A to Z' guarantee, which obliges sellers to reimburse customers even when it can be shown that their complaints are unjustified and even when they don't return the products. Additionally, the court scrutinised parity clauses imposed by Amazon which oblige sellers to offer their products on Amazon at conditions (e.g. regarding prices, customer support and shipping fees) that are equal to or better than those offered through other sales channels. Finally, the court considered exoneration clauses with regard to the 'Fulfilled by Amazon' service to be imbalanced. The court ordereds Amazon to modify the 7 infringing clauses and imposed a civil fine of €4 million.

Many of the clauses scrutinised by the Paris Court of Commerce were also the focus of the Bundeskartellamt's investigation into Amazon, discussed above, in which Amazon agreed to alert third-party sellers of any change to its terms and give sellers a notice period of 15 days. The company also agreed to give a notice period of 30 days when it terminates contracts. Amazon committed to adopt these changes worldwide. But, perhaps, even more interestingly some of the contractual modifications imposed by the court overlap with obligations enshrined

in the P2B Regulation. Amazon argued that the Regulation coming into force meant that the judgment would be without object. However, the court noted that the Regulation is 'without prejudice to national rules…which prohibit or sanction unilateral conduct or unfair commercial practices, to the extent that the relevant aspects are not covered by this Regulation.' With this point in mind the next section will discuss the key provisions of Regulation and to what extent they can address the imbalance of power between platforms and business users.

III. Regulatory Alternatives: The Platform-to-Business Regulation

A. Origins and Rationale

Unlike B2C unfair terms and practices, there is no general rule regulating directly B2B unfair trading practices at EU level. This can be explained by the fact that the imbalance in power is stronger in B2C relationships than B2B relationships, thus unfair terms and practices are extensively regulated with the so-called consumer acquis.[77] Competition law rules require the presence of market power and do not cover dependency relationships. Furthermore, their application requires the finding of an anticompetitive behaviour which is not necessarily determined with the same normative criteria than those used for unfair practices. Although they can address certain terms and practices in vertical relationships between suppliers and retailers or business users and intermediation platforms,[78] they cannot remedy many of the abusive terms and conditions employed by online marketplaces. Most crucially, antitrust rules intervene ex-post. The insufficiency of competition rules to deal with unfair practices has been recognised by the Commission. In particular, the dependency issues, combined with the difficulty in establishing a theory of harm make it particularly difficult to challenge the practices of online platforms. More specific rules, such as the Directives on misleading and

[77] On the EU consumer acquis, see N. Reich and H. W. Micklitz, *EU Consumer Law* (Intersentia 2014). Article 3(1) of the Unfair Contract Terms Directive (UCTD) defines B2C unfair term as follows: 'a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. Article 5(2) of the Unfair Commercial Practice Directive (UCPD) defines a B2C unfair practice when: '(a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'.

[78] In particular, Commission Guidelines of 20 April 2010 on Vertical Restraints, O.J. [2010] C 130/1.

comparative advertising[79] and on late payment[80] prohibit only a limited set of B2B unfair practices. Therefore, as will be shown below, the P2B Regulation fills in an important gap as it also covers instances whereby a platform is not yet dominant in terms of competition law, but it may have enough relative market power vis-à-vis the suppliers to impose unfair terms and conditions upon them. It can thus effectively complement competition law rules insofar as it can address varying levels of dependency on key players which undermine the exercise of effective countervailing bargaining power.

The P2B Regulation follows a series of Commission initiatives in the retail supply chain. In fact, since 2010 the Commission has been closely monitoring the retail supply chain so as to form a better understanding of unfair practices.[81] In 2013 the Commission for the first time analysed unfair trade practices in all supply chains of various economic sectors and found that, although forms and types of unfair trade practices along supply chains may vary from industry to industry, there is a common denominator for unfair trade practices: 'the transfer of costs incurred and the shift of entrepreneurial risk to the weaker party in the relationship'.[82] The Commission identified several B2B unfair practices, in particular in relation to the lack of written contracts and ambiguous terms, the transfer of risk to the weaker party, the use of information, in particular confidential information, retroactive contract changes and termination of the contract. Those terms and conditions were particularly prevalent in the food supply chain,[83] and were defined as practices that 'deviated grossly from good commercial conduct, [and] are contrary to the good faith and fair dealing and are unilaterally imposed by one trading partner on another'.[84]

Obvious parallels exist between B2B unfair terms and practices imposed in the retail supply chain and those imposed in the online intermediation services. Indeed, the Staff Working Document accompanying the Commission Communication of January 2012 on e-commerce noted that: 'these business practices (identified in the Retail Market Monitoring Report) can affect electronic commerce as much as their "brick and mortar" competitors and indeed be more prevalent in that sector. Abuses of market power, especially at the expense of

[79] Directive 2006/114 of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ [2006] L 376/21.
[80] Directive 2011/7 on combating late payment in commercial transactions, OJ [2011] L 48/1.
[81] Report from the Commission of 5 July 2010, Retail market monitoring report, COM (2010) 355, p. 2
[82] Commission Green Paper of 31 January 2013 on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37. See also the Summary of the responses to this Green Paper.
[83] European Commission, 'Communication, Tackling unfair trading practices in the business-to-business food supply chain' COM(2014) 472 final, p.2.
[84] Ibid.

SMEs, are likely to exist in the online as in the offline sector. Other practices may be specific to electronic commerce'.[85] In the case of online intermediation platforms, if information asymmetry is higher and the market contestability is weaker compared to offline distribution infrastructures, then the risks and the costs of unfair practices are higher.

In 2016-2017, the Commission undertook an extensive fact-finding exercise on B2B practices in the online platforms' environment. A public consultation had revealed various concerns relating to platforms abusing their relative stronger position in order to impose unfair terms and conditions upon traders, in particular for access to user bases or databases, or refusal of market access.[86] Further fact-finding, studies, and stakeholder consultations resulted in the adoption of the P2B Regulation in June 2019, which entered into force on 12 July 2020.

B. Provisions

Broadly, the aim of the Regulation is to establish a fair, predictable, sustainable and trusted online business environment, while maintaining and further encouraging an innovation-driven ecosystem around online platforms across the EU. The legislative initiative comes after a complaint to the Commission by traders selling online via marketplaces, hotels using booking platforms and app developers, particularly SMEs, regarding what they perceived as the unfair practices of the online platforms they use to reach consumers. The Regulation has a wide scope; while considering the need for more transparency, fairness, and remedial mechanisms, it defines a varied array of rights and obligations. It is symmetric law whose obligations apply to online intermediation services[87] and online search engines, which provide their services to business users as well as corporate websites established in the EU and which offer goods or services to consumers located in the EU. Recital 2 engages with the issue of the increasing dependence of business users on platforms and refers to the latter's 'superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers

[85] Commission Staff Working Document of 11 January 2012, Online services, including e-commerce, in the Single Market, SEC (2011) 1641, p. 83.
[86] See (n 2) above pp. 11-13.
[87] The P2B Regulation defines online intermediation services as any service that is normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service, *i.e.*, any information society service provider (as defined in Directive 98/34/EC and clarified in Directive (EU) 2015/1535). The P2B Regulation expressly confirms that e-commerce marketplaces, price comparison tools, app stores, and social media are within its scope. It does not apply to peer-to-peer online intermediation services (where no business users are present), pure business-to-business online intermediation services that are not offered to consumers, online payment services, online advertising tools, or online advertising exchanges. Notably, whether the transactions between business users and consumers (i) involve any monetary payment, or (ii) are partially concluded offline is not relevant to the application of the P2B Regulation.

in the Union. For instance, they might unilaterally impose on business users practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing'.

Although centred around the notion of 'fairness' most of the P2B Regulation provisions relate to transparency obligations. Transparency for business users is required in particular as regards the main parameters determining ranking as well as the reasons for their relative importance (Article 5), whether platforms engage in any differentiated treatment (Article 7), and the extent of access to data (Article 9). More specifically, if the platform's own products are given differentiated treatment, i.e. are favoured, either in the ranking of results, or with regard to fees paid for the intermediation, this must be included in the terms and conditions. Any differentiated treatment relating to access to data by the platform and the business users must also be specified. More generally, the terms and conditions must indicate to what extent each party has access to the data generated through interactions on the platform. These obligations are targeted at online marketplaces such as Amazon which allegedly uses the vast amounts of sales data generated by suppliers to determine which products it should start producing itself. Two main reasons seem to justify why the Commission limits the Regulation to transparency. Firstly, the issue of discrimination appears to be mostly confined to (potentially) dominant platforms such Amazon, Google and Facebook. In those cases, Article 102 TFEU can offer redress. Secondly, the Commission at the time might have adopted a cautious approach in preserving the innovation capacity of platforms which may be hampered by regulation. This explains why the P2B Regulation does not ban any practices or prescribe any conduct of platforms in relation to these issues; it is a light-touch, outcomes-based regulation.

In this respect the P2B imposes requirements as to the clarity, the content and the modification of terms and conditions used by providers of online intermediation services. Terms and conditions must be clear, unambiguous and easily available. When the platform changes its terms and conditions it must notify its business users and respect a notice period of at least 15 days. In its terms and conditions the platform must also set out the objective grounds for decisions to suspend or terminate the provision of its intermediation service to business users. Where platforms make use of most favoured nation clauses or 'MFNs' (prohibiting suppliers from offering their goods or services at more favourable conditions elsewhere), they must set out the main economic, commercial or legal considerations for doing so.

Besides these transparency obligations, the proposal seeks to offer suppliers effective redress when harmful practices do arise. To do so, it makes platforms responsible for instituting

dispute resolution mechanisms. In the first place, they must provide for an effective internal system for handling complaints by business users. However, this obligation does not apply to small enterprises. Without exception though, every platform must identify in its terms and conditions one or more mediators with which they are willing to engage to settle disputes. Finally, representative organisations and public bodies are given the right to bring actions when platforms or search engines do not comply with the Regulation.

Overall, the P2B can be seen as a first step in gathering more information on the sector and monitoring the extent of alleged unfair practices. Recital 49 explicitly keeps open the option of 'further measures, including of a legislative nature … if and where the provisions established in this Regulation prove to be insufficient to adequately address imbalances and unfair commercial practices persisting in the sector'. For the most part, the P2B Regulation aims to address enforcement gaps in already existing competition law rules, national contract law and national stricter unilateral conduct rules and falls short of providing an elaborate normative framework for addressing power imbalances in P2B relations. Though centred around the notion of fairness, it does not provide any analytical tools to distinguish fair from unfair practices. However, Recital 2 refers to 'practices which grossly deviate from good commercial conduct or are contrary to good faith and fair dealing', which may contain the seeds for developing a 'fairness' test for P2B relations. The Regulation's main contribution is with respect to transparency in written terms and conditions, which can facilitate data gathering by public authorities so as to gain a better understanding of any exclusionary or exploitative practices. Finally, though transparency can solve the apparent information asymmetry between merchants and online marketplaces, it cannot address market power or dependency issues.

IV. Concluding Remarks: From the P2B Regulation to the Digital Markets Act

As online marketplaces grow in size and influence, their ability to capture value from dependent business users by imposing unfair terms and conditions increases. Current EU competition enforcement against online platforms and marketplaces and commentary has focused on exclusionary abuses, such as self-preferencing, as one manifestation of power imbalances and has not systematically addressed other tools that may effectively complement EU competition law in the quest of taming the platforms' superior bargaining position. The chapter aimed to fill in this gap. In doing so, it examined two parallel developments which have received less attention so far: a) the relevance and potential application to online marketplaces

of national rules on the abuse of economic dependence adopted by some Member States in Europe; and b) the adoption of the P2B Regulation and its implications for addressing the power imbalances between online marketplaces and business users. The chapter explored the interaction of these tools with EU Competition law and unveiled their gap-filling role. Drawing on the competition law cultures of Belgium, France and Germany, it explored the concept of economic dependence and demonstrated its relevance to online marketplaces. It argued that two main aspects of the abuse of economic dependence could effectively address some of the challenges posed by the hybrid nature of online marketplaces. First, precisely because abuse of economic dependence is found through the relative and subjective test of reasonable/sufficient alternatives, it could serve to avoid the difficult task of defining fast-changing digital markets. Second, pursuing the abuse of economic dependence in situations of platform dependence would serve as a suitable enforcement tool to capture abusive refusals to access by non-dominant undertakings, which are likely to become more and more prevalent in our digitalised economy.

The chapter then turned to explore the relevance of P2B Regulation in addressing the platform's superior bargaining position vis-à-vis sellers. Though a light-touch regulation, it is significant insofar as its transparency related obligations can address some unfair terms and conditions imposed by platforms without resorting to the market definition exercise and without the need to demonstrate dominance. However, the instrument falls short of providing a normative framework to distinguish fair from unfair practices.

Notwithstanding these shortcomings, the P2B regulation has paved the way for the recently announced DMA proposal, a far-reaching tool of ex ante regulation which aims to address, amongst others, platform dependency issues. The DMA proposal is concerned with economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened contestability of platform markets. Indeed, the P2B Regulation could be considered the predecessor to the DMA in that it was the first attempt to address issues of economic dependency in P2B relations. Unlike the P2B Regulation, the proposed DMA is asymmetric law: it imposes a series of ex ante behavioural obligations on entities that the Commission designates as 'gatekeepers'. The Regulation defines the criteria by which a platform would qualify as a 'gatekeeper'.[88] Such qualification then triggers the

[88] The DMA envisages a two-step process in which the 'provider of a core platform service' first self-designates as a "gatekeeper", and then adheres to list of obligations that apply to all gatekeepers. Specifically, there are three main cumulative criteria that bring a company under the scope of the DMA: 1. A size that impacts the internal market: this is presumed to be the case if the company achieves an annual turnover in the European Economic Area (EEA) equal to or above € 6.5 billion in the last three financial years, or where its average

application of a set of rules ('obligations') imposed on those platforms that have the ability and incentive to engage in unfair practices that harm competition. The obligations for those designated platforms and the potential sanctions largely resemble behavioural remedies and fines that the European Commission might otherwise seek to impose under its competition law powers. The DMA proposal minimises the detrimental structural effects of unfair practices ex ante, without limiting the ability to intervene ex post under EU and national competition rules. Like the national rules on abuse of economic dependence discussed above, it seeks to complement EU competition law rules, and in particular A. 102 TFEU, given that a gatekeeper may not necessarily be a dominant player.[89] It further minimises the risk of regulatory fragmentation stemming from the fact that Member States apply divergent national rules to address the problems arising from the significant degree of dependency of business users on core platform services provided by gatekeepers and the consequent problems arising from their unfair conduct vis-à-vis their business users.

The DMA builds on the P2B Regulation, notably the definitions of 'online intermediation services' and 'online search engines'. Articles 5 and 6 are the key provisions of the Proposed Regulation. They include a long list of conduct-specific obligations, recognisably drawing inspiration from previous competition law decisions and investigations of the European Commission. Most relevant to our discussion is the prohibition of 'using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users'. Gatekeepers should also 'refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking'. Of course, these obligations

market capitalisation or equivalent fair market value amounted to at least € 65 billion in the last financial year, and it provides a core platform service in at least three Member States; 2. The control of an important gateway for business users towards final consumers: this is presumed to be the case if the company operates a core platform service with more than 45 million monthly active end users established or located in the EU and more than 10 000 yearly active business users established in the EU in the last financial year; 3. An (expected) entrenched and durable position: this is presumed to be the case if the company met the other two criteria in each of the last three financial years; see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en (last accessed 18 January 2021).

[89] Ibid, page 8.

seem to have been drafted with specific past conduct in mind and fall short of containing organising principles.[90]

The proposed DMA is without prejudice to the P2B Regulation: The Commission can benefit in its enforcement of those obligations from the transparency that online intermediation services and online search engines have to provide under the P2B Regulation on practices that could be illegal under the list of obligations if engaged in by gatekeepers. However, the DMA falls short of explicitly addressing unfair contractual terms and practices that disempower business users. A possible list of prohibited practices could be built upon the list already contained in the P2B Regulation and include unilateral or retroactive changes to the contract, unjustified termination/suspension. For the sake of legal certainty a generic definition of such unfair terms and practices could be adopted inspired by the Commission Communication on unfair trading practices in the food supply chain which defines a B2B unfair trading practice as 'practice that grossly deviates from good commercial conduct, is contrary to good faith and fair dealing and is unilaterally imposed by one trading partner on another'.[91] This definition could then be complemented with a black list of terms and practices that undermine consumer welfare. These prohibitions could also be complemented by an EU-wide Code of Conduct between the main intermediation platforms and business users to address the most harmful practices.

[90] For a commentary see C. Caffarra and F. Scott Morton, 'The European Commission Digital Markets Act: A Translation' (5 January 2021) available at https://voxeu.org/article/european-commission-digital-markets-act-translation#.X_S5Rss3Eks.twitter (last accessed 18 January 2021).
[91] See (n 83) above.