SPECIAL RESPONSIBILITY OF DIGITAL PLATFORMS UNDER ARTICLE 102 TFEU IN THE DIGITAL MARKETS ACT – A DATA PERSPECTIVE

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Datasta on tullut keskeinen kilpailun väline Euroopan unionin digitaalisilla sisämarkkinoilla. Suurimpien alustayhtiöiden toiminnan seurauksena on tehty arvioita, annettu päätöksiä ja tuomioita sekä ryhdytty lainsäädäntötoimiin kilpailun toimivuuden turvaamiseksi.

Euroopan unionin toiminnasta annetun sopimuksen 102 artikla koskee määräävän markkina-aseman väärinkäyttöä. Artikla sisältää normin määräävässä markkina-asemassa olevan yrityksen erityisestä velvollisuudesta. Sen mukaan määräävässä asemassa olevilla on erityinen velvollisuus olla vääristämättä toimivaa kilpailua markkinoilla riippumatta niistä syistä, joiden vuoksi määräävä asema on olemassa. Erityisen velvollisuuden vuoksi määräävässä asemassa olevien ei ole välttämättä sallittua toimia tietyllä tavalla, vaikka kyseistä toimintatapaa ei olisi itsessään katsottava määräävän aseman väärinkäytöksi tai muutoinkaan ongelmalliseksi. Tutkimuksen tarkoituksena on selvittää lainopin keinoin ensinnäkin, mikä on digitaalisten alustayhtiöiden erityisen velvollisuuden sisältö tilanteissa, joissa on kyse datan käytöstä. Euroopan unionin tuomioistuinten oikeuskäytännössä alustayhtiöiden erityistä velvollisuutta on käsitelty pääasiassa saman sisältöisenä kuin perinteisten markkinoiden osalta. Määräävässä asemassa olevien alustayhtiöiden erityiseen velvollisuuteen voidaan oikeuskäytännön perusteella katsoa kuuluvan ainakin velvollisuus olennaisen datan jakamiseen sekä kilpailijoiden kohtelemiseen yhdenvertaisemmin ja niiden toimintamahdollisuudet varmistaen.

Toisekseen tutkimuksen tarkoituksena on selvittää, miten alustayhtiöiden havaittu erityinen velvollisuus on vaikuttanut Euroopan unionin uuden digimarkkina-asetuksen sisältöön. Digimarkkina-asetus sisältää erityisiä kilpailuoikeudellisia velvoitteita alustayhtiöille. Velvoitteet, jotka voidaan jakaa kieltoihin ja velvollisuuksiin on suunnattu erityisesti suurimmille alustayhtiöille, jotka nimetään asetuksen mukaisten kriteerien perusteella portinvartijoiksi. Digimarkkina-asetuksessa portinvartija-alustoille asetettavissa velvoitteissa voidaan havaita piirteitä jokaisesta tutkimuksessa tarkastellusta unionin yleisen tuomioistuimen tuomiosta.

Tutkimuksen perusteella on havaittavissa, että digimarkkinasäädös sisältää alustayhtiöiden erityisen velvollisuuden mukaisia velvoitteita, jotka asetetaan yhtiöille etukäteisvelvoitteina ja joiden tavoitteena on markkinoiden kilpailullisuuden turvaaminen riippumatta yksittäisten portinvartijoiden vaikutuksista. Tämä poikkeaa kilpailuoikeuden säännösten perinteisestä tavoitteesta suojella vääristymätöntä kilpailua.

Avainsanat: SEUT 102 artikla, Määräävä markkina-asema, määräävässä markkina-asemassa olevan erityinen velvollisuus, digimarkkina-asetus, data

X Tutkielma ei sisällä muita kuin tekijän/tekijöiden omia henkilötietoja

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Abbreviations

AI	Artificial Intelligence
DMA	Digital Markets Act
EC	European Community
EU	European Union
EFD	Essential Facilities Doctrine
GDPR	General Data Protection Regulation
IoT	Internet of Things
OECD	Organization for the Economic Co-operation and Development
OS	Operating system
TFEU	Treaty on the Functioning of the European Union
WEF	World Economic Forum

1. INTRODUCTION

1.1 Big data and competition in the digital economy

Today, data is a key to successful competition. Rapidly growing digital markets include several types of services, such as platforms and electronic commerce (e-commerce) services, on which firms have successfully established business models that are heavily based on data gathering. On the other hand, the Internet of Things (IoT) has brought goods to the digital realm, allowing service providers to follow individual product users in real time.[1] As the size and scope of data increases exponentially, also the means of processing and analysing that data are developing at an unprecedented rate. Machine learning and Artificial Intelligence (AI) are powerful tools, which allow businesses to receive valuable information on customer behaviour and to use that information further automatically.

All the above-mentioned data gathering, alongside with other exponentially increasing tracking activities result in an amount of data that can be called big data. A general opinion is that big data facilitates innovation and new, improved products.[2] A widely used definition for big data is 'information assets with high volume, high velocity and high variety that demand cost-effective, innovative forms of information processing, which enable enhanced insight, decision-making and process automation'.[3] Big data is often described by the four 'Vs' of which three are mentioned in the definition above, but are added with a value aspect; volume, velocity, variety and value.[4] The term big data has also received its place in the *Oxford English dictionary*, where it is defined as 'data of a very large size, typically to the extent that its manipulation and management present significant logistical challenges'. These definitions show that big data is often described by its volume and the need for computing power to reach its potential. In this thesis, the term will be used to describe the whole phenomenon of data

[1] The internet of things refers to a phenomenon where physical objects that are embedded with sensors, or different other kinds of technologies, are connected over the internet to share the data that they have gathered from the use of those objects. An interesting and recent piece of Finnish literature on the overall phenomenon is *Hyppönen, Mikko*: Internet. WSOY 2021.
[2] Among others, OECD 2016, p 2.
[3] The definition is provided by information technology company Gartner, see https://www.gartner.com/en/information-technology/glossary/big-data. Last accessed 18.12.2022.
[4] See for example, OECD 2016, p. 2. Similarly, *Grunes – Stucke* 2016, p. 16-28. The European Commission has used this definition in its decision in case M.8788 *Apple/Shazam*, see paragraphs 317-326.

gathering activities in digital markets, whereas notion 'data' refers to concrete datasets that are gathered and further analysed to the purpose of benefiting business practices.

Data is used as a key input in companies' business models, which often aim at obtaining competitive advantage, or 'big data advantage'.[5] The competitive relevance of data has been widely studied, resulting in lists of criteria and conditions under which it cannot be negated.[6] So far, the discussion has been policy and goal centred and has mostly resulted in describing the challenges around the various characteristics of data. The main features of these discussions are that datasets should be considered individually, and results depend highly on the qualifications of certain data.

Recently, the relevance of data for competition between, especially, large global technology companies and other market players has been noticed. According to the OECD[7], the ability to process large datasets, which can mean high computing power as well as sophisticated and very efficient algorithms, can lead to market power of large platform service companies. This is often a result of several favourable market characteristics, such as economies of scale and scope as well as network effects.[8] Big data is said to be able to create market concentration, when the largest platform companies have been able to build ecosystems of platforms. This means that only one company achieves a position, where it has the possibility to possess user data from a vast number of different platform sources that it maintains. In this way, these platform companies may also raise barriers to other market players to enter the market. The role of data in the European Union (EU) merger control has already been carefully considered.[9] The discussion should, therefore, focus on the remaining areas of competition law.

Apart from the relevance of the use of data for competition in digital markets, attention has been paid to questions of access to essential data, that the largest platform companies possess.[10] On the other hand, questions that stem from the fact that, although big data is not limited to

[5] See *Grunes – Stucke* 2015, p. 3.
[6] These criteria will be explored later in Chapter 2 of this thesis, studies worth mentioning here are, among others, *Grunes – Stucke* 2015 and *Ezrachi – Stucke* 2016. See also *Crémer et al.* 2019, p. 73, according to which competition will increasingly depend on timely access to relevant data and furthermore, the ability to process that data effectively in order to create new innovations. This access emphasised aspect is one of the central approaches to data that has lately been discussed especially in the EU framework.
[7] Organization for the Economic Co-operation and Development.
[8] OECD 2016, p. 3.
[9] *Crémer et al.* 2019, p. 92.
[10] For discussion on competition law and access to data, see especially *Graef* 2016, who presents the analysis of access to data in the perspective of competition law's abuse of dominant position and the established theory of essential facilities. This theory will be briefly explored later in Chapter 3. See also *Mäihäniemi* 2017.

consumer data, many of its central aspects are targeted at consumers, have been addressed.[11] Then again, big data does not only create market concentration but on the contrary, can limit abusive practices.[12] In addition, data, in itself, might not have high value and therefore, the underlying solutions and innovations for the use the data become more significant. In the literature, the relationship between data protection and competition law has also been discussed.[13] Without an efficient enforcement of obligations in competition law, there is a risk that market players may exploit personal data by the use of anti-competitive methods.[14] However, the market power of large technology companies is not, indeed, the main issue that needs special action in terms of competition law.[15] Instead of centring the focus on the rather evident concentration of the digital (platform) markets, issues that stem from that concentration would need a better focus. This includes privacy and trust concerns, which have their effect on consumer welfare. Therefore, it has been stated that these considerations as well as other issues of social dimension would need further research especially in the context of their applicability.[16]

When data has become a remarkable factor in digital competition, discussion on the overall scope of responsibilities for the data-driven activities of large digital platforms has evoked. As a result, several policy papers on the topics of data, digital markets and competition have been published.[17] Furthermore, the European Commission has taken rather ambitious steps to prevent competition law infringements in digital markets. Among others, it has announced and committed several investigations into platform service companies, including *Google*, *Apple* and *Amazon* of which the decisions regarding Google's conduct have already been re-evaluated by the General Court.[18] As opposed to the Commission's merger reviews, these investigations are led in terms of Article 102 of the Treaty on the Functioning of the European Union (TFEU)[19], which considers abuse of dominant position.

The regulative level has been activated as well. Furthermore, most recently, the Commission has taken legislative measures to control the largest platform service companies and their

[11] *Grunes – Stucke* 2015, p. 2.
[12] *Guerzoni – Nuccio* 2019, p. 324.
[13] See *Graef – van Berlo* 2020 and the doctoral dissertation *Wasastjerna* 2019, in which a privacy dimension is suggested to be added to competition law enforcement.
[14] *Wasastjerna* 2020, p. 8.
[15] *Guerzoni – Nuccio* 2019, p. 324.
[16] See *Mäihäniemi* 2020 on additional goals of competition law, pp. 280–282.
[17] Among others, the policy paper for the European Commission; *Crémer et al.*: Competition policy for the digital era – Final report, 2019, and a report by the British Competition and Markets Authority (CMA): Online platforms and digital advertising - Market study interim report 2019.
[18] Case T-612/17 *Google Shopping* and case T-604/18 *Google Android*.
[19] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390.

powerful position in the market for platform services. In February 2020, the Commission published the European Data Strategy.[20] The strategy, the aim of which is to create a data empowered society and to build a legal framework for data, includes five legislative proposals that have been called the 'Big Five'.[21] These proposals included the proposal of Digital Markets Act.[22] After the political agreement of the content, the texts of the Digital Markets Act were officially adopted and signed by both the European Parliament and the Council on 15 September 2022 and the Regulation entered into force already on 1 November 2022.[23] The Digital Markets Act (DMA)[24] represents a new approach to competition law on digital markets. It is a first proof of the coming legislation directed at digital markets and especially the use of data, which has not been a particular object of regulation before. In particular, the Regulation involves rather exceptional competition regulation including anticipatory responsibilities that are directed at the largest digital platform service companies.

1.2 Abuse of dominant position according to Article 102 TFEU

In the European Union competition law, restrictive business practices are controlled by the provisions of the Treaty on the Functioning of the European Union, of which Article 102 considers abuses of dominant position. According to Article 102 TFEU abuse by an undertaking of dominant position within the internal market is prohibited in so far that it may affect trade

[20] COM(2020) 66 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European strategy for data, 19.2.2020.

[21] For a good overview of the Data Strategy and the Big Five, see, for example, the Working paper 7.6.2022 for Sitra: *Bräutigam et al.*: EU Regulation builds a fairer data economy - The opportunities of the Big Five proposals for businesses, individuals and the public sector, available at https://www.sitra.fi/app/uploads/2022/06/sitra-eu-regulation-builds-a-fairer-data-economy.pdf. Last accessed 20.11.2022.

[22] COM(2020) 842 final, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). Other four proposals of the Data Strategy considered the Data Governance Act (currently in force, Regulation (EU) 2022/868), the Digital Services Act (in force, Regulation (EU) 2022/2065), the Artificial Intelligence Act (the Commission's proposal COM/2021/206 final) and the Data Act (the Commission's proposal COM/2022/68 final). Since these Regulations do not belong to the scope of the EU Competition law and thus, they do neither belong to the scope of this research, they are therefore left for other research practices.

[23] The Digital Markets Act will be effective after six months from this point of time, which will be in May 2023. The Regulation was adopted following the Ordinary legislative procedure, which comprises the work of the co-legislators in the EU, the European Parliament and the Council of the European Union. The procedure is based on Article 294 TFEU. For a description of the available legislative procedures in the EU including the Ordinary legislative procedure as the most common one, see, for example, *Raitio – Tuominen* 2020, pp. 84–88.

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

between Member States. The concept of undertaking is defined in the case law of the Court of Justice of the European Union (later referred to as the EU Courts) by a functional approach.[25] The Court of Justice has ruled that every entity engaged in economic activities is an undertaking within the EU competition law.[26] According to the list of examples in Article 102 TFEU, an abuse can consist of unfair purchase or selling prices or other unfair trading conditions, or limitations in production or development into the prejudice of consumers. Also, conduct which results in placing trading parties at a competitive disadvantage due to the application of dissimilar conditions, or, a situation where the conclusion of contracts is made subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts are listed as the examples of an abuse. This list of examples is not comprehensive and therefore other possibilities for abusive behaviour also exist.[27]

Dominance is connected to market power. Market power can be defined as a situation where a firm can set its prices above the competitive level, or otherwise has the ability to affect the competitive circumstances.[28] This is a traditional definition for market power and it is notable, that it has a fixed connection to the objective of price. Furthermore, the concept of market power can be described as one of the most important economic concepts in competition law. In addition, the objective of competition law can be described through the concept of market power. By means of competition law and policy, it is possible to handle harmful market power in forehand or aftermath.[29]

The aim of competition law is generally to protect the process of undistorted competition. Furthermore, EU competition law has been identified to have several significant objectives, or goals over time.[30] Among these objectives are consumer welfare as well as the establishment and preservation of the internal market.[31] One of the latest views is that fairness in competition law, or also called fair competition, could be a new goal that is articulated in the EU competition law. In the past few years, criticism towards markets and competition as the default solution to

[25] On limitations to this definition, see *van de Gronden – Rusu* 2021, pp. 20–23.
[26] See Case C-41/90 *Höfner*.
[27] *Whish – Bailey* 2021, p. 198.
[28] *Kuoppamäki* 2018, p. 10.
[29] One of the main dilemmas related to market power is about the economics' concepts of allocative and dynamic efficiency; on one side too great market power can block allocative and dynamic efficiency, but on the other side, a greater size of business could be detrimental when reaching for those efficiencies. The efficiency loss can be estimated by the concept of dead-weight loss, see ibid., pp. 12–20.
[30] About different schools of thought behind these identified objectives, see for example *van de Gronden – Rusu* 2021, pp. 3-6 as well as *Whish – Bailey* 2021, pp. 17–22.
[31] About consumer welfare as an objective of competition law, see, for example, *van de Gronden – Rusu* 2021, pp. 9–10.

societal problems has evoked.[32] Fair competition is related to opinions according to which not only large companies but also other undertakings are entitled to compete in the market and be stimulated to reach their full potential.[33] It has been indicated that businesses need a level playing field to reach their full potential.[34] Furthermore, it is of high importance that markets and competition give undertakings incentives to engage in practices that are both efficient and fair. In this regard, the aim of competition law is to ensure equal opportunity in a sense that companies and consumers are free to pursue their goals as they like.

Article 102 TFEU includes an established provision of the Special Responsibility of dominant undertakings. According to the Court of Justice, irrespective of the reasons for which the undertaking has such a dominant position, the dominant undertaking has special responsibility not to allow its conduct to impair genuine undistorted competition.[35] Throughout their case law that concerns abuse of dominant position according to Article 102 TFEU, the EU Courts have repeated this conclusion, almost unchanged. Possibly due to this standard statement, the concept of Special Responsibility has not received any special attention, and on the contrary, so far, the concept has been interpreted more like a statement of the obvious.[36] In addition, the discussion around the Special Responsibility has been rather controversial. When some authors propose the concept to be left completely forgotten, others see great potential in the concept of the Special Responsibility to be used, especially, in the digital market environment.[37]

1.3 Object of study

In this thesis, the following research questions will be assessed.

1. What is the scope of the Special Responsibility of digital platforms in situations concerning the use of data?
2. How is this scope of the Special Responsibility reflected in the Digital Markets Act?

[32] Ibid., p. 6.
[33] Ibid., p. 12.
[34] See Margrethe Vestager, Speech, Brussels 16.7.2020: Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things. https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367. Last accessed 18.12.2022.
[35] Case 322/81 *Michelin v Commission*, para. 57.
[36] See *Whish – Bailey* 2021, p. 197.
[37] On this debate, see, *inter alia*, *Graef – van Berlo* 2020 and *Sauter* 2020.

The scope of the Special Responsibility of digital platforms is a relevant question when considering the most recent competition law cases, that have their focus on the anti-competitive effects of dominant digital platforms on undertakings in the downstream markets.[38] In the literature and case law, the Special Responsibility of Article 102 TFEU has been interpreted as a standard provision developed in the case law of the EU Courts and it is said to be almost a statement of the obvious.[39] As the EU Courts have repeatedly concluded, the exact scope and interpretation of the Special Responsibility as set in Article 102 TFEU is to be decided on a case-by-case basis.[40]

Today, however, data-driven digital markets are different and much more complex when compared with the traditional, analogue or offline markets. The largest platform companies, which dominate markets globally, are dominant undertakings in the meaning of Article 102 TFEU. Therefore, they naturally have the Special Responsibility not to impair genuine undistorted competition as it is known in case law to date. One of the most remarkable features of large platforms is that with the help of the network effects and economies of scale and scope, just a few platforms have attained such a market position that can result in barriers to entry and is even called super-dominance.[41] This development raises the question whether there would be a need for more precise obligations, which would involve clear responsibilities at least for those platforms having the greatest dominance in the market.

The aim of this thesis is, against the explained context, to analyse the scope of the Special Responsibility under the EU competition law Article 102 TFEU in today's digital markets, where large platform service companies operate and compete with highly data-driven business models. It will be ultimately evaluated, whether the Special Responsibility gets a more precise, essential meaning in the Digital Markets Act[42], based on today's needs for responsibility of dominant players in the digital realm in situations which concern the use of data. It will first be discussed, what the scope of the Special Responsibility is in situations that concern the use of data. This question will be addressed from the perspective of the case law of the EU Courts, the Court of Justice and the General Court. Furthermore, it will briefly be analysed, whether the statements about the Special Responsibility differ in any way from earlier, and basically identical statements of the Court of Justice, which consider analogue markets. In this regard, it

[38] See *Graef – van Berlo* 2020, p. 5.
[39] See *Whish – Bailey* 2021, p. 197.
[40] See, among others, case T-612/17 *Google Shopping*, para. 165.
[41] See *Sauter* 2020, p. 414.
[42] Regulation (EU) 2022/1925.

will be argued that the Special Responsibility is mostly treated in the same way than has been the case traditionally.[43] Furthermore, due to the emphasis on a case-by-case analysis, the Special Responsibility does not get only one essential scope.

On the other hand, the new Digital Markets Act includes provisions that impose responsibilities on the so-called gatekeeper platforms in the digital internal markets. Since the Digital Markets Act is a regulation, it is binding in its entirety and directly applicable in all the EU Member States.[44] In this research, the impact of the Special Responsibility of digital platforms on the Digital Markets Act will be assessed. Furthermore, it will be discovered whether the provisions of the Digital Markets Act can be interpreted as concrete obligations of the Special Responsibility of large digital platforms in situations which concern the use of data. Thus, the aim of the second part of the research is to assess the effects of the analysed case law on the Digital Markets Act.

The material of this research includes the primary and secondary legislation of the European Union of which the most important are Article 102 of the Treaty on the Functioning of the European Union as well as the Digital Markets Act. Secondly, the case law of the Court of Justice and of the General Court as well as the decisions of the Commission will be used. Furthermore, to facilitate a comprehensive analysis of the object of study, some soft law material, such as the Guidance on the Commission's enforcement priorities[45], which concerns interpretation and enforcement of Article 102 TFEU, will be used.

The Special Responsibility of dominant undertakings is a concept related to market dominance and is included in Article 102 TFEU. Therefore, first, the scope of this research is limited to European union law. Secondly, when the focus is on the analysis of Article 102 TFEU, other anti-competitive provisions of the Union law are left for some other research practices. Finally, infringements and enforcement of Article 102 TFEU are covered only where necessary as regards the description and analysis of the Special Responsibility.

[43] See Chapter 3.
[44] According to Article 288 TFEU, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. For an overview of the norms in EU law, see for example, *Raitio - Tuominen* 2020, pp. 72–88.
[45] 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, OJ C 45, 24.2.2009, pp. 7–20.

The protection of personal data has also attracted more attention in the field of competition law. Furthermore, it seems that the EU competition policy goals have shifted their emphasis from economic efficiency to consumer welfare, which emphasises the necessity of consumer and personal data protection. The legal framework for rights and protection of personal data has been said to have evident competition implications.[46] The discussion on the interaction between competition law and data protection was raised to a new level when in 2019, the German Bundeskartellamt (the German competition authority) gave its decision regarding Facebook's (today Meta) conduct.[47] The decision is said to prove the interlinkage of competition law's Special Responsibility and data protection.[48] As *de lege ferenda* type of discussion, the Special Responsibility has been proposed to include elements outside competition law and which include elements of, *inter alia*, data protection law. In this research, the interlinkage between competition law and data protection law will not be fully covered and furthermore, data protection will be discussed only where necessary, especially in the framework of the definition of the Special Responsibility.

1.4 Methodological considerations

The method of my research is the legal doctrine. According to *Aarnio*, law as a science covers several fields of research, which differ inter alia in their objectives.[49] The legal doctrine has its objective in revealing the content of law with interpretation and systematisation. The legal doctrinal approach aims at an internal assessment, giving a systematic analysis of the principles, rules and concepts in a particular field of law. It also assesses the relationships between these components in order to solve problems, such as gaps or unclarities in the existing legislation.[50] The legal doctrine can be further divided into theoretical and practical concepts so that the objective of systematisation is pursued by the first and interpretation by the latter.[51] It is clear

[46] *Grunes – Stucke* 2015, pp. 12–13.
[47] Case B6-22/16. The conclusion of the Bundeskartellamt was that Facebook had abused its dominant position by infringing data protection rules. *Graef* and *van Berlo*, 2020 p. 7, have therefore noted that the authority seems to have adopted the view that Facebook, as a super-dominant undertaking, has a rather broad special responsibility to comply with data protection rules.[47] In this regard, a great question is whether dominant undertakings have higher responsibility than non-dominant firms for complying with data protection rules.
[48] See *Graef – van Berlo* 2020, p. 7.
[49] See *Aarnio* 2011, p. 6.
[50] *Smits* 2017, p. 210.
[51] *Aarnio* has analysed this classification further in his works, see for example *Aarnio* 2011, pp. 126–127.

that the legal doctrinal approach is the most suitable choice for this research, which basically aims at interpretation as well as systemisation of the positive law. This finding can be assessed by three major elements of the legal doctrine, which are, first, the internal perspective of law, secondly, that law is considered as an organised system and finally, that the objective of the legal doctrine is the present law.[52] An important aim of the doctrinal approach is prescription. The concept refers to the fact that, in addition to describing the content of the law, the doctrine also evaluates whether an argument can be led through the filter of the legal system.[53]

The object of this research, which is ultimately the Special Responsibility under EU competition law, is a provision included in Article 102 TFEU, which is positive law. The Special Responsibility obtains its scope through a case-by-case analysis. Therefore, the legal doctrinal method will be used to analyse the case law of the EU Courts. The aim of the research is, by analysing the case law and finding the scope of the Special Responsibility of dominant digital platforms, to systematise the concept as an internal part of the legal system. Secondly, the legal doctrine will be used to analyse the Digital Markets Act. When interpreting and systemising the Special Responsibility, also some questions of *de lege ferenda* will be discussed.[54]

Competition law is a casuistic field of law in which case law has a significant role.[55] The provisions of competition law are usually interpreted by their objectives. Therefore, different situations are assessed according to their essential meaning and effects on specific markets and in this way, it is ultimately decided whether the question is about a restriction of competition. It is possible to describe the objective of competition law by saying that it regulates harmful market power either afterwards, *ex post*, or in advance, *ex ante*.[56] For example, in the Article 102 TFEU prohibition of abuse of dominant position, the restrictions of competition are confirmed only after the anti-competitive behaviour has already been conducted and furthermore, enforcement actions by the Commission happen *ex post*.[57] The Digital Markets Act, on the contrary, includes *ex ante* type of competition regulation since it includes such obligations that may be enforced *ex ante* when compared to possible harm to competition. This is due to the fact that the Regulation imposes compliance obligations on gatekeepers the goal

[52] *Smits* 2017, pp. 210–213.
[53] Ibid., pp. 217–219. On the choice of method, see also *Hirvonen* 2011, pp. 21–22.
[54] *De lege ferenda* type of research differs from the legal doctrinal approach so that when the legal doctrine describes the law as it is, *de lege ferenda* research answers the question what law ought to be, see *Leskinen* 2022, p. 1158.
[55] *Kuoppamäki* 2018, p. 46.
[56] Ibid., p. 10.
[57] See Recital 5 of the DMA.

of which is to remove, in advance, circumstances that lead to the impairment of genuine competition. Therefore, the Digital Markets Act is stated to have an *ex ante* effect on contestability and fairness in the digital markets.[58] Furthermore, the assessment of obligations laid down by the Digital Markets Act is different in the way that with traditional competition law provisions, enforcement is highly dependent on the effects of certain behaviour that already has occurred, the Digital Markets Act simply forces the gatekeepers to act in a certain way, which is, in beforehand, regarded as pro-competitive.

As an object of research, competition law offers several methodological choices. Competition law is a field in which it is useful and sometimes mandatory to use especially economic analysis to understand relations or conditions of different markets.[59] Therefore, when conducting research around competition, economic theory, or often called competition theory, becomes a necessary method.[60] On the other hand, when thinking about the global characteristic of the digital markets, also legal comparative analysis could be selected for a perspective of study. In this research, however, these methods will not be used. As the aim of the research is to analyse the existing and becoming law, and in particular, the essential meaning of provisions in the positive law, the legal doctrine fits the best for that purpose.

1.5 Structure

This thesis consists of five main chapters. After the first, introductory chapter, in the second chapter, some of the most relevant characteristics of competition in the European Union digital markets will be discussed. The data-driven market reality and related phenomena are the inspiration and context to this thesis. In order to explore the scope of the Special Responsibility in situations which concern use of data, it will first be explained how the use of data is a matter of competition and furthermore, a powerful tool by the use of which it may be possible to obtain a dominant position. Therefore, a special attention is given to the perspective of data and its

[58] DMA, Recital 73.
[59] According to *Whish - Bailey* 2021 p. 3, today's competition lawyer and competition economist can be illustrated as co-pilots in an airplane, where it is not enough for one to understand the other, but both to understand each other in order to fly safely.
[60] For an overview of the competition theory, see for example *Kanniainen – Määttä* 2001. About the relationship between competition law and economics (or law and economics), see for example, *Kuoppamäki* 2018, pp. 6–10 and 46.

effects on competition. Since the object of study of this thesis is based on positive law, it will also be briefly discussed whether the existing competition law framework is relevant to digital markets.

The third main chapter focuses on the first research question of what the scope of the Special Responsibility of digital platforms is in situations which concern the use of data. To analyse this question comprehensively, first, the Special Responsibility of dominant undertakings will be defined. Since the analysis of the Special Responsibility is an integral part of the analysis of abuse of dominance defined in Article 102 of the TFEU, it is necessary to explain this assessment in detail. In this regard, the establishment of a dominant position as well as relevant types of abusive behaviour which fall under Article 102 TFEU will, in particular, be discussed. Finally, in order to analyse the scope of the Special Responsibility of digital platforms, the case law of the EU Courts will be analysed.

In the fourth chapter, the second research question of how the Digital Markets Act is affected by the case law of the EU Courts will be assessed. Furthermore, it will be discovered, whether the defined scope of the Special Responsibility is visible in the provisions of the Digital Markets Act. In this regard, the relevant provisions of the Digital Markets Act will be discussed and analysed against the findings from the case law.

In the fifth and final chapter, the research findings will be brought together and a final overview of the scope of the Special Responsibility of dominant digital platforms in situations which concern the use of data will be given.

2. DATA AS A MATTER OF COMPETITION IN DIGITAL MARKETS

The aim of this chapter is to explain, why the use of data can be a relevant factor when analysing dominance and restrictions of competition in the framework of abuse of dominant position of Article 102 TFEU. In this regard, the most relevant characteristics of digital markets will be explained and furthermore, the question of competitive relevance of data will be discussed. To later explore the scope of the Special Responsibility in situations where the use of data is concerned, it becomes necessary to explain, how the use of data may be a matter of competition law. It will be discovered that data may be used as a powerful tool by which the largest digital platforms may strengthen their position so that it affects competition in digital markets. As a result of combining favourable characteristics of digital markets and extensive and insightful data gathering, digital platforms may even become dominant undertakings in the meaning of Article 102 TFEU.

Finally, to validate the object of study of this research, and before moving forward to explain the Special Responsibility and its background on Article 102 TFEU in detail, it will briefly be discussed, why the existing competition law framework, and in particular, Article 102 TFEU can be applied to data-driven digital platforms and digital markets although the features of them differ in many respects from the traditional analogue markets.

2.1 Characteristics of digital markets

Characteristics of digitalisation and digital markets are said to reshape the traditional understanding of how markets function. Furthermore, those characteristics bring new challenges to which competition law must account for.[61] This is the same in both, the substantive and the enforcement sides of law. The impact of powerful digital market features is getting to be noticed by policymakers, and as a result, the special features of digital markets are also starting to be taken into account in competition proceedings, such as the analysis of dominance.[62] The combination of significant digital markets' characteristics and the high

[61] *van de Gronden – Rusu* 2021, p. 45.
[62] The analysis of dominance is discussed in Chapter 3.

volume and variety of data that digital market players, in particular the platforms, hold, has been said to make these digital players so-called data-opolies, also in other words, digital gatekeepers.[63]

The first feature of digital markets is that those markets are particularly fast-paced and cyclical. When observing those features that separate digital markets from analogue markets, it may be noticed that digital markets are best described as cyclical when compared with traditional analogue markets.[64] This is due to the vulnerability of market power to displacement by a next cycle of innovation on the market. Digital markets are frequently contestable because when there are low entry barriers, newcomers can more easily challenge the market due to the possibility to reach large segments of end users more quickly through the far-reaching online platform services.

Traditional analogue markets are often based on a traditional, supplier – buyer setting, which is a one sided market. Then again, in digital markets, there are usually multiple sides. Therefore, another important term related to digital markets, which is often used in pursuance of data-driven businesses, is two- or multi-sided markets. Multi-sided markets are usually markets that include a free, consumer side and then again, at least one income stream provider side.[65] Where the idea of the supplier side seems to remain approximately the same as in the analogue, one-sided markets, the buyer side is layered and often includes both consumers and other service providers. Two-sided markets are such markets where two or more different consumer groups are present, and where network effect arises as more consumers join that market.[66] The idea of a traditional newspaper may be used as a rare example from analogue markets. The publisher of the newspaper sells advertising space to advertisers, but in addition, the publisher, of course, sells the copies of newspapers to readers.

According to an OECD study, two-sided markets are often given the name of two-sided platforms, because they differ in business models from undertakings operating in one-sided markets. The two-sided platforms are characterised by three elements, of which the first element is that there are two different groups of users (or consumers) that are interdependent. Then again, secondly, there are indirect externalities across groups of these users, which means that

[63] *Wasastjerna* 2020, pp. 78–79. The term gatekeeper was launched officially as a definition for certain kinds of powerful digital platforms in the Digital Markets Act. More on this definition, see Chapter 4, Section 4.1.1.
[64] See *van de Gronden – Rusu* 2021, pp. 45–46.
[65] *Ezrachi – Stucke* 2016, p. 20, 131 and 134.
[66] *Whish – Bailey* 2021, p. 13 and 35.

the possible value for users on one side increases with the number of users on the other side of a specific platform. The third element of two-sided platforms is that the price structure of the platform is non-neutral in a way that the platform can set the price structure so that it affects the level of transactions. The platform can for example charge more on one side of the market and reduce the prices for the other side so that the volume of transactions is affected.[67]

Big data fades the line between the demand and supply sides.[68] For example, digital platform users act both as the consumers of services and the producers of data that the platform consumes for its own purposes and thus forms a real-time feedback loop. These purposes may lead to restrictive practices for competition, such as entry barriers. Then again, the characteristics of big data, which can be described by the four 'Vs'; volume, velocity, variety and value, may lead to negative implications for competition policy.[69] These implications include barriers to entry and refusal of giving access to essential input data. Furthermore, the scale of data can be used as an efficiency defence.

Apart from the multi-sidedness of digital markets, the concept of network effects characterises digital market economy.[70] As the success of platform businesses depends on the ability to attract a large segment of end users and business users, digital markets are characterised by direct and indirect network effects.[71] In the decision of case *Google Search (Shopping),* the Commission noted that network effects were part of the barriers to enter the general internet search market.[72] However, when comparing the effects of regular and data-enabled network effects that are based on machine learning, it has been noted that data-based machine learning, in itself, can develop competitive advantage, but do not guarantee real defensible barriers like regular network effects.[73] Thus, data-enabled network effects are assumably not that strong as regular network effects, unless the scale of business and market share are significantly high, which is the situation with large platform companies such as Google.

[67] See OECD 2009, p. 11.
[68] OECD 2016, p. 3.
[69] *Grunes – Stucke* 2015, p. 3.
[70] Network effects can be defined as a situation where the value of a certain product for customers increases with the number of other customers consuming the same product, see inter alia *Whish – Bailey* 2021, p. 13. For a description of network effects in an online environment, see *Ezrachi – Stucke* 2016, p 133-135.
[71] *van de Gronden – Rusu* 2021, p. 46.
[72] Case AT.39740 *Google Search Shopping*, para. 292–296.
[73] See *Hagiu – Wright* 2020. In their article, the authors aimed at proving the relevance and power of big data. They approached the subject with the concept of defensible barriers and compared the situations of customer data based machine learning with the regular, offline network effects.

The degree of advantage that is created by data-enabled learning can be explored by seven different aspects.[74] The degree of competitive advantage depends on the amount of value added by data and about how lasting the marginal value of learning from data is. Then again the competitive advantage is dependent on how quickly the data expires, and how unique or hard to copy the data is and in addition, how difficult it is to produce same kind of products based on a certain customer data. Finally, the most remarkable factors are whether individual customer data helps to improve the product or service for the same user, or only for others, and whether the data learning cycle is quick enough to produce insights, which advantage the products for the use of today's and not only of future customers. Answers to these questions tell whether the business has produced data-based, real network effects and not only lower advantage in competition.

Large platform services have a wide base of end users and business users. Thus, they can take extensive tracking and profiling activities to gather information that is provided and created by those users while using the platform services.[75] The most extensive platforms, such as Google, have even formed platform ecosystems. While these platforms represent key structuring elements to the digital economy of today, the large structures of ecosystems are also able to raise entry barriers to the market. As mentioned above, the Commission launched, in the context of the Digital Markets Act, a definition for these kinds of large gateway platforms, which is the gatekeeper.[76] A gatekeeping platform service has a remarkable impact on the competitive environment in the digital markets; there is not only inter-platform competition between different service providers, but a great deal of the digital competition is in the form of intra-platform competition. This means that the gatekeeper platform service is able to provide space for business users, which, by using the same platform, actually compete inside that platform. Furthermore, the platform service company itself does usually compete in the same intra-platform market. In other words, this means that the platform competes inside its own platform as well. Thus, in the digital markets there is usually both horizontal and vertical competition. From the perspective of the gatekeeper platform service company, the horizontal direction

[74] Ibid.
[75] The Digital Markets Act, alongside of other important features of digital platforms, is based on this fact. See the proposal of the European Commission for a Regulation of the European parliament and of the Council on contestable and fair markets in the digital sector COM(2020) 842 final, p. 1. The Digital Markets Act will be discussed in detail in Chapter 4.
[76] Ibid., p. 2. The definition can now be found in Article 2(1) of the Digital Markets Act.

means competition with other platforms whereas the vertical competition means competing with the business users of the platform itself.

What is related to personal data is, that the common business structures of digital market players often involve a free product for consumers. The pricing of the service is designed so that in return, the service company receives data as the price paid of that particular service. Digital markets can be said to include so called non-price markets, which mean that many services are provided freely to consumers. Since in the digital markets, the price of a certain product or service to consumers is rather often zero, digital markets need a careful examination at least in terms of market definition and market power. Competition on a non-price market is usually analysed by aspects that cannot be measured by the same means as price, such as quality, variety, or innovation. The level of innovation is a typical parameter of competition particularly when the service in question is free of charge.

A more recent characteristic of digital platform markets is that digital platforms have even begun to act as so-called regulators. In a recent policy paper made for the Commission, attention was paid on the fact that in digital markets, competition occurs inside specific platforms. Especially in marketplace platforms, the platform operators have started to set up rules and institutions through which the users interact.[77] The exact appearance of these rules depends on their function and design, but according to the report, examples of them are rules relating to the platform design choices, the relationship between the platform and the users, or interactions between users.[78] Although platforms might also have rules which are positive in a competitive sense, there may be examples of situations in which a dominant platform tries to sell so called monopoly positions to their business users.[79] Digital platforms are therefore called regulators, and they are even said to have regulatory power, which platforms have responsibility to use in a pro-competitive manner.[80] In relation to platforms being regulators, in the report it was stressed that because of their function as regulators, dominant platforms have responsibility to ensure that the rules they set up, do not impede undistorted competition without objective justification.[81] A dominant platform that sets up a marketplace must ensure a level playing field

[77] *Crémer et al.* 2019, p. 6.
[78] See ibid., pp. 60–61.
[79] Moreover, later in the report by *Crémer et al.* (2019), and with reference to the Commission's case AT.39740 *Google Search (Shopping)* it was concluded that rules set up by a dominant platform may become anti-competitive when the platform itself competes with the platform users.
[80] Ibid., p. 16.
[81] Ibid., p. 6.

on this marketplace and must not use its rule-setting power to determine the outcome of the competition.

2.2 Competitive relevance of data

When defining the concept of data, first, it is common to divide data into the main categories of personal and non-personal data.[82] The General Data Protection Regulation (GDPR)[83] protects natural persons by regulating the processing of personal data.[84] In the framework of the GDPR, personal data is defined as any information which relates to an identified or identifiable natural person.[85] An identifiable person is a person who can be identified directly or indirectly in particular on the grounds of an identifier such as a name or an identification number, or, factors, which are specific to, *inter alia*, physical, genetic, cultural or social identity of the natural person in question. The World Economic Forum has categorised personal data into three dimensions; volunteered, observed, and inferred.[86] Examples of these are that volunteered data is intentionally contributed by a user, like social media posts, observed data is gathered by tracking users' activities online, and inferred data is obtained by the analysis of volunteered and observed data with, for example, machine learning tools. The non-personal data is all other data except personal data. Naturally, both, the personal and the non-personal data may be objects of competition, but by far, the discussion related to data and competition has heavily focused on the other main category, personal data.

In the literature, a framework consisting of four different questions to determine the competitive relevance of data has been proposed.[87] The framework evaluates whether a company owns or only controls the relevant data, whether the data is available as a product or input to competitors, whether the data is already a competitively critical input, and finally, whether relevant, available substitutes for that data do exist. The competitive relevance of data is most often addressed either by the variety of the features of data or, by the way in which the risks of data are

[82] *Inter alia*, ibid., p. 24.
[83] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR).
[84] GDPR Articles 1, 2, 3.
[85] GDPR Article 4(1)(1).
[86] WEF 2011, p. 7.
[87] *Sivinski* et al., pp. 201–202.

addressed. Different features and different kinds of data hold different relevance for the competitive process. Therefore, and because data is most often very complex, any discussion on its use should begin by the analysis of the features of the data concerned.

Data is stated to be a central asset in digital business.[88] Data has also been described as the key factor for, among others, production processes and targeted marketing, not to forget Artificial Intelligence.[89] In the literature, it has been noted that when analysing competitive constraints, such as infringements that form an abuse of dominant position, there are two principal ways in which the risks of data can be addressed.[90] Data can either be addressed as a quality parameter or as an input or asset. Similarly, the OECD notes that competition authorities can address risks for competition by treating data as an asset or input, or secondly, by considering the impacts of data on the quality dimensions.[91]

The relevance of data as an asset in competition law can be further divided into three different functions.[92] First of them is related to the viewpoint that data is often described as a currency in digital markets. Especially in the context of the European Union, data is said to be the price that consumers pay for online services.[93] When assessing harm related to price, the theories of price can be converted from price to data. Then again, as the public concern about the world's personal data in the control of just a few big technology companies has been growing, competition authorities are pushed to discover the effects of the data usage by large companies.[94] Thus, the public concern has been one of the incentives to define data as a currency in digital markets.

Secondly, data can also form a necessary input for certain products or services that the competitors of the incumbent providers of digital platforms want to introduce.[95] This role of data relates to the question of access to essential data. If certain data is seen as a critical input for a certain product market, holding the data in the hands of one company can lead to implications for competition. A functioning competitive process is increasingly dependent on timely access to data.[96] The final function of data as an asset is that by analysing data, it might

[88] WEF 2019, p. 5.
[89] See *Crémer et al.* 2019, p. 73.
[90] *Wasastjerna* 2020, p. 173.
[91] OECD 2016, p. 3–4.
[92] *Graef* 2016, p. 365.
[93] *Wasastjerna* 2020, p. 172.
[94] Ibid., p. 173.
[95] *Graef* 2016, p. 365.
[96] *Crémer et al.* 2019 pp. 7–8.

be possible to develop new products or services, and this has the possibility to give rise to new markets and innovations.

Apart from the asset role of data, risks can be analysed on the quality dimension. If data is assessed as a quality parameter, or in other words, a parameter of a non-price dimension, this enables the analysis to reveal some privacy-related concerns of data.[97] It has been noted that privacy is not a social cost, such as air pollution, but a part of individual agreements.[98] Although it seems to be difficult to measure, that does not mean that it should be left for consumer protection authorities and be analysed as a factor with no competitive significance.

2.3 Discussion on the relevance of the competition law framework

The provisions of EU competition law have stayed unchanged for an already long period of time. For example, Article 102 TFEU has not met any textual changes since it came into force as Article 86 of the Treaty establishing the European Economic Community.[99] Potentially due to these unchanged provisions, recently, especially in literature, there have been discussions on whether and how to apply competition law rules to digital platforms.[100] Although the traditional framework of the competition rules is still ultimately said to be fit for purpose also when considering digital markets, the special features of digital markets are however said to need a more careful examination when considering, for instance, the establishment of dominant position or infringements of competition rules, such as potential abuses of the dominant position.

The relevance of data for competition and furthermore, implications of data-driven business models are commonly acknowledged. When it comes to applying competition rules to situations which concern the use of data, studies have so far usually agreed on the fact that there is no need for actual amendments in the legal framework, although, at the same time, a likely need

[97] *Wasastjerna* 2020, p. 173.
[98] *Grunes – Stucke* 2015, pp. 5–6.
[99] The Treaty establishing the European Economic Community (EEC), also called the Treaty of Rome, came into force in 1958. After several changes the Treaty is now the Treaty on the Functioning of the European Union.
[100] In this regard, *van de Gronden* and *Rusu* 2021, p. 105, point out that it is not surprising that discussions around digitalisation, big data and dominance have lately been closely connected to the need to re-modernise the application of Article 102 TFEU.

for updated methodologies or even competencies is acknowledged. For example, according to a white paper of the World Economic Forum (WEF), worldwide competition regulations are broad and open-ended and there is no solid proof that those rules would not be applicable to technology and competition issues that concern two-sided markets.[101] As long as there is no robust evidence of competition laws failing systematically to achieve their goals, there is no reasonable need for amendments in the legal framework. Therefore, the existing competition concepts in the European Union framework are well suited to their purpose.[102] Although the existing legal framework is considered to be sufficient, new business practices, including the use of data, would need some new methods or even competencies.[103] Furthermore, data is not a new phenomenon in the field of competition law and as the existing legal framework has already been proven to fit the phenomenon, the Commission should neither impose disproportionate limitations through competition law enforcement.[104]

It is evident that more concrete studies considering the application of competition law to situations involving the use of data are asked for. For now, especially certain categories of challenges occurring from the application of Article 102 TFEU on the use of data have been emphasised. What is surprising is that the non-price markets and multi-sidedness of digital markets seem not to have received any place among those considerations.[105] Article 102 TFEU and the use of data are most often addressed by the question of access to data and the effects of giving or refusing to give access to data on competition.[106]

However, even if the regulative framework was still fit for purpose, a certain will to apply and adopt that framework to new digital markets in reliable ways is needed.[107] This means that the analysis of competition issues needs to acknowledge the competitive reality, which, in the digital environment, has its own peculiarities. Competition law doctrine has been able to react to new challenges with the case-by-case approach and as a matter of fact, competition law has been created to react to ever-changing market circumstances.[108] Furthermore, competition law

[101] See WEF 2019, p. 15. The paper also points out that if there is no evident consensus about the competitive assessment of different digital market practices, radical changes should rather be avoided.
[102] *Graef* 2016, p. 366.
[103] *Iacovides – Jeanrond* 2018, pp. 457–458.
[104] *Davilla* 2017, p. 381.
[105] *Grunes* and *Stucke*, 2015, p. 6, explain that due to the non-price characteristic of digital markets, a careful examination of relevant markets and market power is necessary. Still, it seems that the market definition is not a specific problem and can adjust well to the digital environment. Market definition in digital markets is discussed in detail in Section 3.1.
[106] See, for example, *Mäihäniemi* 2017 or *Graef* 2016.
[107] *Graef* 2016, p. 366.
[108] *Crémer et al.* 2019, p. 52.

has always had its stable principles, which have been guiding the enforcement. Due to these facts, the existing competition law framework is flexible enough and does not need changes for the digital markets. Interestingly, Article 102 TFEU has been proposed to be a 'background regime' for the whole new legal framework of the digital economy.[109] This could indicate that also the idea of special responsibility of dominant undertakings included in Article 102 would have an even more general relevance.

[109] See *Crémer et al.* 2019, p. 53. In particular, this is due to the Article's ability to facilitate the analysis of markets and market failures.

3. SPECIAL RESPONSIBILITY

The Special Responsibility is a concept that is interpreted for dominant undertakings; undertakings holding a dominant position have special responsibility to avoid abusing their dominant position. In this chapter, the focus will be on the first research question of this thesis and thus, it will be discovered, what the scope of the Special Responsibility of digital platforms is in situations which concern the use of data. As the analysis of the Special Responsibility is an integral part of the analysis of abuse of dominance set in Article 102 TFEU, first, the assessment of abuse of dominant position according to Article 102 TFEU will be discussed in detail. Following the structure of Article 102, the establishment of dominant position, relevant types of abusive behaviour and the relation of the Special Responsibility to the assessment of abuse of dominance will be covered.

The assessment of Article 102 is highly dependent on the individual features of case law. Since the Special Responsibility obtains its concrete meaning through case law, the most relevant judgements of the EU Courts that concern digital platforms, will be analysed. The aim of this chapter is ultimately to define the scope of the Special Responsibility of digital platforms according to this case law.

3.1 Assessment of dominance in digital markets

Article 102 TFEU can be interpreted as holding in its wording five cumulative conditions under which an infringement of that Article, or in other words, an abuse of a dominant position is present.[110] 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*. The exact interpretation of a dominant position is disputed.[111] There are two analytical steps to the finding of dominance of an undertaking; firstly, the relevant market will be defined and secondly, factors indicating

[110] About these cumulative conditions, or also called, constitutive elements of Article 102 TFEU in more detail, see *van de Gronden – Rusu* 2021, pp. 105–156. For a comprehensive description of Article 102 TFEU, see also *Whish – Bailey* 2021, pp. 180–223.
[111] *Kuoppamäki* 2018, p. 247.

substantial market power in the identified relevant markets are analysed in order to find whether the undertaking holds a dominant position.[112]

There is no comprehensive definition for the meaning of an abuse itself, and it seems that the Court of Justice has preferred not to make any broad statements of it.[113] However, it is possible to identify three broad categories of abuse, which are exploitative and exclusionary abuses as well as single market abuses.[114] For the purpose of this research, there is no need for a comprehensive discussion on the overall application of these forms of abuses included in Article 102 TFEU. This is because with the concept of the Special Responsibility, the question is not about an abuse committed using a dominant position, but more on the mere existence of dominance. However, the case law concerned later in this chapter addresses the analysis of abusive behaviour. The analysis of the Special Responsibility is indeed an integral part of the analysis that is taken towards a finding of abuse. Therefore, before analysing the case law, some especially relevant factors in the analysis of Article 102 abuse of dominant position will be discussed. Furthermore, when the abuse is formally confirmed, there is also some level of certainty about the scope of the Special Responsibility.

The Commission published a guidance paper on its enforcement priorities of Article 82 of the EC Treaty (today Article 102 TFEU) in 2009.[115] The focus of Article 102 TFEU enforcement shifted from more formalistic analysis to an effects-based approach, culminating in the adoption of the 2009 Guidance of the Commission's enforcement priorities.[116] The Guidance defines the establishment of dominance to be comprised of the identification of the relevant market, which includes relevant geographical and relevant product markets, market power, and finally, the significance of that power.

As the challenges with the market definition of digital markets seem to be related especially to the product market[117], first, the relevant product market definition will be discussed and after this, some observations of the relevant geographic market will be made.

[112] *van de Gronden – Rusu* 2021, p. 109.
[113] *Whish – Bailey* 2021, pp. 194–196.
[114] Ibid., p. 209.
[115] Guidance of the Commission's enforcement priorities, OJ C 45 24.2.2009.
[116] *van de Gronden – Rusu* 2021, p. 109. In case *Post Danmark II,* C-23/14, *Post Danmark A/S v Konkurrencerådet*, para. 52, the Court of Justice clarified that the Guidance on the Commission's enforcement priorities is only the Commission's approach and includes the choices that it prioritises. Accordingly, the administrative practice that the Commission follows is not binding on national competition authorities or courts.
[117] *van de Gronden – Rusu* 2021, p. 115.

3.1.1 Relevant product market

As a first step of the analysis of dominance, the relevant market must be defined. In the scope of this research, it means that the relevant digital market needs to be defined. According to the Commission's Notice on market definition, there can be three main competitive constraints, which are demand substitutability, supply substitutability and potential competition.[118] In general, the relevant market is defined by identifying the relevant product market as well as the relevant geographical market.[119] A relevant product market comprises all the products or services, which are regarded as interchangeable or substitutable by the consumer. This can be due to the products' characteristics, their prices, or their intended use.[120] Then again, a relevant geographical market comprises the area where the undertakings concerned are involved in the supply and demand of products or services, where the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.[121]

Traditionally, the relevant product market is defined by the SSNIP test, the so-called small-but-significant-non-transitory-increase-in-price test, which provides a conceptual framework for market definition.[122] The purpose of the SSNIP test, also called the hypothetical monopolist test, is to explore, whether the products or services in question are interchangeable and secondly, whether those products are substitutable.[123] Substitutability is most often addressed on the demand side, which is the most immediate and effective disciplinary force on the suppliers of a given product.[124] According to the SSNIP test, two products are in the same

[118] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997 (Notice on market definition), paragraphs 13-14. The Notice is currently under evaluation and the Commission has published a draft of the revised Market Definition Notice in which attention has been paid also to new market phenomenon including non-price markets and digital market characteristics. See European Commission, Press release, Brussels 8.11.2022: Competition: Commission seeks feedback on draft revised Market Definition Notice. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528. Last accessed 18.12.2022.
[119] Briefly about relevant market tests in literature, see *van de Gronden – Rusu* 2021, pp. 23–25, or *Whish – Bailey* 2021, pp. 22–39.
[120] Notice on market definition, para. 7.
[121] Ibid., para. 8.
[122] See ibid., para. 17, or also *Whish – Bailey* 2021, pp. 27–28.
[123] Apart from the SSNIP test, according to *Kuoppamäki* 2018, pp. 268–269, other traditional ways for identifying the relevant product market is the analysis of price correlation between two or more products in the supposedly same market.
[124] Notice on Market Definition, para. 13.

market if a five to ten per cent increase in price of a product X would lead to the situation where most of the demand that previously focused on the product X would switch to product Y.[125]

As discussed in Chapter 2 above, digital platform service companies function most often on a two- or multi-sided market. Then again, digital markets are different in many other respects as well. The special features of those markets signal that also the market definition is different when compared with the traditional markets.[126] Furthermore, applying traditional tools especially in a setting of multi-sided platforms may yield even unreliable market definitions.[127] According to the OECD study, a too mechanical market definition which may even exclude one side of the market has the possibility to lead the analysis to errors.[128] Therefore, it should be noted that market definition should be a transparent and consistent process, which confers legal certainty to the market players.[129]

The first, natural question in market definition may be whether the two sides of the platform market should be defined jointly or separately.[130] It seems that so far, platform market sides are defined separately. In the literature, it has been concluded that the two-sided nature of the market should be a defining fact when exploring the relevant market.[131] Adding to this view, the OECD study finds it more important to take linkages and the complexity of interrelationships of the market sides into account in spite of making a precise relevant product market definition.

There is not yet a consensus on how to define a certain digital platform market with special features that differ from the analogue markets.[132] It is however clear that, when it comes to the digital economy, the traditional tools in defining supply side or demand side substitutability seem not to be fit for purpose.[133] This is, for a major part, due to the pricing of digital market goods and services. As it has been earlier described, digital market services are often offered for free. Usually, this is true on at least one side of a multi-sided platform. On the other hand,

[125] *Kuoppamäki* 2018, p. 267. As a relevant notice, before the actual testing, relevant products must be chosen by hand and therefore, according to *Kuoppamäki*, p. 268, the test may not be more scientific than the traditional comparison of product properties or consumer choices. Attention should also be paid on the competitiveness of prices before the test price increase. This is because in the circumstances of high price level, the threshold of consumers for switching to other product is exceeded more quickly and easier.
[126] *van de Gronden – Rusu* 2021, p. 115; *Kuoppamäki* 2018, pp. 271–272.
[127] *van de Gronden – Rusu* 2021, p. 116.
[128] See OECD 2009, p. 11.
[129] *van de Gronden – Rusu* 2021, p. 117.
[130] Among others, OECD 2009, p. 11.
[131] See *Affeldt et al.* 2014, p. 338, who discuss market definition in two-sided markets. Similarly, OECD 2009, p. 11.
[132] *Kuoppamäki* 2018, p. 272.
[133] *van de Gronden – Rusu* 2021, p. 115.

when prices become a factor in consumers' decision-making, consumers easily become price sensitive and look for substitutes. In case law, the relevant market in the digital environment has been so far identified by evaluating the effects of either changes in quality of platform services or products, or also, the comparison of absolute price changes.

It is clear that the SSNIP test is not useful in those market settings where the price does not play any role between different market sides.[134] The SSNIP test is based on the hypothetical increase in price, and when that price does not exist, the test can not be applied. In that situation, the only option for addressing demand elasticity in the case of non-price markets and for performing the hypothetical monopolist test seems to be replacing the price-centred analysis with a quality-centred analysis. This can be done by a test called small-but-significant-non-transitory-decrease-in-quality, the SSNDQ test.[135] The purpose of the SSNDQ test is to replace the SSNIP test so that instead of the hypothetical increase in price, the test evaluates the effect of a hypothetical decrease in quality.[136] In addition to looking at the quality of a specific service, the test could also assess the hypothetical effects of a change in the general terms and conditions of a specific platform.

Quality of services, the collection of data and general terms and conditions of platform services are significantly interrelated. The role of data as an asset is especially relevant when that data is not easily replicated and when a digital platform service, where the data is collected, is offered for free. In case of popular digital platform services, the question is most often about personal data. When end users of digital platform services allow a service provider to collect and access their personal data, the monetary price of that service seem to be replaced by terms and conditions that consider the commercial use of the end user personal data.[137] Then again, the quality of terms and conditions, such as loose coverage or particularity may form a quality factor that could be analysed by the SSNDQ test.

In the literature, the Commission decisions of cases *Google Search (Shopping)*[138] as well as *Google Android*[139] are assessed as good examples of cases, where the quality of a free online platform service is in the centre of the analysis of the relevant market.[140] In case *Google Search*

[134] See, for example, *Kuoppamäki* 2018, p. 272.
[135] *Mandrescu* 2018 (a), p. 252.
[136] See for example *Kuoppamäki* 2018, p. 272.
[137] *Kuoppamäki* 2018, pp. 272–273.
[138] Case AT.39740 *Google Search Shopping*.
[139] Case AT.40099 *Google Android*. The judgments of the General Court in the Google cases will be discovered in Section 3.4 below.
[140] *van de Gronden – Rusu* 2021, p. 115.

(Shopping), the Commission concluded that there were two relevant product markets, of which the first was the market for general search services and the second was the market for comparison shopping services.[141] In terms of the general search services' market, the Commission concluded that the market constituted an economic activity, where both the demand and the supply sides had limited substitutability between general search services and other online services. This outcome did not change when comparing demand and supply for general search services on static devices to mobile devices.[142]

In case *Google Search (Shopping),* the Commission addressed demand side substitutability by comparing general search services to three different categories of digital services, which were content websites, specialised search services as well as social networking services. The general search services were concluded to have limited demand side substitutability with all these three categories of services. Among others, the Commission concluded the following;

> *"…the volume of general searches performed on social networks represents only a small share of the total volume of general searches. For example, in 2011, the number of general searches performed via Facebook in Europe was equivalent to only 3.2 % of the number of general searches performed on Google Search, even though Facebook is by far the largest social network."*[143]

In this way, by comparing functionalities, the usage of certain search technologies and intended use of these selected online services, the Commission concluded that general search services constituted their own market.

When defining the relevant digital market, apart from the quality of services and the general terms and conditions of platform services, the monetary price of a product or service can be considered.[144] Furthermore, on multi-sided platform markets it is necessary to define the number of markets in each situation. By doing this, the correct application of the assessing tools and even their translation to the digital platform ecosystems becomes possible.[145] If it is decided that a market is multi-sided and that those sides are separate from each other, the price can be used in the context of the SSNIP test on the market side, which functions in monetary prices.[146]

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[141] Case AT.39740, para. 154.
[142] Case AT.39740, para. 156.
[143] Case AT.39740, para. 181.
[144] *Van de Gronden* and *Rusu* 2021, p. 116, observe that although some digital markets have their greatest focus on data, and not on the monetary price, the price factor should not be forgotten, since especially on multi-sided markets, the paying side of the market, often the advertiser, can be indicated.
[145] *Mandrescu* 2018 (b), p. 454.
[146] See *Whish – Bailey* 2021, pp. 35–36.

An example could be a general search engine, of which the other, price included market side is the market for online advertising.

When digital platforms comprise their own ecosystems, competition does not occur for purely individual products, but in groups of such products or services.[147] This means that those service entities offer a range of products or services, which can be in a way or another complementary to each other.[148] It has also been considered whether a market could be defined as broadly as an entire ecosystem.[149] However, at least this was not the case in the Commission's decision of case *Google Android*. There, the Commission found several relevant product markets, which were the market for licencing of smart mobile OS's (operating systems), the market for Android app stores, the market for general search services as well as the market for non OS-specific mobile web browsers.[150]

3.1.2 Relevant geographic market

Compared with the relevant product market, the relevant geographic market might not cause that many challenges within the digital economy. Traditionally, some products or services are clearly supplied throughout the EU, or even globally, whereas others are supplied in a rather narrow geographical area.[151] Therefore, the idea in defining the area of supply is to understand which other market players impose a competitive constraint on the one that is examined.

For defining the relevant geographical market, the Commission uses the hypothetical monopolist test, which basically asks whether a sufficient number of customers would switch to suppliers from other country B instead of those from the original country A, if these country A suppliers would make a small but significant increase in price.[152] If the customers would switch their suppliers, this would mean that the relevant geographical market is at least the areas

[147] *van de Gronden – Rusu* 2021, pp. 116–117.
[148] It is sensible that in this regard, the Commission's attention has recently been turning into developing new competition tools and especially *ex ante* type of regulation considering the so-called gatekeepers in digital markets.
[149] *Whish – Bailey* 2021, p. 36. According to the authors, in this regard the AT.40099 *Google Android* decision by the Commission is especially important because the market definition in the decision reflects the overriding importance of taking into account constraints also from outside of the relevant market. See case AT.40099, para. 497–557.
[150] AT.40099, para. 217. In its judgment of T-604/18 *Google Android*, the General Court upheld the Commission's definition of the relevant market. See para. 130–234.
[151] *Whish – Bailey* 2021, p. 36.
[152] See the Notice on market definition paragraphs 28-31, which prescribe the process of defining the relevant market in the Commission's practice.

of both countries A and B. The costs of transportation and trade flows are usually important factors in defining the relevant geographical market.[153] This seems not to be of any relevance in case of digital platform services, since in digital environment, no tariffs or other transportation fees do usually exist. Therefore, in the case of digital markets other features for defining the relevant geographic market must be found.

It could be assumed that all the global platform services would have, in most cases, worldwide relevant geographic markets. However, in the case of *Google Search (Shopping)*, where the relevant product market was defined to be the market for general search services and the market for comparison shopping services, the Commission identified the relevant geographic market for both general search services and comparison shopping services being national.[154] On the general search services, the Commission concluded, that although general search services can be accessed from anywhere of the world, the relevant geographic market is still national based on three different reasons. First, this is due to the fact that the main general search services have localised sites in different national countries and in a large variety of different languages, for example in almost every official language of the Union. Secondly, barriers to extending search technology beyond national and linguistic borders do exist. Finally, the Commission concluded that Google did not, either itself, contest that the relevant geographic market was national.

3.1.3 Dominant position

When analysing the position of a certain undertaking, market definition, which was discussed in the previous section, is a useful tool and forms a preliminary analysis to the overall assessment of dominance.[155] However, multiple parameters and a more in-depth overview are usually required to do a comprehensive analysis on the key question, which naturally is the existence of a dominant position in the identified market.

According to the Guidance on the Commission's enforcement priorities, the assessment of dominance needs to consider the competitive structure of the market, and in particular, the market position of the dominant undertaking and its competitors, expansion and entry related

[153] *Whish – Bailey* 2021, p. 38.
[154] Case AT.39740, para. 251–255 (general search services) and para. 256–263 (comparison shopping services).
[155] See *Whish – Bailey* 2021, p. 184.

constraints as well as countervailing buyer power.[156] This means that when analysing dominance, the focus is on the market shares of a certain undertaking and its competitors, on barriers to entry or expansion and the constraints that potential competitors may exercise, and finally, on the countervailing force of buyers.[157] The idea is, therefore, to investigate the market circumstances among actual competitors, or also potential competitors and finally through the analysis of whether a supplier or suppliers are confronted with buyer power.[158]

Most of the competition law cases concern substantial market power of an undertaking.[159] Actual competition can be, and mostly is, analysed by the market shares of undertakings. The Court of Justice has mentioned, however, that the importance of market shares as the evidence of dominance varies from market to market according to the structure of it.[160] Then again, very large market shares are definitely a piece evidence of the existence of dominance.[161] In the Guidance on the Commission's enforcement priorities, market shares are also described as a useful first indication of the market structure and furthermore, as an indication of the importance of the undertaking that act on the specific market.[162]

There is no single numeric definition for what is that high market share that it leads to the finding of a dominant position. The Court of Justice has stated that a market share of 50 per cent could be enough large, in the absence of some exceptional circumstances, to lead to a presumption of dominance.[163] Then again, the Court has also found dominance with a market share of under 50 per cent, namely a share in the range of 40 to 45 per cent.[164] The Court has emphasised the fact that also other factors can be significant and lead to the finding of dominance. All in all, it is obvious that very large market shares are likely to lead to a finding of dominance. In the viewpoint of digital markets, many of the most powerful undertakings in the field have rather large market shares.

However, market shares, in themselves, cannot usually indicate dominance as they do not consider potential competition.[165] Potential competition is investigated by assessing the impact

[156] Paragraph 12.
[157] See *van de Gronden – Rusu* 2021, p. 117.
[158] For a comprehensive explanation of the countervailing buyer power, see inter alia, *Whish – Bailey* 2021, p. 44, or *Jones et al.* 2019, p. 354-355.
[159] *Whish – Bailey* 2021, p. 185. This is for the major part because a true monopoly is rather rare and accordingly, most investigated undertakings are not monopolist although they might have even significant market power.
[160] See case 85/76, *Hoffmann-La Roche v Commission*, para. 41.
[161] C-36/79, para. 42.
[162] Paragraph 13.
[163] Case C-62/86, *AKZO v Commission*, para. 60.
[164] Case 27/76 *United Brands*, para. 108–109 and Case COMP/38.784 *Telefónica*, para. 236.
[165] *Whish – Bailey* 2021, p. 188.

of expansion by existing competitors and entry by potential competitors. Examples of potential barriers to entry or expansion that can indicate dominance are legal barriers, economic advantages, costs or network effects.[166] A legal barrier can be an intellectual property right, which a potential dominant undertaking has privilege to.

Economic advantages have been considered as barriers to entry or expansion in various cases within the EU. In case *Google Android*, the Commission argued that the control of an essential facility formed an economic advantage.[167] In addition, similarly to case *Google Search (Shopping)*, the Commission stated that the significant investments in the development of smart mobile operating systems or the general search engine constituted a barrier to entry and expansion.[168]

A dynamic perspective refers to the assessment of potential competition apart from the actual one.[169] It could be a better option for digital markets where, for example, market shares are less reliable due to the fact that innovation is able to displace market power in short run. Furthermore, market share analysis is static in the context of analogue markets, whereas digital markets are dynamic in a sense that also their analysis needs to take a more in-depth look. Although the dynamic perspective can be underlined in the perspective of digital markets, recent Commission decisions, such as the decision in case *Google Search (Shopping)*[170], have still used conventional market shares as a factor in assessing dominance.

There are several cases in which the EU Courts as well as the Commission have both made their decision based on the degree of market power. Furthermore, the tendency seems to be that the higher the degree of market power, the more likely a finding of dominance, and the higher the risks of a finding of an abuse.[171] In case *IMS Health*, the question was about granting licence of IMS's copyright to third parties on non-discriminatory basis. The Commission, when ordering IMS to grant the licence, stated that IMS was in a quasi-monopoly situation.[172] Quasi-monopoly means basically that an undertaking has relatively high market share, an extreme market position. For example, large platform companies are often said to be in a quasi-

[166] Guidance on the Commission's enforcement priorities, paragraph 17.
[167] See case AT.40099, para. 621–626.
[168] Case AT.40099 *Google Android* para. 462–463 and case AT.39740 *Google Search (Shopping)*, para. 286–291.
[169] *van de Gronden – Rusu* 2021, p. 121.
[170] Case AT.39740.
[171] *Whish – Bailey* 2021, p. 192-193, similarly *Jones et al.* 2019, p. 334.
[172] See case COMP D3/38.044 *NDC Health/IMS Health*, para. 58, 83 and 86. The decision was withdrawn, see European Commission, press release, Brussels 13.8.2003: Commission intervention no longer necessary to enable NDC Health to compete with IMS Health, IP/03/1159. https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1159. Last accessed 18.12.2022.

monopoly situation because their market shares have been found to cover up to 90 per cent of the market, if not even more. In the literature, quasi-monopoly is also called super-dominance.[173] However, as such, super-dominance is not an established concept in EU competition law. Still, extreme market positions can indicate a strengthened special responsibility since the undertaking in question would have both a greater asymmetry of power and a greater ability to make such amendments that are possible only for a dominant undertaking. Therefore, even the degree of dominance may be a relevant factor when determining the effects of abusive conduct under competition law.[174]

3.2 Concept of Special Responsibility

The Special Responsibility of dominant undertakings refers to a loosely defined provision of Article 102 TFEU, which has been formulated in the case law of the Court of Justice.[175] The responsibility includes the obligation of dominant undertakings to avoid abusing their dominant position, which is prohibited by Article 102 TFEU and in addition, to compete exclusively on the merits.[176] Where Article 101 TFEU forbids agreements, decisions and other concerted practices that are harmful to competition between certain undertakings, Article 102 TFEU sets a unilateral prohibition not to abuse one's dominant position through the actions of the dominant undertaking. Compared with non-dominant undertakings, in specific circumstances dominant undertakings may, followed from the nature of the obligations set by Article 102 TFEU, not be allowed to adopt certain practices, or take measures which would not in themselves constitute abuses of dominance, or would even be unproblematic if adopted by non-dominant undertakings.[177] The Court of Justice and the Commission have conventionally called this the Special Responsibility of dominant undertakings. It has been similarly defined in judgements beginning from the judgement of the Court of Justice in case *Michelin v Commission*.[178]

[173] See *Sauter* 2020, p. 414.
[174] *Graef – van Berlo* 2020, p. 7.
[175] Case 322/81 *Michelin v Commission*.
[176] *Sauter* 2020, p. 407.
[177] Case T-111/96 *ITT Promedia v Commission*, para. 139.
[178] Case 322/81.

In the case *Michelin v Commission*, the Court of Justice held that an undertaking holding a dominant position has special responsibility not to distort competition regardless of any reasons or circumstances in which the dominant position has been obtained;

> *"It is not possible to uphold the objections made against those arguments by Michelin NV, [..], that Michelin NV is thus penalized for the quality of its products and services. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*."[179]

This statement was an extension of the Court's conclusion in its judgement of case *Hoffman-La Roche v Commission*, where the Court argued that the sheer presence of an undertaking holding a dominant position would be enough to result in a weakened state of competition.[180] The statement of Special Responsibility in the mentioned judgement of case *Michelin v Commission* has been recognised as the first statement of the Special Responsibility for dominant undertakings and it has been repeated throughout the judgements of the EU Courts as well as Commission's decisions. According to those decisions and judgements, the concept of the Special Responsibility appears to be clear. Whenever an undertaking holds a dominant position, that position brings obligations on the basis of Article 102 prohibition of abuse of dominant position.

In more recent judgements, the Court of Justice has repeated the above statement, but also made some interesting observations on the obligations of Article 102 TFEU. In case *Deutsche Telekom v Commission*, the Court argued that Article 82 EC (today 102 TFEU) refers to practices that cause damage to consumers directly, but also to practices which can be detrimental through their impact on competition. Thus, a dominant undertaking has special responsibility not to allow its conduct to impair undistorted competition.[181] Similarly, in case *TeliaSonera*, the Court repeated the argument that the prohibition of Article 102 TFEU must be interpreted as including both, the practices that may cause damage to consumers directly and the practices that indirectly cause damage through their impact on competition.[182] Therefore, a

[179] Ibid., para. 57.
[180] Case 85/76 *Hoffmann-La Roche v Commission*, para. 91.
[181] Case C-280/08 P *Deutsche Telekom v Commission*, para. 176.
[182] Case C-52/09 *TeliaSonera*, para. 24.

dominant undertaking has special responsibility not to allow its behaviour to impair competition.

In the literature, it has been noted that it is obvious that Article 102 TFEU includes obligations for dominant undertakings that firms without a dominant position do not bear.[183] Thus, also undertakings in digital markets, when in dominant position, must comply with the Special Responsibility. In addition, due to the role of platforms as regulators, dominant platforms have responsibility to ensure that their rules do not impede free, undistorted competition without any objective justification.[184]

3.2.1 Competition on the merits

The Special Responsibility of dominant undertakings has a close connection to the notion of competition on the merits. Furthermore, the EU Courts and the Commission have stated that the responsibility of dominant undertakings includes the obligation to avoid abusing their dominant position and at the same time, to compete exclusively on their merits.[185] This means that when competing exclusively on the merits, a dominant undertaking should not be found to act abusively and thus, the undertaking has presumably taken care of its special responsibilities as a dominant undertaking. The Guidance on the Commission's enforcement priorities[186] includes examples of what can be considered as competition on the merits. Offering lower prices or a better quality for products or services are usually considered as competition on the merits.[187]

The expression of competition on the merits has frequently been used in the EU Courts' judgements.[188] In case *Deutsche Telekom* the Court of Justice noted that a dominant undertaking must not abuse its dominant position by means of strengthening its position "by using methods

[183] *Whish - Bailey* 2021, p. 197.
[184] *Crémer et al.* 2019, pp. 6 and 65–69. It seems that a principle of responsibility could be useful for assessing especially leveraging of market power, self-preferencing activities, or data exchange of platforms in the framework of Article 102 TFEU.
[185] See *Sauter* 2020, p. 407.
[186] Communication from the Commission, 2009/C 45/02.
[187] Guidance on the Commission's enforcement priorities, paragraph 5.
[188] *Inter alia*, case C-52/09 *TeliaSonera*, para. 24. See also *Whish – Bailey* 2021, p. 200.

other than those which come within the scope of competition on the merits".[189] Similarly, in case *Microsoft v Commission*, the General Court held that the meaning of Article 102 TFEU is to prohibit dominant undertakings from strengthening their position by other means than those which are based on competition on the merits.[190]

In the case *Post Danmark I*, the Court of Justice held that the purpose of Article 102 TFEU is not to prevent undertakings from trying to obtain a dominant position on their own merits.[191] The Court noted that the meaning of Article 102 is neither to ensure that less efficient competitors would remain on the market.[192] Furthermore, according to the Court, it is possible that competition on the merits can lead to the departure from the market or the marginalization of less efficient competitors, "and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".[193] Although the onus is, however, on the dominant undertaking not to allow its behaviour to impair competition on the merits[194], in practice, by limiting the Special Responsibility of dominant undertaking by allowing it to compete on its merits, the additional duties caused by the Special Responsibility are also limited.[195]

In case *Google Android*, the General Court held that in certain circumstances in which, for example, the conduct of a dominant company produces exclusionary effects which do not fall within the scope of competition on the merits, that kind of conduct constitutes an abuse of dominant position.[196] Therefore, because the dominant company must not allow its behaviour to impair competition on the merits, Article 102 also prohibits the dominant firm from adopting pricing practices that have an exclusionary effect on those competitors that are as efficient.[197]

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[189] Case C-280/08 P *Deutsche Telekom v Commission*, para. 177.
[190] Case T-201/04 *Microsoft v Commission*, para. 1070.
[191] Case C-209/10 *Post Danmark I*, the request for a preliminary ruling that concerned the interpretation of Article 82 EC (Article 102 TFEU) by the Danish Højesteret. As *Graef* and *van Berlo* 2020, p. 5, have noted, it is interesting that this judgment was the first judgment by the Court of Justice where an abuse was not found, and this fact had a likely connection with the Court's reasoning concerning competition on the merits.
[192] C-209/10 *Post Danmark I*, para. 21, similarly, case T-604/18 *Google Android*, para. 277.
[193] C-209/10 *Post Danmark I*, para. 22, similarly T-604/18, para. 278. On the assessment of the efficiency of competitors, see also case *Post Danmark II*, C-23/14 *Post Danmark A/S v Konkurrencerådet*, in which the Court of Justice specifically considered the application of the concept of equally efficient competitors and furthermore, the 'as efficient competitor' test when examining whether the pricing practices of a dominant undertaking could drive an equally efficient competitor from the market, see para. 51–62.
[194] T-604/18, para. 279.
[195] *Graef – van Berlo* 2020, p. 5.
[196] Case T-604/18, para. 276.
[197] Case T-604/18, para. 280.

3.2.2 Propositions for expanding the scope of Special Responsibility

The Special Responsibility has been proposed to be strengthened by principles originating from other legal fields since, especially in the literature, many see that there is a need for a more comprehensive provision of responsibility when it comes to undertakings with the greatest market power in the platform economy. Furthermore, when regarding high amounts of data, big data, of which many characteristics are targeted at consumers, especially the questions of data protection and consumer protection quickly arise. Perhaps therefore, so far, suggestions have been limited to expanding the Special Responsibility by notions which are inspired by the principle of accountability in data protection law, or the principle of fairness in consumer law.[198]

First, the Special Responsibility of dominant undertakings has been proposed to be strengthened by a notion of accountability, which would be inspired by the GDPR's principle of accountability.[199] In particular, this would mean that a dominant firm would have to show what measures it has taken in order to comply with the competition rules. When an effective enforcement of competition law is yet lacking a right approach especially in the field of digital markets, the implementation of accountability as a positive duty to show compliance with the competition rules would concretise the already existing considerations of expanding the Special Responsibility.[200]

Secondly, the scope of Special Responsibility has been assessed from the perspective of consumers in the digital markets and through the question whether competition law could be

[198] It should be noted that data protection and competition regulations differ in the way that when competition law, and in particular Article 102 TFEU imposes obligations on dominant undertakings, according to Article 2 of the GDPR, it is applied to all data controllers and processors regardless of their market position, see, *inter alia*, *Kelleher – Murray* 2018, p. 245. The coexistence and interaction of competition law and data protection has been researched, *inter alia*, by *Wasastjerna*, 2019 and *Wiatrowski*, 2021.

[199] *Graef – van Berlo* 2020, pp. 21–22. Accountability, which is one of the main principles of the data protection law, can be found in GDPR Article 5(2), which provides that the controller of data shall be responsible for and be able to demonstrate compliance with all principles that the GDPR holds. According to *Kelleher* and *Murray* 2018, p. 151, by setting the principle of accountability apart from all other principles provided by the GDPR, it is emphasised that the accountability is an overarching principle which applies jointly and equally to all the six principles set in Article 5(1) GDPR. The importance of accountability lies in the fact that it ensures that a data subject may seek remedies against data controllers if non-compliance with set obligations occurs. The requirement of being able to demonstrate compliance with the GDPR is further developed in Article 24 GDPR. According to that Article, the data controller is responsible for implementing appropriate measures to ensure and to be able to demonstrate that data processing is performed in accordance with the Regulation. Although that Article is titled as the responsibility of the controller, according to *Docksey*, 2021, p. 557, it can be interpreted as an accountability obligation alongside of Article 5(2) GDPR. See also *de Terwangne* 2021, p. 319.

[200] *Graef – van Berlo* 2020, p. 21.

used to protect consumers from exploitation of digitally dominant undertakings and their use of consumer data.[201] Furthermore, a framework for translating the existing Special Responsibility of dominant undertakings into a 'duty of care for digital dominance' has been proposed.[202] The effects of the possible use of the proposed framework depend on whether an undertaking is digitally dominant, what does the duty of care involve and finally, the further clarification of the legal basis.

The common factor of the propositions for expanding the Special Responsibility is that they basically propose a renewed, or even expanded principle of Special Responsibility, which would be added with elements that are inspired by other legal fields outside of competition law. Also, the suggestions for expanding the Special Responsibility discover, how the effectiveness of regulation in the areas of competition, data and consumer protection could be improved.[203] Essentially, these propositions aim at complementing the definition of the Special Responsibility by suggesting positive law type of additions and could also be called antitrust compliance by design.[204] Although the propositions of expanding the Special Responsibility of Article 102 TFEU might not cause any changes to the Special Responsibility as it is known in competition law today, imposing positive duties in the framework of competition law is a new approach that has gained attention through the Regulations of the Commission's Data Strategy[205], such as the Digital Markets Act and the Digital Services Act.

[201] See *Sauter* 2020, p 407.
[202] Ibid., p. 427. *Graef* and *van Berlo*, 2020, p. 23, wonder, however, whether a duty of dominant undertakings to protect consumers would be better established within consumer law itself. Since *Sauter* argues that the framework is closely connected to the principle of fairness that has recently been emphasized also within the EU competition law, the expanded Special Responsibility could promote general fairness in competition law and not traditional consumer protection that is already well covered.
[203] *Graef – van Berlo* 2020, p. 1.
[204] The expression of compliance by design was first introduced in the framework of the GDPR according to which firms must show compliance of the data protection rules from the very beginning. This expression has been used even by Commissioner for Competition Margrethe Vestager in a speech given in the Bundeskartellamt 18th Conference on Competition, see Margrethe Vestager, European Commissioner for Competition, Speech, Bundeskartellamt 18th Conference on Competition, Algorithms and Competition, Berlin 16.3.2017. https://wayback.archive-it.org/12090/20191129221651/https:/ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en. Last accessed 18.12.2022.
[205] COM(2020) 66 final.

3.3 Abusive behaviour

Traditionally, abusive practices include either unfair or discriminative conditions for consumers or practices which are intended for the foreclosure of competitors from the market or setting other competitive constraints.[206] An evolving challenge for competition law enforcement is to distinguish anti-competitive or abusive foreclosure from other foreclosure, which is based on the superior efficiency of a dominant undertaking and is therefore not anti-competitive.[207] The foreclosure may occur in either the upstream or downstream market, and then the foreclosure is, respectively, either horizontal or vertical foreclosure.[208] The main criticism about the case law of Article 102 TFEU has focused on the argument that the Commission and the EU Courts have applied the Article in a way that protects also inefficient competitors instead of the process of competition.[209]

Some of the most relevant types of abuses in the context of digital economy and digital platform markets belong to the identified category of exclusionary abuses.[210] In case *Google Android*, the General Court held that exclusionary effects characterise such situations in which effective access of actual or also potential competitors to markets is hampered or eliminated due to the conduct of the dominant firm. The dominant undertaking is thus allowed to negatively influence, to its own advantage, the various parameters of competition, including price, production, innovation, variety or quality of goods or services.[211] For example, if access to necessary data is not available to all market players, and in particular, to market entrants, the possession of this kind of data may lead to dominance.[212] Therefore, when it comes to big data, the main type of abuse under Article 102 TFEU is the refusal to grant access to data that is

[206] *Kuoppamäki* 2018, p. 291.
[207] Ibid., p. 294. See also *Whish – Bailey* 2021, p. 215.
[208] *Whish – Bailey* 2021, p. 215.
[209] Ibid., p. 201. In the opinion of the authors, the criticism according to which case law of Article 102 TFEU is too protectionist towards competitors and finds false positives in efficient dominant firms, is overrated and "at best a misdescription of the true position and at worst little more than a slogan by protagonists of minimalist intervention".
[210] According to *Whish – Bailey* 2021, p. 215, most common examples of exclusionary abuses are situations of horizontal foreclosure, such as exclusive purchasing agreements, rebates or predatory pricing, which basically means that a dominant firm reduces prices to a loss-making level so that a competitor is being foreclosed and then it raises prices again to accumulate profits. However, in platform markets, exclusionary abuses are, maybe even more often than in traditional markets, concerned about harm to competition in the downstream market. This is the case with, for example, refusal to supply, which was the situation in the General Court case T-201/04 *Microsoft v Commission*, which is discussed below in in Section 3.4.2.
[211] Case T-604/18 *Google Android*, para. 281.
[212] *van de Gronden – Rusu* 2021, p. 121.

essential to competitors in the downstream market.[213] Exclusionary effects have the possibility to constitute an abuse of dominance also on other markets than the dominated market, since the fact that the conduct of a dominant undertaking produces exclusionary effects on markets other than the dominated market does not preclude the application of Article 102 TFEU.[214]

According to the Essential Facilities Doctrine (EFD)[215], under certain circumstances an undertaking holding an essential facility might have an obligation to grant access to that essential facility. These essential facilities have traditionally been physical infrastructure objects, such as railway networks or pipeline.[216] Basically, an undertaking holding an essential facility can hold a dominant position based on the indispensability of the essential facility. There is also risk of abusive behaviour, for example, if the undertaking refuses to grant access to the facility. The EFD has been developed in the jurisprudence of the United States, but it has also been applied in the European Union case law. Although argued to have an important role in the EU competition law, the Doctrine has not in itself been formally recognised by the General Court, nor the Court of Justice.[217]

The Essential Facilities Doctrine was first assessed in the Court of Justice case *Commercial Solvents v Commission*, where the Court stated that the undertaking had abused its dominant position by refusing to supply medical raw material to its competitors.[218] However, in case *Oscar Bronner*, the Court of Justice further defined the requirement for indispensability.[219] Bronner was a publisher of an Austrian daily newspaper, *Der Standard*, which had only a small market share of the daily newspaper market in Austria. Bronner argued that its most remarkable competitor, *Mediaprint* abused its dominant position by refusing to grant Bronner access to the highly developed newspaper home delivery distribution system. Ultimately, the Court held that

[213] *Davilla* 2017, p. 380.
[214] Case T-604/18 *Google Android*, para. 282 and the case law cited.
[215] The doctrine is originally from the United States antitrust case law where it has been more commonly used. More of the EFD, see *Graef* 2016, or also *Whish – Bailey* 2021, p. 736.
[216] In addition, the first competition law cases in the USA where about granting access to railway networks which were totally controlled by private companies. See case *United States v Terminal Railroad Association of St Louis*, 224 US 383 (1912).
[217] *Graef* 2016, p. 155. See also *Whish – Bailey* 2021, p. 737. The authors point out that the Court of Justice has preferred to use the term 'indispensable' instead of the expression 'essential'. Still another alternative expression would be 'objectively necessary'. As these expressions have roughly the same meaning, here, the expression of 'indispensable' will be used.
[218] Joined cases 6/73 and 7/73.
[219] Case C-7/97, *Oscar Bronner*, para. 4–8 and 24.

a facility is indispensable if its duplication is physically impossible, legally impossible or not economically viable.[220]

In cases of multi-sided platforms, for which price might not be the most relevant factor of competition, the use and possession of data may become highly relevant.[221] If access to data is not available to all market players, and not especially for market entrants, the possession of this kind of data may lead to dominance.[222] The question remains, whether the Essential Facilities Doctrine could be applied to these kinds of circumstances where data is somehow essential for competing on the market. In general, Article 102 TFEU can be used as a back-ground regime for analysing situation, where an undertaking is granting access to data, or, on the contrary, is refusing to give access to data.[223]

However, the consensus is that access to data for market entrants and other undertakings should be granted only if that data is truly indispensable. The analysis of data indispensability can be similar to the analysis under the Essential Facilities Doctrine. Then again, taking into account the features of data and the different data categories; volunteered, observed and inferred data, the analysis seems to be more complex than with the EFD and traditional infrastructures.[224] As a result, according to the policy report for the Commission, the Essential Facilities Doctrine should not be used as it is in assessing possible abuse of dominant position with a refusal to grant access to data.[225]

The case law seems to have established five criteria to decide whether an undertaking which refuses to supply a customer in a downstream market, is abusing its dominance.[226] The criteria include questions of whether there is a refusal, whether the accused undertaking holds a dominant position in the upstream market, whether the product is indispensable for the downstream market, whether a refusal leads to the elimination of effective competition in the downstream market and finally, whether there is an objective justification for the refusal to supply. First, it needs to be assessed whether the accused undertaking holds a dominant position

[220] Ibid., para. 41–47. For a discussion about the case, see also *Whish – Bailey* 2021, pp. 737–742.
[221] Furthermore, according to *Mäihäniemi* 2020, p. 277, the main reason why competition law would be interested in regulating access to information bases, basically data, is that where information is controlled by one network-based dominant undertaking, significant competition problems may occur.
[222] *van de Gronden – Rusu* 2021, p. 121.
[223] *Crémer et al.* 2019, p. 101.
[224] Ibid., p. 102.
[225] Ibid., p. 98. The Commission argues that the EFD is invented for classical refusals to give access to critical infrastructure and has later been expanded to essential intellectual property rights. About the question of the relevance of EFD for digital markets, see also *Mäihäniemi* 2020, pp. 287–295.
[226] *Whish – Bailey* 2021, p. 735.

in the upstream market. To be able to assess the dominance, the upstream market must be defined, because that is the market on which the dominance must be found. Then again, the exclusion of all competition on the downstream market must be present for establishing a violation of Article 102 TFEU. Secondly, when assessing the indispensability of the product or service, it must be analysed, whether the product to which access is denied, is indispensable to potential competitors in the downstream market.

Absolute refusals to supply are analysed through a framework set out in the case law. As noted by several scholars, the requirements of the framework stem from the judgements of the EU Courts, such as in case *Oscar Bronner*.[227] The framework, which is also called the current four-prong exceptional circumstances test, includes the indispensability requirement, requirement of the refusal to supply to exclude all effective competition on the downstream market, requirement of preventing the introduction of a new product and finally, the requirement that there is no objective justification for the refusal.[228]

Still one kind of abuse that is particularly relevant in digital platform markets is preferential treatment, or self-preferencing. Self-preferencing can be defined as practices in which a firm gives preferential treatment to its own products or services when there is competition with other products or services. Self-preferencing is defined as a subcategory of leveraging, which means practices that a dominant undertaking performs in order to extend its market power to its related markets.[229] Therefore, in leveraging of market power, the dominant firm strategically uses its market power to increase its market power in a discrete market segment, such as downstream market, which is typically related.[230] It is particularly a phenomenon of digital markets where platforms compete with other service providers inside their own platform environment, which is usually the downstream market. Self-preferencing has become decisive in platform markets, because already Google has been found to abuse its dominant position by preferring its own product over other products in the market for comparison shopping services.[231] Before the General Court had confirmed in its judgment that self-preferencing accounted for a form of abuse under Article 102 TFEU, it was argued that the statement of the Commission according

[227] Case C-7/97. Due to the name of the other party in the case, in literature, the requirements for a refusal to deal are also called the Bronner conditions.
[228] See *Graef* 2016, p. 169.
[229] See *Crémer et al.* 2019, pp. 7 and 65–68. Probably therefore *Jones et al.*, 2019, p. 527, call self-preferencing 'a kind of discriminatory leveraging'.
[230] *Jones et al.* 2019, p. 390.
[231] Case T-612/17 *Google Shopping*.

to which self-preferencing would have been an already established, independent theory of harm under Article 102 was a rather selective or incorrect presentation of the law.[232] However, apart from recent case law, and as will be discussed below in more detail, self-preferencing seems to be of high relevance also in the new EU legislation, the Digital Markets Act. Judging from these signs, self-preferencing must be treated as an independent form of abuse under Article 102.

3.4 Case Study: Special Responsibility of dominant platforms

3.4.1 General aspects

Since the EU Courts have argued that the Special Responsibility is a descriptive element of Article 102 TFEU, the concrete duties imposed by the Special Responsibility of dominant undertakings must be analysed from the case law. This may include the assessment of the specific tests that the EU Courts have utilised in their analysis.[233] In the following, this assessment will be presented in the framework of the General Court's judgments in *Microsoft v Commission*[234], in case *Google Shopping*[235] as well as in *Google Android*[236], which is the newest addition to judgments related to the "GAFAM" companies and abuse of dominance. There is not yet much case law on the Special Responsibility that concerns digital platforms and the use of data. However, this situation is most obviously not very long-lasting when looking into the several investigations that the Commission has opened regarding large platform companies. It's worth mentioning that, in the beginning of 2022, the General Court gave its judgment in case *Intel*[237]. Although Intel is a technology company, the judgment did not, or at least not directly, consider digital markets, nor the use of data in the meaning of this research.[238]

[232] See *Jones et al.* 2019, p. 531. For a more comprehensive discussion of the judgment, see Section 3.4 below.
[233] *Gonzalez-Diaz – Snelders* 2013, p. 138.
[234] Case T-201/04 *Microsoft v Commission*, 17 September 2007.
[235] Case T-612/17 *Google Shopping*, 10 November 2021. The judgment is currently under appeal in the Court of Justice, case C-48/22 P. Later, also the preceding Commission decision of case AT.39740 *Google Search (Shopping)* of the same proceeding will be discussed.
[236] Case T-604/18 *Google Android*, 14 September 2022. The judgment is currently under appeal in the Court of Justice, case C-738/22 P.
[237] Case T-286/09 RENV *Intel*, 26 January 2022.
[238] The *Intel* judgment is still a landmark decision especially because the General Court, ultimately, annulled the European Commission's decision and confirmed a more economics based analysis. In 2009 the Commission concluded that Intel had abused its dominant position in the market for one of the most important kind of specific

In addition to Google, in recent years, the Commission has also opened investigations into the practices of Apple, Amazon and Facebook, today Meta, in several areas.[239] Even before any detailed decisions have been given, one could assume that these decisions and following judgments are going to heavily focus on problematics around access to data and responsibilities of the undertakings for the data they control.[240] The Commission begun its investigations into possible anti-competitive conduct regarding Amazon in 2019. In the Opening of Proceedings of case *Amazon Marketplace*[241], the Commission concluded that the proceedings concern Amazon's use of commercially sensitive information available to Amazon's marketplace operations for facilitating its retail activities. This information included especially third-party seller information and transactional information.[242] In 2020, the Commission sent a statement of objections to Amazon, arguing that as a preliminary view, it sees that Amazon has a dual role as a platform. In the role of marketplace service provider, it has leveraged its dominance by the use of non-public marketplace seller data, which has led Amazon to avoid normal risks of retail competition.[243] Related to this view, commissioner for competition policy Margrethe Vestager said, among others, that "data on the activity of third-party sellers should not be used to the benefit of Amazon when it acts as a competitor to these sellers. Based on these views and preliminary information, one can expect a decision, which, for the first time, discusses competition in the downstream market and an abuse of dominance by the use of data.

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computer components, called x86 CPU processors. Before the latest 2022 judgment of the General Court, the case was ruled once by the General Court and after that, it was appealed to the Court of Justice. However, the Court of Justice set aside the initial judgment and referred the case back to the General Court. The Court concluded that the Commission made significant errors when using the 'as efficient competitor' test. Ultimately, the meaning of the Court seems to have been that undertakings must be able to rely on economic effects-based analysis. See also, General Court of the European Union, Press release No 16/22, Luxembourg 26 January 2022, Judgment in Case T-286/09 RENV Intel Corporation v Commission, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf. Last accessed 18.12.2022.

[239] After the decisions for these cases have been given, one could notice that all of the so called "GAFAM" companies (Google, Amazon, Facebook, Apple and Microsoft) are then covered by decisions of the Commission. These cases are worth mentioning, because, as the question is about market leading wealthy corporations, there is a high probability for the cases to be appealed to the EU Courts after the decisions by the Commission.

[240] Another interesting question around the ongoing investigations is, whether the below discussed Digital Markets Act and the discussion around it influences the forthcoming decisions of the Commission or possible further proceedings in these matters. This is, of course, keeping in mind that the Digital Markets Act will only apply from May 2023 onwards and most provisions are not effective before year 2024.

[241] Case AT.40462 Amazon Marketplace.

[242] European Commission, Opening of Proceedings 17.7.2019, case AT.40462 Amazon Marketplace. https://ec.europa.eu/competition/antitrust/cases/dec_docs/40462/40462_6210_9.pdf. Last accessed 18.12.2022. Amazon used this information also for the selection of the Featured Offer in the 'Buy Box'. Regarding the Buy Box function, when sending the statement of objections to Amazon, the Commission also decided to open a new, separate investigation into Amazon's practices, saying that Amazon might have artificially favoured its own retail offers with the Buy Box and loyalty customer program functions. See case AT.40703 *Amazon – Buy Box*.

[243] See European Commission, Press release 10.11.2020: 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, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2077. Last accessed 18.12.2022.

In 2020 the Commission, on one hand, announced to start investigating Apple's App Store practices in the markets for music streaming and audiobooks, and on the other hand, Apple's conduct with its Apple Pay payment application.[244] The investigations on Apple's music streaming and audiobooks' services concern, in particular, the mandatory use of Apple's own in-app purchase mechanism, the use of which has been made mandatory for app developers competing with, among others, Apple itself.[245] Interestingly, the Commission held that "[t]he conduct in question may also disintermediate developers of competing music streaming services from important customer data, while Apple may obtain valuable data about the activities and offers of its competitors".[246]

In April 2021 the Commission sent a statement of objections, which is a formal informational step in the investigative process, to Apple, which concerned its distribution of music streaming apps through App Store.[247] The Commission held preliminary, that Apple held a dominant position in the market for the distribution of music streaming apps through App Store. Furthermore, Apple's devices and systems formed a closed ecosystem in which Apple had total control over the user experience for iPhones and iPads. Apple set mandatory and non-negotiable rules to all app developers distributing their apps through App Store. According to the Commission, Apple could have therefore abused its dominant position by affecting the prices of music streaming apps.

In the opened investigation to the practices of Facebook[248], the Commission announced to assess whether Facebook violated competition rules by using advertising data to compete with other advertisers on the same market, in particular the market for classified ads.[249] According to the Commission, Facebook was allowed to use the data that it had gathered of other advertisers on Facebook's social network to strengthen the position of Facebook Marketplace and outcompete other providers. Therefore, the question is, in particular, about the activity and

[244] Cases AT.40437 *Apple – App Store Practices (music streaming)*, AT.40652 *Apple – App Store Practices (e-books/audiobooks)* and AT.40452 *Mobile Payments*.
[245] See European Commission, Press release 16.6.2020: Antitrust: Commission opens investigations into Apple's App Store rules. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073. Last accessed 18.12.2022.
[246] European Commission, Opening of Proceedings 16.6.2020, case AT.40437 Apple – App Store Practices. https://ec.europa.eu/competition/antitrust/cases/dec_docs/40437/40437_657_5.pdf. Last accessed 18.12.2022.
[247] European Commission, Press release 30.4.2021: Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061. Last accessed 18.12.2022.
[248] Today Meta.
[249] Case AT.40684 *Facebook leveraging*. See European Commission, Press release, Brussels 4.6.2021: Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848. Last accessed 18.12.2022.

preference data of the users of competing providers. In the investigation, the Commission said to also examine a question of tying. As said, further information is required in order to make more concrete assessments of the Special Responsibility of Facebook, Amazon or Apple in these circumstances. However, it is already obvious that, if and when, these proceedings make their way to the EU Courts, the scope of the Special Responsibility related to the use of data will get new definitions.

3.4.2 Microsoft

Tying refers to a situation where the supplier of a product, the tying product, requires a buyer to also buy a second product, which is the tied product.[250] Tying might be achieved by refusing to supply the tying product unless the buyer also purchases the tied product. Case T-201/04 *Microsoft v Commission* has been assessed to be one of the most important precedents when assessing the legal rules on tying under Article 102 TFEU.[251] It also offers an early-stage judgment about the Special Responsibility of a digital platform, in this case the Microsoft's Windows operating system.[252] In its analysis, the General Court used the criteria of the Essential Facilities Doctrine when assessing the dominance of Windows.[253]

In its decision, which then came under appeal before the General Court, the Commission concluded that Microsoft abused its dominant position by refusing to supply interoperability information and to authorise its use for the development and distribution of competing products.[254] The Commission used a more effects-based, rule of reason approach when analysing tying of Windows media player to the Windows operating system than in previous cases. Furthermore, it thus left the more form-based approach established in earlier case law.[255] Ultimately, this change of approach could also imply a more effects-based responsibility in which the undertaking is responsible, in particular, for not behaving in such a way the effects of which could impair genuine undistorted competition. This is especially due to the

[250] *Whish - Bailey* 2021, p. 723.
[251] *Kuoppamäki* 2018 (b), p. 319. More accurately, *Whish* and *Bailey*, 2021, p. 723, consider that the tying in the case can be defined as technical tying, in which it is physically impossible to take one product without the other.
[252] See also ibid., p. 318.
[253] T-201/04, para. 36 and 332-333.
[254] See case COMP/C-3/37.792 *Microsoft*, Commission decision of 24.3.2004.
[255] See *Kuoppamäki* 2018 (b). p. 320. See also *Graef – van Berlo* 2020 footnote 34, p. 6.

Commission's approach to the interoperability factor; it concluded that the main problem of the case is ultimately whether Microsoft provides to its competitors "the interoperability information that it has a special responsibility to provide".

Not surprisingly, first, the General Court held that while the finding of dominance does not in itself mean that the undertaking would have abused its dominant position, that undertaking has special responsibility, irrespective of the reasons of that position, not to allow its conduct to impair genuine undistorted competition.[256] However, in the same paragraph, the Court then argued that:

> *"Should it be established in the present case that the existing degree of interoperability does not enable developers of non-Microsoft work group server operating systems to remain viably on the market for those operating systems, it follows that the maintenance of effective competition on that market is being hindered."*

Indeed, the Commission had previously stated that Microsoft did not take its special responsibility sufficiently into account while refusing to give access to the interoperability information. According to the Commission, in particular, the Special Responsibility derives from Microsoft's quasi-monopoly on the client PC operating system market.[257] In its judgment, the General Court explicitly agreed to this view.

In this case, the Special Responsibility of the undertaking in question, Microsoft, seems to regard especially the sharing or non-sharing of the interoperability information that Microsoft maintained. This outcome was evidently due to the super-dominance of Microsoft, or in other words, the quasi-monopolist position of it. In the opinion of the General Court, the information for operating in the Windows operating system was such an essential facility, that giving access to it would have been the responsibility of Microsoft due to its dominance.

3.4.3 Google Shopping

When considering case law about the Special Responsibility of dominant digital platforms, and even case law considering the use of data by digital platforms, case T-612/17 *Google Shopping* of the General Court is, apart from case *Microsoft v Commission* that is discussed above, one

[256] T-201/04, para. 229.
[257] AT.37792, para. 787.

of the most important cases considering digital platforms so far. However, there are two preliminary thoughts that should be discussed before going into detail. First, case *Google Shopping* does not necessarily, directly deal with questions of access to data. As noted by the Court, in its judgment it examined favouring and refusal to give access to the general search results site of Google.[258] Still, the case is generally important in terms of the Special Responsibility of digital platforms and yet some aspects of the use of data can also be analysed through the judgment. Secondly, as discussed above, the judgment in case *Google Shopping* is only the first judgment considering infringements of Article 102 TFEU committed by Google and was followed by the judgment of T-604/18 *Google Android*.

A comparison shopping service is the kind of digital service where, in response to users' queries, it returns product offers from merchant websites and this enables users to compare different product offers.[259] In general terms, in case *Google Shopping*, the question was about product search results which appeared to a specific comparison shopping results' box that was placed on a central place in Google's general search website. In its judgment, the General Court examined Google's claims based on the 2017 decision by the Commission[260] in which the Commission found that Google had abused its dominant position in the market for comparison shopping services. *Inter alia*, Google claimed that its conduct was only quality improvements in its search services, in other words, leveraging practices that would not be prohibited as such, and therefore, Google argued, that its conduct was altogether in the scope of competition on the merits and not an abuse of dominant position.[261] Ultimately, the case considered Google's special responsibility, as a dominant undertaking, not to favour its own comparison shopping service and to show more equally different product comparison search results, especially other results than those of Google's own comparison shopping service.

Google's general search engine includes at least two different kinds of search results, general search results, which are displayed with a general criteria of the search engine and secondly, the specialised search results, which are displayed in accordance with a special logic for the particular type of search and, in addition, which are very often paid for by merchants.[262] These specialised search results are often distinguished from other search results by the word 'Ad' or

[258] T-612/17, para. 122-123.
[259] Case AT.39740 *Google Search (Shopping)*, para. 26.
[260] Ibid.
[261] T-612/17, para. 158.
[262] Ibid., para. 2, similarly, case AT.39740, para. 7–25.

'Sponsored'.[263] From 2002 Google has provided a comparison shopping service for product comparison, first as an independent site, which was called Froogle. Later it added a box for the comparison shopping search results, also called product results, to the general search results page as well.[264] Since 2013 Google has used one unit for these groups of product ads on its general search site, which is called the Shopping Unit.[265]

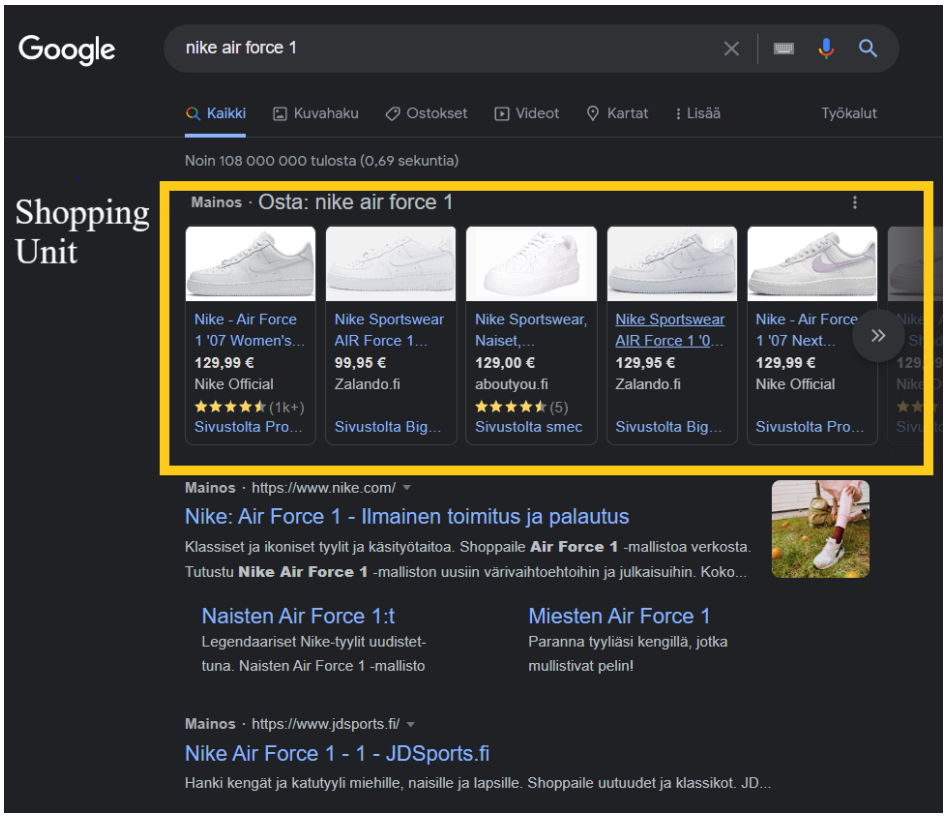

Figure 1: Screenshot of a Google search for Nike trainers, August 2022.

In its decision, the Commission examined the positioning of Google's own comparison shopping service tool, nowadays the Shopping Unit, in Google's general search results page. Figure 1 shows the Shopping Unit as it is today, which is, after the judgement of the General Court was given. By clicking the link 'Ostokset' (Shopping) in the general navigation's menu,

[263] T-612/17, para. 5.
[264] For the sake of clarity, the general search results page is the normal search website that the user of Google's search service uses most likely.
[265] See Figure 1. The Shopping Unit has had predecessors which are also discussed in the Google Shopping judgment and the Commission decision in the case. See T-612/17, para. 8–20.

users can access Google's own comparison shopping service. However, after the evidence was provided for the case investigations, Google seems to have removed the second link to its comparison shopping service, which previously existed as part of the header of the Shopping Unit. This means that, unlike before, today the comparison shopping page is only accessible through the navigation panel and consequently, the Shopping Unit contains only direct links to third party merchants, or exactly, their products that appear when a Google search is conducted.

The Commission concluded that Google had abused its dominant position by favouring its own comparison shopping service in the national markets for both the specialised search services and the general search services, and in this way, was reducing traffic from the general search site to competing comparison shopping services. Google had displayed its own comparison shopping service results with richer graphical features, which meant basically more images and dynamically provided information on the shopping product results.[266] According to the Commission, the abuse was mainly committed by this more favourable positioning and displaying of Google's own comparison shopping service compared with other services operating in the same market.

In order to demonstrate the reasons why Google's conduct was abusive and accordingly, was not in the scope of competition on the merits, the Commission described the conduct by five different aspects.[267] First of all, Google positioned and displayed its own comparison shopping services more favourably in its general search results pages than any competing comparison shopping services.[268] Secondly, user traffic is a significant factor in comparison shopping service markets.[269] Google's conduct diverted the number of visits by decreasing traffic from Google's general search results page to competing comparison shopping services and on the other hand, increasing traffic to Google's own comparison shopping service.[270] Thirdly, the Commission noted that the traffic from Google's general search page to competing comparison shopping services was that significant that the number of visits could not be effectively replaced by other sources of traffic.[271] This, according to the Commission, was the reason to Google's capability of extending its dominant position in the national markets for general search services

[266] AT.39740, para. 397–401.
[267] Ibid., para. 342.
[268] Ibid., Section 7.2.1.
[269] Ibid., Section 7.2.2.
[270] Ibid., Section 7.2.3.
[271] Ibid., Section 7.2.4.

to the national markets for comparison shopping services as well as of protecting dominant position in the national markets for general search services.[272]

When considering the scope of the Special Responsibility, probably the most important aspects of the judgment of the General Court are the reasoning considering the use of the Essential Facilities Doctrine and secondly, the reasoning considering Google's claim of only improving the quality of its services instead of abusing its dominant position. As a preliminary notice, the General Court emphasised that Google did not dispute the fact that it held a dominant position on all national markets for general search services, which were included in the decision by the Commission.[273] In the same manner as the Commission, in its judgment, the General Court concluded that Google had abused its dominant position by positioning and displaying its own comparison shopping service in the Google search website more favourably compared to competing comparison shopping services. The abuse, according to the Court, was conducted in the market for specialised search services.[274]

Again, the General Court stated that according to the settled case law, dominant undertakings have been imposed special responsibility not to allow their behaviour to impair genuine, undistorted competition on the internal market.[275] Furthermore, the actual scope of Special Responsibility of dominant undertakings must be considered in the light of the specific circumstances of the case which especially show that competition has been weakened.[276] The undistorted competition can be guaranteed only if equality of opportunity is secured between competitors.[277] However, this does not mean that undertakings are prevented from acquiring a dominant position on a market on their own merits. Furthermore, competition on the merits may lead to the departure from the market or the marginalisation of competitors.[278] The Court concluded that the above discussed factors which the Commission had found as grounds for the abuse were such relevant circumstances that they characterised the existence of conduct falling outside the scope of competition on the merits.[279] Especially, the Court argued that the

[272] Ibid., Sections 7.3.1 and 7.3.3.
[273] T-612/17, para. 119.
[274] Ibid., para. 703. However, what was different in the conclusion of the Court was that according to the Court, the Commission was mistaken in finding an infringement also on the national markets for general search services. The Court, therefore, annulled Commission's decision for those parts in which the Commission found an infringement in markets for general search services on the basis of the existence of anticompetitive effects in those markets in Article 1 of its judgment.
[275] Ibid., para. 150.
[276] Ibid., para. 165.
[277] Ibid., para. 155.
[278] Ibid., para. 157.
[279] Ibid., para. 174.

importance of Google's user traffic from its general search pages to other websites and the nature of that traffic were crucial in determining the conduct to be abusive.

Ultimately, the case considers Google's special responsibility, as a dominant undertaking, not to favour its own comparison shopping service and to show more equally different product comparison search results, especially other results than those of Google's own comparison shopping service. According to the Court, in this case, not only the leveraging practices formed the infringement of Article 102 TFEU.[280] Furthermore, the Court held that "the practices at issue enabled Google to highlight its own comparison shopping service on its general search results pages while leaving competing comparison shopping services virtually invisible on those pages, which, in principle, is not consistent with the intended purpose of a general search service".[281]

In its judgment, the General Court argued that the general search results page was not an essential facility. However, at first, the Court noted that the "general results page has characteristics akin to those of an essential facility".[282] As discussed above, the Essential Facilities Doctrine has been developed to evaluate the importance of certain infrastructure. In *Google Shopping*, the Court argued that the general results page as an infrastructure is, at least in principle, open and this factor distinguishes it from those infrastructures, such as intellectual property rights, that in case law have been evaluated before and that, in particular, depend on the ability to obtain exclusive use of them.[283] It seems that, therefore, the General Court held that taking into account the universality of Google's general search engine, which is designed to index results containing any possible content, the promotion on Google's general results pages of its own specialised results over the specialised results of competitors involves a certain form of abnormality.[284] While other commentators of the judgment see that self-preferencing is usual in many other industries, such as supermarkets, as well and it would not be against a platform's interests to have partially closed business model, others have emphasised the nature

[280] Ibid., para. 166. The Court also referred to the above discussed case T-201/04 *Microsoft v Commission* in which part of the leveraging infringement was formed of bundling and the refusal to supply interoperability information. By the reference, the Court wanted to demonstrate that although leveraging practices of a dominant undertaking are not prohibited as such, Article 102 TFEU is still applicable to such practices and furthermore, several kinds of leveraging have been found to be infringements of Article 102 TFEU.
[281] T-612/17, para. 184.
[282] Ibid., para. 224.
[283] Ibid., para. 177.
[284] Ibid., para. 176.

of Google's general search engine of providing consumers with choices.[285] Therefore, Google's self-preferencing in the most visible part of the search results page cannot be considered pro-competitive.[286]

The more favourable positioning of Google's own search results must have been, in the first place, based on traffic data. The reason for Google's optimised positioning of its comparison shopping tool in its general search results page must have been data that Google gathers from the user traffic in its services. Since Google owns the general search engine it also receives the data on consumer behaviour on its platform. Google must have understood that the first search results receive the most clicks by consumers and therefore, came up with the idea of placement and order of the Shopping Unit or its predecessor. When considering Google's behaviour in this point of view, Google had evidently special responsibility not to use the data that it had gathered also about its competitors, to its own advantage. The Court argued that the Commission was correct in the finding of essential facility. Furthermore, one could argue that also the data gathered of this essential facility was essential at least in a sense that one would not have been allowed to use it so that the conduct becomes anticompetitive.

The General Court argued that the EU legislation of open internet access has been found to impose the internet operators a general obligation of equal treatment and this obligation imposed on internet operators on the upstream market cannot be disregarded when considering Google's conduct on the downstream market, given the "ultra-dominant position" of Google as well as its Special Responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market.[287] The deviation from competition on the merits is more obvious as it follows a change of conduct on the part of the dominant operator. The Court held that, indeed, Google changed its conduct.[288] Finally, the Court argued that since Google was in the position of 'super-dominant' and 'a gateway to the internet', it was under an even stronger obligation not to allow its conduct to impair genuine, undistorted competition on the related market for specialised comparison shopping services.[289] Basically, the Court's argumentation

[285] See *Ibáñez Colomo, Pablo*: The General Court in Case T-612/17, Google Shopping: the rise of a doctrine of equal treatment in Article 102 TFEU, Chillin'Competition (blog) 10.11.2021. Available at https://chillingcompetition.com/2021/11/10/the-general-court-in-case-t%E2%80%91612-17-google-shopping-the-rise-of-a-doctrine-of-equal-treatment-in-article-102-tfeu/. Last accessed 18.12.2022.
[286] *Persch, Johannes*: Google Shopping: The General Court takes its position, Kluwer Competition Law Blog 15.11.2021. http://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/. Last accessed 18.12.2022.
[287] T-612/17, para. 180.
[288] Ibid., para. 181.
[289] Ibid., para. 182–183.

means that the Court gave its opinion on what kind of conduct does not belong to the scope of competition on the merits. As competing on one's merits is permissible, the overgoing part of the conduct belongs to the scope of the Special Responsibility.

3.4.4 Google Android

Adding to the contribution of the *Microsoft v Commission* judgment, the judgment of the General Court in case T-604/18 *Google and Alphabet v Commission* is the newest and possible the most important precedent of tying in digital platform markets. In its decision, which then came under appeal before the General Court, the Commission found that, on the basis of Google's conduct within the smart mobile operating system Android, Google abused its dominant position.[290] The decision of the Commission has received some critique about its reasoning regarding, especially, the market definition and the overall reasoning of the conclusion that Google holds a dominant position in the identified market.[291]

The abuse of Google considered four different markets that included, *inter alia*, the worldwide market for Android app stores, excluding China, as well as the national markets for general search services, in which abuse was already found in Commission's decision of *Google Search (Shopping)*.[292] In addition to abusive tying, the case considered anti-competitive conditions of licencing as well as conditional revenue share payments for hardware manufacturers and mobile network operators on the condition of not pre-installing any competing general search services on a certain portfolio of devices.[293] Therefore, the Commission found the abuse to have consisted of three different restrictive conduct, that were:

[290] Case AT.40099 *Google Android*.
[291] *Auer* 2020, p. 46. According to *Auer*, the Commission failed to take into account the complex business environment where Google and its competitors operate. In addition, it has been argued that the above mentioned judgment in case T-286/09 *Intel* will have effects on the *Google Android* judgment in terms of the analysis of the restrictive revenue share agreements which were directed at mobile operators to ensure that they would not pre-install competing general search services (applications) on their devices. Where in *Intel*, the Court of Justice considered the reasoning of the use of the 'as efficient competitor' test (the AEC test) insufficient, the General Court was forced to take these observations into account when ruling on the *Google Android* case.
[292] See case AT.39740, para. 341–343.
[293] See case AT.40099, Sections 12 and 13. See also, *inter alia*, Summary of Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40099 — Google Android), OJ C 402, 28.11.2019, pp. 19–22

1. restrictive distribution agreements considering two different requirements for manufacturers of mobile devices; to first pre-install Google Search app to obtain Google's app store called the Play Store, and secondly, to pre-install Chrome browser in order to getting a licence of Play Store and the Google Search app;
2. restrictive 'anti-fragmentation agreements', according to which the manufacturers obtained important operating licences for the pre-installation only if they undertook not to sell such devices that Google had not approved;
3. and restrictive revenue share agreements, according to which the manufacturers and other mobile network operators were granted a share of Google's advertising revenue only if they undertook not to pre-install a competing general search service on certain portfolio of devices.[294]

Again, the Commission held that irrespective of the reasons for which Google has a dominant position on the market for general search, it does not mean that Google would not have its special responsibility not to allow its conduct to impair competition.[295] The Commission also noted that the Special Responsibility must be considered in the light of those specific circumstances which demonstrate that competition has been weakened.[296] In terms of the first restrictive conduct, in its decision, the Commission concluded that Google abused its position by tying, on one hand, the Google Search app with the Play Store and on the other hand, Google Chrome with the Play Store and the Google Search apps. When assessing the abusive tying of Google's products, the Commission used the same criteria as the General Court had applied in its *Microsoft v Commission* judgment.[297] The General Court also held that the pre-installation practices of Google were instances of tying. Although, according to the Court, tying of products is a common practice in trade, an undertaking which is dominant in one or more product markets, can harm consumers directly by foreclosing the market for the tied product or even indirectly by foreclosing the tying market, which is the market for the tying product.[298] The Court argued that a close examination of the actual effects was required before it could be concluded that the tying in question was harmful to competition. According to the Court, such examination, *inter alia*, reduces the risk that conduct, which is not actually detrimental to competition on the merits, will not incorrectly be defined as abusive.[299] It has been argued that

[294] AT.40099, Article 1.
[295] Ibid., para. 727 and 729.
[296] Ibid., para. 730.
[297] Case T-201/04, see Section 3.4.2.
[298] T-604/18, para. 283.
[299] Ibid., para. 295.

therefore, in its judgment, the General Court acknowledged that, in the specific circumstances that the case had, the anticompetitive impact of the tying conduct could not, in any way, be presumed, and it had to be established in light of the relevant economic and legal context.[300]

The Court concluded that it agreed with the Commission in so far as the Commission had found the tying practices to restrict competition.[301] It held that the advantage conferred by the pre-installation of Google's apps was due to, *inter alia*, a 'status quo bias', which referred to the fact also used by the Commission that users tended to use those applications that were readily offered to them.[302] As the Court clarified, the question was not about the actual possibilities of users to download and use other apps, but the incentives to do so.[303] Furthermore, this tendency had the possibility to significantly increase the usage of the readily offered services on a lasting basis. Although providers of general search services competing with Google Search were concluded to be free to provide the same pre-installation as that provided by Google, that did not happen.[304] In addition, the Court held that part of the explanation for the lack of other pre-installation agreements lies in the combined effects of all the three situations that the Commission had found to restrict competition.[305] In this regard, the Court paid attention to the difference in treatment between a service provider that directly competed with Google and such service provider that was going to use the Google Search site as the default website on its browser. The Court found it striking that while the former did not get agreements for pre-installation, the latter did.[306] Finally, the Court held that although Android users were free to download competing apps or to change the default settings, or developers could offer their apps to be installed to devices, that was not sufficiently the case because of the pre-installation conditions of the distribution agreements.[307]

Eventually, in its judgment, the General Court upheld Google's plea regarding the revenue share agreements and therefore annulled the Commission's decision in so far as it concerned the grant of revenue share payments on condition that manufacturers pre-installed no competing

[300] See *Ibáñez Colomo, Pablo*: The notion of abuse after the Android judgment (Case T-604/18): what is clearer and what remains to be clarified (I), Chillin'Competition 28.9.2022. https://chillingcompetition.com/2022/09/28/the-notion-of-abuse-after-the-android-judgment-case-t%e2%80%91604-18-what-is-clearer-and-what-remains-to-be-clarified-i/. Last accessed 18.12.2022.
[301] See T-604/18, para. 596.
[302] Ibid., para. 321 and 418, see also, AT.40099. para. 781–782.
[303] T-604/18, para. 292.
[304] The Court held that also Google's usage shares confirmed the 'status quo bias', see T-604/18, para. 583.
[305] Ibid., para. 537.
[306] Ibid., para. 538.
[307] Ibid., para. 567.

general search services on a certain portfolio of devices.[308] This was due to errors that the General Court found in the Commission's analysis. These errors had occurred, especially, in the Commission's analysis of the 'as efficient competitor' test regarding the revenue share agreements the results of which did not support the finding of an abuse resulting from the agreements.[309]

The General Court held that, taking into account the relevant case law, and here, the Court referred to the *Intel* judgment, it was required to analyse the capability of the revenue share agreements to restrict competition on the merits.[310] Furthermore, to prove that a conduct is capable of restricting competition, and in particular, of producing foreclosure effects, the Court noted that the Commission is required to analyse, *inter alia*, the share of the market covered by the contested practice.[311] In particular, this means an impact analysis. The Court concluded that the Commission's finding of a restriction of competition was incorrect both when assessing the coverage of the revenue share agreements and the Commission's application of the AEC test.[312] Finally, the Court concluded that the abuse could neither be found merely on the basis of hypothetical restriction of innovation or of a possible interest in pre-installing several general search service apps if the revenue share agreements did not exist.[313] These hypothetical factors were insufficient, in themselves, to cover the errors that the Commission made in analysing the capacity of the revenue share agreements to foreclose a hypothetically as efficient competitor.

As an interesting consideration, one could ask whether the maximisation of consumer data gathering played any role in the decision-making leading to the judgment of the restriction of competition. On one hand, both the decision of the Commission and the judgment of the Court include a review of the data-centred business model of Google. The Commission noted that many of Google's products and services are free of charge to users and are search-driven in the meaning that the searches continuously teach Google's machine learning technology used in its business.[314] Furthermore, Google gathers user data via its products and services so that it

[308] See ibid., para. 800–802. See also the press release No 147/22, 14.9.2022, pp. 3–4, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf. Last accessed 18.12.2022
[309] See T-604/18, para. 798–799. About the Court's analysis of the errors in the application of the AEC test, see para. 733–797.
[310] Ibid., para. 637–648. According to *Kadar*, 2019, the notion of capability to harm competition has been debated for many years. When a strict interpretation of the notion of capability would require evidence of actual effects on the market, a more expansive interpretation would allow competition rules to be enforced also when harm to competition is hypothetical and not supported by concrete evidence.
[311] T-604/18, para. 679 and the case law cited.
[312] Ibid., para. 679–699.
[313] Ibid., para. 801.
[314] See AT.40099, para. 107–108.

receives a continuous stream of information that it can use in its search and advertising businesses.[315] This information includes several types of collected data such as contact information, account authentication data, location data as well as interaction data, such as clicks.[316] In the Commission's investigations, Google admitted that smart mobile devices are a particular source of user data, especially in combination with other user data.[317] On the other hand, when explaining the legal framework of tying practices and their exclusionary effects, the Court emphasised the fact that like all competition on price, not all competition on other parameters may be regarded as legitimate.[318]

3.4.5 Observations of the scope of Special Responsibility

The first observation about the *Microsoft v Commission*, *Google Shopping* and *Google Android* judgments is that with digital platforms, the Special Responsibility of dominant undertakings is treated in the same way than it has been done traditionally. Therefore, for example, no changes have been made to the definition of the Special Responsibility, which is still responsibility of dominant undertakings including the obligation not to allow one's conduct to impair genuine, undistorted competition. Nevertheless, due to the emphasis on a case-by-case analysis, specific features on the scope of the Special Responsibility of digital platforms can naturally be defined from the judgments in the review. Furthermore, in Google Shopping, the General Court held that Google was under a stronger obligation of Special Responsibility due to Google's super-dominance and its position as a gateway to internet. This could be a slight indication of a stronger Special Responsibility of digital platforms due to the qualities of their business and, potentially, due to the extensive use of consumer data.

Three specific matters can be named to belong to the scope of the Special Responsibility when considering digital platforms and situations with the use of data. The first being, certainly, that access to any essential data of a dominant undertaking, that is essential for genuine competition in the meaning of indispensability, must be given to competitors to avoid hindering competition. Furthermore, it follows that holding this kind of data to own use only does not belong to the

[315] Ibid., para. 109.
[316] Ibid., para. 110–111, similarly T-604/18, para. 58.
[317] AT.40099, para. 114.
[318] T-604/18, para. 280.

scope of competition on the merits. If the data which is available to competitors before giving access to the specific essential data, is not enough to keep the competitors viable on the market, the maintenance of effective competition on that market is hindered. If an undertaking has even a super-dominant position on that market, at least then there is solid proof that its Special Responsibility includes giving competitors access to the essential data.

Secondly, self-preferencing regarding platform's own comparison shopping services is prohibited when the question is about an open search engine the aim of which is to provide consumers with neutral choices. From the point of view of the Special Responsibility, a dominant platform is responsible for refraining from practices that could be regarded as self-preferential conduct. This kind of behaviour has a heavily data-centred business model under it, and thus, when there is a data and algorithm based business, the undertaking in charge must be careful of using all the available data in its business so that the conduct does not fall outside of competition on the merits. In certain circumstances, it might be hard to objectively evaluate the position of a certain platform although in the case Google, it being called a gateway to internet cannot be surprising to anyone.

Finally, the Special Responsibility of a digital platform includes a prohibition of tying different mobile applications so that the application developers or mobile operators cannot effectively and equally market and get their apps downloaded within a certain mobile operating system. In other words, a mobile operating system must not be used in such ways that lead to the weakening of competition and a strengthened dominant position of one service provider. When thinking of the perspective of data, if one service provider has control over a whole operating system and controls different apps, it then has the possibility to collect and combine a great amount of data. Therefore, it seems to be included in the Special Responsibility of a digital platform that it is prohibited from using conditions which make it impossible, in practice, to install competing applications.

4. DIGITAL MARKETS ACT

In this chapter, the second research question of how the Digital Markets Act is affected by the findings of the case law that was analysed in Chapter four will be discovered. Furthermore, it will be assessed, how the defined scope of the Special Responsibility is reflected in the Digital Markets Act. In this regard, the purpose and main contents of the Regulation will be explored. Furthermore, some of the most relevant definitions of the Regulation will be explained. Ultimately, the relevant provisions of the Digital Markets Act will be explained and analysed against the scope of Special Responsibility which has been identified from the case law considering large digital platforms in Section 3.4.

4.1 Scope, definitions and responsibility obligations

As has already been discussed in Chapter 2, digital markets hold several special economic features which can, when exploited, lead to dominance and a possible weakened state of competition on the market. The core platform service companies have the power to, by exploiting their special characteristics, make markets function to the detriment of both business users and end users. In those situations, the business users' and end users' freedom of choice decreases and the core platform in question can obtain the position of a gatekeeper.[319] According to Article 1(1) of the Digital Markets Act, the purpose of the regulation is to contribute to the proper functioning of the internal market and therefore, to establish uniform rules for ensuring a competitive and fair digital market for the territory of the Union where gatekeepers operate. In other words, the objective of the Regulation is to ensure that markets where gatekeepers operate remain contestable and fair.[320] This is regardless of actual, potential, or presumed effects of the conduct of a given gatekeeper on competition on a certain market. Therefore, ultimately, the aim of the Regulation is to protect a different legal interest from that protected by Articles 101 and 102 TFEU.

[319] DMA, Reg. 2022/1925, recital 2.
[320] DMA Recital 11.

The wording of Article 1 directly reveals one of the most significant concepts launched by the Commission, the gatekeepers. It follows from Article 1(2) that the regulation is only applicable to digital platform, also called core platform service providers, that can be defined as gatekeepers by means of objective criteria which are laid down in Article 3 of the Regulation.[321] The legal basis for the Digital Markets Act is in Article 114 TFEU, which provides the measures required for ensuring the functioning of the European Union internal market. As regards the legal basis, the recitals of the DMA emphasise the nature of online platforms as cross-border services. In this context the fragmentation of national regulation would significantly undermine the functioning of the digital single market if harmonisation at EU level was not conducted.[322]

The Digital Markets Act is meant to complement, first of all, the existing EU antitrust regulations and national regulations. Where antitrust rules traditionally apply in individual market situations where restrictions of competition have occurred, the assessment in the framework of the DMA is said to be clearly complementary.[323] In addition, Articles 101 and 102 TFEU may only lead to enforcement after a restriction has occurred and require an extensive investigation procedure.[324] The digital market legislation specifically addresses a need which, in the presence of the said requirements, cannot be met by the current competition laws. The DMA specifically addresses the 'detrimental structural effects of unfair practices' in advance.[325] The purpose of the obligations in the DMA is to ensure that markets of gatekeepers are and will be contestable and fair regardless of the conduct of a given gatekeeper.[326]

Secondly, the Regulation is complementary to EU data protection laws, especially the General Data Protection Regulation[327].[328] What is interesting, is that the GDPR is also directly referred to in several Articles of the DMA.[329] These Articles are especially connected with transparency

[321] These criteria will be assessed in more detail in the next Section 4.1.1.
[322] DMA, Recitals 6-7.
[323] DMA, Recitals 10-11.
[324] DMA, Recitals 5 and 10-11.
[325] See the Proposal for a Regulation of the European parliament and of the council on contestable and fair markets in the digital sector (Digital Markets Act), 15.12.2020, COM/2020/842 final, p. 4.
[326] DMA, Recital 11.
[327] Regulation 2016/679, GDPR.
[328] DMA, Recital 12.
[329] For example, personal data is defined in Article 2 so that it means personal data as defined in Article 4, point (1), of Regulation (EU) 2016/679 (GDPR). Furthermore, according to Article 5(2) of the DMA, the gatekeeper is prohibited to process, combine or cross-use personal data, or sign in end users to other services, unless the end user has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.

obligations relating to consumer profiling and the mandatory possibility of not giving consent to the aggregation of data between core platform services.[330]

Chapter II of the Digital Markets Act includes provisions for the definition of gatekeepers, for example, provisions on the conditions under which a core platform service provider should be designated as a gatekeeper (Article 3), and on when to reconsider the designation of a gatekeeper (Article 4). Chapter III, which can be regarded as the most important chapter of the Regulation, on the other hand, includes obligations imposed on designated gatekeepers that are valid either as such or after they are further specified (especially Articles 5, 6 and 7). The imposition of obligations involves prohibiting unfair practices or practices that limit contestability. Where, according to Article 3(8) of the DMA, the Commission may designate a gatekeeper also on the basis of a market investigation, which is further defined in Article 17, the practices of the market investigation are further laid down in Chapter IV. Chapter V includes provisions on enforcement and sanctions of non-compliance with the obligations of the Regulation (Articles 29, 30 and 31).[331]

4.1.1 Core platform service providers to gatekeepers

Article 3 of the Digital Markets Act considers the criterion and thresholds according to which a core platform service provider is designated as a gatekeeper. A core platform service provider shall be designated as a gatekeeper if it meets the three criteria as referred to in paragraph 1 of the Article. First, the gatekeeper must have a significant impact on the internal market. According to paragraph 2, point (a), this criterion is expected to be met if the company to which the core platform service belongs has had an annual turnover in the European Economic Area (EEA) of at least 7.5 billion euros in the last three financial years. Alternatively, the criterion is met with the average market capitalisation or equivalent fair market value of the undertaking

[330] See DMA, Recitals 36-37 and 72.

[331] Like any other chapter in this thesis, the aim of this chapter does not include assessment of fines or other enforcement related questions and thus, this side of the coin will not be covered. However, it is worth mentioning that the DMA includes a rather wide range of possible investigative methods for the Commission. In addition, according to DMA Article 30, a fine imposed by the Commission in a situation of non-compliance may be up to 10 per cent of the total worldwide turnover of the non-compliant gatekeeper in the preceding financial year.

concerned of at least 75 billion euros in the last financial year and when the company provides its core platform service in at least three Member States.

The second criterion for the designation as a gatekeeper is that the core platform service serves as an important gateway for business users to reach end-users. According to paragraph 2, point (b), this criterion is expected to be met if the core platform service provider has at least 45 million active end users established in the Union or located in the Union monthly, as well as at least 10 000 active business users established in the Union during the most recent financial year. According to the third criterion, a gatekeeper core platform service provider holds an entrenched and durable position on the market, or that such a position is anticipated in the near future. The quantitative thresholds for this criterion are the same as for the second criterion, but the criterion is assumed to be met if the thresholds are met in the last three financial years.

As described, paragraph 2 of Article 3 defines the quantitative thresholds for each criterion of a gatekeeper. A core platform service may obtain the position of a gatekeeper according to either quantitative threshold values of paragraph 2, or also according to the above mentioned market investigation, which is defined in paragraph 8 and committed by the Commission. In practice, therefore, a core platform service provider that meets certain criteria shall be designated as the gatekeeper and is even required to inform the Commission of the fulfilment of the requirements so that the Commission can carry out the designation. According to paragraph 3, subparagraph 2, the Commission may even designate a service provider as a gatekeeper, even though it has not provided the appropriate information necessary for it within a certain period of time.

Eventually, paragraph 8 of Article 3 holds that the Commission may designate as a gatekeeper any core platform service provider that meets all the three criteria for designation that were discussed above, but which does not meet every quantitative threshold of paragraph 2. Related assessment of the Commission is regulated by paragraph 8, subparagraph 2 according to which the Commission should use the same type of reference values and benchmarks as the specified threshold types. However, the Commission should also include in its analysis factors related to the structural characteristics of the market more broadly. For example, according to the second subparagraph, the assessment also targets network effects and data-driven advantages due to data-driven benefits. This is of particular importance when thinking of the service provider's ability to obtain and collect personal data and non-personal data or, to use analytics capabilities.

On the other hand, the market investigation also examines the economies of scale from which the core platform service provider benefits, also in terms of data.

4.1.2 Responsibilities for gatekeepers according to the Digital Markets Act

The responsibilities of gatekeepers consist of fulfilling the obligations set out in Articles 5, 6 and 7 of the Digital Markets Act. These obligations are concretised under the Commission's monitoring of effective implementation and compliance.[332] The responsibilities of gatekeepers may be divided into obligations and direct prohibitions. Article 5 provide for the direct obligations of gatekeepers and Article 6, under its title, the obligations of gatekeepers 'susceptible of being further specified under Article 8'. This means that the Commission has been given the possibility to further specify some of the measures that the gatekeeper should adopt in order to effectively comply with these obligations.[333] As is evident from the recital of the DMA, the powers of the Commission of deciding on compliance are connected to the idea that the gatekeepers should ensure compliance with the obligation of the DMA by design. When the Commission has powers to order certain measures to be taken by the gatekeepers in order for them to comply with the DMA already in beforehand, this strengthens the nature of the DMA as regulation of direct obligations that do not require any restrictions of competition before it is applicable.

Since the purpose of the DMA is to ensure the proper functioning of the internal market and therefore to affect the behaviour of certain digital sector businesses, the obligations laid down in Articles 5, 6 and 7 concern, in particular, the relationship of gatekeepers to a third party, or another service provider. The gatekeepers must not discourage consumers from establishing connections with third party companies outside their platform. For example, according to Article 6(4) of the Digital Markets Act, gatekeepers must, in certain circumstances, enable the installation and efficient use of third-party software applications or application stores in conjunction with their own services. Gatekeepers are also required under Article 5(4) to allow

[332] Article 26 of the DMA considers the Commission's monitoring of obligations and measures.
[333] DMA, Recital 65.

business users to market their products and to conclude contract with customers acquired through the core platform service or other, non-gatekeeper platforms.

On the other hand, obligations of the DMA are also intended to protect advertisers or other business users operating on the gatekeepers' platforms. For example, Article 6(8) requires gatekeepers to provide advertisers on its platform upon request and free of charge access to the gatekeeper's performance measurement tools and information that allow the advertisers to carry out their own independent verification. Article 6(5) prohibits the gatekeeper from presenting their own services or products in a more favourable position compared to similar services or products provided by third parties on the same platform. Under Article 6(3), on the other hand, gatekeepers must technically allow end users to easily un-install any software applications preinstalled on the operating systems of gatekeepers.

The DMA also concerns the combination of data from different core platform services. According to the DMA Article 5(2), a gatekeeper must not process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper, it must neither combine personal data that is from different services, cross-use personal data from the relevant core platform service in other services, or, sign in end users to other services in the purpose of combining personal data. These all prohibitions are unless the end user has presented with specific choice and has given consent within the meaning of the GDPR for the processing of the personal data. Since gatekeepers are in a dual-role position, first as intermediary for third-party undertakings and also as undertaking directly providing products or services[334], they may unfairly benefit from this role for example by using data collected of the business users. Therefore, the DMA ensures that gatekeepers do not unfairly use data from the activities of other users to strengthen their market position by the use of this kind of data.[335] Data access is regulated, in particular, by Article 6(10), which requires the gatekeeper to provide business users or third parties authorised by a business user free access to all aggregated and non-aggregated data generated from the use of core platform services.

[334] DMA, Recital 51.
[335] Article 6(2) of the DMA.

Article 7 includes obligations on interoperability of number-independent interpersonal communications services.[336] Article 7(1) requires gatekeepers to ensure interoperability, or the ability for different apps to inter operate with each other, between instant messaging services.

All the obligations imposed on gatekeepers must be necessary and appropriate to ensure contestability and to avoid unfair conditions.[337] It could mean that the gatekeepers must therefore be subject to the kind of responsibility that does not restrict their opportunities to function and compete on their own merits. This can be observed from, for example, Article 6(4) according to which gatekeepers shall not be prevented from applying, to the extent that they are strictly necessary and proportionate, measures and settings other than default settings, enabling end users to effectively protect security in relation to third-party software applications or software application stores, provided that such measures and settings other than default settings are duly justified by the gatekeeper.

4.2 Comparison of case law and the Digital Markets Act

As discussed earlier, the Special Responsibility of dominant undertakings can be viewed as a statement of the obvious in the sense that Article 102 of TFEU clearly imposes obligations on dominant undertakings that others do not bear.[338] When it comes to the Digital Markets Act, the statement, however, seems to gain content as the Regulation defines clear obligations for those platforms that are defined as gatekeepers. The Digital Markets Act applies to those undertakings that are designated as gatekeepers. It is a well-established view, even self-evident, that all the largest platform companies will be defined as gatekeepers, and so will also Microsoft and Google that were parties in the analysed cases.

[336] Interestingly, in the Commission's proposal for the Digital Markets Act, COM(2020) 842 final, there was no separate Article for number-independent interpersonal communications services. According to the definitions of DMA Article 2, a number-independent interpersonal communications service is defined by Directive (EU) 2018/1972 Article 2 according to which it is an interpersonal communications service which does not connect with publicly assigned numbering resources or which does not enable communication with a number in national or international numbering plans. This means that the question is about instant messaging apps, such as the popular instant messaging service Whatsapp.
[337] DMA, Recital 27.
[338] *Whish – Bailey* 2021, p. 197.

The obligations of the Digital Markets Act are very similar to the features and identified scope of the Special Responsibility of platform companies in cases *Microsoft v Commission*[339], *Google Shopping*[340] and *Google Android*[341]. All of the above mentioned and analysed cases include a data perspective – either as a direct act of abuse or so that the business model of the undertaking was based on data related activities. Also, the Digital Markets Act includes several obligations related to the use of data and it seems that it is directed at potential data-driven abuses. According to the DMA Article 6 paragraph 2, a gatekeeper must not use any data that is not publicly available and that is generated by those business users while using the relevant core platform service. The non-publicly available data means any data that is generated by business users that can be inferred from or collected through the commercial activities of business users on the relevant core platform services.

The General Court's judgment in case *Google Android* concerned Google's practices that aimed at using the Android mobile operating system (OS) for directing end user traffic to its own general search service. Gatekeepers shall, according to Article 5(4), allow business users to communicate and promote offers to end users acquired via its core platform service or through other channels regardless of whether it will be done in the core platform service of the gatekeeper or not. Furthermore, according to paragraph 5 of the same Article, a gatekeeper must allow end users to use the software application of a business user through the core platform services of the gatekeeper. The gatekeeper must neither, according to paragraph 7, require end users or business users to use, inter alia, a specific web browser engine in the context of using the gatekeeper's core platform services. Then again, according to Article 6, paragraph 3, a gatekeeper must allow and enable end users to un-install any software applications on the operating system of the gatekeeper. In addition, the gatekeeper must enable easy changing of the default settings on the operating system, virtual assistant or web browser of the gatekeeper that direct end users to those services that are provided by the gatekeeper. In Article 6 paragraph 6, the gatekeeper must not restrict technically or otherwise the ability of end users to switch between different software applications and services that are accessed using the core platform services of the gatekeeper, including, in particular, the choice of Internet access services for end users. In *Google Android*, the question was especially about the Google Chrome web browser. The General Court held that the fact that users did not actually change to competing

[339] T-201/04.
[340] T-612/17.
[341] T-604/18.

services, was crucial in finding the abuse.[342] All of these obligations are recognisable features of the *Google Android* case.

Still, more direct obligations for the functioning of operating systems are included particularly in Article 6. According to Article 6 paragraph 4, gatekeepers must allow the installation of third-party software applications or app stores using its operating system. Furthermore, the gatekeeper must allow these software applications or app stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper must not prevent the downloaded third-party software applications or app stores from prompting end users to decide whether they will set these applications or apps as their default. Again, these are relevant obligations when thinking of the *Google Android* judgment. In paragraph 7, the gatekeeper is also forced to allow providers of services of hardware effectively interoperate with the same hardware and software features accessed via the operating system available to services or hardware provided by the gatekeeper. This obligation reminds of the case *Microsoft v Commission* in which Microsoft abused its dominant position by refusing to supply the interoperability information and to authorise its use for the development and distribution of competing products.

Case *Google Shopping* has become remarkable especially due to the fact that the General Court held that self-preferencing was enough to form an abuse of dominant position. Also, the Court based its arguments on fairness. According to the DMA Article 6(5) gatekeepers must not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself compared to the treatment of similar services or products of a third party. The gatekeeper must particularly apply transparent, fair and non-discriminatory conditions to such rankings. This provision has, most obviously, its background on the *Google Shopping* case. It should be noted that the prohibition of self-preferencing was included already in the Commission's Competition policy report of 2019 which led the way of development towards the DMA.[343]

[342] T-604/18, para. 321.
[343] *Crémer et al.* 2019, pp. 66–67.

5. CONCLUSIONS

The Special Responsibility of dominant undertakings refers to a loosely defined provision that is included in Article 102 TFEU. It has been further defined in the case law of the EU Courts according to which those undertakings that are dominant have special responsibility, irrespective of the reasons of which they have such a position, not to allow their conduct to impair genuine, undistorted competition on the common market. However, this does not mean that dominant undertakings would be prohibited from competing on their own merits.

The data-driven benefits are important characteristics of the digital markets. Data is an important factor of production, the absence of which may even prevent undertakings from entering markets. Digital platforms have the possibility to connect business users to end users efficiently and, in this framework, the platforms get access to large volumes of data across markets and fields of business. Combining end-user data from different sources gives platforms advantages which have the possibility of leading to barriers to entry and dominance. The new Digital Markets Act includes obligations to gatekeepers in relation to their functioning in the digital markets as well as the data they manage. Furthermore, the Digital Markets Act includes the obligations of gatekeepers for sharing data with the business users and third parties, including advertisers.

The aim of this research was, first, to assess the scope of the Special Responsibility of digital platforms in situations concerning the use of data. According to the Court of Justice, the scope of Special Responsibility is ultimately defined through the assessment of individual cases. The analysed case law of digital platforms with a data perspective revealed that with digital platforms, the concept of Special Responsibility is treated in a same manner as it has been traditionally. However, a digital platform may be under an even stronger obligation of Special Responsibility due to its super-dominant and gateway positions. Then again, the scope of Special Responsibility of digital platforms may involve obligations of interoperability including giving access to data when that data is truly necessary so that without such data competition on the specific market would be hindered. Favouring of certain platform's own services is prohibited for super-dominant digital platforms when the question is about indexing search results in an open, general search engine. Furthermore, the Special Responsibility may include an obligation of fair treatment. In addition, the Special Responsibility of digital platforms may

involve requirements of enabling mobile application developers or mobile operators to effectively market and download their own apps within a certain mobile operating system that the dominant platform controls. The Special Responsibility includes, therefore, the requirement of taking care of competitive environment within any operating system.

Secondly, the aim of this research was to analyse, how the scope of Special Responsibility of digital platforms is reflected in the Digital Markets Act. The data perspective involved in the analysed case law is emphasised also in the obligations of the Digital Markets Act. It seems that the identified scope of Special Responsibility has had a remarkable effect on the obligations of the Digital Markets Act, or at least those obligations have a direct connection to the case law that was analysed in this research. In particular, most of the obligations of the Digital Markets Act had features that the General Court concluded to be abusive in its case law. Therefore, as a result of this research, it can be argued that the scope of the Special Responsibility of digital platforms under Article 102 TFEU, that has traditionally been defined in the case law of the Court of Justice, has been concretised as *ex ante* type of obligations in the Digital Markets Act. Furthermore, the purpose of these obligations, which is to ensure that markets of gatekeepers are and will be contestable and fair regardless of the conduct of a given gatekeeper, is consistent with the scope of the Special Responsibility.

Digital markets will certainly bring various new problems for the enforcement of competition law. Furthermore, the framework of digital markets and big data is one of the most remarkable challenges for competition law in the near future and is, of course, already now.[344] The Digital Markets Act has opened a new era of competition legislation. In terms of the case law of Article 102 and digital markets, the EU Courts have already given judgment in some cases of digital dominance, but there are still many anticipated cases to be ruled. Since the Digital Markets Act has not been applied yet, all the related questions are still waiting to be discovered and solved. The application and enforcement of the Digital Markets Act and furthermore, the relationship of the Digital Markets Act with other provisions of the EU competition law will be a remarkable object of research. One important question that requires future research efforts is how the finding of dominance will be affected by the Commission's decision of designation as a gatekeeper. Furthermore, attention should be paid on whether the definition of the scope of Special Responsibility of dominant platforms and obligations of gatekeepers according to the Digital Markets Act will be converged.

[344] *van de Gronden – Rusu* 2021, pp. 6–7, see also *Grunes – Stucke* 2016, p. 37.

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