B2B Unfair Trade Practices and EU Competition Law

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EU competition law appears to interpret fairness in B2B trade relations as "equal opportunities to trade" for market actors. A positive and pragmatic inquiry into the relevant regulations, cases and doctrines support that approach. This contribution suggests a new definition for these practices under EU competition law. Accordingly, any trade practice representing supremacy in bargaining power – usually dominance – and distorting the equal opportunity to trade of one or more trading partners could be conceived as unfair trade practices (UTPs) under EU competition law. Thus, these practices restrict competition according to EU competition law. Indeed, the EU Commission, Parliament and many Member States have emphasized the restrictive effects of UTPs even when practiced by non-dominant undertakings. UTPs could include all kinds of trade practices toward trading partners, regardless of the industry and environment in which they occur, whether online or offline. This definition can also relieve competition lawyers from inefficient exploitative/exclusionary abusive conduct divisions.

Keywords: unfair trade practices; fairness; equal opportunity to trade; business to business relations; online platform to business relations

I. Introduction

Businesses have finally received attention from the EU authorities as targets of unfair trade practices (UTPs) in the current decade. Consumers have always been assumed to be the main victim of UTPs due to their position in relation to businesses. However, market reality suggests otherwise.

B2B UTPs lack harmonized and inclusive action at the EU level,[1] although this issue appears to capture the Commission's attention periodically. Nevertheless, EU competition law appears always to have been competent to deal with this matter to a considerable extent. Article 102 TFEU is a solid basis for researching and investigating

[1] See further in the third and fourth sections about action at the EU level.

B2B UTPs. Disparity in bargaining power, in the form of dominance, is central to Article 102, whether a single undertaking or a group of undertakings collectively possess this power. EU case law on Article 102 illustrates potential to intervene in B2B UTPs. Accordingly, assessing the relevant case law is indispensable to demonstrating how B2B UTPs are reflected under Article 102. Significantly, determining what EU competition law means by "fair" or "unfair" practices is paramount for understanding the relationship between Article 102 and UTPs.

Therefore, this contribution aims to answer two questions central to the study of UTPs. Firstly, how does "fairness", concerning businesses, appear in the mirror of EU competition law? And secondly, since not all types of UTPs would fall within the scope of EU competition law, what kind of competition-restrictive UTPs relating to businesses would be caught by EU competition law, in particular Article 102?

To answer these questions, this contribution adopts a pragmatic and positive approach. This, firstly, appears more effective in tackling the complexity and – allegedly – vagueness of notions such as "fairness". Secondly, reviewing the relevant cases is the most plausible – if not the only – way to study UTPs. Besides, the legal dogmatic method has been adopted, which involved studying the relevant regulations, directives, guidelines, case law, available literature and doctrines.

The text is divided into three main sections followed by a conclusion. Section II deals with the first question, thus clarifying the meaning of fairness in relation to businesses. Section III studies examples of UTPs in EU competition law, drawn from the available case law. Section IV reflects UTPs in online platform-business relations. These are examined separately due, firstly, to the exceptional characteristics of online platform-business models and, secondly, to the different approach by the EU Commission regarding UTPs in the online environment, which eventually resulted in

regulatory action. Otherwise, UTPs appear to be much the same regardless of the type of industry in which they are practised.

II. Does EU Competition Law Protect Fairness?

Fairness as a "multidimensional concept"[2] is one of the most challenging notions to define. This intricate notion has undergone different interpretations based on distinct contexts.[3] In the EU, it is reflected in various subsets of law, specifically consumer,[4] contract[5] and competition law.[6] Interestingly, fairness emerges in all fields as involving a contrast between power and weakness.

Even though some authors find it almost impossible to define fairness in different fields of law,[7] there appears to be a quasi-consensus on how it is understood, not defined, in competition law. The common understanding of fairness may not

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[2] Munda Giuseppe, 'Dealing with Fairness in Public Policy Analysis: A Methodological Framework' (2017) Publications Office of the European Union 1, 5 <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC107843/jrc107843_smce-ia-fairness.pdf> accessed 11 June 2018.

[3] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press 2011) 21.

[4] Council Directive (EEC) 93/13/ on Unfair Terms in Consumer Contracts [1993] OJ L95/29; Council Directive (EC) 2005/29/ on Unfair Commercial Practices [2005] OJ L149/22.

[5] Ole Lando and Hugh Beal (eds), *The Principles of European Contract Law, Parts I & II,* (The Hague, Kluwer Law International 2000); Christian von Bar and others (eds), 'Principles, definitions and Model Rules of European Private law – Draft Common Frame of Reference (DCFR)' (Outline Edition, European Law Publishers 2009) <https://sakig.pl/uploads/upfiles/moot/dfcr.pdf> accessed 11 June 2018.

[6] Specifically Art.102 TFEU.

[7] Pinar Akman, *The Concept of Abuse in EU Competition law: Law and Economic Approach* (Oxford, Hart Publishing 2012) 181–82, 204; Maurits Dolmans and Wanjie Lin, 'Fairness and competition law: A fairness paradox' (2017) 4 Concurrences 1, 5 and 20. Mainly due to the allegation of being a subjective and vague concept.

necessarily provide a comprehensive definition, but to some extent solves the problem concerning the difficulty or impossibility of suggesting an exhaustive definition.[8] Accordingly, a more pragmatic and positive approach is pursued here rather than a theoretical and normative one.

Fairness is predominantly intertwined with "equal opportunities"[9] for different actors in the market. At any rate, striving for equal opportunity does not ensure an equal

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[8] Indeed, we have no choice but to agree, while compromising on certain matters so that we can proceed with the discussion, otherwise lawyers would have stopped at the start trying to define basic concepts such as law and never progressing any further.

[9] See Edwin J. Hughes, 'The Left Side of Antitrust: What Fairness Means and Why it Matters' (1994) 77(2) Marquette Law Review 265, 283; Roger J. Van den Bergh & Peter D. Camesesca, *European Competition Law and Economics: A Comparative Perspective* (Antwerpen, Intersentia 2001) 3; David J. Gerber, 'Fairness in Competition Law: European And U.S. Experience' (Conference on Fairness and Asian Competition Laws, Kyoto-Japan, March 2004) 6–7, referring to the importance of values such as equality for Europe; Christian Ahlborn and A. Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Claus D. Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reform Approach to Article 85 EC* (Hart Publishing 2007) 60; Nazzini (n 3)147–48, even though the author introduced fairness as a test rather than as an objective; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) CLES Working Paper Series 3/2013 22, 31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> accessed 11 June 2018; Wouter P.J. Wils, 'The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance' (2014) 37 (4) World Competition 405; Alfonso Lamadrid de Pablo, 'Competition Law as Fairness' (2017) 8 Journal of European Competition Law & Practice 147–48; Margrethe Vestager, 'The New Age of Corporate Monopolies' (presentation on Ted, 2017) <https://www.ted.com/talks/margrethe_vestager_the_new_age_of_corporate_monopolies/transcript#t-647576> accessed 11 June 2018, mentioning '…competition on equal terms'; Doris Hildebrand, 'The equality and social fairness objectives in EU competition law: The

outcome;[10] hence, fair and equal access to the market may result in "fair inequality".[11] Accordingly, as long as there is "competition on the merits", fairness and/or equal opportunity is achieved[12]; Because competition law aims to eliminate greed, not competition.[13]

Considering various points of view on the role of fairness in EU competition law, there appear to be three main categories of opinions. Firstly, those who both deny the importance of fairness in this context – fairness as it is – and reject it as a proper goal for competition law in general – fairness as it should be.[14] Secondly, some authors admit the importance of fairness as it is; however, they criticize it and assert that its role is shrinking, and should be doing so, as happened in the USA.[15] Thirdly, scholars who

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European School of Thought' (2017) 1 Concurrences 1, 2, the author emphasized equal distribution of wealth as well.

[10] Nazzini (n 3) 147–48.

[11] Giuseppe (n 2) 5.

[12] Vestager (n 9); Johannes Laitenberger, Director-General for Competition, European Commission, 'EU competition law in innovation and digital markets: fairness and the consumer welfare perspective' (Hogan Lovells event, Brussels, October 2017); for a different view distinguishing competition on the merits from fairness, see Maurits and Lin, (n 7) 9.

[13] Thomas J. Horton, 'Fairness and Antitrust Reconsidered: An Evolutionary Perspective' (2013) 44 McGeorge Law Review 847; Vestager (n 9).

[14] See e.g. Heike Schweitzer 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Ehlermann and Marquis (eds) (n 9); Peter Behrens 'The Ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' (2015) 7/15 Institute for European Integration Working Paper <https://www.econstor.eu/bitstream/10419/120873/1/834998815.pdf> accessed 11 June 2018

[15] See e.g. Van den Bergh and Camesesca (n 9) 6–7; Ahlborn, and Padilla (n 9).

embrace the role of fairness in EU competition law both as it is and as it should be.[16] Regardless of the controversial origin of fairness in EU competition law, according to different authors,[17] this contribution emphasizes the role of fairness in EU competition law by adopting the third category of opinion.

Considerable evidence has already been provided illustrating how and why discussing fairness is relevant to EU competition law.[18] By demonstrating the most fundamental element of that evidence, this part of the article strives to construct other arguments in this context, while avoiding repetition.

EU competition law should not be interpreted as a rootless segment of the EU legal system, which itself forms part of the European Community representing different values and goals. Although competition law is neither competent – nor is supposed to – protect all values and aims, some of those values and aims are relevant to the application of competition law. If the main purpose of the EU is to establish and protect the internal market, without public and private[19] barriers for cross-border businesses, how can EU competition law be construed so as to disregard that aim?

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[16] See e.g. Hildebrand (n 9); Lamadrid de Pablo (n 9); and for similar opinions in US antitrust context see e.g. Hughes (n 9); Horton (n 13).

[17] Many authors claim that the Ordoliberal school of thought impressed EU competition law so that fairness became important as the individual's rights were pivotal for Ordoliberals. See e.g. Ahlborn and Padilla (n 9) 63; Lianos (n 9) 24–25; and for a different perspective see e.g. Schweitzer (n 14) 133–35; Lianos (n 9) 26; Behrens (n 14).

[18] To avoid repeating here, see e.g. Ahlborn and Padilla (n 9) 55–74, even though the authors criticized EU competition law on this account; Lianos (n 9) 31–54; Hildebrand (n 9).

[19] Schweitzer (n 14) 137.

Is it accurate to interpret competition law in the vacuum of economic analysis alone? Competition law is the most proper means[20] to functionalize and protect the internal market. Although competition law should also take advantage of economic analysis, economists are supposed to assist lawyers, not to decide on their behalf. Since "fair competition"[21] is indispensable to the EU "social market system",[22] EU competition law is likewise required to reflect that same system. Moreover, discussing the aims of competition law in general without specifying the jurisdiction could be misleading. Different competition laws around the globe may embrace substantial similarities, while their differences should not be underestimated. In particular, if competition law is understood as a means of achieving other goals, the diversity of different societies needs special attention.

One important factor, less highlighted in EU competition-law scholarly works, is the dignity of fairness as an intrinsic value for social human beings. This issue has also been emphasized in other aspects of science and social science, from philosophy to biology.[23] Some empirical studies have also demonstrated the importance of fairness and "social interest" in some human decision making – according to different economic

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[20] For discussion of competition law as an aim by itself or as a means to achieve other aims, see Lianos (n 9) 37, (footnote 158).

[21] Vestager (n 9).

[22] See Commission, 'Report on Competition Policy 2016' COM (2017) 285 final, 2. It quoted from the President of the European Commission, Jean-Claude Juncker, who recalled that "(a) fair playing field also means that in Europe, consumers are protected against cartels and abuses by powerful companies. (...) The Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for".

[23] Horton (n 13) 839–842.

and competitive environments – rather than "self-interest".[24] On the contrary, these studies have shown that in situations where fair play results in unfair outcomes to fair players – because others benefit from unfair advantages – the absence of sanctions increases the likelihood of unfair play.[25] Hence, potent justification exists for regulating a competitive environment for the sake of social interest and fairness.

Besides, fairness appears to be an undeniable value for different societies, to the extent that even those who claim efficiency as the sole goal of competition law do not deny the significance of fairness in general. They do not actually support the idea that fairness has *competition law* relevance, and they transfer the role to other subsets of law, such as contract, tort, and unfair competition law.[26] This work casts doubt on that approach by asking how can we be selective in terms of our values? In brief, fairness is either important or it is not. But, if it is, then it cannot be valuable here, but not there.

Furthermore, the EU still lacks coherent and complete regulations on various forms of unfair competition and trade practices protecting businesses.[27] Accordingly, it is more comprehensible to delegate the burden to competition law, considering that

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[24] Ernst Fehr and Klaus M. Schmidt, 'A Theory of Fairness, Competition, and Cooperation' (1999) 114 Quarterly Journal of Economics 817.

[25] ibid 819, 855–56.

[26] Dolmans and Lin (n 7) 20; Horton (n 13) 832.

[27] Consumers have directives such as Unfair Terms in Consumer Contracts (n 4); Directive of the European Parliament and of the Council 2005/29/EC concerning unfair business-to-consumer commercial practices ('Unfair Commercial Practices Directive') [2005] OJ L 149/22. Regarding businesses, especially SMEs, the EU appears to be paying more attention by adopting Directive of the European Parliament and of the Council 2011/7/EU on combating late payment in commercial transactions ('Late Payment Directive') [2011] OJ L 48/1.

protecting competition without its actors is an "empty slogan".[28] Likewise, Article 3(2) of Council Regulation (EC) No 1/2003 authorizes EU Member States to apply stricter rules in terms of unilateral action and dominance; indeed, some Member States have already done so.[29] This indicates EU regulators' awareness about the credibility of fairness among EU Member States.

To sum up so far, EU competition law implies fairness as an inseparable value intertwined in the body of law – fairness forms part of concerns for free but fair competition in the market. Even though criticized as a concept for vagueness, legal uncertainty, subjectivity and for being differently understood from time to time and

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[28] Wolfgang Wurmnest, 'The Reform of Article 82 EC in the Light of the "Economic Approach"' in Mark O. Mackenrodt, Beatriz C. Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 14. For the same argument that harm to competitors can result in harm to the structure of the market, see Peter Behrens, 'Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition' in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?* (Cheltenham and Northampton, MA, Edward Elgar, 2006) 228; Mor Bakhoum 'Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance' (December 14, 2015) in Paul Nihoul et al. (eds), *Abuse Regulation in Competition Law: Past, Present and Future* (Edward Elgar, ASCOLA series) (forthcoming) 20–22.

[29] Germany, France, Italy, Greece, Austria; see Jochen Glöckner, 'Unfair Trading Practices in The Supply Chain and the Co-Ordination of European Contract, Competition and Unfair Competition Law in Their Reaction to Disparities in Bargaining Power' (2017) 12 Journal of Intellectual Property Law & Practice 416, 419. For deeper elaboration in this matter, see Pranvera Këllezi, 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer-Verlag Berlin Heidelberg, 2008).

culture to culture,[30] the importance of fairness cannot be disregarded. Moreover, in the context of EU competition law, certain courts and authorities with a considerable procedural background are directly involved in interpreting and clarifying the notion of fairness in practice.[31] Thus, the need does not arise to ascertain the judgment of everyone around the world at different periods. The following, by a rather pragmatic approach, discusses legal proceedings of the EU courts and the Commission.

III. Fairness in Practice (Examples of B2B UTPs)

This section endeavours to clarify the role of fairness – equal opportunity – through EU competition law cases, which assists to provide a clearer understanding of B2B UTPs.[32] Whereas fairness – UTPs – could be exposed to discussion in the case of cartels and concerted practices, on the other hand,[33] in relation to direct rivals and final consumers of a dominant undertaking, it is worth recalling at the outset that the main focus here is on customers of dominant undertakings which are actually intermediary buyers. The section is divided into two main parts, due to the special situation of intermediary buyers in a market which varies from being purely trading partners to competitors of dominant undertakings at a different level of the market. Before examining each part, some preliminary issues need to be raised.

The first issue concerns "exploitative abuse", which in the literature[34] – while hardly discussed – appears to be directly connected to a dominant undertaking's

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[30] Dolmans and Lin (n 7) 2–5.

[31] Laitenberger (n 12) 5.

[32] The suggested explanation of the B2B UTPs is provided in the conclusion.

[33] Gerber (n 9) 2–3.

[34] See e.g. Carles E. Mosso and Stephen A. Ryan 'Article 82 – Abuse of a Dominant Position' in Jonathan Faull and Ali Nickpay (eds), *The EC Law of Competition* (Oxford University

relations with customers and consumers. Accordingly, exploitation of customers/consumers and exclusion of competitors are familiar expressions. Exploitative abuses have been treated as the abandoned child of Article 102 TFEU, although at first Article 102 and abuse of a dominant position were interpreted as merely exploitative.[35] The EU Commission has left no guideline, guidance or discussion paper on these abuses. Moreover, the majority of commentators are either reluctant to discuss this issue, or simply deny its relevance to competition law discourse, unless in exceptional circumstances.[36] The main reasons expressed are the assertion that the market would "self-correct"[37] over time, that exploitation lacks competition law

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Press, Oxford 1999) 146; Daniel G. Goyder, *EC Competition Law* (4th ed. Oxford University Press 2003) 283; Bruce Lyons, 'The Paradox of the Exclusion of Exploitative Abuse' in Konkurrensverket Swedish Competition Authority (ed), *The Pros and Cons of High Prices* (Kalmar 2007) 66; Pinar Akman, 'Searching for the Long-lost Soul of Art. 82 EC' (2009) 29 (2) Oxford Journal of Legal Studies 267; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (5th ed., Oxford University Press, 2014) 367; Bakhoum (n 28)1; Walter Frenz, *Handbook of EU Competition Law* (Springer 2016) 706.

[35] R Joliet, *Monopolization and Abuse of Dominant Position* (Martinus Nijhoff La Haye 1970) 250.

[36] Lars-Hendrik Röller, 'Exploitative Abuses' in Ehlermann and Marquis (eds) (n 9); Lyons (n 34) 67 *et seq*; Massimo Motta and Alexander de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in Konkurrensverket Swedish Competition Authority (ed) (n 34) 14; Antonio Robles, 'Exploitative Prices in European Competition Law' (10th ASCOLA Conference, Tokyo, May 2015) 1, 8; Frederic Jenny, 'Abuse of dominance by firms charging excessive or unfair prices: an assessment' (2016) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880382> accessed 11 June 2018.

[37] Massimo Motta and Alexander de Streel 'Excessive Pricing and Price Squeeze under EU Law' in Claus D. Ehlermann and Isabela Atanasiu (eds), *What Is an Abuse of Dominant Position?* (Hart Publishing Oxford 2006) 108; Röller (n 36) 527–28.

relevance – no effect on the structure of the market –[38] and that the possibility of a false positive is increased.[39]

However, EU competition law has undeniably outlawed abusive exploitation of dominance in the market; Article 102 (a) expressly prohibits imposing unfair prices and trade conditions, as the most blatant form of exploitative abuses. Moreover, if exploitative abuses are not the true focus of competition law, why has the relevant provision, in cases of abuse of dominance, not been revised, whilst the treaty itself has been modified over time? Paragraph 7 of Commission Guidance 2009 on enforcement priorities in applying Article 82 EC[40] (102 TFEU) expressly recognized exploitative abuses. DG Competition, Blanca Rodriguez Galindo, mentioned that "abusive exploitation must, of course, be stopped".[41] In some cases exploitation was explicitly mentioned.[42] Further, if exclusionary abuses are the only category of abuses that

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[38] Pınar Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (2008) 09-1CCP Working Paper 17 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328316> accessed 11 June 2018; Akman, *The Concept of Abuse in EU Competition law: Law and Economic Approach* (n 7) 228. For explanation of other commentators' opinions see Patrick Hubert and Marie-Laure Combet, 'Exploitative abuse: The end of the Paradox?' (2011) 1 Concurrences 44.

[39] Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (n 38) 16; Jenny (n 36) 36.

[40] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Communication) 2009/C 45/02 (The Guidance).

[41] Blanca Rodriguez Galindo (Directorate-General for Competition), 'Prohibition of the abuse of a dominant position' (2007) 3 <http://ec.europa.eu/competition/speeches/text/sp2007_18_en.pdf> accessed 11 June 2018.

[42] See e.g. *DSD* (Case COMP D3/34493) Commission Decision 2001/463/EC [2001] OJ L166/1 [15]; *Deutsche Post AG* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40, paras 155,159 and 167.

deserve intervention, competition law should be indifferent towards many actions by state and/or natural monopolies, because there is no possibility of entry in the same level of the market.

Regardless of such complexity in terms of exploitative abuses, abusive exploitative conduct *vis-à-vis* trading partners appears to be different from that in relation to final consumers. Although exploitative abuses are directed at both customers and final consumers, and a considerable number of commentators have assessed them equally, in this regard it may be less justified to consider trading partners in the same category as final consumers. Even so, the notion of consumers in the context of EU competition law apparently encompasses both intermediary and final consumers.[43] Indeed, trading partners are undertakings competing in the market, so that exploiting them may affect the structure of the market and competition. In other words, as is evident, the fact that a customer is not competing with a dominant undertaking does not imply that it – the customer – is not competing at another level of the market with others.

Although a speech by *Neelie Kroes*,[44] a former European Commissioner, on prioritizing exclusionary abuses, has built a basis for opponents of exploitative abuses, nevertheless she implied the importance for the EU of exploitation of customers. Moreover, she aimed to alter the centre of attention from the outcome (exploitation) to

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[43] Commission, **'**Guidelines on the application of Article 81(3) of the Treaty' (Communication) 2004/C 101/08 para 84.

[44] Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (Speech at the Fordham Corporate Law Institute, New York, 23 September 2005), 'it is sound for our enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers'.

the cause (exclusion).[45] At first, it appears rational and effective to do so, but as explained above, this approach fails to consider the inverse situation, when exploitation of customers may increase the risk of exclusion or dysfunctionality of customers. The same approach is reflected by the Japan Fair Trade Commission, although abuse of superior bargaining power, without dominance, is objectionable there as well. According to their Guidelines on Abuse of a Superior Bargaining Position,[46] exploitative abuses can place transacting parties in a disadvantaged competitive position *vis-à-vis* their competitors, while empowering the abuser against competitors. In France, exploitation of customers – even by a powerful undertaking without dominance – can be caught by competition law for its effect(s) on the market.[47] Hence, if exploitative abuse of bargaining power, specifically in cases of "economic dependence"[48] could affect the market, that of dominance would *a fortiori* do so.

The difficulty to draw a clear line between exclusionary and exploitative abuses[49] may have inspired one author to recognize abuse of a dominant position only when both exploitative and exclusionary effects are present.[50] This approach considers exploitation of trading partners as abuse when – and only when – it leads to exclusion of

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[45] As some commentators explained that exploitation is a signal of existing problems in the market. See Akman, 'Exploitative Abuse in Article 82EC: Back to Basics? (n 38) 33.

[46] The Japan Fair Trade Commission, 'Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act' (Tentative Translation, November 30, 2010) I.1.

[47] Bakhoum (n 28) 5, 11.

[48] ibid 9.

[49] Richard Whish and David Bailey, *Competition law* (7th Edition, Oxford University Press 2011) 201–02.

[50] Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (n 38).

those customers.[51] This reasoning led that author to settle on the sole importance of efficiency *vis-à-vis* fairness,[52] thus disregarding the role of fairness in such cases.

However, protecting the market without its actors is meaningless,[53] and it is abundantly clear from EU case law that maintaining market actors is often understood as protecting the process of competition.[54] If one claims that protecting the EU internal market[55] is often misunderstood as that of fairness, the counterclaim would be that the EU market itself is based on values such as fairness.[56] Moreover, whenever abuse of market dominance is involved, the negative effect/s of such abuse (not necessarily actual exclusion)[57] is/are often[58] presupposed, and mere imposition of unreasonable

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[51] Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approach* (n 7) 220–22.

[52] ibid 150. The author claims in the book that 'efficiency' should be the only goal of EU competition law.

[53] See (n 28)

[54] The EU courts and authorities have mentioned equality of opportunity as a prerequisite for "a system of undistorted competition", see e.g. Case C-202/88 *France v Commission* [1991] ECR I-1223 para 51; Case C-462/99 *Connect Austria* [2003] ECR I-5197 para 83; Joined Cases C-327/03 and C-328/03 *ISIS Multimedia and Firma O2* [2005] ECR I-8877 para 39; Case C-49/07 MOTOE [2008] ECR I-4863 para 51.

[55] Pinar Akman and Luke Garrod, 'When Are Excessive Prices Unfair?' (2010) 10/04 CCP Working Paper 18 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578181> accessed 11 June 2018. In a case of unfair pricing involving British Leyland, the main reason according to the authors was limiting internal market trade rather than abusive exploitative unfair pricing.

[56] Gerber (n 9) 9, explaining the importance of fairness for the EU internal market.

[57] Case C-95/04 *British Airways plc v EC Commission* [2007] ECR I-2331, Opinion of AG *Kokott,* para 71, explaining that the mere "likelihood" of negative effect in case of Art 102 is enough.

[58] The next parts explain the difference in approach depending on whether the customer is competing with the dominant undertaking or not. See III.1 and III.2.

trade practices would be enough for application of competition law. Accordingly, it is hard to find exploitation of trading partners without the *assumption* of limiting their opportunities to trade and consequently distortion of competition in the – usually downstream – market.

The division between exploitative and exclusionary abuses appears to be less reliable in the case of trading partners, since overlap may often occur.[59] Accordingly, this contribution divides the practical part based on the presence of competition between a dominant undertaking and a trading partner, instead of exploitative and exclusionary abuse.[60] Before launching the next discussion, it is worth recalling that ascertaining whether unilateral conduct by a dominant undertaking amounts to abusive conduct is allegedly the "most difficult question in competition law".[61] Besides, the border between types of abuse is not always explicit, as the same practice could be relevant to various abuses.[62]

III.1 UTPs vis-à-vis customers without competitive relations

Article 102 (a) TFEU is the main legal basis for tackling unfair trade conditions

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[59] The available literature suggests that finding abusive exploitative conduct is very difficult. See Richard Whish, *Competition Law* (6th ed. Oxford University Press Oxford 2009) 709.

[60] According to the common understanding, whenever a dominant undertaking is competing with a customer in the downstream market, the type of abuse is exclusionary, if not exploitative. However, as noted, it is very difficult in the case of customers to distinguish between exclusionary and exploitative abuse.

[61] Richard Whish, 'Review of O'Donoghue and Padilla, the Law and Economics of Article 82 EC' (2006) 2(2) Competition Policy International 189, 190.

[62] See Jones and Sufrin (n 34) 372. This article endeavours to collet similar anti-competitive practices in terms of their nature, effects and objects which could be located under UTPs as an umbrella term. See conclusion.

(UTCs)[63] imposed on trading partners by a dominant undertaking. The subparagraph contains different types of unfair conditions, from pricing to non-pricing and direct to indirect imposition, towards all customers and consumers. It does not distinguish between situations where competition exists between a dominant undertaking and the customer in the downstream market. Nevertheless, case law has established different tests and criteria for assessing each situation, corresponding to presence or absence of competition between a dominant undertaking and a customer. In addition to Article 102 (a), Article 102 (c) appears to conform to this part since competition between a dominant undertaking and a customer need not be present for abusive discrimination to occur. Thus, this part assesses three types of unfair practices, namely unfair pricing (excessive price), unfair non-pricing conditions, and discrimination.[64] Although unfair pricing encompasses unfair low-pricing strategies which primarily target direct competitors, only excessive pricing is relevant to this discussion.

III.1.1 Unfair excessive pricing as an example of UTPs

Unfair excessive pricing is among the most notorious types of abuse and allegedly extremely difficult to prove in practice.[65] It has been widely criticized for, *inter alia*, lack of certain legal tests, discouraging the incentive to innovation and investment specifically in dynamic industries with a high level of fixed and sunk costs, misleading

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[63] Terms and conditions of contracts are in fact a subset of practice.

[64] All abuses can occur in relation to customers that compete in the downstream market with the dominant undertaking as well. However, they are discussed in this part because firstly this is not often the case and secondly because the presence of competition is not necessary for assessing the practice.

[65] Jonathan Faull and Ali Nickpay (eds), *EC Law of Competition* (Oxford University Press 2007) 4.365.

the competition authorities away from their main task and into the realm of price regulation, which they are ill-equipped to deal with, and the ability of the market to self-correct[66].

This form of UTC – as an example of UTPs – has undergone significant analysis compared to non-price conditions. The reason may lie in the ease of condemning the former, for the above-mentioned reasons, rather than the latter due to common opposition to exploitative abuses in the literature. Although some criticisms appear to be based on sound reasoning, notable exaggeration[67] appears in the difficulty of assessing unfair pricing, for the following reasons.

(1) One strong critique is the complexity of cost-price analysis and the onerous burden on competition authorities to undertake this kind of economic analysis. However, the Commission has sometimes[68] refrained from applying the standard complex test;[69] indeed, the CJEU, in para. 253 of United Brands, left room for manoeuvre in the case of new tests for assessing unfairness of price. Other competition authorities, specifically in the UK, have been practicing profound cost-price analysis[70] proving the possibility of applying just such an analysis. Moreover, a consensus prevails among commentators to accept prohibition of

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[66] For more see David S. Evans and A. Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1(1) Journal of Competition Law and Economics 97; Lyons (n 34); Röller (n 36); Robles (n 36); Jenny (n 36).

[67] Amelia Fletcher and Alina Jardine, 'Towards an Appropriate Policy for Excessive Pricing' in Ehlermann and Marquis (eds) (n 9) 541.

[68] *Deutsche Post* (n 42) para 159.

[69] The CJEU suggested a two-step test in case 27/76 *United Brands v Commission* [1978] ECR 207 paras 250–252.

[70] Whish and Bailey (n 49) 722.

unfair pricing only in exceptional situations,[71] mainly the existence of a monopoly and long-lasting barriers to entry. If cost-price analysis can be applied in this situation, why should it not be possible in other situations?[72] Interestingly, the difficulty in determining the costs of dominant undertakings has been overstated exclusively in the case of excessive pricing, whilst the same analysis is needed, for example, in predatory pricing and as efficient tests,[73] without being equally criticized.[74] Besides, the prohibition against unfair pricing can act as a preventive,[75] *ex-ante*, measure which would relieve competition authorities from the task of complex cost-price analysis.

(2) In addition to the allegation of practical difficulty, the common belief is that the market would self-correct and unfair pricing is in fact positive. However, according to game theory, it is *ex-post* entry prices which can attract potential entry rather than *ex-ante* prices. This is because prices could more likely fall after a new entry due to the possibility of predatory pricing by a dominant undertaking or the natural reaction of the market to the presence of

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[71] Robles (n 36) 8; for a summary of different opinions on exceptional circumstances see Jenny (n 36) 38–40.

[72] For a similar argument see Emil Paulis 'Article 82 EC and Exploitative Conduct' in Ehlermann and Marquis (eds) (n 9) 520 – the author does not accept any criteria suggested by others for prohibiting unfair pricing, except when barriers to entry are high and long-lasting.

[73] Lyons (n 34) 72; Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (n 7) 238 (footnote 32).

[74] For a different opinion see Jenny (n 36) 37.

[75] Ariel Ezrachi and David Gilo, 'Are Excessive Prices Really Self-Correcting' (2009) 5 Journal of Competition Law and Economics 249, 261.

competition.[76] Accordingly, the self-correction claim is not based on sound reasoning, and the presence or absence of entry barriers is irrelevant.[77]

(3) Pricing control would decrease incentives for innovation and harm dynamic efficiency. Although this is the most reliable criticism against prohibition of unfair pricing, nevertheless not all markets are dynamic and not all dominant undertakings are based on efficiency. Besides, the profit for incentivizing innovation is not unlimited. Thus, if excessive profit goes beyond what is necessary for innovation, intervention is required.[78] Albeit, one question remains, namely, how and why should dynamic efficiency be prioritized?

(4) Undoubtedly, price fixing through cartels or concerted practices is as such anti-competitive. That being so, then why should prohibition of the same action by unilateral intention be substantially different?[79] One explanation could be that the former directly harms competition, and undertakings are colluding instead of doing what they are supposed to do, that is, to compete. However, the main cause of prohibition is the *results* of lack of competition, such as higher prices and/or lower quality, not mere collusion and lack of competition. If we imagine an oligopolistic market in which undertakings have decided – their intentions are irrelevant – to fix prices at the lowest possible amount,[80] something similar to the situation of perfect competition, would competition law still be against it? If

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[76] ibid 254–60.

[77] ibid 261.

[78] ibid 251; Michal S. Gal, 'Abuse of Dominance- Exploitative Abuses' in Loannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law* (Edward Elgar 2013) 385, 396.

[79] This article does not in the least defend prohibition of unfair pricing *per se*.

[80] If all other factors such as quality are not affected.

not, the same logic for intervention is present in the case of unfair pricing. The ability to impose excessive prices is one of the basic elements for blaming a monopoly.[81] Similarly, an unfair and unreasonable excessive price imposed by a dominant undertaking can be blamed equally.

Although the Commission has launched few official unfair pricing cases, this does not imply total disregard for unfair pricing. Indeed, the Commission has closed some unfair pricing cases after price cuts.[82] Additionally, the availability of preliminary rulings by the CJEU in this regard proves the viability of prohibiting unfair pricing in EU competition law.[83] The Commission's recent investigations into excessive/unfair pricing confirm such a claim.[84]

Interestingly, in almost all accessible cases, whether formal or informal, successful or unsuccessful, excessive price has been raised *vis-à-vis* trading partners

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[81] Lyons (n 34) 66.

[82] Motta and de Streel, 'Excessive Pricing and Price Squeeze under EU Law' (n 37) 102–03; Jones and Sufrin (n 34) 576 (footnote 900), even though the authors claim that the Commission "has not much concerned itself with high prices".

[83] See e.g. Case 66/86 *Ahmed Saeed Flugreisen et al. v Zentrale zur Bekämpfung* [1989] ECR 803; Case 395/87 *Ministère public v Jean-Louis Tournier*[1989] ECR 02521 Opinion of AG Jacobs, 2553-2561; Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811; Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 02479; Case C -177/16 *AKKA/LAA* [2017] (not yet published).

[84] Commission - Press Release, 'Commission sends Statement of Objections to Gazprom – Factsheet', Brussels, 22 April 2015 (MEMO/15/4829); Commission - Press Release, 'Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines', Brussels, 15 May 2017 (IP/17/1323).

rather than final consumers.[85] This indicates the importance of customers' businesses and their opportunities to continue and compete in the market.[86] In short, importance of B2B UTPs for EU competition law compared to other kinds of UTPs.

III.1.2 Non-pricing UTCs

This form of abusive practice appears to be the least discussed in EU competition law. The limited literature has predominantly criticized UTCs for lacking competition law relevance. Indeed, some commentators suggest other subsets of law, such as contract, consumer or unfair competition law, as a proper legal basis for tackling these cases.[87] This part of the article strives to respond to these criticisms, after reviewing some important cases and their connection to the notion of "equal opportunity" and UTPs.

In a preliminary ruling for a case originally raised against *SV SABAM and NV Fonior*, the CJEU emphasized the importance of balance between contracting parties' rights.[88] SABAM, a *de facto* monopoly in copyright management, imposed unreasonable/unfair conditions on its members by "demanding the global assignment of all copyrights", even future rights, which lasted five years after withdrawal of

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[85] See e.g. *United Brands* (n 69); Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 03263; *Corinne Bodson* (n 83); *Deutsche Post AG* **(**n 42).

[86] As, for example, in *Deutsche Post AG*, the Commission referred to limiting "opportunities" of postal operators due to abusive "surcharging incoming cross-border letter mail". *Deutsche Post AG* (n 42) para 178. or in *Gazprom*, unfair pricing policy was suspected to hinder competition among gas suppliers in eight Member States.

[87] Jones and Sufrin (n 34) 583; Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (n 7) 157.

[88] Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313 para 8.

membership.[89] According to the CJEU, the inclusion in a contract of provisions which exceed what is "absolutely necessary" for a dominant undertaking "to carry out its activity" could be recognized as UTCs.[90]

The Commission adopted a similar approach in *GEMA*, even though no abuse was eventually detected, when "indispensability" and "equity" were introduced as tests[91] for recognizing the unfairness of conditions. The former demarcates the extent a dominant undertaking can burden a contracting party – not beyond what is absolutely necessary – while the latter concerns the freedom and opportunity of contracting parties not to be inequitably limited.[92] The significance of trading partners' freedom was also acknowledged in *United Brands.*[93]/[94]

The Commission in DSD referred to the principle of "proportionality", formerly established by the CJEU in *United Brands*,[95] in recognizing UTCs.[96] DSD, the dominant undertaking in the market for collection and recovery of sales packaging, licensed its *Green Dot* trademark to any undertaking willing to join its system. Not only

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[89] ibid paras 3–4.

[90] ibid paras 10–11.

[91] Please note that *this work* considers them as "tests".

[92] *GEMA Statutes* (Case IV/29.971) Commission Decision 82/204/EEC [1982] OJ L94/12 [17]

[93] (n 69) 253.

[94] More examples of UTCs in this regard can be found in *Tetra Pak*, where limiting the freedom of a purchaser to enjoy the product it owned, entitling the dominant undertaking to inspect without notifying and imposing obligations to use *Tetra Pak's* repair and maintenance services, were found abusive. In short, the dominant undertaking required unreasonable obligations going beyond protecting its "commercial interest". Case T-83/91 *Tetra Pak International SA v Commission* [1994 ECR II-755 para 140 upheld in Case C-333/94 P *Tetra Pak International SA v Commission* {1996} ECR I-5951.

[95] (n 69) para190.

[96] *DSD* (n 42) [6].

could the licence fee be adjusted unilaterally by the dominant undertaking, but also it was "misleading" as irrelevant to actual usage[97]. In fact, contracting parties were supposed to pay a "licence fee for the total quantity of sales packaging carrying the Green Dot trade mark", regardless of the actual usage of DSD's services.[98]

This practice was recognized as disproportionate since the dominant undertaking did not have any "reasonable interest in linking the fee payable by its contractual partners not to the exemption service actually used but to the extent to which the mark is used".[99] Again, the necessity of balancing different parties' interests was recalled in this case,[100] as it was in the Opinion of Advocate General (AG) Jacobs in another case with comparable facts.[101] In this case *Sacem*, the French copyright management society, required discotheques to pay for the "whole repertory, irrespective of the type or number of musical works actually used" by them.[102] The AG, while emphasizing "a clear inequality of bargaining power" between the parties, implied the indispensability principle as a proper test for recognizing the unfairness of the term.[103]

In addition to "indispensability", "equity" and "proportionality", which all appear to imply similar connotations, "oppressiveness and one-sidedness"[104] can also determine the threshold of unfair trade conditions.[105] Indeterminacy and lack of

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[97] ibid 7, 16.

[98] ibid 22.

[99] ibid 16.

[100] ibid.

[101] *Ministère public* (n 83) 2551.

[102] ibid 2550.

[103] ibid 2550 and 51.

[104] Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (n 38) 19.

[105] In *Alsatel v Novasam*, the long duration of a rental agreement and the possibility of recommencing "with its initial duration", a penalty clause for termination limiting the

transparency in the discount system were found to be abusive UTCs in *Michelin,* where customers were left uncertain about obtaining a discount.[106]

One-sidedness appeared in the *Microsoft* standard licensing agreement with PC manufacturers. The long duration of the agreement, requiring licensees "to pay for minimum numbers of copies of a product regardless of actual use" and paying royalties for production of every PC item, were regarded as abusive.[107] In *AAMS v Commission*, limiting a trading partner's opportunities to launch new cigarette brands via a time-limit for introducing new cigarettes, limiting their ability to increase monthly quantities of cigarettes and disproportionate inspections, were found to be abusive terms in a distribution agreement.[108]

Despite the existence of these cases noted above and the applicability of EU competition law for hindering UTCs imposed on trading partners, a shadow of doubt remains in the literature as to such applicability.[109] According to the following, UTCs imposed by dominant undertakings should be dealt with under EU competition law.

(1) The CJEU expressly stated in *Hoffmann-La Roche* that Article 102 TFEU "aimed in fact at situations which clearly originate in contractual relations".[110]

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customer's freedom to deal exclusively with the dominant undertaking and an indeterminate additional price as the result of modifications, were deemed UTCs. Case 247/86 *Alsatel v SA Novasam* [1988] ECR 5987 para 10.

[106] Case T-203/01 *Manufacture Francaise des Pneumatiques Michelin v EC Commission* [2003] ECR II-4071 para 141.

[107] Jones and Sufrin (n 34) 852, however, the authors imply that the main reason for concern lay in exclusion of competitors rather than affecting customers.

[108] Case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission of the European Communities* [2001] ECR II-03413 paras 24, 64 and 83.

[109] See (n 87).

[110] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 00461 para 161.

Accordingly, it should be no surprise if common features are found in both competition and contract law, however different their aims might be.

(2) Existing directives and regulations on unfair contract terms in the EU exclusively apply in relation to final consumers. Significantly, unfair competition law, as introduced in some Member States, is essentially incapable of protecting against UTPs. Unfair competition law – "passing off" in common law systems – originally aimed to safeguard the targets of unregistered trademarks against consumer confusion and deception.[111] Even so, in both common law and – especially – civil law systems the term has been expanded and covers a wider range of unlawful practices, from "deceptive advertising", "counterfeit of non-protected products" and "trade secrets" to "predatory pricing".[112] Hence, it mostly affects advertising and commercial practices, the origin of goods and services and replicas of competitors' goods or services, rather than UTCs as introduced above.[113]

(3) The Commission, after almost a decade, is still struggling with the situation of B2B UTPs in the food supply chain. Despite the significance of the subject

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[111] Mary LaFrance, 'Passing off and Unfair Competition: Conflict and Convergence in Competition Law' (2012) 102 The Law Journal of The International Trademark Association 1096, 1104.

[112] ibid 1096, 98; Hanss Ullrich, 'Anti-unfair Competition Law and Anti-Trust Law: A Continental Conundrum?' (2005) EUI Working Paper LAW 2005/01 3. <cadmus.eui.eu/bitstream/handle/1814/2832/law05-01.pdf accessed> accessed 11 June 2018.

[113] It is important to emphasize that the main feature of UTCs and UTPs in general is the disparity in bargaining power between two different sides, which is not pivotal in unfair competition. A small and unsuccessful company is able – and is even more likely – to e.g. copy a competitor's trademark or misappropriate a competitor's trade secrets. Such actions are not linked to the size or bargaining power of wrongdoers.

matter, no binding regulation has been enacted so far. Not only the Commission but also the Parliament have published various documents[114] in this regard and the issue appears to be still on the agenda. Various factors have raised concern for B2B UTCs. These include, for example, fear factors[115] (preventing SMEs from complaining), increasing costs of trading partners,[116] decreasing productivity and incentives to invest, hindering cross-border investments and even reducing economic efficiency.[117] The important question that arises is that if the actions of a non-dominant undertaking which merely enjoys superior bargaining power could raise such concerns, how is it that similar practices by a dominant undertaking do not deserve enforcement via competition law? In other

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[114] Commission, **'**Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A better functioning food supply chain in Europe' (Communication) COM(2009) 591 final; Commission, 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe' (Green Paper) COM(2013) 37 final; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions-Tackling unfair trading practices in the business-to-business food supply chain' (Communication) COM(2014) 472 final; European Parliament, ' Unfair trading practices in the food supply chain- European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain' (2015/2065(INI)) P8_TA(2016)0250; Commission, ' Report from the Commission to the European Parliament and the Council- on unfair business-to-business trading practices in the food supply chain' (Report) COM(2016) 32 final.

[115] See e.g. COM (2014) 472 final (n 114) 7 and 11.

[116] Dedicated Research, AIM-CIAA Survey on Unfair Commercial Practices in Europe (March 2011) 11 <http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/registered-org/federacion-espanola-de-industrias-de-alimentacion-y-bebidas-fiab-2-annex_es.pdf> accessed 11 June 2018.

[117] COM (2014) 472 final (n 114) 3, 5 and 12.

words, all necessary elements to prevent customers from effective competition among themselves are present even if no dominant undertaking is involved; thus, if a dominant undertaking were involved, their functionality and opportunity to compete would *a fortiori* be limited.

Due to its ability to control the market, a dominant undertaking could systematically practice UTCs with a substantial number – if not all – of its trading partners.[118] This capacity may have freed the hands of competition law to intervene even in cases of unfair pricing, whereas the current directive on unfair contract terms in B2C relations expressly excludes "adequacy of the price and remuneration".[119] Indeed, the relevance of the issue to competition law is to the extent that if unfair practices by a non-dominant undertaking could affect trade between Member States, which normally is not the case, EU competition law would appear to intervene.

(4) The dysfunctionality of contract law, due to the high costs of dispute resolution through litigation and the fear factor, has not only led to actions by the EU authorities as mentioned, but also forced many Member States to appoint "different national enforcement authorities to address UTPs".[120] Thus, how could we expect contract law to address the issue in cases of dominance? Public

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[118] ECN (Subgroup Food), 'Activities in The Food Sector- Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector' (2012) para 73 <http://ec.europa.eu/competition/ecn/food_report_en.pdf> accessed 11 June 2018.

[119] Unfair Terms in Consumer Contracts (n 4) Art. 4(2).

[120] COM (2016) 32 final (n 114) 6.

enforcement appeared to be a better substitute than private enforcement, since "Member States with public enforcement had no cases in the last few years".[121]

(5) Moreover, some Member States have already modified their competition law to address the issue of inequality of bargaining power, even without dominance, as well.[122] If the EU already incurred the cost of establishing and developing a system of public enforcement and building procedural experience, why should it not use available resources for UTPs by dominant undertakings, since the Commission has not foreseen regulatory action, for offline markets[123], so far?[124]

III.1.3 Discrimination vis-à-vis customers as an example of UTPs

Like UTCs, discriminatory practices *vis-à-vis* trading partners have received strong criticism. Despite the explicitness of Article 102 (c) in identifying discrimination as a form of abuse of a dominant position, many economists have recognized positive and procompetitive effects of discrimination, specifically when it increases output, enhances economies of scale and scope and assists in covering fixed and sunk costs.[125] However,

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[121] ibid 7.

[122] Maria Rehbinder, 'Commission report on Unfair Trading Practices in the food supply chain' (4th meeting of the Agricultural Markets Task Force, Brussels, 24 May 2016) 6 <http://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/2016-05-24/presentation-rehbinder.pdf> accessed 11 June 2018.

[123] See the next chapter.

[124] COM (2016) 32 final (n 114) 12.

[125] ibid 3-4; for more see Herbert Hovenkamp, 'The Robinson-Patman Act and Competition: unfinished business' (2000) 68 (1) Antitrust Law Journal 125; John Temple Lang and Robert O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC' (2002) 26 Fordham International Law Journal 83; Thomas P. Gehrig and Rune Stenbacka, 'Price Discrimination, competition and Antitrust' in

the possibility of negative effects has always been anticipated, too.[126]

The wording of Article 102 (c) indicates discrimination against trading partners,[127] even though other kinds of discrimination have also been recognized.[128] Two important factors make Article 102 (c) abusive, firstly, applying dissimilar conditions to equivalent transactions – or similar conditions to non-equivalent transactions;[129] and secondly, placing trading partners at a competitive disadvantage. Assessing when, and according to what criteria, transactions are in fact equivalent and what constitutes a "competitive disadvantage" fall outside of the scope of this article.[130] What is relevant here is the importance of fairness[131] for market actors as a pivotal basis for the prohibition against discrimination.

Equal opportunity to trade is not only inferred according to the wording of Article 102 (c), competitive disadvantage, but relevant case law also indicates the same

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Konkurrensverket Swedish Competition Authority (ed), *The Pros and Cons of Price Discrimination* (Elanders Gotab AB 2005).

[126] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge, CUP 2004) 496; Damien Gerard, 'Price Discrimination under Article 82 (2) (C) EC: Clearing up the Ambiguities' (2005) Global Competition Law Centre <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113354> accessed 11 June 2018; Mark Armstrong, 'Price Discrimination' in Paulo Buccirossi (ed), Handbook of Antitrust Economics (Cambridge, MA, MIT Press 2008) 433.

[127] Jones and Sufrin (n 34) 398.

[128] See e.g. ibid 398; Gerard (n 126) 17.

[129] Case 13/63 J *Italian Republic v Commission* [1963] ECR 165, 178.

[130] Evaluating both factors have been criticized in the literature. See e.g. Lang and O'Donoghue (n 125) 115; Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (n 7) 235.

[131] Gerard (n 126) 11, the author acknowledged "political economy and fairness" as motivation for outlawing discrimination; Gehrig and Stenbacka (n 125) 138, the authors emphasized the relevance of fairness.

meaning. Indeed, discrimination appears to be the most transparent form of abuse implying equality of opportunity. For instance, the Commission in *Alpha Flight Services* related equality of opportunity[132] – as a requirement for "a system of undistorted competition" – to prohibition of discrimination.[133] Moreover, AG *Kokott* recognized Article 82 (c) EC (102 (c) TFEU) as "an expression of the general principle of equal treatment".[134]

The CJEU in *United Brands*,[135] the court of first instance in *Tetra Pak*,[136] and the Commission in *Portuguese airports*,[137] referred to competitive disadvantage as the result of discriminatory treatment. In this context, equality of opportunity, the principle of equal treatment and competitive disadvantage appear to embrace the same idea. This idea does not pertain to the level of efficiency of market actors, trading partners, but to prohibition of distorting their chance to be, and compete, in the market.

Even if one claims that most decided 102 (c) cases concerned "protectionist or market partitioning effects",[138] this does not rebut the significance of equality of opportunity in those cases. The possibility that state-owned dominant undertakings have a greater tendency to discriminate in favour of national customers should not cast doubt on the enforceability of Article 102 (c) TFEU, and deemed as discrimination based on

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[132] Derived from *France* (n 54).

[133] *Alpha Flight Services/Aéroports de Paris* (IV/35.613) Commission Decision 98/513/EC [1998] OJ L230/10 paras 83–84.

[134] CASE C-95/04 P *British Airways plc v Commission* [2006] ECR I-2331, Opinion of AG *Kokott*, para 114.

[135] *United Brands* (n 69) para 233.

[136] *Tetra Pak International SA*, CaseT-83/91 (n 94) para 160.

[137] *Portuguese Airport* (Case IV/35.703) Commission Decision 1999/199/EC [1999] OJ L69/31 paras 24, 26, 32, 35 and 40.

[138] Gerard (n 126) 22.

mere nationality, irrelevant to competition law.[139] Indeed, the basis of discrimination, which here is nationality, is the *cause* of and the *motive* for actions *resulting* in a competitive disadvantage. Hence, competition law and Article 102 (c) should indeed be involved to tackle unfair *outcomes*.

Equally, the presence of a ban on arbitrage and partitioning the internal market in some cases[140] does not downgrade the need to protect equal opportunities for trade. Firstly, preventing arbitrage is generally the prerequisite for successful discrimination,[141] secondly, disapproval of partitioning the market does not preclude that of unequal treatment. In other words, it is a false presumption to conclude that discrimination is found abusive merely due to partitioning the internal market, and competitive disadvantage alone could not constitute abusive discrimination.

Significantly, many commentators[142] have criticized the procedure of the EU courts and Commission for disregarding assessment of competitive disadvantage in many cases.[143] Discriminatory treatment was found abusive even where customers were not actually competing in the same market. According to the Commission, "Article 82 (102) may be applied even in the absence of a direct effect on competition between undertakings on any given market".[144] In so claiming, the Commission referred to the CJEU, according to which Article 82 (102) includes a non-exhaustive list.

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[139] Such a doubt has been presented by some authors, see e.g. ibid 22, 26–27; Lang and O'Donoghue (n 125) 121.

[140] See e.g. *United Brands* (n 69)*; Tetra Pak International SA*, Case T-83/91 (n 94).

[141] Akman, *The Concept of Abuse in EU Competition law: Law and Economic Approach* (n 7) 236.

[142] ibid 244-245; Gerard (n 126) 18-19; Jones and Sufrin (n 34) 572–74.

[143] See e.g. *United Brands* (n 69); Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783 para 34; *Deutsche Post AG* (n 42) 133.

[144] *Deutsche Post AG* (n 42) 133.

Although the procedure appears to be more protectionist than expected, the possibility to *become* competitors within the internal market should not be overlooked. Indeed, a discriminatory practice targeting customers which are not currently competing with each other can preclude their potentiality to do so in the future. This consideration may have resulted in prohibiting many discriminatory cases so far.

All in all, the three abusive practices discussed possess the following common features. Firstly, in almost[145] all available cases, abusive practices were condemned in relation to customers active in a level of the market rather than in relation to consumers. This implies the importance of equality of opportunity as a reliable basis for finding abusive treatment. In all cases, the ability of trading partners to compete and act properly in the market was in a sense distorted. In other words, these practices can restrict competition, though mainly in downstream markets, and form UTPs.

Moreover, the level of efficiency of customers exposed to UTCs and discriminatory treatment was not an issue for assessment. Accordingly, the mere fact of imposition of unfair and discriminatory conditions by a dominant undertaking is assumed to legitimize intervention. In other words, the presence of an abusive practice, as a deviation from competition on the merit, appears to capture more attention than the actual effects of such a practice, although negative effects on customers are usually assumed. Indeed, a dominant undertaking is often an unavoidable trading partner for customers which may have no other choice but to accept unfair conditions.

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[145] Except, at least, one case of discrimination in which final consumers are the target of protection. See *Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [1998] OJ L 5/55.

III.2 UTPs vis-à-vis customers with competitive relation

UTPs could embrace a wide range of activities including refusal to supply and margin squeeze, which are normally categorized as exclusionary abuse of a dominant position.[146]As explained before,[147] this article does not distinguish between exploitative and exclusionary abuses against trading partners. Accordingly, this part of the article discusses practices not usually considered UTPs in competition law. The reason for doing so is twofold. Firstly, practices such as refusal to supply cause similar – although usually more aggressive and onerous – effects on customers. Hence, constructive refusal to supply basically consists of practices, such as excessive pricing,[148] discussed before. Secondly, some examples of UTPs, mentioned in available documents in this regard,[149] are comparable with refusal to supply.[150]

III.2.1 Refusal to supply as an example of UTPs

Refusal to supply according to case law and the Commission[151] is almost[152] always a case of vertically integrated dominant undertakings competing with their customers in the downstream market. Refusal to supply is an interesting case proving the special responsibility of a dominant undertaking by limiting its freedom to choose trading

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[146] See The Guidance (n 40) 18.

[147] See section III.

[148] Jones and Sufrin (n 34) 510.

[149] See (n 114)

[150] e.g. unilaterally terminating a commercial relationship.

[151] The Guidance (n 40) para 76.

[152] There are exceptional situations when refusal to supply is practised by a dominant undertaking without competing with the customer in the downstream market; see *United Brands* (n 69) para 82.

partners to create equal opportunities for market actors.[153] In fact, ownership in the EU encompasses "certain social duties",[154] specifically when the owner occupies a dominant position.

However, for the sake of balancing different rights, refusal to supply is abusive only when the cumulative criteria are fulfilled.[155]Accordingly, the need arises to prove necessity and indispensability of the product/service "to compete effectively in a downstream market", without which effective competition would be eliminated, thus harming consumers. Especially when IPRs are involved and the owner is forced to issue a licence, due care is needed to protect the incentive to innovate in future.

The borderline for intervention is drawn where the opportunity for downstream competitors to compete substantially depends on supply by a dominant undertaking. Although the criteria mentioned imply a relatively high threshold for assessing abusive refusal to supply, available case law, for the following reasons, demonstrates a tendency towards protecting equality of opportunity than dominant undertakings' property rights.

(1) Case law does not provide actual assessment for efficiency concerns as to whether maintaining a downstream competitor is welfare-enhancing or not.[156] In

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[153] *Microsoft* (Case COMP/C-3/37.792) Commission Decision 2007/53/EC [2004] OJ L 32/23 para 783; *Wanadoo España* vs. *Telefónica* (Case COMP/38.784) Commission Decision 2008/C 83/05 [2007] OJ C 83/6 para 303. The latter case concerned margin squeeze; however, the idea is the same. The importance of the dominant undertaking's incentive should be balanced by that of others.

[154] Hans Henrik Lidgard, 'Refusal to Supply or to Licence, (2009) 4 Europarättslig Tidskrift 694, 695.

[155] The Guidance (n 40) para 81. See Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1998] ECR I-7791, in which the criteria were not met.

[156] Jones and Sufrin (n 34) 513, referring to joined case 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223.

other words, if a product/service is deemed indispensable, exclusion of competitors, whether as or even less efficient[157] is usually presumed.

(2) Elimination of effective competition should not be interpreted as actual elimination of competitor(s) – "It is sufficient that the rivals are disadvantaged and consequently compete less aggressively".[158]

(3) It appears that, at least in non-IPR cases, the risk of eliminating one downstream competitor, one that asked for supply, would be enough.[159] In a reference for a preliminary ruling, the CJEU recognized refusal to supply if there is a "possibility of eliminating all competition *from another undertaking*".[160]

(4) Additionally, the standard for detecting abuse is considerably lower in the case of terminating an existing business relationship, imposing a duty to supply by specific regulations, or achieving dominance through "special or exclusive rights", such as state financing.[161]

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[157] The Guidance (n 40) para 24.

[158] *Telekomunikacja Polska* (COMP/39.525) Commission Decision 2011/C 324/06 OJ C 324/5 para 815; see also Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601 paras 560–61.

[159] Jones and Sufrin (n 34) 551.

[160] Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 03261 para 26 (emphasis added); see also *Oscar Bronner GmbH & Co. KG* (n 155) paras 10 and 25.

[161] The Guidance (n 40) paras 82 and 84; for a critical view on these exceptions see Damien Geradin, 'Refusal to supply and margin squeeze: A discussion of why the "*Telefonica* exceptions" are wrong' (2011) TILEC Discussion Paper 7–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750226> accessed 11 June 2018.

(5) Even when an IPR is involved, not only could a dominant owner be forced to supply, but it is also obliged to license based on fair, reasonable and non-discriminatory conditions.[162]

III.2.2 Margin squeeze as an example of UTPs

Margin squeeze is another form of abusive practice where an upstream[163] dominant undertaking competes with its customers in a downstream market. Prohibition of this form of abusive practice appears to be based on equal opportunity for market actors as well.[164] In margin squeeze, the dominant undertaking – either by charging a high wholesale price (to its customers), or charging a low retail price (to end users, consumers) and even both strategies – practically leaves a "negative or insufficient" margin for a downstream competitor to compete.[165] It is not necessary for each price, wholesale or retail, to be unfair, excessive or predatory; because what makes it abusive is "the unfairness of the spread between" two prices.[166] Indeed, such a squeeze of margin is capable of making competition for downstream undertakings either

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[162] See e.g. *Microsoft* (Case COMP/C-3/37.792) Art. 5 (a). To see how the European Commissioner for competition haggled over royalties, see Neelie Kroes, 'Introductory remarks on Microsoft's compliance with March 2004 antitrust decision' (2007) (Press conference, Brussels, 22 October 2007).

[163] There is no need for dominance in the downstream market. Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527 paras 83 and 89.

[164] Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-00477 paras 198–99.

[165] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC, OJ L263/9 para 107.

[166] Case C-280/08 p *Deutsche Telekom AG v European Commission* [2010] ECR I-09555 paras 157, 159 and 183; *Konkurrensverket* (n 163) para 34. For a critical view on this matter see J. Gregory Sidak, 'Abolishing the Price Squeeze as a Theory of Antitrust Liability [2008] 4 Journal of Competition Law and Economics 279.

impossible or more difficult.[167]

Besides, proving a concrete anti-competitive effect is not required, so that merely demonstrating potential effect is sufficient.[168] Although the Commission discussed this together with refusal to supply,[169] which implies the former as the subset of the latter, the CJEU has expressed a different view.[170] Accordingly, margin squeeze should be interpreted as a separate abuse without the need to assess refusal to supply criteria. Again, here the scales of EU courts have tilted toward protection of equal opportunities for trade.

Both case law and Commission guidance have demonstrated that such protection is for trade opportunities of "at least as efficient competitors".[171] Therefore, if the difference between wholesale and retail prices is enough for a dominant undertaking and its 'as efficient' competitors to compete, without incurring loss or making no profit, intervention is less likely. In other words, the opportunity of an inefficient competitor with relatively high production costs would not be protected. In any case, inefficient undertakings may have to leave the market, in the long run at any rate, even in the absence of a dominant undertaking.

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[167] *Konkurrensverket* (n 163) para 63.

[168] ibid para 64. It is interesting to note that according to the Commission, the mere existence of margin squeeze without any need to prove anti-competitive effect was enough. *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) (n 165) paras 179–180. Even though the court, despite upholding the case, did not agree with the Commission**.** *Deutsche Telekom AG*, Case T-271/03 (n 164) para 235.

[169] The Guidance (n 40) 18, part D.

[170] *Konkurrensverket* (n 163) paras 54–59 and 72. "…[E]ven where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned".

[171] *Deutsche Telekom AG*, Case C-280/08 p (n 166) para 234; The Guidance (n 40) para 23.

However, it should be borne in mind that it is normal for new entrants to produce less efficiently. Thus, considering the *current* situation of undertakings would not always be a reliable basis.[172] A competitor may always *become* as efficient "within a reasonable period", whereas abusive practices by a dominant undertaking could hinder it from doing so.[173] Hence, an over-strict approach toward the 'as efficient' test can cause unfair outcomes by undue prevention of equality of opportunity.

Considering various kinds of UTPs against trading partners, with and without competitive relations with the dominant undertaking, demonstrated a key difference regarding each situation. Legal proceedings of the courts and Commission appear to be noticeably stricter against UTPs when the dominant undertaking is not competing with its customers in the same level of the market, usually downstream. In these cases, as noted earlier, actions by the dominant undertaking are required to be indispensable, proportionate, transparent and equitable, without considering the level of efficiency of customers targeted by UTPs.

Indeed, here the dominant undertaking is not usually forced to do something in favour of trading partners, such as supplying raw material, but it is obliged not to abusively impose unreasonable, unfair and disproportionate conditions on one or more customers. Although a transaction is, at any rate, involved in the present case, where one side, usually the dominant undertaking, supplies goods/services to the other, it is actually normal business behaviour without which production would be meaningless. However, when a dominant undertaking's subsidiary is active in the downstream market, refusal to supply other customers is a meaningful strategy. Here, conversely, the

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[172] Adrian Kunzler, 'Economic content of competition law: the point of regulating preferences' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 182, 201–12.

[173] Nazzini (n 3) 153.

threshold for finding abuse is stricter, because the dominant undertaking is forced to do something for customers.

IV. UTPs in Digital Markets

Rapid expansion of internet usage and its significant role in different aspects of our lives, from leisure and entertainment to conducting daily purchases and launching lucrative businesses, have propelled the EU to initiate a massive project known as the "Digital Single Market" (DSM). Indeed, a real EU single market will never exist if the growing online market is neglected. In May 2015 the EU Commission published its DSM Strategy for Europe, in which it predetermined 16 different legislative and/or non-legislative initiatives for creation of the EU digital market.[174] "Analysis of the role of Platforms" was included in the DSM agenda, due to their pivotal role and power in the online economy.[175] Because the issue of UTPs was raised in online platform-business relations, the following focuses solely on this matter.[176]

Online platforms can be described as the "engine[s]"[177] of the digital market, creating value by connecting two distinct, but interrelated, users and acting as a gateway

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[174] Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Digital Single Market Strategy for Europe' COM (2015) 192 final.

[175] ibid 11.

[176] See Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM/2016/0288 final; House of Lords-Select Committee on European Union, 'Online Platforms and the Digital Single Market' (2016) 10th Report of Session 34 <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf> accessed 11 June 2018.

[177] ibid 20 (cited from Professor Ariel Ezrachi and Professor Maurice Stucke)

for many businesses to access the market.[178] Although it is for lawyers to propose a specified definition of legal concepts for the sake of legal certainty, no consensus so far exists on a comprehensive, inclusive and exclusive definition of online platforms.[179] Economists have largely adopted the term two-or multi-sided market instead of platforms.[180]

Albeit the predominant focus of this contribution is on a substantive inquiry into competition law enforcement, it is nevertheless useful to briefly overview the

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[178] Olga Batura and others, 'Business-to-Business relations in the online platform environment' (2017) FWC ENTR/300/PP/2013/FC-WIFO 1 <https://www.researchgate.net/profile/Olga_Batura/publication/320058456_Business-to-Business_relations_in_the_online_platform_environment/links/59cb84c00f7e9bbfdc3b377f/Business-to-Business-relations-in-the-online-platform-environment.pdf> accessed 11 June 2018.

[179] Commission, 'Commission Staff Working Document- Online Platforms, Accompanying the document Communication on Online Platforms and the Digital Single Market' COM(2016) 288 final 2; UK Competition & Market Authority, 'CMA response to the call for evidence: Online Platforms and the EU Digital Single Market' (October 2015) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502607/Response_to_House_of_Lords_inquiry_on_online_platforms.pdf> accessed 11 June 2018; Dirk Auer and Nicolas Petit, 'Two-Sided Markets and the Challenge of Turning Economic Theory into Competition Policy' (2015) Working Paper 9–11 <https://pdfs.semanticscholar.org/6935/3a607eb39923626437c4d831040cfd576192.pdf> accessed 11 June 2018.

[180] See e.g. Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-sided Markets' (2003) 1(4) Journal of the European Economic Association 990; David S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) Yale Journal on Regulation 325; Julian Wright, 'One-sided Logic in Two-sided Markets' (2004) 3(1) Review of Network Economics 44; Mark Armstrong, 'Competition in two-sided markets' (2006) 37(3) Rand Journal of Economics 668.

economics of online platforms and associated challenges for competition law enforcement.

IV.1 Economics of Online Platforms

Certain common features among most platforms, if not all, distinguish them from conventional, one-sided markets. Online platforms are mainly characterized by an indirect network effect, that is, increase in the value of the platform for one side if the number of users on the other side rises. Platforms, by acting as an intermediary, create a bridge between two groups of users, such as sellers and buyers on eBay and facilitate, for example, a transaction or communication[181] which may not otherwise have happened at all or as conveniently. By so doing, they "facilitate the realization of indirect network" effect.[182]

For the sake of profit maximization or even profit making, platforms need to manipulate the price structure to internalize the existing network effect. Accordingly, one side, with higher price elasticity of demand which values the presence of the other side less or even nil, is charged lower or even zero, and vice versa.[183] This is the

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[181] Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report' (2006) RAND Journal of Economics, 37 (3) 645, 646.

[182] David S. Evans and Michael D. Noel, 'Defining Markets That Involve Multi-Sided Platform Businesses: An Empirical Framework with an Application to Google's Purchase of Doubleclick, (2007) 3 <http://ssrn.com/abstract=1027933> accessed 11 June 2018.

[183] Bernard Caillaud and Bruno Jullien, 'Chicken & egg: Competition among intermediation service providers' (2003) 34 (2) RAND Journal of Economics 309, 310–311.

primary reason behind the non-neutral price structure of many business models adopted by online platforms.[184]

These specifications, which are neither utterly new nor specific only to the online sphere,[185] have raised various challenges for competition authorities, especially in terms of assessing market power and defining the market. Considering the presence of at least two different sides, how many markets should be defined? Does the number of markets relate to the type of platforms, such as transaction and non-transaction ones? What is the proper test for defining the market? Can the SSNIP test (small but significant non-transitory increase in price), which is predominantly based on price analysis, work here? What is/are proper alternative/s? Would offline and online markets be substitutes? If the network effect leads to a "winner-takes-all" situation and competition turns to be "for the market" rather than in the market, can market share alone properly signify the amount of power? The only clear-cut statement that can be made here is that this contribution will not examine these issues,[186] since the focus is rather on the type of abuse.

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[184] Bertin Martens, 'An Economic Policy Perspective on Online Platforms' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05. JRC101501, 11 < https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101501.pdf> accessed 11 June 2018.

[185] Evans and Noel (n 182); OECD Plolicy roundtable, 'Two-sided Markets' (2009) competition Law and Policy DAF/COMP (2009) 23. In fact, the digital environment has widely facilitated and expanded emergence of such business models.

[186] They have already undergone deep analysis by both lawyers and – especially – economists. Although some general agreement exists among different commentators, some have presented very different standpoints as well. See e.g. Caillaud and Jullien (n 183); Rochet and Tirole, 'Platform Competition in Two-sided Markets' (n 180); Geoffrey G. Parker & Marshall W. Van Alstyne, 'Two-Sided Network Effects: A Theory of Information Product Design' (2005) 51(10) Management Science 1494; Rochet and Tirole 'Two-Sided Markets: A Progress Report' (n 181); Armstrong, 'Competition in two-sided markets' (n

Another controversial factor, discussed extensively in the literature, is the role of big data in boosting the market power of a few online platforms. Three different viewpoints are distinguishable in this regard. Firstly, big data, gathering, maintaining, processing and use of data, plays a substantial role in achieving dominance and even monopoly/quasi-monopoly in new markets.[187] Secondly, big data would rather drive competition than concentration, and data is effortlessly accessible, for example, through data brokers.[188] Thirdly, big data could in some circumstances create competition law concerns, while in other situations it may facilitate competition.[189]

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180). For more specific studies, see for example: Emch Eric & Scott Thompson, 'Market Definition and Market Power in Payment Card Networks' (2006) 5 (1) Review of Network Economics 45; Evans and Noel (n 182); Elena Argentesi and Lapo Filistrucchi, 'Estimating Market Power in a Two-sided Market: The Case of Newspapers' (2007) 22 (7) Journal of Applied Econometrics 1247; Pier Luigi Parcu, Maria Luisa Stasi and Marco Botta, 'Antitrust Enforcement in Traditional v Online Platforms' (Workshop ENTraNCE for Executives, European University Institute, Florence, 4th – 5th December 2015) <http://cadmus.eui.eu/bitstream/handle/1814/40524/ENTraNCE_PB_2016_02.pdf?sequence=1&isAllowed=y> accessed 11 June 2018. For a different opinion which results in a very wide definition of 'market' see David S. Evans, 'Attention Rivalry among Online Platforms' (2013) 9(2) Journal of Competition Law &Eonomics 313.

[187] Maurice E. Stucke and Allen P. Grunes, 'Debunking the Myths Over Big Data and Antitrust' (2015) Competition Policy International <http://ssrn.com/abstract=2612562> accessed 11 June 2018.

[188] Darren S. Tucker and Hill B. Wellford, 'Big Mistakes Regarding Big Data' (2014) Antitrust Source, American Bar Association < https://ssrn.com/abstract=2549044> accessed 11 June 2018; Anja Lambrecht and Catherine E. Tucker, 'Can Big Data Protect a Firm from Competition?' (2015) <http://ssrn.com/abstract=2705530> accessed 11 June 2018.

[189] Alfonso Lamadrid & Sam Villiers, 'Big Data, Privacy And Competition Law: Do Competition Authorities Know How To Do It?' (2017) CPI Antitrust Chronicle <https://antitrustlair.files.wordpress.com/2017/01/cpi-lamadrid-villiers.pdf> accessed 11 June 2018; Harry van Til, Nicolai van Gorp and Katelyn Price, 'Big data and competition' (2017) ECORYS.

Regardless of all disparities in opinions, it is nonetheless possible to acknowledge that the characteristics of new business models – such as the indirect network effect, lock-in effect, the role of big data, economies of scope and scale – tend to concentration.[190]/[191] Hence, few operating giants could act as "gatekeepers".[192] This issue increases the possibility of abusing market power, imposing unfair trade terms and engaging in UTPs, especially in relation to businesses.

IV.2 UTPs in the online environment and competition law

Almost all contributors concur that the rules, not tools, of competition law are flexible and competent enough to deal with competition law concerns of the new economy.[193]

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[190] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services' COM (2018) 238 final 1 (The Proposal).

[191] Even though other factors might also be driving competition, such as the feasibility of a disruptive innovation and/or new business model that overthrows the market incumbent, or the heterogeneity of consumers' preferences that makes multi-homing more likely, see e.g. Olga Batura, Nicolai van Gorp and Pierre Larouche, 'Online Platforms and the EU Digital Single Market – a Response to the Call for Evidence by the House of Lords's Internal Market Sub-Committee' (2015) e-Conomics 7 <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_e-conomics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> accessed 11 June 2018.

[192] Nicolai Van Gorp and Olga Batura, 'Challenges for Competition Policy in a Digitalised Economy' (Study of the ECON Committee of the European Parliament, July 2015) 8 <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf> accessed 11 June 2018.

[193] See e.g. House of Lords-Select Committee on European Union (n 176) 51–52 (cited from e-Conomics and Alex Chisholm, Computer and Communications Industry Association and David Evans); UK Competition & Market Authority (n 179) 3 and 9; Lamadrid and Villiers (n 189) 1.

Moreover, the Commission, in one of its latest publications in this regard, expressly affirmed the applicability of EU competition law to UTPs in platform-business relations.[194]/[195] The Commission has regarded competition law as the "main baseline" for tackling UTPs, while it has considered other potential alternatives, either soft or hard law, as well. However, if a new approach commences, competition law would nevertheless apply when a dominant undertaking is involved.[196]

The Commission eventually proposed a regulation, hard law, concerning fairness and transparency in platform-business relations. In fact, many types of UTPs are/can be practiced by even non-dominant platforms when businesses are *dependent* on platforms[197]. Besides, "the current regulatory framework [competition law] may not be effective in preventing some of these practices, nor in providing effective redress".[198]

It appears that the Commission may have realized the need for an *ex-ante* approach to enhance transparency in platform-business relations. The proposal provides some binding guidelines for online platforms. It aims not only to prevent, *ex-ante*, common unfair practices, but also to guide the business environment in the context of online platforms as a "new", "expanding" and "less-regulated" phenomenon. Otherwise, as mentioned before, the main baseline for tackling UTPs, in relation to businesses, is

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[194] Commission, 'Fairness in platform-to- business relations' (Initiative) Ref. Ares (2017) 5222469 - 25/10/2017 (The Initiative).

[195] In addition to its substantive relevance, it is wise to tackle issues of new business models, to the extent possible, by existing rules because their lifetime might be surprisingly short, and they could disappear and be replaced by other models even before the passage of law.

[196] The Initiative (n 194).

[197] Studying this kind of UTPs which are prohibited based on the new Proposal falls outside of the scope of this article, because the focus here is on B2B UTPs under EU competition law.

[198] The Proposal (n 190) 1–2.

nevertheless EU competition law. The new regulatory proposal is just a complementary means, which leaves the application of competition law unaffected.[199]

The original objective of acting against UTPs, according to the Commission, is to "ensure a fair and innovation-friendly platform economy".[200] It would, *inter alia*, secure "a predictable business environment" and "effective[ly] redress possibilities", enhance "the general level of trust" and "transparency", and limit "abuse of dependencies".[201] It appears less justifiable why the Commission has raised the issue of UTPs in the online environment separately. As mentioned, objectives should be desirable in all different forms of market, whether online or offline, one-sided or multi-sided.[202] However, the Commission appears to recognize UTPs by online platforms as more crucial, due to the "cross-border nature of the online service" and the unlimited geographical market, which magnifies the need for a less fragmented approach in the EU.[203]

Examples of UTPs might differ, depending on the types of market and business models; however, the yardstick according to the EU competition law is the same. That is, to protect against unequal bargaining power, and to provide equal opportunity for all market actors and balance between different parties' rights.[204] Since the predominant

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[199] The Initiative (n 194) 3.

[200] ibid.

[201] ibid; The Proposal (n 190) 18.

[202] See the third argumentation under section II.1.2.

[203] The Proposal (n 190) 4.

[204] See the previous sections. Besides, the similar objective persuaded the Commission to tackle B2B UTPs while imposed by non-dominant undertakings which may fall outside of EU competition law. See The Initiative (n 194) 1; Batura and others (n 178) xix.

focus of this contribution is on UTPs according to EU competition law, assessment of the new regulatory proposal falls outside the scope of the present discussion.

So far, only a few cases have been raised by the Commission. None of these has proceeded to the EU courts, either due to preliminary settlements and commitment decisions, or just being in the early stages. The following offers an overview of these cases. Since the nature and type of practices are highly controversial, no specific categorization is provided.

Arguably, one of the most common[205] UTPs in the online environment, especially in the price comparison and hotel booking markets, is the "parity" or "most-favoured-nation" clause. Although they are not limited to online markets, it is more convenient to control compliance with the clause in the online sphere. Parity clauses require trading partners to treat with their business party, platforms, as favourably as they do with other platforms. Accordingly, all or some terms and conditions of the transaction, normally the price, should be either better or at least equal to the same transactions with others.[206] These clauses limit the ability of businesses to differentiate the price of their products/services offered on each intermediary platform, in short, selling cheaply elsewhere.

The extent of limitation depends on the type of clause. A wide parity clause forbids offering better conditions on all or most available alternatives, including other

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[205] Almost all Member States have recognized parity clauses as collusion rather than abuse of a dominant position and UTPs. See further below.

[206] Ariel Ezrachi, 'The Competitive effects of parity clauses on online commerce' (2015) 11(2-3) European Competition Journal 488, 488; Margherita Colangelo, 'Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking' (2017) 8(1) Journal of European Competition Law & Practice 3, 4.

platforms, while a narrow parity clause merely targets a business's own website or offline distribution channel.[207]

The positive and efficient effects of these clauses, such as hindering freeriding and reducing transaction costs,[208] are indeed inconsiderable compared to their negative effects. Parity clauses, specifically wide ones, can "exploit suppliers and exclude competitors".[209] A platform can charge its trading partner a higher fee, such as a commission fee, while the other party is unable to increase the price of its product/service on the platform due to the parity clause. Hence, it may, in extreme situations, leave the platform and even the market.[210] Indeed, the difference in bargaining power between the platform and the trading partner increases the likelihood of imposing the clause.[211] Besides, the higher the power of the platform, the higher would be the negative effects.[212] Trading partners have no choice but to accept the clause, otherwise platforms could threaten to delist them and block their access to the

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[207] Ezrachi (n 206) 489.

[208] For positive effects, see Francisco Enrique González-Díaz and Matthew Bennet, 'The law and economics of most-favoured nation clauses, (2015) 1(3) Competition Law & Policy Debate 26, 34–36.

[209] House of Lords-Select Committee on European Union (n 176) 38.

[210] Pınar Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015)15-12 CCP Working Paper 46 <http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62> accessed 11 June 2018.

[211] House of Lords-Select Committee on European Union (n 176) 37 (cited from Ufi Ibrahim).

[212] Steven C. Salop and Fiona Scott Morton 'Developing an Administrable MFN Enforcement Policy' (2013) 27 (2) Antitrust 15, 18.

platform.[213] Other potential negative effects are associated with parity clauses, such as barriers to entry for new platforms, which are not dealt with here.[214]

Almost all Member States, due to the presence of an agreement between parties, have recognized parity clauses as collusion. However, they have merely condemned the platform, that is, only one side of the "collusion". This could imply that the underlying reason for condemning these clauses is in fact abuse of dominance rather than collusion. However, convicting merely the powerful side signifies the presence of power and the forcible nature of the agreement.[215] Accordingly, some scholars, referring to the genuine agency model, consider Article 102 TFEU more relevant than Article 101.[216] In addition, the Commission in its investigation of parity clauses by Amazon, appeared to refer to Article 102 TFEU rather than Article 101.[217] Article 102 (a) could be the most relevant provision in these cases.

Google-Android could[218] also be considered an interesting case from the standpoint of legal evaluation of UTPs. According to the Commission, *Google* "abused its dominant position by imposing restrictions on Android device manufacturers and

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[213] House of Lords-Select Committee on European Union (n 176) 39.

[214] For more see Salop and Morton (n 212) 15; Jonathan B. Baker and Judith A. Chevalier 'The Competitive Consequences of Most-Favored-Nation Provisions' (2013) 27 (2) Antitrust 20, 24.

[215] Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (n 210) 4.

[216] ibid 21-26 and 41-49; Colangelo (n 206) 10.

[217] Commission - Press Release, 'Antitrust: Commission opens formal investigation into Amazon's e-book distribution arrangements', Brussels, 11 June 2015 (IP/15/5166).

[218] It may also be interpreted as tying, as most commentators preferred so. See e.g. Benjamin Edelman and Damien Geradin, 'Android and Competition Law: Exploring and Assessing Google's Practices in Mobile' (2016) European Competition Journal (forthcoming) <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2833476> accessed 11 June 2018.

mobile network operators".[219] The Commission has recognized *Google* as dominant in three different markets, that is, general search, the licensable version of Android and app stores for Android. Although Android is offered for free, some important Google applications, *YouTube* and *App Store* – which have no substitute – require a licence agreement.

Google required device manufacturers (DM) to sign two different agreements in order to qualify for installing and obtaining a licence for *App Store* and *YouTube*. The first was a mobile Application Distribution Agreement, by which DMs must preinstall all *Google* applications, including those with many substitutes, and even set them as a default app. The second was an Anti-Fragmentation Agreement, which prohibits DMs from installing other versions of Android than that developed by *Google.* Forcing DMs to agree to these terms restricts their opportunities to trade by "constraining their options, reducing their secondary revenue sources, and limiting their ability to distinguish themselves from competitors".[220]

Another interesting case in this regard is *Google*'s Comparison Shopping service, which recently resulted in a Commission decision and imposition of a massive fine.[221] By contrast, a similar investigation in the USA found "a legitimate business justification" in *Google*'s conduct.[222] According to the Commission, *Google* abused its

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[219] Commission - Press release, 'Commission sends Statement of Objections to Google on Android operating system and applications', Brussels, 20 April 2016 (IP/16/1492).

[220] Edelman and Geradin (n 218) 3, 31.

[221] *Google Search (Shopping)* (AT.39740) Commission Decision C (2017) 4444 final [2017]

[222] FTC, 'Statement of the Federal Trade Commission Regarding Google's Search Practices' (2013) FTC File Number 111-0163 <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf> accessed 11 June 2018.

dominance by systematically favouring the position of its own Comparison Shopping Service in its general search results.[223] Hence, *Google* artificially gained traffic by "reduc[ing] the opportunities for *Google*'s [vertical] competitors".[224] However, previous versions of the same service, such as *Google* Product and *Froogle*, for which *Google* did not engage in similar favouring practices, were comparatively unsuccessful.[225]

Apart from some articles commissioned by *Google*, which robustly defended *Google*'s conduct,[226] the form of abuse is indeed controversial.[227] A new type of abuse, based on the non-exhaustive list of Article 102, discrimination, refusal to supply and

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[223] *Google Search (Shopping)* (n 221) para. 343

[224] European Commission - Press release, 'Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules', Brussels, 14 July 2016 (IP/16/2532).

[225] *Google Search (Shopping)* (n 221) para. 343.

[226] See e.g. Pınar Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU Competition Law' (2017) University of Illinois Journal of Law, Technology and Policy (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811789> accessed 11 June 2018. The author proposed different types of defences, from questioning the presence of dominance in the case and market definition to rejecting various possible abuses based on Art. 102 TFEU; John Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' World Competition <https://www.kluwerlawonline.com/document.php?id=WOCO2016002> accessed 11 June 2018.

[227] Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Search Quality in the Search Engine Market' (2013) 9 (2) Journal of Competition Law & Economics 419; Renato Nazzini, 'Google and the (Ever-stretching) Boundaries of Article 102 TFUE' (2015) 6 (5) Journal of European Competition Law & Practice 301; Nicolas Petit, 'Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) <http://dx.doi.org/10.2139/ssrn.2592253> accessed 11 June 2018.

tying could allegedly be a proper type of abuse in this case.[228] Although there is no need to fit abuse into any established form, the characteristics of the present case appear to be similar to those of discrimination (Art. 102 (c)).

Google applied a different algorithm to its own service and by doing so placed its vertical competitors, trading partners, at a competitive disadvantage. Some authors argued that Article 102 (c) concerns merely discrimination *vis-à-vis* trading partners, not the dominant undertaking itself.[229] However, if a dominant undertaking cannot privilege one trading partner over another, it *a fortiori* cannot do the same for its own subsidiary.[230] A similar basis exists in the case of margin squeeze, where an upstream dominant undertaking cannot charge its vertical competitors more than its own subsidiary so as to leave no margin for them to compete in the downstream market. Besides, in some cases discrimination in favour of a subsidiary falls under Article 102 (c).[231]

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[228] See e.g. Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?' (2015) 1 (1) Competition Law & Policy Debate 4; Petit (n 227); Lisa Mays, 'The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe' (2015) 83 (2) The George Washington Law Review 721; Ben Edelman, 'Does Google Leverage Market Power Through Tying and Bundling' (2015) 11 (2) Journal of Competition Law & Economics 365.

[229] Nazzini, 'Google and the (Ever-stretching) Boundaries of Article 102 TFUE' (n 227) 308; Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU Competition Law' (n 226) 34-35.

[230] Unless the critics do not accept existence of two different levels of the market in the *Google* Shopping case.

[231] Case C-242/95 *GT-Link A/S and De Danske Statsbaner (DSB)* [1997] ECRI–4449; Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689 para 93.

Moreover, a transaction indeed exists between *Google* and a website that makes them trading partners of *Google*.[232] Firstly, websites have to comply with Google's Webmaster Guidelines – otherwise they could even be removed from *Google*'s index.[233] Secondly, an exchange – give-and-take – exists between *Google* and website-based businesses. *Google* provides visibility for websites, while websites increase the value and quality of *Google* search results. Indeed, the more comprehensive *Google*'s search results are, the more users and eventually advertisers, meaning revenue, *Google* would earn. Thirdly, a trading party has a broader meaning than contracting party.[234]

Google is indeed under Commission scrutiny for other potential abuses, such as restrictions on data portability, exclusionary contracts, copying rivals' content.[235] These practices predominantly target its competitors, hence less likely to fall within abusive UTPs.

Online platforms, specifically those with high market power, could easily abuse their role as "gatekeeper" and intermediary by practicing UTPs against businesses. If privacy and data usage issues are the biggest challenge in relation to consumers, UTPs are indeed the most important matter in platform-business relations. The more a platform enjoys the existence of a strong network effect, popularity among consumers

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[232] For a different opinion see Nazzini, 'Google and the (Ever-stretching) Boundaries of Article 102 TFUE' (n 227) 308; Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU Competition Law' (n 226) 35.

[233] *Google Search (Shopping)* (n 221) para. 346.

[234] *BdKEP—Restrictions on Mail Preparation* (COMP/38.745) Commission Decision [2014] para. 92 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38745/38745_32_1.pdf> accessed 11 June 2018.

[235] ICOPM, 'An Overview of the Commission's Case against Google' (4 June 2015) < http://i-comp.org/blog/2015/overview-commissions-case-google/> accessed 11 June 2018.

and lack of multi-homing,[236] the more it could impose UTPs on businesses. It may not make any business sense to restrict consumers. Instead, by satisfying them and having them on the platform, restricting and exploiting businesses becomes easier. Businesses, generally speaking, appear to have less potential for multi-homing, especially if the platform is satisfactory and beyond in the eyes of consumers. Significantly, smaller businesses might not be able to achieve the same reputation on an alternative, if any, platform.[237]

V. Conclusion

Reviewing the relevant legal documents, case law and doctrines implies that "equal opportunity to trade" could be the most plausible understanding of fairness in the context of EU competition law. The relevant EU competition cases on UTPs imply that the direct concern is almost always businesses rather than consumers.[238] However, it should be borne in mind that this interpretation, "equal opportunity to trade", predominantly concerns businesses, not final consumers. Hence, a different explanation might apply to consumer-related fairness. Similarly, other competition law systems may

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[236] UK Competition & Market Authority (n 179) 10–11.

[237] Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?' (2013) 83 Düsseldorf Institute for Competition Economics- discussion paper 11-12 <https://www.econstor.eu/bitstream/10419/68229/1/73435858X.pdf> accessed 11 June 2018.

[238] Even though arguably the ultimate goal is nevertheless consumers, it appears that EU consumer law is a more sensible means for primary and direct protection of fairness in relation to consumers.

interpret fairness differently.[239]

As a rule, the presence of disparity in bargaining power between different sides makes UTPs distinguishable from other practices such as unfair competition, when power and/or dominance let the superior party limit the other side's opportunity to trade. This important factor, in addition to clarifying the notion of UTPs, could play a significant role in distinguishing different types of abusive conduct, (Article 102).

Accordingly, EU competition law would better classify different abuses based on the object of abuse. Thus, if it is the trading partner of the dominant undertaking whose opportunity to trade has been distorted, the abuse can be called UTP, or B2B UTP. UTPs form an umbrella term to cover variety of condemned practices and imposition of unfair terms. Although this broad definition of UTP, in the context of EU competition law, results in including a variety of practices, it could nevertheless relieve EU competition lawyers from the traditional, misleading and unreliable "exploitative and exclusionary" divisions.[240]

EU competition law is a reliable and efficient legal basis for tackling various – if not all – types of B2B UTPs, as the relevant proceedings and the Commission have demonstrated and emphasized. However, the EU lacks a harmonized approach in terms of abuse of dependency – without dominance. The Commission periodically happens to notice a need for action, as when the farmers' crisis took place[241] or recently the digital

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[239] It appears less justifiable to generalize all competition law systems around the world, without a proper evaluation of their broader social contexts. Accordingly, labelling EU competition law as "protectionist", "protecting competitors rather than competition", etc. while looking at values, objectives and history of another competition law system, might not be acceptable.

[240] See section III.

[241] See e.g. Glöckner (n 29).

single market strategy raised the question of UTPs in platform-business relations. The latter resulted in regulatory action, while the destiny of the former remains unclear.[242] Considering that UTPs are not limited to the food supply chain and platform-business relations, the Commission should take more inclusive and harmonized steps. Moreover, it might be more helpful if EU competition law could even be able to intervene in some cases of abuse without dominance if trade between Member States is affected.

[242] See III.1.2.