Platform markets, dominance issues and single- and multi-homing of merchants

Platform markets, dominance issues and single- and multi-homing of merchants: a real or hypothetical choice?

Abstract: This article considers the implications of restricting the ability of business users to interact with a plurality of platforms for competition between platforms and between the merchants themselves. After examining the economic implications of the merchants' choice of single- versus multi-homing, the article will analyse the legality of two practices that can restrict, if not altogether deny, the ability of merchants to choose whether to use one or a plurality of platforms in light of the EU Competition rules, namely exclusivity clauses and across platforms parity agreements. It will be argued that due to the features of platform markets, the ability of merchants to multi-home should be preserved so as to ensure that these markets remain open and competitive and that the incentive for new intermediaries to continue innovating in the way they provide their services.

Keywords: Competition; European Union; dominant position; anti-competitive arrangements; exclusivity; price.

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1. Introduction

This paper considers whether restricting the ability of merchants to offer their products on more than one platform at the same time is compatible with EU competition law. Online platforms can cut down search costs for consumers and allow merchants to reach out to what is a potentially vast array of possible clients. Also, by providing additional services (e.g. by processing payments) they enhance the consumers' experience and help undertakings operate more efficiently. The interdependence between the user groups that each rely on the platform is central to the dynamic of these markets. In addition, the positive feedback loop generated by increasing demand for the services of a specific platforms by one group determines its popularity vis-à-vis the other users. As a result, how platforms not only win over, but also keep users loyalty to their services is a decisive factor for the continuing openness and competition of these markets.

This paper will start by discussing the economic issues surrounding platform markets: it will outline different types of platforms and summarise the approach to market definition in this area. Thereafter, it will consider the economic implications arising from the relationship

between users and platforms and in particular whether and how the platforms' attempts to limit the ability of its users to interact with rival intermediaries can affect the functioning of competition on the market for platform services. For this purpose the article will examine the examples of exclusivity and across platform parity clauses ('APPAs) in light of the EU competition rules. After discussing the economic implications of these agreements, the paper will outline the legal approach applicable to them both in light of Article 101 TFEU and, more extensively, in accordance with Article 102 TFEU.

It will be argued that while platforms may have economic incentives toward imposing similar obligations on merchants, the fact that the former become "unavoidable trading partners" in certain industries means that competing intermediaries are unable to challenge their dominance. Accordingly, it will be concluded that while they might have prima facie positive implications for the functioning of platforms, these benefits are unlikely to counterbalance the impact of these arrangements in terms of reinforcing the leading platform's market power and of slowing down innovation. #

2. Features of platform markets—openness or exclusivity?

2.1. Platforms and market definition—a summary

Two-sided markets have received significant attention in recent years, largely due to the emergence of online commerce.[1] The rise of the Apple Store for apps and other online services and of Amazon for tangible goods, among others, have prompted much needed debate on the economics of these markets. However, platforms are not an online phenomenon.

Taxi booking circuits and newspapers as sellers of advertising space, for instance, perform the same function: they mediate between two different sets of groups, allowing each of them to seek out the other at reduced search costs. A "multi-sided platform" can consequently be defined as "a firm (…) [that] sells different products to different groups of consumers, while recognising that the demand from one group of customers depends on the

[1] See inter alia Organisation for Economic Cooperation and Development, "Rethinking antitrust tools for multi-sided platforms", (2018) (hereinafter referred to as the OECD 2018 report); European Commission — Observatory on the Online Platform Economy, Progress Report, 10 July 2020, available at: https://ec.europa.eu/digital-single-market/en/news/commission-expert-group-publishes-progress-reports-online-platform-economy; Competition and Markets Authority, Market study into online platforms and digital advertising, 1 July 2020, available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

demand from the other group(s)".[2] In the context of such a broad definition, several types of platforms can be identified. Some provide a match-making service, akin to that of an agent. This is the case, for instance, of AirBnB, where homeowners are put in touch with potential tenants. The job of the platform is to "host" this act of intermediation. In addition, since the platform provides accessory services such as offering a payment facility, it allows the part to stipulate and execute the contract with just a few clicks.[3]

Audience platforms, instead, sell distinct services to different categories of users: although there is no transaction being conducted through the platform, one user group looks for a space on the platform so that it can attract members of the other group to its products. A transaction, if there is, is likely to occur on a different market and at a later time.[4] This is the case, for instance, with newspapers. According to the US Supreme Court in Times Picayune, for instance, members of the printed press act as "dual traders":[5] they sell news content to their readership and advertising space to businesses.[6] As a result, the job of the newspaper as platform is to allow these two groups to interact, with a view to a new transaction concerning the advertisers' products being concluded.[7] In this scenario, therefore, newspapers compete for an audience.[8]

In light of the forgoing, it is clear that the activity performed by the platform in both the scenarios illustrated so far is characterised by a relationship of interdependence between the user groups that access it. The more a platform is popular among the members of one group, the more likely it is that the former will attract custom from the other group.[9] These factors have several implications in a number of contexts. In respect to market definition, it has been suggested that when an "audience platform" exists, there should be two separate markets, one between the media outlet and their readers and one between advertisers and the same outlets.[10] As per intermediation platforms, such as AirBnB, the platform contracts on two distinct, yet

[2] Organisation for Economic Cooperation and Development, "Rethinking antitrust tools for multi-sided platforms", (2018) (hereinafter referred to as the OECD 2018 report), p. 10
[3] See e.g. Bamberger and Lobel, "Platform market power", (2017) 32 Berkley Tech LJ 1051, p. 1069.
[4] Filistrucchi and others, "Market definition in two-sided markets: theory and practice", (2015) 10(2) Journal of Competition Law and Economics 293, p. 314-315.
[5] Times Picayune Pub Co v US, 345 US 594 (1953), 610.
[6] Ibid.; see also Filistrucchi, cit. (fn. 4), p. 319.
[7] Times Picayune, cit. (fn. 5), 611; Filistrucchi, cit. (fn 4), p. 297; see also p. 320.
[8] Filistrucchi, cit. (fn. 4), p. 320-321.
[9] See ex multis Zhong et al., "Achieving stable and optimal passenger-driver match in ride-sharing systems", (2018) paper given at 15th IEEE International Conference on mobile ad-hoc and sensor systems, available at: https://ieeexplore-ieee-org.ezproxy.is.ed.ac.uk/stamp/stamp.jsp?tp=&arnumber=8567549, p. 125-127; see also Baldwin and Woodard, "The architecture of platforms: a unified view", (2008), Harvard Business School Working Paper 09-034, p. 5-6, 11.
[10] See inter alia Filistrucchi, cit. (fn, 4), p. 321.

interrelated, market segments, with respectively the landlords, in exchange for a fee, and the perspective tenants, for free.[11] Similar considerations can be made for other types of matchmaking platforms, such as taxi booking and call despatch service providers. Drivers and passengers rely on this type of platform, operating via telephone or, especially more recently, through apps, in order to be matched with each other as soon as and as efficiently as possible.[12] The platform therefore provides a service to each of these groups on distinct market segments.[13]

The relation of interdependence between user groups and, as a consequence, between the markets on which each operates is also decisive for the way in which services are priced on each side of the platform. Thus, it is usually the case that consumer can access platform services for free, whereas merchants have to pay a fee or commission to the platform. This payment therefore goes not only to cover costs for the service provided to the business users, but also to subsidise supposedly "free" services provided on the other side of the platform.[14] While it is clear that two distinct markets exist for each of these services, it should be emphasised that it is the pricing structure determined for the platform, rather than the price charged to each user group that should be carefully assessed when assessing allegations of predation or of other types of exclusionary conduct.[15] Finally the relationship between user groups and between the platform and each of these groups matters when it comes to market definition. For "matchmaking" platforms, what is sold is the very act of intermediation; where instead platforms compete for an "audience", the definition of the market is more complex, with distinct markets for each of the activities performed by the platform itself.[16]

In light of the forgoing analysis, it can be concluded that platform markets are characterised by peculiar features such as indirect network effects and a relationship of interdependence between user groups. It was also shown earlier that these characteristics are central to the definition of the relevant market and the determination of price. The next section will consider how this interdependence affects competition between platforms and in that context address questions of user loyalty.

[11] Ibid.
[12] E.g. Zhong, cit. (fn. 9), p. 127. See also Baldwin and Woodard, "The architecture of platforms: a unified view", (2008), Harvard Business School Working Paper 09-034, p. 5-6, 11.
[13] Baldwin and Woodard, loc. ult. cit.
[14] Inter alia, Pickard, "Competition policy and the rise of digital platforms", (2019) 40(11) ECLR 507, p.508.
[15] Id., p. 59.
[16] OECD Report, cit. (fn. 1), p. 13. See also Wismer and Rasek, "Market definition in multi-sided markets", in OECD report, cit. (fn. 1), p. 58; see also pp. 63-64.

2.2. Platforms, network effects and the choice of multi- versus single-homing

Section 2.1 discussed the issue of market definition in platform industries and observed that since the popularity of a platform is critical to its success, retaining customers on both sides of the platform is central to its viability and success.[17] In light of the forgoing, can a platform encourage or even demand loyalty from their users? What effects does this practice have? Several factors affect the decision of users to stick with one intermediary, as opposed to relying on many. They range from the existence or size of any switching costs, the nature of the products or services offered by each platform and any prices that platforms may charge for access to its intermediation services.[18]

While consumers are generally not charged a fee for access to the platform, they might still be induced to deal with a particular one if the latter hosts products they like and cannot find elsewhere.[19] The same decision, however, is more complex for businesses. According to the EU Commission, connecting with a plurality of platforms may be difficult for traders, especially small ones, who may lack the scale for growing anew their reputation on a new intermediary, since the latter depends on the number of transactions completed on it.[20] In addition, due to the importance of having a critical mass of users, platforms often seek to entice merchants and consumers toward their services. Multi-homing can therefore be limited or excluded in a variety of ways. Businesses can be de facto locked in with an intermediary because they have invested heavily in ensuring compatibility with that platform. A similar outcome can also follow from the terms and conditions that govern the users' relationship with the platform itself. Exclusivity clauses are perhaps the most obvious tool for this purpose. Nonetheless, other arrangements, such as clauses restraining the freedom of merchants to set prices for their products that are then listed on a platform, can be used to entice them to remain loyal to a specific intermediary.

A trader's decision to multi-home as opposed to single-home can affect competition between platforms in different ways. It has been observed that when only one side can switch platforms and the other is bound exclusively to a platform, the latter becomes, de facto, a

[17] Id., p. 646.
[18] See inter alia, European Commission, "The competitive landscape of platform markets", JRC Digital Economy Working Paper 2017-04, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106299.pdf, p. 8.
[19] See e.g. id., p. 4.
[20] Id., p. 11-12.

gatekeeper for the consumer side of the market, since only those businesses passing through it can enter the relevant consumer market.[21] As a result, not only is the platform de facto an unavoidable trading partner for merchants that wish to penetrate the market in question, but is also likely to influence the way in which products sold through it are priced, including encouraging merchants to set supra-competitive prices in transactions conducted via the platform.[22]

If instead both sides can multi-home, no such gatekeeper will arise and both sides will therefore be more likely to compete effectively. As was aptly observed by the EU Commission in respect of the social media advertising market, where switching costs for users of the media in question are low, the ability of advertisers to multi-home increases their ability to reach out to the wider public.[23] In this case, multi-homing therefore boosts market penetration and is likely to lead to an efficient use of the tools chosen by advertisers.[24] Similar views were expressed by Rochet and Tirole in relation to multi-homing on the credit card market: since multi-homing results in more intense price competition between credit card providers, the latter are likely to lower their prices with a view to enticing users into paying with their own cards.[25]

In light of the forgoing, it can be suggested that limiting the ability of platform users, especially merchants, to interact with a variety of platforms can have an adverse effect on rivalry between the platforms themselves as well as the affected users. It is acknowledged that seeking loyalty from users, especially "popular" ones, may be a rational choice for platforms and a way to maintain their viability. However, it is argued that whether any benefits arising from exclusivity may counterbalance the loss of competition that this causes appears unclear.[26] Accordingly, it is submitted that loyalty-inducing practices must be carefully examined with a view to ensuring that competition is not unduly compromised.

As was observed earlier, exclusivity clauses are perhaps the most explicit way in which a platform can prevent users, especially merchants, from multi-homing.[27] It was noted that platforms can find it rational to bind merchants to themselves: especially when traders are

[21] See e.g. Rochet and Tirole, "Platform competition in multi-sided markets", (2003) 1(4) Journal of the European Economic Association 990, pp. 992-993.
[22] Armstrong and Wright, "Two-sided markets, competitive bottlenecks and exclusive contracts", (2007) 32(2) Econ Theory 353, p. 373-374. See also Caillaud and Jullien, "Chicken and egg: competition among intermediation service providers", (2003) 34(2) RAND Journal of Econ 309, p. 310; see also p. 320.
[23] EU Commission, cit. (fn. 18), p. 25.
[24] Ibid.
[25] Rochet and Tirole, cit. (fn.21), p. 993.
[26] See e.g. Caillaud and Jullien, cit. (fn. 22), p. 320.
[27] See inter alia Armstrong and Wright, "Two-sided markets, competitive bottlenecks and exclusive contracts", (2007) 32(2) Econ Theory 353, p. 373-374.

popular among consumers or when the intermediary has invested significantly in promoting the products in question, securing the loyalty of specific businesses can allow an intermediary to recoup the costs associated with hosting them and ensure, more generally, the viability of the platform.[28]

Loyalty obligations or inducements, however, can have adverse effects on consumer choice, since they may prevent consumer users of alternative, lower-cost and perhaps less established platforms from purchasing certain goods.[29] Exclusivity clauses can also play havoc with competition among platforms. Shapiro argued that especially when the platform using loyalty obligations is a leading one, the perspective for merchants to lose the benefits of being associated with it would likely dissuade them from seeking out other intermediaries (even when the latter are more efficient). In addition, since new entrants and lesser known intermediaries can struggle to attract appealing sellers, they "may find it far more difficult to ignite the positive feedback" that is necessary for them to establish themselves on the market and therefore put pressure on the leading incumbent.[30]

Pricing arrangements are also used to dissuade platform users from switching to competing intermediaries. Across platform parity agreements (APPAs), for instance, impose an obligation on merchants to refrain from offering lower prices on competing platforms where usage costs may be lower.[31] From the platforms' standpoint, APPAs can have the advantage of cutting the risk of free-riding, by limiting the practice of show-rooming, i.e. when consumers view products on an established platform and then purchase them directly or via another intermediary at a lower cost.[32] As a result, platforms can control the flow of sales and as a result of income, thereby ensuring that costs associated with investing in advertising the products and more generally, in building its own reputation can be covered.[33] Especially in competitive platform markets and if the platform is remunerated via commission, price parity

[28] Lee, "Vertical integration and exclusivity in platform and two-sided markets", ((2013) 103(7) American Econ Review 2960, p. 2961. See also, mutatis mutandis, Wang and Wright, "Search platforms: showrooming and price parity agreements", (2020) 51(1) RAND Journal of Economics 32, pp. 34-35.
[29] See inter alia Armstrong and Wright, cit. (fn. 27), p. 375.
[30] Shapiro, "Exclusivity in network industries", (1999) 7 Geo. Mason L Rev 673, p. 678.
[31] For a summary, see OECD, "Summary Record of the 124th meeting of the competition committee", 28 October 2015, executive summary, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)2/ANN3/FINAL&doclanguage=en.
[32] See e.g. Padilla, Piccolo and Watson, "The simple economics of price parity agreements: the case of the airline tickets distribution industry", (2020) J European Comp L & Econ, available at: https://doi.org/10.1093/joclec/nhaa028, pp. 3-5.
[33] See e.g. mutatis mutandis, Hughes, "Bright line or barbed wire? The classification of supplier influence over resale price in EU Competition law", (2017) 28(6) ECLR 272, pp. 276-277; see also Wright and Wang, cit. (fn. 28), p. 35, 52-53.

clauses might be essential to maintain the financial viability of the platform itself, by forcing transactions to be conducted exclusively through the platform and therefore securing the income associated with them.[34]

There are, however, several objections to price parity arrangements. It was argued that these clauses can remove or weaken the incentive to set lower prices when this would be possible if the merchant could offer lower prices via lower cost platforms.[35] This, in turn, can have an impact on competition between intermediaries. Since the affected sellers cannot offer products at a lower price than the one changed through a certain—perhaps well-established—platform, alternative intermediaries may find it more difficult to attract merchants toward their services and thus operate viably on the market.[36] Using an APPA can ultimately slow down innovation in the way in which platform services are offered since they can contribute to the crystallisation of positions of leadership and therefore prevent alternative business models to emerge.[37] Also, especially when platform competition is already weak and it is the leading incumbent that relies on price parity obligations, the latter can make the dominant intermediary an unavoidable trading partner to the exclusion of rivals.[38]

In light of the forgoing analysis it may be concluded that price parity clauses are at the very least ambiguous in their impact on choice and on price and quality competition, both on the platform market and on the market where products sold through them are traded. They can encourage coordination on prices, since they prevent merchants from offering discounts and generally lower prices on channels alternative to the platform; they can also foreclose the platform market since they can be used to attract and lock in particularly popular brands into a certain platform to the exclusion of others that are perhaps cheaper and more efficient.[39] The next section will consider the legal implications of the exclusivity arrangements considered so far in light of the EU competition rules.

[34] Akman, "A competition law assessment of platforms most favoured customer clauses", (2016) 12(4) JCLE 781, p. 792.
[35] Id., p. 791.
[36] OECD, cit. (fn. 1), p. 2.
[37] Ibid.; see also Akman, cit. (fn. 34), p. 791.
[38] Akman, cit. (fn. 34), p. 792-793.
[39] See inter alia Hughes, cit. (fn. 33), p. 277; also Akman, cit. (fn. 34), p. 790.

3. The relationship between merchants and platforms put to the test of EU competition law

3.1. Practices inducing the loyalty of platform users and Article 101 TFEU

3.1.1. Exclusivity clauses and the impact of the prohibition of anti-competitive agreements

The previous sections discussed some of the economic issues arising from loyalty inducing practices in platform markets, with particular emphasis on price parity and exclusivity clauses. This section is will explore the question of whether price parity and exclusivity clauses are compatible with EU competition law, starting from Article 101 TFEU. The implications of engendering user loyalty to platforms has been the subject of considerable attention on the part of competition authorities, at national and EU level alike.

In Italy, the Autorita' Garante per la Concorrenza ed il Mercato (AGCM) investigated the use of exclusivity clauses in the context of the taxi despatch services' market.[40] In 2018 and 2019 the agency fined a number of undertakings that ran taxi phone lines, on the ground that the exclusivity clauses they had the users of their service agree infringed Article 101 TFEU. The decisions followed a number of complaints lodged by an undertaking operating an app-based service and alleging that due to the enforcement of these clauses, it had been unable to secure enough business customers as to meet the demand it channelled.[41] As a result, it had de facto been marginalised from the market, although it provided a more efficient and lower cost service for drivers and a more appealing one for consumers. Unlike traditional phone-based intermediaries, the complainant allowed drivers to engage with a variety of channels, including its own competitors, to access demand and had no access fee.[42] Consumers could locate and track their booked car, use the app to pay for services and even select their own language for use of the service if it was different from the local one.[43]

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[40] Case I801A, MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi 3570, decision of 27 June 2018, available (in Italian) at: http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/264D4B0ED3B221FFC12582C6004BBF4E/$File/p27244.pdf (hereinafter referred to as 'MyTaxi-Rome'); case I801B, MyTaxi/TaxiBlu/YellowTaxi/Autoradiotassi', decision of 27 June 2018 (hereinafter referred to as 'MyTaxi-Milan decision'), available at: https://www.agcm.it/dotcmsDOC/allegati-news/I801B_ch.%20istr._omi.pdf; Case I832, Servizi di Prenotazione del Trasporto Taxi—Napoli, decision of 13 February 2019, available at: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/E7B2BD080673DA7CC12583AC0059209B/$File/p27553.pdf (hereinafter referred to as 'MyTaxi-Napoli').

[41] See MyTaxi-Rome, para. 273-274; MyTaxi-Milano, para. 220-223; MyTaxi-Napoli, para. 29-30.

[42] See e.g. MyTaxi-Rome, para. 227, 233-234.

[43] Id., para. 235.

The AGCM acknowledged that, since many of the investigated parties were cooperative organisations with a mutualistic function, they could demand that their members stick to their services.[44] However, it went on to state that the exclusivity obligation had to be kept within precise limits, and in particular that it should not go beyond what is necessary to allow the organisations in question to fulfil their solidarity function. The AGCM observed that this obligation was impose on all users of the taxi phone line, regardless of whether they were members of the organisation or mere users and had no duration limit. It was also found that these clauses were common across the whole of the platform market and that, while there were a significant number of independent taxi drivers, who did not rely on any intermediary to source calls, they tended to stay independent and therefore could not be attracted toward a new platform.

In light of the forgoing, the AGCM took the view that the exclusivity agreement in question, while not constituting a restriction of competition by object,[45] had anti-competitive effects. In its view, applying an exclusivity obligation having so wide a scope, set against the background of a market where, on the one hand, other intermediaries used the same sort of clause and on the other hand there a substantial number of independent taxis—as such unwilling to rely on an intermediary—made it more difficult, if not impossible in certain cities, for rival platforms like the complainant to enter in and operate profitably on the market.[46] This outcome came at the expense not just of the complainant but ultimately, also of consumers who could not access more efficient and more appealing services.[47]

The above analysis indicates that the service agreements concluded by platforms and their users were examined on the basis of the assumption that they constitute 'agreements' between undertakings that are reciprocally independent and do not compete on the same market, in light of the framework for assessment developed by the EU Court of Justice in its Delimitis case. However, is this the right characterisation for these practices? It has been suggested that this question can only be answered upon an examination of the clauses of the service agreement concluded by the platform and its business users.[48] Akman argued that some of these arrangements should be characterised as agency agreement and as such exempt from the application of Article 101(1) TFEU, on the ground that the parties are in fact acting together as

[44] Id., para. 219-220, 224.
[45] See e.g. MyTaxi-Milano, para. 193-196.
[46] Id., para. 220-223, 241-246.
[47] Id., para. 245-246; see also MyTaxi-Napoli, para. 30.
[48] Akman, "Online platforms, agency and competition law: mind the gap", (2019) 43(2) Fordham Int'l L J 209, pp. 221-223, see also p. 242 ff.

a single economic entity.[49] She suggested that especially matchmaking platforms, [50] despite tending to exert significant control over their users, for instance in relation of the setting of prices, did not "take ownership of what is being sold/provided" to customers via the platform's intervention.[51]

In addition, the fact that the platform only took little if not no risk as to the performance of the contract was read as showing that the platform acted as an agent of the merchant users, thus putting the agreement out of the reach of Article 101 TFEU.[52] It was only in those cases where the platform acted at the same time as intermediary on behalf of suppliers and as seller of competing goods or services that the reciprocal dealings between the platform and its users could be subject to the competition rules.[53] Thus, this commentator argued that, whenever the terms and conditions of the platform usage agreement indicate that the latter is "competitively neutral", Article 101 TFEU should not be applicable to it.[54]

It can be agreed with Akman that Article 101 TFEU should not be applied to those platform agreements that are, in fact, genuine agency arrangements. To do otherwise would be tantamount as to penalise specific intermediaries for a legitimate business choice. However, it is equally legitimate to ask whether and, if so, how the resulting "enforcement gap", that arises from the inapplicability of Article 101 to these arrangements should be addressed. More generally, it could be queried whether Article 101 should remain applicable to agreements that are not 'genuine' agency contracts but nonetheless display some features of these arrangements. In general, it may be noted that while Article 102 TFEU could come into play for those cases involving a dominant platform, as will be examined further in this contribution, it may not be applicable when a platform, while not dominant, in accordance with EU competition law, holds an influential position on a specific market.

It is argued that the approach suggested by Akman seems to focus more, if not exclusively, on the relationship between the platform and its business users, without however including a consideration of the impact that the usage agreement can have on competition between platforms.[55] This approach can be contrasted with the position adopted by the AGCM in MyTaxi: it is suggested that this decision focused on the relationship between platforms and

[49] See inter alia case T-325/01, Daimler Chrysler AG v Commission, [2005} ECR II-3319, para. 85-88. See Akman, cit. (fn. 49), p. 242-243.
[50] Akman, cit. (fn. 49) p. 271-272.
[51] Id., p. 273-274.
[52] Ibid.; see also p. 275.
[53] Id., p. 302-304.
[54] Id., p. 306.
[55] Id., p. 316.

in particular on the impact that the exclusivity obligation imposed on taxi drivers vis-à-vis "traditional" call despatchers had on the entry and expansion of more innovative, app based service providers.[56]

Against this background, it may be argued that the AGCM, relying on the Delimitis preliminary ruling and on its pattern of analysis of 'by effect' restrictions, sought to address the 'enforcement gap' that could have arisen, had the usage agreements in issue been treated as agency contracts, with a view to addressing the foreclosing effects arising from them.[57] Although the concerns for protecting legitimate choices of business models cannot be dismissed,[58] it is submitted that they should be analysed in the broader context of the implications of the usage agreement for the continuing competitiveness and contestability of the platform market.[59] On this specific point, it is argued that the Delimitis test provides an appropriate and well-defined framework within which this analysis can be carried out.[60]

In light of the forgoing analysis it is concluded that exclusivity clauses, when imposed as part of the terms and conditions of use of a platform by merchants, can be rather controversial and could potentially infringe Article 101 TFEU. While it is recognised that it is essential to consider carefully the content of the platform agreement, to ensure that the EU competition rules are applicable to it, the impact of similar clauses on the openness of the platform market and on the potential for other intermediaries to innovate may be considerable and therefore justify competition intervention.

3.1.2 Price parity agreements and Article 101 TFEU

The previous section examined several issues arising from the application of Article 101 TFEU to exclusivity clauses in platform markets and argued that while these agreements often present features akin to those of a "genuine agency" arrangement, as such falling outwith the scope of this provision, focusing solely on the relationship between the platform and its users may cause the impact of these arrangements on the market for intermediation being overlooked. It is suggested that similar considerations seem to have been at play in the approach adopted by the

[56] See e.g. MyTaxi-Milano, para. 193-196; see also para. 220-223, 242-246.
[57] Id., para. 244-246; see also, inter alia, Andreangeli, "Taxi services, platforms and Article 101: changing the shape of the transport intermediation services industry?", (2020) 4(2) MCLRev 41, pp. 52-55.
[58] Akman, cit. (fn. 49), p. 316.
[59] Inter alia, Andreangeli, cit. (fn. 58), p. 66-67.
[60] Ibid.

German Cartel Office (Bundeskartellamt, referred to as 'BKamT') to another loyalty inducing arrangement, namely across platform parity clauses.

In the HRS case the BKamT considered whether the price parity clauses stipulated by online travel agents and the hotels that they listed on their booking platforms conformed to Article 101 TFEU.[61] The BKamT took the view that these clauses eliminated "the economic incentive for hotel portals to offer lower commissions to the hotels" as well as discouraging them from innovating their services.[62] Furthermore the fact that HRS clauses co-existed with similar conditions imposed by its direct competitors, Expedia and Booking.com, made difficult, if not impossible, for new platforms to enter or expand on the relevant market for the provision of hotel booking services, since these new rivals were de facto not able to source rooms at rates lower than those negotiated by the incumbents. [63]

The decision found that price parity clauses also had an adverse effect also on competition among hotels, which were restricted in their ability to pass on the positive effect of lower commissions on to their users and prevented from applying more advantageous prices for those rooms that were not allocated online and were instead sold at the reception desk.[64] It was added that since HRS's main competitors, also included APPAs in their terms and conditions, it was practically impossible for hotels that relied on OTAs to find alternative channels for the sale of their services.[65] The impact of these clauses was amplified by the absence of alternative channels of distribution for hotel services, as well as by the fact that hotels themselves had de facto been deprived of much of their freedom to set prices in direct sales.[66]

A broadly similar approach was also adopted by the UK Competition and Markets Authority (CMA) in respect of price parity clauses stipulated by a popular price comparison online platform (ComparetheMarket.com, 'CtM') with a number of home insurers.[67] The CMA found that these arrangements protected the platform's position on the price comparison services' markets from any significant pressure that could have come from other rivals, on the ground that the latter could not be offered lower prices for insurance policies whose providers

[61] Decision of the Bundeskartellamt, 20 December 2013, B9-66/10—*HRS, available at:* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3,.
[62] Id., para. 137.
[63] Id., para. 160-161.
[64] Id., para. 173.
[65] Id., para. 174.
[66] Ibid.
[67] Competition and Markets Authority, BGL Holdings and others, decision of 19 November 2020, available at: https://assets.publishing.service.gov.uk/media/5fb52495d3bf7f63d8c04de7/Summary_of_Infringement_Decision_-_19_Nov_2020.pdf (summary).

had already contracted with ComparetheMarket.[68] As a result, rival price comparison websites could never gain a competitive advantage on CtM, even though they could have offered similar services at lower prices. CtM, instead, could continue to ask retailer for progressively higher fees without fear of retaliation and monitored and enforced closely the observance by insurers of the parity obligations.[69] CtM, therefore was protected by any countervailing competitive pressure coming from alternative platforms and could therefore reinforce its leading position on the relevant market.[70]

It is suggested that the approach toward APPAs resulting from the decisions above shows a number of traits that are broadly similar to the analysis of exclusivity clauses under Article 101 TFEU, considered earlier. Just as with single-homing obligations, the impact that parity clauses on competition on the market for platform services and in particular the circumstance that these arrangements had a foreclosing impact vis-à-vis new or existing competitors. Both the CMA and the BKamT emphasised that APPAs could lead to the crystallisation of the position on the market of a specific platform, thus stifling the emergence of new, more efficient and lower-cost rivals.[71]

It can be concluded that price parity clauses present significant challenges for the continuing openness of platform markets, by prejudicing competition among intermediaries, inhibiting the emergence of novel ways of providing these services and dampening rivalry among merchants. As a result, it is submitted that any potential implications for the integrity of a platform's business model that could arise from applying Article 101 TFEU to platform usage agreements must be analysed alongside the assessment of the clause's potential negative effects.

3.2. Loyalty inducing arrangements, dominance and platforms: exclusivity clauses and price parity arrangements and Article 102 TFEU

The previous section discussed the questions arising from the applicability of Article 101 TFEU to exclusivity and price parity clauses in platform markets. The analysis will not turn to the issue of whether these arrangements, if stipulated by dominant platforms, may be incompatible with Article 102 TFEU. This section will proceed as follows. After summarising how

[68] Id., para. 2.
[69] Id., para. 6.
[70] Id., para. 10.
[71] Id., para. 9. See also HRS, cit. (fn. 62), para. 172-174.

dominance can be assessed in platform markets, the section will explore the role of usage trends, including switching from one to other platforms, in this context. The implications of practices limiting multi-homing on entry or expansion of rivals of a dominant platform will then be explored. It may be reminded that the concept of dominance identifies a position of economic strength that enables the undertaking which enjoys it to behave to an appreciable extent independently of its competitors, its customers and eventually consumers. The presence of a dominant undertaking does not prevent a degree of competition being maintained; however, it does mean that the undertaking in question can affect to an appreciable extent how that remaining competition works and can operate in such a way that this competition does not adversely affect its position.[72]

It is well-established that dominance can only be assessed in light of the features of the relevant market, the number and relative strength of rivals and the dynamics of competition characterising the affected industry.[73] Having regard especially to platform markets, it was illustrated earlier that these intermediaries compete for "space" on the market for their matchmaking or "audience-creation" services: they do so on the basis of price, of the quality of their services and in particular of the breadth of the retailers that they showcase. Ensuring that users have a good "experience" of the platform environment is especially important: because these services tend to be homogenous in the eyes of the consumers and are offered free of charge to them, service quality is decisive in affecting their choice.[74] It is suggested that taxi app-based call despatch intermediaries are a telling example of how innovative service providers can, with the help of low entry costs,[75] disrupt existing patterns of competition and threaten incumbents adopting more "traditional" business models.[76]

Against this background it is argued that the assessment of dominance on platform market should take into account a range of factors: some might be peculiar to these industries, whereas others may not be as useful as in other markets. Thus, high market shares are not always a

[72] Ex multis, case 85/76, Hoffmann LaRoche v Commission, [1979] ECR 461, para. 38.
[73] See inter alia, EU Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7, para. 11-12.
[74] See Evans, "Multi-sided platforms, dynamic competition and the assessment of market power for internet-based firms", Coase-Sandor Institute for Law and Economics, University of Chicago Law School, Law and Economics paper No 753, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746095, pp. 25-27.
[75] See ex multis Evans, "Why the dynamics of competition for online platforms leads to sleepless night but not to sleepy monopolies", (2017), accessible at: https://dx.doi.org/10.2139/ssrn.3009438, pp. 8-9; see also Evans, "The antitrust economic of multi-sided platform markets", (2003) 20 Yale J on Reg 325, p. 360; see also pp. 364-366.
[76] Supra, section 3.1.1, fn. 46-48 and accompanying text.

fool-proof indication of dominance. Where barriers to entry are very low and competition takes place primarily on the basis of innovation and quality, an undertaking holding a large share of demand may not actually be able to behave independently of its competitors, as, if it did so, the latter would immediately react to challenge its course of action.[77] Also, the impact of network effects can be significant, since the latter can cause the market to "tip" in favour of the platform that is most popular in the eyes of one user group, making it just as popular for the other user group.[78] As a result, a leading platform is likely to emerge and hold a large share of the market, at least for a time.[79] However, if "major technological developments in the sector" intervene, the leadership position in question could be dismantled relatively quickly.[80]

The Cisco/Messagenet appeal judgment, that ruled on a challenge to the EU Commission decision approving the merger between Microsoft and Skype, showed that in markets where the barriers to entry and expansion are very low and the innovation cycles tend to be short the impact of indirect network effects and their ability to lead the market to "tip" may be significantly weaker than in other markets.[81] In this context, the behaviour of users and in particular their ability to rely on multiple service providers was regarded as a significant indicator of the transience of any leading position, despite the prima facie high market shares.[82]

Evaluating usage trends of specific platforms can shed light on several questions, starting from whether a given platform is in competition with another—single homing may indicate that the services offered by one undertaking are sufficiently distinct as to fall in a different market. By contrast, a high switching rate may be read as evidence of healthy competition between platforms.[83] User behaviour can also help to ascertain whether there are any significant barriers to entry and other features of the market that can be conducive to monopolisation. It has been observed that low or no multi-homing cannot only be an indication that the services offered by one platform are seen as unique by consumers, but also that especially for merchant users the costs of switching are so considerable as to make it uneconomical to rely on a different intermediary,[84] for instance due to the high costs associated with ensuring compatibility with another platform.[85]

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[77] See e.g. case T-79/12, Cisco and Messagenet v Commission, ECLI: EU: T: 2013: 635, para. 67-74.
[78] See inter alia Collyer, Mullan and Timan, "Measuring market power in multi-sided markets", in OECD report, cit. (fn. 1), p. 73.
[79] Ibid.
[80] Ibid.
[81] Case T-79/12, cit. (fn. 78), para. 79-84.
[82] Id., para. 81.
[83] See e.g. Wismer and Rasek, cit. (fn. 16), p. 57.
[84] See Collyer et al., cit. (fn. 79), p. 76.
[85] Ibid.

However, lack of multi-homing can also be an indication of a more general feature of the market. When certain goods or services can only be sourced via a certain platform, even though the intermediation service is the same for all platforms, users will continue to use the platform hosting their choice product to the exclusion of others, even though in principle they are not bound to that particular intermediary and can (and often do, for other purchases) interact with others. This is the case when a competitive bottleneck arises:[86] since a leading platform has succeeded in locking in users on one side, users on the other side, despite being able in principle to multi-home, in practice have to channel business through the leading platforms in order to reach its users.[87]

This outcome has significant implications for the competition between platforms, since it leads to the crystallisation of the position of the "platform of choice" as the winner on the merchant side of the market, until such time as a more appealing rival emerges.[88] Indirect network effects are very likely to speed up the process and to entrench its outcome thus acting as de facto barriers to entry or expansion vis-à-vis rival intermediaries.[89] The leading platform is likely to have both the incentive and the resources to compete strongly to maintain its user base and to attract new clients.[90] Thus, as a new entrant faces the challenge of building a presence on one side, while at the same time having to address the challenge arising from the small number of users on the other side, the behaviour of platform customers becomes critical to this process.[91] Maintaining the ability of users to interact with a variety of intermediaries, including low-cost, innovative ones, increases the chance of actual or potential rivals of a leading platform to grow that critical presence on the market and, consequently, to put actual pressure on the incumbent.[92] In this context, multi-homing "changes the game considerably", since users will be likely to "accept the bribe" from the incumbent in order to join in, but will still join the new rival platform if this is seen as "desirable" at a later stage.[93]

In light of the forgoing it is concluded that the pattern of interconnection of users with not only the incumbent but also with the rival intermediaries is central to the assessment of

[86] Armstrong and Wright, "Two-sided markets, competitive bottlenecks and exclusivity contracts", (2007) 32 Econ Theory 353, p. 354; see also Evans and Schmalensee, "The antitrust analysis of multi-sided platform businesses", (2013) NBER Working Paper No 18783, pp. 15-16.
[87] Armstrong, "Competition in two-sided markets", (2006) 37(3) RAND Journal of Economics 668, p. 669-670.
[88] Ibid.
[89] Evans and Schmalensee, cit. (fn. 87), p. 19.
[90] Ibid.
[91] Ibid.; see also pp. 30-31.
[92] Ibid.
[93] Doganoglu and Wright, "Exclusive dealing with network effects", (2010) 28(2) International Journal of Industrial Organisation 145, p. 151

dominance since it provides an indication of how permanent this position of leadership is against threats coming from rivals, whether actual or potential. Especially when the platforms' offer is not entirely homogenous, the scope for multi-homing becomes crucial for ascertaining whether the market leader occupies a sufficiently stable position or whether, instead, user behaviour vis-à-vis rivals indicate that the latter can challenge the leading platform's hold on the market.

3.3.Article 102 TFEU and exclusive dealing in traditional industries

So far this paper has discussed the dynamics of platform markets, the importance of the interdependence existing between the market segments affected and in particular the role of the usage and switching patterns that characterise the behaviour of customers of each platform. The previous section concentrated on the question of dominance in platform markets and analysed the factors that can affect its assessment. It is now time to consider the legality of exclusivity clauses and more generally, of arrangements aimed at discouraging platform users from interacting with platforms in competition with a dominant one. In general, the Court of Justice held in the Hoffmann LaRoche decision that "an undertaking which is in a dominant position on a market and ties its purchasers—even if it does so at their own request—by an obligation or promise on their part to obtain all of most of their own requirements from the" dominant firm will infringe Article 102 TFEU, regardless of whether this promise is without condition or assisted by a commitment to compensate the purchaser.[94] The Court emphasised the foreclosing effect that was associated to these clauses, which, in its view, were not "based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict the choice of his sources of supply", thereby restricting the ability of rivals to expand their share of the market and allowing the dominant supplier to consolidate its hold on it.[95]

Petit, among other commentators, suggested that the Court of Justice subjected exclusivity clauses to a "rule of per se illegality": it was suggested that because "an exclusivity obligation [could] be presumed to generate exclusive purchases" and as such could therefore be "enforced by the [dominant] suppliers, it could be presumed to have an anti-competitive impact on the market, by foreclosing rivals.[96] It is submitted on this point that this approach

[94] Case 85/76, Hoffmann LaRoche v Commission, [1979] ECR 461, para. 89.
[95] Id., para. 90.
[96] Petit, "Intel and the rule of reason in abuse of dominance cases", (2018) 43(5) ELRev 728, p. 743.

can be considered to be consistent with the concern for maintaining market openness and avoiding the marginalisation of "as efficient rivals" from markets where, due to the presence of a dominant firm, competition was already weakened.[97]

At least for a time, this approach appeared to apply to all arrangements enticing loyalty, either expressly or indirectly. For instance, in Michelin the General Court held that a rebate system designed to grant a financial advantage to a customer upon the condition that they should source their requirements from a dominant firm was contrary to Article 102 TFEU,[98] if it was not based on a "countervailing financial advantage" arising, from instance, from a cost reduction linked to purchasing a large quantity of product.[99] Although customers had no formal obligation to purchase most of their supplies from the dominant firm, the circumstance that they had been promised a rebate by the end of a certain period, subject to their acquiring a certain quantity of merchandise was found to infringe Article 102,[100] since it provided a powerful incentive to remain loyal to the dominant supplier, to the detriment of less powerful rivals, who were prevented from competing for the affected buyers.[101]

More recently, however, this position seems to have become more nuanced, especially when loyalty is sought through the offer of a financial advantage in exchange for the client's continued custom. In the Intel appeal the Grand Chamber of the Court of Justice held that Article 102 TFEU should not prevent an undertakings from becoming a leader on the relevant market on account of its performance or be interpreted in a way that "protects" the position of less efficient firms.[102] However, it took the view that a loyalty inducing arrangement (such as a rebate scheme) would have been incompatible with the competition rules if it had an "exclusionary effect on competitors considered to be as efficient as itself (…)".[103] On that basis the Court of Justice concluded that loyalty inducing rebates, when offered by a dominant undertaking should have been analysed in a light of a number of factors such as the size of the undertaking, the share of the supply affected by the arrangement, the "duration and (…) amount" of the rebates and the conditions governing them and the existence of a "strategy aiming to exclude" rivals that are as efficient as the dominant firm.[104]

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[97] See inter alia Temple Lang, "How can the problems of exclusionary abuses under Article 102 TFEU be resolved?", (2012) 37(2) ELRev 136, pp. 141-143.
[98] Case T-203/01, Michelin v Commission, ECLI: EU: T: 2003: 250, para. 56.
[99] Id., para. 58-59.
[100] Id., para. 56.
[101] Id., para. 57. See also case C322/81, Michelin v Commission, [[1983] ECR 3461, para. 54-55.
[102] Case C-413/14 P, Intel Corp v Commission, ECLI: EU: C: 2017: 632, para. 136.
[103] Id., para. 140.
[104] Id., para. 140.

Against this background, it is argued that the EU Court of Justice has moved from the unequivocal condemnation of exclusivity inducing arrangements—whether express or indirect, as in the case of discounts and rebate schemes—as incompatible with Article 102 TFEU without the need to carry out an in-depth investigation of its impact, to a position whereby exclusivity obligations, on the one hand, remain subject to the same 'per se' prohibition whereas implicit loyalty inducing practices (such as the promise of a discount that bore no relation to the cost savings associated with "buying in bulk", for instance) would be looked at in light of all the circumstances of the case and by taking into account, inter alia, their efficiency enhancing effects.[105]

Although commentators have suggested that it might be too early to see a "rule of reason approach" being affirmed in this area,[106] it could be suggested that with Intel the Court of Justice sought to refine the scope of Article 102 TFEU as more of an efficiency-focused prohibition, where the marginalisation of inefficient competitors, resulting from a dominant undertaking's behaviour should no longer be necessarily condemned.[107]

3.4. Article 102 TFEU, exclusivity arrangements and platform markets: how does the "nuanced approach" work?

The previous section summarised the approach adopted toward exclusivity arrangements involving dominant companies and suggested that the interpretation of Article 102 may have evolved from a per se prohibition of all loyalty-inducing practices that tied customers to a dominant undertaking to relatively more flexible standards. What does this mean, however, for those practices that seek to outlaw multi-homing, whether explicit or resulting from the impact of the indirect network effects affecting platform industries?

It is suggested that the 'per se' condemnation enshrined in, among others, the Hoffmann LaRoche judgment is going to apply to express exclusivity clauses, which, if stipulated by a dominant platform, will be incompatible with Article 102 TFEU. It is submitted that this outcome is consistent with the broader concern for allowing multi-homing in platform markets where a leader has already arisen and where any restriction on the ability to interact with several

[105] Petit, cit. (fn. 77), p. 744-745.
[106] See e.g. Colangelo and Maggiolino, "Intel and the rebirth of the economic approach in EU competition law", (2018) 49(6) IIC 685, pp. 697-698.
[107] Petit, cit. (fn. 97), pp. 740-741.

platforms would lead to the marginalisation of rivals, thus slowing down, if not altogether stopping, the emergence of a new challenger.[108]

As for other loyalty-inducing arrangements, such as, for instance APPAs, the nuanced approach elaborated in Intel is likely to be applicable. It is suggested, therefore, that price parity clauses should be examined in light of all circumstances of the case and the inquiry should focus on whether these arrangements are likely to lead to the exclusion from the market of an "as efficient" competitor.[109] It was observed earlier that a platform can rationally impose a prima facie justifiable parity obligation on merchants. [110] However, as, among others, the HRS decision showed, these clauses, especially if they prevent the merchant from offering its best prices not only through its own sales' channels but also, and perhaps more problematically, through competing platforms, can impair any competitive pressure that rivals could exert on the leading platforms.[111]

The EU Commission addressed the question of the legality of parity clauses in the Amazon/E-Books commitment decision. This case concerned the imposition on several e-book publishers of obligations to inform Amazon of the terms and conditions they offered to Amazon's rivals and to offer it conditions that were at least as good as those applied to competing platforms.[112] The Commission claimed that the imposition of similar obligations on e-book publishers could result in Amazon's rivals being prevented from competing on grounds of price, quality of services and innovation: since publishers could not offer more advantageous prices to rival platforms, the latter were discouraged from vying for their business by offering more efficient services and, in turn, cheaper usage fees.[113]

The Commission observed that Amazon enjoyed a dominant position on the market for e-books in German and English, which was found to be an autonomous market vis-à-vis that for the supply of books or audiobooks and which geographically covered the whole of the EEA.[114] The preliminary assessment of the market highlighted the existence of significant

[108] See e.g. Petit, cit., (fn.97), p. 745; see also Temple Lang, cit. (fn. 98), p. 144.
[109] Interl, cit. (fn. 103), para. 140.
[110] See inter alia Constantine, "OECD hearing on across platform parity agreements", Competition Committee, 28 October 2015, published in (2016) 15 Comp L J 33, pp. 35-36; see also Friederiszick and Glowicka, "Competition policy in modern retail markets", (2016) 4(1) J Antitrust Enforcement 42, especially pp. 57, 70-71; also Ezrachi, "The competitive effects of parity clauses on online commerce", (2015) 11(1-2) Eur. Comp Journal 488, pp. 491-492.
[111] See e.g. Petit, cit., (fn.97), p. 745; see also Temple Lang, cit. (fn. 98), p. 144.
[112] EU Commission, case AT.40153, see press release of 11 June 2015, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5166.
[113] Ibid.
[114] Id., para. 56 ff.

financial and technological barriers to entry or expansion that competitors had to overcome in order to challenge Amazon's position of leadership on the market.[115] Thus, the dominant platform had become an "unavoidable trading partner" for many e-book vendors and was "prepared to use that position in order to negotiate terms and conditions" to which its rivals could not aspire.[116]

In relation to the "business model parity" arrangement, it was found that this clause could hinder both the e-book suppliers' incentive to develop and offer their products in innovative ways and the ability of rival platforms to respond to these new practices and thereby to compete for the e-book suppliers' business on grounds of lower costs and innovative services.[117] Broadly similar conclusions were also reached for 'selection parity' clauses, namely arrangements with which Amazon bound suppliers to release e-books to it at a certain date if the same book was offered to other intermediaries at the same time and condition and in particular to notify Amazon if the –book was unlikely to "display well" on its e-reader.[118] It was found that such a clause had the potential of "forcing" e-publishers into adopting Amazon's own format, thereby obliging them to produce the same e-book in multiple formats if they wanted to release them on a number of platforms.[119] This, in turn, resulted in e-publishers being discouraged from interacting with a variety of retailers and thus weakened competition on the platform market.[120]

Finally, the preliminary assessment found that price parity clauses resulted in lesser competition between Amazon and other e-book retailers: in its view, because the publisher could not offer a book on a rival platform at a lower price than the one set for Amazon, there was very little incentive for a competing e-book retailer to offer lower commissions, simply because the latter were unlikely to be "internalised" into a lower price for the e-book vis-à-vis the price advertised on Amazon.[121]

In the course of the proceedings Amazon offered not to enforce any of its parity clauses that prevented publishers from dealing freely with rival intermediaries.[122] Following market

[115] Id., para. 65.
[116] Id., para. 67.
[117] Id., para. 75-76; see also para. 80, 85.
[118] Id., para. 82.
[119] Id., para. 87.
[120] Id., para. 89.
[121] Id., para. 122-123.
[122] See Commitments document, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4052_10.pdf, especially p. 4.

testing, the EU Commission approved these commitments[123] on the ground that they were both appropriate and proportionate to addressing the concerns for competition that it had identified.[124] The EU Competition Commissioner commented that the discontinuation of these clauses would have allowed publishers and retailers to continue innovating the content and format of the e-books they offered, thereby benefitting consumers and enhancing quality-based competition on both the publishing and the platform/retail market.[125]

Although the Amazon/E-Books decision was adopted under Article 9 of Council Regulation No 1/2003 and therefore contained no legally binding finding of an infringement, it suggests several important insights as to the Commission's approach to APPAs.[126] It is argued that the way in which the Commission appraised the arrangement confirms that these clauses are unlikely to be treated as 'per se' Article 102 infringements and are instead subject to a standard more akin to the EU Court of Justice's Intel decision.[127] It is submitted that the Commission deployed a counterfactual analysis, where Amazon's leadership on the e-book retail market, the scope and the duration of the parity obligations were central in measuring whether e-book publishers would have had a real incentive to seek out competing platforms (especially those offering services at a lower fee) had it not been for the parity commitment vis-à-vis Amazon.[128] Thus, the Commission could estimate to what extent rivals could have entered into or expand their position on the market, with as opposed to without the parity clauses.[129]

It is added that this more flexible approach to parity clauses also allowed the EU Commission to draw a distinction between different types of parity obligations, thereby ensuring that the integrity of Amazon's business model could be protected and the risks associated with free-riding could be limited.[130] While parity obligations that prevent a retailer from offering its best prices on all channels, namely on all the other rival platforms as well as directly, are regarded as being incompatible with Article 102 TFEU, the retailer can still be obliged to refrain from offering its best prices on their website or even face-to-face to its own

[123] EU Commission, case AT.40153, E-Book MFNs and related matters (Amazon), decision of 4 May 2017, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf.
[124] Id., para. 180-181.
[125] See Press Release no IP/17/1223 of 4 May 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223.
[126] Amazon, cit. (fn. 124), para. 87-98; see also, inter alia, Akman, cit. (fn. 34), p. 803-804.
[127] See Amazon, cit. (fn. 124), para. 119-123; cf. Intel, cit. (fn. 103), para. 138-140.
[128] Amazon decision, cit. (fn. 124), para. 119-123.
[129] Id., para. 125.
[130] See Akman, cit. (fn. 34), p. 801.

customers.[131] It has been suggested that "narrow" parity clauses whose scope is confined to "requiring parity between a platform and the retailer's own online channels" would likely be regarded as being "objectively justified" by the need to protect the value of the investment in a given brand against the risk of free riding.[132] However, it should be borne in mind that in any event the platform would have to show that these clauses are "indispensable" to meet their legitimate objective: it is submitted that having to demonstrate the likelihood that the "narrow" parity obligations do not distort competition among platform would still be a tall order for the intermediary seeking to rely on the objective justification defence.[133]

In light of the forgoing analysis, it can be concluded that price parity clauses, when they are concluded by a dominant platforms, can have an adverse impact on competition among platforms. As the Amazon/E-books commitment decision showed, these arrangements can discourage merchant multi-homing and lead to the marginalisation and exit from the market of less powerful rivals, even though their services may be less costly than those offered by the market leader. It should, however, be emphasised that the practices are not subjected to a per se rule of illegality, but must be examined in light of all the circumstances of each case. As was argued earlier, this more flexible standard of review allows platforms to continue stipulating "narrow" parity clauses on the ground that they do not compromise competition among platforms and at the same time confer a degree of protection to the goodwill, investment and integrity associated with the platform itself.

4. Dominant platforms and practices restricting multi-homing—some conclusions

The rise of platform markets is an incontestable feature of the digital economy, which brings significant gains in terms of choice and market penetration. However, due to the indirect network externalities characterising them, these markets tend to encourage the emergence of powerful intermediaries, with potentially negative consequences for competition between different platforms as well as among the suppliers of the goods or services traded on them. This paper discussed the economic and legal implications of the choice of single- versus multi-homing in platform markets and the impact that practices curtailing that choice can have on competition between intermediaries as well as merchants. It was illustrated that, especially in markets where platforms are still competing with each other, allowing users to remain free to

[131] Id., para. 180-181; see also, mutatis mutandis, HRS, cit. (fn. 62), para. 174.
[132] Id., p. 830.
[133] Id., p. 831.

interact with a variety of intermediaries is essential to permit new entry ensure competitive pressure on the incumbent platforms, so that when a leading platform emerges it cannot stifle the challenge posed by existing and new, more innovative entrants.

It was acknowledged that Article 101 TFEU may not be applicable to all platform usage agreements, for some may constitute genuine agency agreements. It was argued, however, that in all other cases the agreements should be carefully scrutinised since its impact is likely to go beyond the relationship between the merchant and the platform and affect competition between intermediaries and therefore have anti-competitive effects on the platform market, to the advantage of incumbent, powerful platforms. It is submitted that this position is consistent with the economic aspects of platform markets and in particular with the need to protect their openness so that the incentive to innovate in how intermediation services are provided is maintained.

In its latter part the paper examined the question of whether exclusivity and price parity agreement would be contrary to Article 102 TFEU if stipulated by a dominant platform. It was found that while express exclusivity clauses are likely to be subjected to a per se finding of illegality under Article 102 TFEU, the framework for assessment should instead the more complex one of, for instance, the Intel judgment when price parity clauses are concerned. It was acknowledged that certain parity clauses may be necessary to protect the platform's investment. However, it was argued that their scope and in particular how much they constrain the ability of merchants to seek out alternative intermediaries should be carefully scrutinised as they might impede competition between the leading platform and less established challengers. If instead merchants only commit to a restriction of their freedom to set prices on their own retail channels, the clause in question should remain outwith the scope of Article 102 TFEU as a practice that is objectively justified as a means of safeguarding the value of the platform's promotion efforts, even when the former is dominant.

It can be concluded that in the challenging world of e-commerce where network effects are typical and, as a result, positions of leadership are very likely to emerge, the ability of business users to interact with a variety of intermediation challenges should be strongly safeguarded so as to maintain market openness and protect and enhance the incentive of new, more efficient intermediaries to challenge leading ones, to the benefit, ultimately of consumer choice and continuing innovation.

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