Utrecht University

The essential facilities doctrine requirement of indispensability and access to vertically integrated gatekeeper online platforms for downstream competitors

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List of abbreviations

Commission	European Commission
ECJ	European Court of Justice
Enforcement Priorities	Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings
EU	European Union
GC	General Court
NCAs	National competition authorities
OECD	Organisation for Economic Co-operation and Development
TFEU	Treaty of the Functioning of the European Union

Introduction

The last decade online platforms have emerged as important drivers of the digital economy and have been playing an increasingly important role in the modern economy. Seven out of the ten biggest companies in the world operate digital platforms.[1] In the European Union more than a million businesses use online platforms to reach their customers and it is estimated that circa 60% of private and 30% of public consumption of goods and services related to the digital economy are transacted through online platforms.[2]

The growing importance of online platforms, in conjunction with their specific characteristics, has led some of these platforms to acquire significant market power. A few of them have even come to play a pivotal role in the digital economy, such as Google's search engine, Google's and Apple's app stores and Amazon's online marketplace. These platforms are often referred to as 'gatekeeper' online platforms.[3]

These gatekeeper online platforms have recently been the target of many competition law investigations by the European Commission and national competition authorities.[4] In these cases, these platforms are being investigated for alleged abusive 'leveraging' of their dominant positions on their core online platform markets to downstream markets on which they directly compete with downstream competitors. These 'vertically integrated' gatekeeper online platforms would therefore violate Article 102 of the Treaty of the Functioning of the European Union (hereinafter: TFEU), which prohibits abusive unilateral conduct of dominant undertakings.

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[1] World Economic Forum, 'Competition Policy in a Globalized, Digitalized Economy' (White Paper, December 2019), 5 <http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf> accessed 25 May 2020.

[2] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 54 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[3] Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019), 29-30, 92-93 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 60 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Orla Lynskey, 'Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 13-15 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020.

[4] See for example *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017]; Case T-612/17 *Google and Alphabet v Commission* [2017] OJ 2017/C 369/51; *Google Android* (Case AT.40099) European Commission Decision C(2018) 4761 final [2018], paras 7-14; Case T-604/18 *Google and Alphabet v Commission* [2018] OJ C445/26; European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Amazon' (Press Release, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 27 April 2020; Netherlands Authority for Consumers and Markets, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (Press Release, 11 April 2019) <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 24 May 2020; Friso Bostoen, 'Spotify lodges antitrust complaint against Apple: it's 'time to play fair' in the music streaming industry' (*CoRe Blog*, 24 April 2019) <https://coreblog.lexxion.eu/spotify-apple/> accessed 24 May 2020.

There are good reasons to believe that the conduct in a number of these cases should be categorised as a 'refusal to deal'. The refusal to deal in these cases more specifically consists of refusals by these vertically integrated gatekeeper online platforms to supply access to their platforms to their downstream competitors. However, as is established in the case law of the European Court of Justice, refusals to deal are only abusive in the exceptional circumstances that the strict requirements of the 'essential facilities doctrine' are met.[5] The most important of these requirements is the 'indispensability requirement', which requires that the refused input must be indispensable for downstream competitors to compete.[6] This is a particularly difficult requirement to meet.

The European Commission, knowing that it may not have been able to prove that access to these vertically integrated 'gatekeeper' online platforms is indispensable for their downstream competitors to compete, seems to be avoiding categorising the conduct in these cases as refusals to deal.[7] This is indicative of a broader sentiment that leveraging conduct by vertically integrated gatekeeper online platforms which amounts to a refusal to deal, should be deemed abusive even below the threshold of indispensability. The European Commission and national competition authorities are advocating for such a lower threshold as part of a more interventionist agenda towards the conduct of gatekeeper online platforms, which would be based on increased ex ante regulation.[8] Moreover, on the basis of recent cases, courts,

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[5] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, paras 51-57; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41; Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, para 563.

[6] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 717.

[7] Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 9; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[8] European Commission, 'New competition tool' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 4 June 2020; European Commission, 'Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 4 June 2020; Kay Jebelli, 'The Paradox of EU Ex-Ante Market Regulation for Gatekeepers' (*ProjectDisco*, 19 May 2020) <http://www.project-disco.org/european-union/051920-the-paradox-of-eu-ex-ante-market-regulation-for-gatekeepers/> accessed 1 June 2020; Damien Geradin, 'European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"' (*The Platform Law Blog*, 11 May 2020) <https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/> accessed 1 June 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 54 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; French Competition Authority, 'Contribution to the debate on competition policy and digital challenges' (Report, 2020), 7 <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 5 May 2020; German Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy' (Report by the Commission Competition Law 4.0, 2019) <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed 5 May 2020; Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Nicolai van Gorp and Paul de Bijl,

commentators and the European Commission have argued that the requirement of indispensability should not be part of the legal test with regard to three specific types of refusals to deal: when the refusal to deal constitutes a '*constructive* refusal to deal', when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature and when the refusal to deal constitutes a '*termination* of supply'.[9]

Abandoning the indispensability requirement, whether entirely or in any of these specific scenarios – and thereby lowering the threshold for finding a refusal to deal abusive – would be a significant shift in policy. Indeed, a lower threshold for finding refusals by vertically integrated gatekeeper online platforms to supply access to their downstream competitors abusive could have considerable implications on the incentives of undertakings to invest and innovate, while innovation plays an especially important role in online platform markets.[10] It is therefore questionable whether abandoning the requirement of indispensability in these cases is desirable. Therefore, the question that arises and which is also the central question in this thesis, is the following:

> 'Should the essential facilities doctrine requirement of indispensability under Article 102 TFEU be applied in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors?'

This question is *normative* in nature.[11] This means that it will be assessed whether it is *desirable* to apply the indispensability requirement in these specific cases. To arrive at such a conclusion, a *normative framework* is applied. The research question will be answered by assessing whether applying the requirement of indispensability leads to outcomes which are beneficial to *consumer welfare*, which is often recognised as the main goal of European competition law.

'Digital Gatekeepers. Assessing Exclusionary Conduct' (Report for the Dutch Ministry of Economic Affairs and Climate, 2019) <https://www.government.nl/binaries/government/documents/reports/2019/10/07/digital-gatekeepers/Digital+Gatekeepers.pdf> accessed 1 June 2020. See also Netherlands Authority for Consumers and Markets, 'Future-proofing of competition policy in regard to online platforms' (Letter to the Speaker of the House of Representatives of the States General, May 2019) <https://www.government.nl/binaries/government/documents/letters/2019/05/23/future-proofing-of-competition-policy-in-regard-to-online-platforms/Brief+ENG.pdf> accessed 6 May 2020.

[9] Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia EE v GlaxoSmithKline* ECLI:EU:C:2008:504, [2008] ECR I-7139; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527; Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929; *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017]; Case T-612/17 *Google and Alphabet v Commission* [2017] OJ 2017/C 369/51; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532; Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 218; Kevin Coates, 'The Estoppel Abuse' (*21st Century Competition Blog*, 28 October 2013) <http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/> accessed 13 May 2020.

[10] Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309; Wolfgang Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) MAGKS Joint Discussion Paper Series in Economics, No. 42-2017, 2, 4, 19 <https://www.econstor.eu/bitstream/10419/174338/1/42-2017_kerber.pdf> accessed 1 May 2020. See also Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020.

[11] It must be noted that in order to answer the research question, different sections of this thesis are different in nature. Therefore, in the overview of the structure of this thesis below, it will be explained at each chapter what the nature is of the sub-questions underlying each chapter.

However, as consumer welfare is a broad and ambiguous concept, the competition parameter of *innovation* will be used as a *proxy*, because innovation is a key contributor to consumer welfare in online platform markets. Thus, more specifically, the impact of applying the requirement of indispensability on the *overall level of innovation* is assessed.

In this context, the three aforementioned purported exceptions to the applicability of the indispensability requirement – when the refusal to deal constitutes a '*constructive* refusal to deal', when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature and when the refusal to deal constitutes a '*termination* of supply' – will also be evaluated. These purported exceptions are particularly important in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors, as such denials are likely to fall under one (or more) of these exceptions.

In terms of methodology, this research is library-based. Case law of the European Court of Justice (hereinafter: ECJ) and General Court (hereinafter: GC) will be consulted, as well as European Commission (hereinafter: Commission) decisions and guidance documents. Furthermore, legal literature will be consulted. The focus will be on European legal literature, as this thesis focusses on European competition law. Moreover, where necessary, economic and business literature is consulted. In addition, reports commissioned by the Commission, the French, German, Dutch and United Kingdom national competition authorities (hereinafter: NCAs) and relevant non-gouvernmental organisations such as the OECD on the topic of online platform regulation will be used. Finally, competition law blogs, newspaper articles and press releases by competition authorities are used.

The structure of this thesis is as follows: in the first chapter, the role of the essential facilities doctrine requirement of indispensability under Article 102 TFEU is explained. This chapter is therefore *descriptive* in nature.

Then, in the second chapter, it is analysed whether access to vertically integrated 'gatekeeper' online platforms is indispensable for downstream competitors of these platforms to compete. As will be explained, this is a question that arises from several recent investigations by the Commission and NCAs. Vertically integrated 'gatekeeper' online platforms are then conceptualised, after which it is assessed whether access to these platforms is indispensable for their downstream competitors to compete. This chapter is therefore respectively *descriptive*, *conceptual* and *evaluative* in nature.

In the third chapter, the position taken in several reports issued by the Commission and NCAs that the indispensability requirement should be abandoned in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors is discussed, as is the critique on this position. The chapter will then aim to contribute to this discussion by assessing the impact of applying the indispensability requirement on the *overall level of innovation*, which is used as a *proxy* for the impact on *consumer welfare*. As such, it will be argued whether it is *desirable* to abandon or hold on to the requirement of indispensability. This chapter is therefore respectively *descriptive* and *normative* in nature.

Finally, in the fourth chapter, it will be assessed whether the indispensability requirement should also be applied in the three aforementioned specific refusal to deal scenarios: when the

refusal to deal constitutes a '*constructive* refusal to deal', when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature and when the refusal to deal constitutes a '*termination* of supply'. In making this assessment, more general legal arguments will be raised. Importantly, however, this chapter will also build on the findings from the third chapter, with regard to vertically integrated gatekeeper online platforms *specifically*. This chapter is therefore simultaneously *descriptive*, *evaluative* and *normative* in nature.[12]

In the fifth and final chapter, a general conclusion will be drawn, in which the research question will be answered.

[12] The purported exceptions are *described*, the arguments raised in defence of these exceptions are *evaluated* and a *normative* conclusion is drawn on the basis of the evaluation and the application of the findings in the third chapter.

Chapter 1 – The role of the essential facilities doctrine requirement of indispensability under Article 102 TFEU

The goal of this chapter is to explain the role of the essential facilities doctrine requirement of indispensability under Article 102 TFEU. This is relevant, because the requirement of indispensability plays a key role in the assessment of whether a denial of access by a vertically integrated gatekeeper online platform to its platform to its downstream competitors is abusive or not. This will be discussed in the second chapter.

The structure of this chapter is as follows: in paragraph 1.1 the essential facilities doctrine requirement of indispensability is briefly placed in the wider context of the four requirements of Article 102 TFEU. Then, in paragraph 1.2, the focus will be on the 'refusal to deal' theory of abuse and the 'essential facilities doctrine'. The concept of indispensability plays a key role under the latter. It will be explained what a refusal to deal is and that such a refusal can, under exceptional circumstances, be abusive when the requirements of the essential facilities doctrine are met. These requirements will be discussed individually, where the main focus will be on the indispensability requirement. Finally, in paragraph 1.3, different types of refusals to deal will briefly be discussed. In paragraph 1.4, a sub-conclusion will be drawn on the chapter.

1.1. The essential facilities doctrine requirement of indispensability in the context of Article 102 TFEU

Article 102 TFEU prohibits abusive unilateral conduct of dominant undertakings.[13] Four requirements must be met in order to find a violation of Article 102 TFEU. First, the entity at hand must be an 'undertaking'. Second, this undertaking must be in a dominant position within a substantial part of the internal market. Third, the conduct of the dominant undertaking must amount to an abuse. Fourth, and finally, the abusive conduct must affect trade between Member States.

It is under the third requirement – proving that the conduct amounts to an abuse – that the essential facilities doctrine and its requirement of indispensability can play a role. The concept of abuse refers to conduct which does not constitute competition 'on the merits'.[14] The conduct must be found abusive, because the mere possession of a dominant position without the presence of an abuse is not unlawful.[15] Any assessment of the abusiveness of the conduct thus presupposes that it has been proven that the entity at hand is a dominant undertaking.[16]

[13] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 180.
[14] Case C-280/08 P *Deutsche Telekom AG v Commission* ECLI:EU:C:2010:603, [2008] ECR-I 9555, para 177; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 204.
[15] However, a dominant position does bring with it a special responsibility for the dominant undertaking not to let its conduct distort genuine, undistorted competition. See Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* ECLI:EU:C:1983:313, [1983] ECR 3461, para 57.
[16] Every entity engaged in an economic activity is an undertaking. See Case C-41/90 *Höfner and Elser v Macrotron GmbH* ECLI:EU:C:1991:161, [1991] ECR I-1979, para 21. An undertaking is dominant when it is in a position of economic strength. A position of economic strength enables an undertaking 'to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent

Indispensability will be relevant in proving the abusiveness of the conduct if the conduct at hand constitutes a 'refusal to deal' by a dominant undertaking.[17] If the refusal to deal is found to be abusive, it must then also be proven that the abuse affects trade between Member States in order to find a violation of Article 102 TFEU.[18]

1.2. Refusal to deal, the essential facilities doctrine and indispensability

The essential facilities doctrine and its requirement of indispensability are thus relevant when the conduct of the dominant undertaking constitutes a 'refusal to deal' (or: 'refusal to supply'). To understand why the indispensability requirement is key in these cases, it is first necessary to elaborate upon refusals to deal.

1.2.1. Refusal to deal

An undertaking 'refuses to deal' when it refuses to supply an input to another undertaking.[19] An input can be a good or a service, but also access to a network.[20] In principle, refusals to deal are *not* abusive, because all undertakings, whether dominant or not, are free to decide with whom they want to trade and how to dispose of their property.[21] However, a refusal to deal *can be* abusive under certain circumstances.

This will be the case when an undertaking which is dominant on an upstream market and which is also active on a downstream market, refuses to supply an important upstream input to its downstream competitors.[22] Such an undertaking which is active on both the upstream and

independently of its competitors, customers and ultimately of its consumers'. See Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* ECLI:EU:C:1978:22, [1978] ECR 207, para 65; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para 38. To assess whether dominance exists, the relevant product, geographical and temporal market must be defined and dominance on that market must be established on the basis of a combination of factors, such as the market position of the dominant undertaking and its competitors, the potential impact of expansion by actual competitors or entry by potential competitors and countervailing buyer power. See European Commission, 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C372/5; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, paras 10-18.

[17] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 717-18.

[18] This means that the abuse must have 'an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'. See Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ECLI:EU:C:1966:41, [1966] ECR 299, 341; European Commission, 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' [2004] OJ C101/81.

[19] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 713.

[20] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 78.

[21] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, arts 16 and 17; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 56; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 514-15.

[22] 'Upstream' and 'downstream' refers to the vertical relation between these markets: the upstream market provides an input that is used by undertakings on the downstream market to provide their own product or service.

downstream market is 'vertically integrated'.[23] If this refusal to deal by the vertically integrated undertaking which is dominant on the upstream market results in the inability of its downstream competitors to enter or remain on the market, effective competition is prevented. In these circumstances, a refusal to deal could be abusive.[24] As such, a vertically integrated undertaking could refuse to deal in order to strengthen its position on the downstream market.[25] This is a form of 'leveraging', which refers to an undertaking using its market power in one market to favour its own business in a separate, closely related market such as a downstream market.[26]

In practice, almost all abusive refusal to deal cases concern a vertically integrated undertaking which is dominant on the upstream market which refuses to deal with a downstream competitor.[27] This is also why, in the next chapters, this thesis specifically focusses on *vertically integrated* 'gatekeeper' online platforms which deny access to their platform to their *downstream* competitors.

1.2.2. Imposing a duty to deal: considerations to be taken into account

When a vertically integrated undertaking that is dominant on the upstream market refuses to supply an input to its downstream competitors, a competition authority could impose an obligation to deal on the dominant undertaking so as to protect effective competition on that downstream market. The vertically integrated undertaking would then be forced to actively promote competition against its own downstream business.[28] As such, deciding whether to interfere must be done carefully, not only because the economic freedom of the undertaking would be infringed, but also because the existence of such an obligation may not actually be beneficial to competition.[29]

In the *short-term*, it may be pro-competitive to enable downstream competitors to enter or remain on the market.[30] Presence of these competitors could, for example, lead to lower prices and more consumer choice.[31] However, the imposition of the obligation to deal may also

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[23] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 715.
[24] Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[25] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 209.
[26] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 250.
[27] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 715.
[28] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 34.
[29] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 713; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.
[30] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 57.
[31] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.

undermine the incentives of competing undertakings to invest and innovate, as they could essentially 'free-ride' on the investments made by the dominant undertaking.[32]

Furthermore, if obligations to deal would be imposed unreservedly by competition authorities, dominant undertakings (and undertakings that expect to become dominant) could be disincentivised to develop new products or infrastructure in the first place, knowing that they might have a duty to supply the input later.[33] In the *long run*, an obligation to deal could therefore actually have anti-competitive effects.[34] This is the 'trade-off' that must be made when deciding whether to intervene in refusal to deal cases.[35]

Another aspect to the imposition of an obligation to deal, which has particularly been highlighted in the United States antitrust debate on imposing obligations to deal, is that such an obligation will often require competition authorities to impose 'proactive' remedies.[36] To ensure access is given, competition authorities would, for example, have to set the prices and quantities to be supplied, or draft the terms and conditions which are to be applied. Accordingly, the competition authority would have to implement these remedies and actively monitor that the remedies are complied with.[37] Competition authorities are not well suited for this.[38] Such a burden could therefore lead to reluctance of competition authorities to take on refusal to deal cases.[39]

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[32] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 75; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 713.

[33] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 57; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 75.

[34] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 57.

[35] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 180. See also Carl S Mair, 'Taking Technological Infrastructure Seriously' (DPhil thesis, University of Leiden 2017), 86-87.

[36] Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 Antitrust Law Journal 841, 853. This view has been explicitly accepted in the United States case law on the essential facilities doctrine. See Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020. See also Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 539.

[37] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 539.

[38] Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 Antitrust Law Journal 841, 853.

[39] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020. For the reasons outlined in this sub-paragraph, the scope of liability under the United States antitrust law variant of the essential facilities doctrine is very limited, even more so than under European competition law, the scope of which is discussed in the next sub-paragraph. See Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 161-64; Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection

1.2.3. The essential facilities doctrine

In light of these reasons, the ECJ explicitly held that a refusal to deal constitutes an abuse of dominance only in the 'exceptional circumstances' that the requirements of the 'essential facilities doctrine' are met.[40] The essential facilities doctrine is the test developed in the case law for establishing the abusiveness of a refusal to deal.[41] (At least) three requirements must be met. First, the input which is refused by the vertically integrated undertaking which is dominant on the upstream market must be 'indispensable' for its downstream competitors to compete on the downstream market.[42] Second, refusing to supply the input must eliminate all effective competition on the downstream market.[43] Third, the refusal cannot be objectively justified.[44] Furthermore, in case the input consists of intangible property protected by intellectual property rights, a fourth requirement applies. In these cases, the refusal must also prevent the emergence of a new product for which there is consumer demand.[45] In the context of this thesis, this requirement is not relevant. It will therefore not be discussed any further.

The three relevant requirements will now be elaborated upon individually. As the focus of this thesis is on the requirement of indispensability, the other two requirements will only be discussed briefly.

1.2.3.1 Indispensability

Indispensability of the input is thus one of the requirements for establishing whether a refusal to deal is abusive under the essential facilities doctrine.[46] Requiring indispensability of the input is intelligible, as downstream competitors will not be able to compete with the vertically

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Research Program, Issue Brief 29-03-28, 4-5 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020.

[40] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 50; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 26.

[41] Although the ECJ does not refer to this test as the 'essential facilities doctrine', the test is generally referred to as such. See for example Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 33.

[42] Case 311/84 *CBEM v CLT & IPB* ECLI:EU:C:1985:394, [1985] ECR 1125, para 26; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 53; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41.

[43] Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223, para 25; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 56; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41; Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, para 563.

[44] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, paras 51-57; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41.

[45] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 54; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* ECLI:EU:C:2004:257, [2004] ECR-I 5039, paras 38, 48-49.

[46] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 719.

integrated dominant undertaking when access to an indispensable input is denied. If the input is *not* indispensable, they can simply switch to using another input. Conversely, by leveraging its dominant position in the upstream market for the indispensable input, a dominant undertaking can completely foreclose the downstream market.[47] The effects of such a complete foreclosure of the downstream market are sufficient to justify the imposition of an obligation to deal.[48] The indispensability requirement is thus meant to indicate when a refusal to deal results in an anti-competitive foreclosure of the downstream market.[49]

The next question is then, logically: *when* is an input indispensable? In *Bronner*, the ECJ held that indispensability means that there is 'no actual or potential substitute' for the input.[50] First, to establish that there are no *actual* substitutes, it must be demonstrated that there are no economically viable readily available substitutes. This also includes substitutes which are less advantageous for downstream competitors.[51] Second, it must be established that there are no *potential* substitutes. No potential substitutes will exist when it is technically, legally or economically impossible or unreasonably difficult for a hypothetical competitor as efficient as the refusing dominant undertaking to duplicate the input, alone or in cooperation with others, on a similar scale as the dominant undertaking that is refusing access.[52] This means that the mere reason that a downstream competitor is a small business and does not have the financial resources to duplicate the input, is not sufficient to establish indispensability.[53] Thus, when there are no economically viable actual or potential substitutes, the input will be deemed indispensable.[54]

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[47] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[48] ibid.
[49] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 717.
[50] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 52.
[51] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 43; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* ECLI:EU:C:2004:257, [2004] ECR-I 5039, Opinion of AG Tizzano, para 80; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 216.
[52] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, paras 45-46; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* ECLI:EU:C:2004:257, [2004] ECR-I 5039, Opinion of AG Tizzano, para 80; Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 314; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 7-8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[53] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 45.
[54] ibid, para 46.

The indispensability requirement is a particularly high threshold to meet in practice.[55] As such, it significantly limits the applicability of Article 102 TFEU in refusal to deal cases.[56] Indispensability is therefore the key requirement for establishing the abusiveness of a refusal to deal.

1.2.3.2 Elimination of all effective competition

If the input is deemed to be indispensable, it must then also be found that the refusal to supply the indispensable input eliminates *all effective competition* on the downstream market. Until the *Microsoft* case, *all* competition would have to be eliminated for this requirement to be met.[57] In *Microsoft*, however, the GC held that it was not required to demonstrate that *all* competition on the market would be eliminated as a result of the refusal to deal. Rather, it would suffice to demonstrate 'that the refusal to supply is liable, or likely, to eliminate all *effective* competition on the market'.[58] The Court added that 'the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition'.[59]

1.2.3.3 No objective justification

Third and lastly, if the input is indispensable and the refusal to deal eliminates all effective competition, the conduct will be deemed abusive, unless the dominant undertaking can prove that there is an objective justification for the refusal to deal.[60] The dominant undertaking must prove that the refusal to deal was objectively necessary to pursue a legitimate interest other than its own commercial advantage, and that the refusal to deal was proportional.[61] If no objective justification is proven, the refusal to deal will be found abusive.

1.3. Different forms of refusals to deal

Finally, it is important to note that different types of refusals to deal are distinguished. One distinction that is made is that between an *outright* refusal to deal and a *constructive* refusal to deal. An *outright* refusal to deal means that the dominant undertaking refuses to deal with a customer *entirely*. However, a dominant undertaking can also (propose to) deal under

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[55] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 532.
[56] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 717.
[57] Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223, para 25; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41.
[58] Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, para 563 (emphasis added).
[59] ibid.
[60] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41.
[61] Case 311/84 *CBEM v CLT & IPB* ECLI:EU:C:1985:394, [1985] ECR 1125, para 27; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 217, 724.

unreasonable terms and conditions or needlessly delay dealing.[62] This is called a *constructive* refusal to deal.[63]

Furthermore, a distinction is made between *de novo* refusals to deal and *terminations* of supply. A *de novo* refusal to deal means that an undertaking refuses to deal with a customer it has *not* previously dealt with. A *termination* of supply means that an undertaking refuses to deal with a customer is *has* previously dealt with.[64]

These distinctions are relevant to make, as it is argued that it is not necessary to establish the indispensability of the input if the refusal to deal concerns a *constructive* refusal to deal or a *termination* of supply. In the fourth chapter it will be discussed whether these purported exceptions to the applicability of the indispensability requirement should be followed, specifically in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors.

1.4. Sub-conclusion

The goal of this chapter was to explain the role of the essential facilities doctrine requirement of 'indispensability' under Article 102 TFEU. As part of the essential facilities doctrine, the indispensability requirement is meant to indicate when a refusal of a vertically integrated undertaking that is dominant on an upstream market to deal with its downstream competitor(s), results in anti-competitive foreclosure of that downstream market.

An input will be deemed indispensable when there are no *actual* or *potential* substitutes for it. This is a particularly high threshold to meet in practice. The indispensability requirement thus significantly limits the scope of applicability of Article 102 TFEU and is therefore the key requirement for establishing the abusiveness of a refusal to deal.

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[62] Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* ECLI:EU:T:2009:317, [2009] ECR II-3155; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 79; David Bailey and Laura E John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, OUP 2018), para 10.151.

[63] ibid.

[64] David Bailey and Laura E John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, OUP 2018), para 10.152.

Chapter 2 – Indispensability and access to vertically integrated ‘gatekeeper’ online platforms for downstream competitors

The goal of this chapter is to analyse whether access to vertically integrated ‘gatekeeper’ online platforms is indispensable for downstream competitors of these platforms to compete.

This is relevant because a number of online platforms, such as Google’s search engine and Amazon’s online marketplace, have recently been or are currently being investigated by the Commission and NCAs for alleged abusive leveraging conduct. As will be discussed, a number of these cases arguably concern refusals to supply access to the platform to downstream competitors, even though the Commission has, problematically so, not addressed these cases as refusal to deal cases. As was established in the previous chapter, the indispensability requirement plays a key role in finding a refusal to deal abusive. With the platforms under investigation typically being referred to as (vertically integrated) ‘gatekeeper’ online platforms, these cases thus raise the question: is access to such vertically integrated ‘gatekeeper’ online platforms indispensable for their downstream competitors to compete.

The structure of this chapter is as follows: first, in paragraph 2.1, four recent cases in which dominant online platforms have been or are being investigated for alleged abusive leveraging conduct will be discussed. It will be argued why the conduct of the platforms in these cases amounts to a refusal to deal. It will also be explained in more detail why it is problematic that the Commission has not addressed these cases as such and why these cases raise the question whether access to vertically integrated ‘gatekeeper’ online platforms is indispensable for downstream competitors of these platforms to compete.

Then, in paragraph 2.2, in order to answer this question, gatekeeper’ online platforms will be conceptualised. It will be explained how four characteristics of online platforms can, combined, lead to significant market power for some online platforms, some of which then become ‘gatekeeper’ online platforms. The special position these platforms possess will be explained.

Having analysed what the special position of a ‘gatekeeper’ online platform entails, the question whether access to vertically integrated ‘gatekeeper’ online platforms is indispensable for their downstream competitors to compete can then be answered. This is done in paragraph 2.3.

Finally, a sub-conclusion will be drawn on the chapter in paragraph 2.4.

2.1. Recent investigations and cases concerning leveraging by dominant online platforms: refusals to deal in disguise

As was already touched upon in the first chapter, a refusal to deal can be a way for a vertically integrated undertaking which is dominant on an upstream market to leverage its market power to a downstream market. While such leveraging *can* be anti-competitive, this is not necessarily the case, as leveraging can lead to (further) vertical integration and significant efficiencies can

be derived from vertical integration.[65] These efficiencies can consist of elimination of double marginalisation, reduction of transaction costs and benefits to competition due to innovation and the improvement of products and services.[66] Nevertheless, there appears to be an increasing believe that leveraging in online platform markets is by its nature more likely to be anti-competitive.[67]

Instructive in this sense is the fact that leveraging conduct by dominant online platforms has been at the heart of several recent investigations by the Commission and NCAs.[68] These cases mostly concern vertically integrated online platforms that play a *dual role*: these are platforms that are dominant on the upstream platform market and which are also active on a downstream market, meaning that they offer products and services on their own platform in direct competition with other, third-party downstream competitors.[69] In a number of cases, the conduct arguably amounts to a refusal to supply access to the platform to downstream competitors, even if the Commission has not addressed these cases as such.

In the next sub-paragraphs (2.3.1-2.3.5), it will be argued why the conduct in these cases arguably amounts to refusals to deal, why it is problematic that the Commission has not addressed these cases as such and why the follow-on question to these cases is whether access to vertically integrated 'gatekeeper' online platforms is indispensable for downstream competitors to compete.

2.1.1. *Google Shopping*

One of the recent cases which concerned leveraging by an online platform is the *Google Shopping* case, which is currently under appeal.[70] The Commission found that Google abused its dominant position in the general search services market by more favourably positioning and displaying its own comparison-shopping service compared to competing comparison-shopping

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[65] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 546.
[66] European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2008] OJ C265/6, para 13; European Commission, 'Guidelines on Vertical Restraints' [2010] OJ C130/1, para 98; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 454; Dirk Auer and others, 'Why sound law and economics should guide competition policy in the digital economy' (Contribution of ICLE to the European Commission's inquiry on 'Shaping Competition Policy in the Era of Digitisation', 2018), 3-4, 7 <https://laweconcenter.org/wp-content/uploads/2018/10/ICLE-EU-Comments.pdf> accessed 24 May 2020.
[67] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 454. See also Pietro Crocioni, 'Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework' (2008) 4(2) Journal of Competition Law & Economics 449, 455-473.
[68] World Economic Forum, 'Competition Policy in a Globalized, Digitalized Economy' (White Paper, December 2019), 11 <http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf > accessed 25 May 2020.
[69] Examples of this 'dual role' are plentiful: Amazon offers products on its own online marketplace, Google offers comparison-shopping services on its own search engine and Apple provides its own music apps in its own app store.
[70] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017]; Case T-612/17 *Google and Alphabet v Commission* [2017] OJ 2017/C 369/51.

services.[71] The Commission found this conduct to be abusive, because it constituted ‘a practice falling outside the scope of competition on the merits’.[72] This conclusion was arrived at on the basis of a two-pronged test: i) the conduct diverted traffic from Google's general search results pages to competing comparison-shopping services and increased traffic to Google's own comparison-shopping service, and ii) the conduct was ‘capable of having, or likely to have, anti-competitive effects’.[73]

Google thus used its dominant position on the market for general search engines to give a competitive advantage to its own comparison-shopping service over competing comparison-shopping services. This form of leveraging has been labelled as ‘self-preferencing’.[74] The Commission based the abusiveness of the conduct on the fact that it constitutes ‘leveraging’, which ‘falls outside the scope of competition on the merits’.[75] It argues that Article 102 TFEU prohibits ‘the conduct of an undertaking with a dominant position in a given market that tends to extend that position to a neighbouring but separate market by distorting competition’.[76]

However, as was discussed in paragraph 2.1, leveraging is not abusive *per se*. A *per se* prohibition of self-preferencing would undermine the benefits for consumers and efficiencies that can follow from vertical integration.[77] There is thus no clear underlying theory of harm.[78] Intervention by a competition authority is, however, only justified when there *is* a clear theory of harm on which the intervention is based.[79] The fact that the Commission found that self-preferencing is an abuse is therefore problematic.

With no clear theory of harm being formulated, discussion has arisen in the literature about which existing theory of harm might be applicable to this ‘self-preferencing’ conduct. A vast

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[71] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 2.
[72] ibid, para 341.
[73] ibid.
[74] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the digital era’ (Report for the European Commission, 2019), 7 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Damien Geradin, ‘What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms’ Market Power?’ (2018) TILEC Discussion Paper No. 2018-041, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967> accessed 20 April 2020.
[75] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 649; Inge Graef, ‘Rethinking the Essential Facilities Doctrine for the EU Digital Economy’ (2019) TILEC Discussion Paper No. 2019-028, 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.
[76] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 334; Inge Graef, ‘Rethinking the Essential Facilities Doctrine for the EU Digital Economy’ (2019) TILEC Discussion Paper No. 2019-028, 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.
[77] Peter Alexiadis and Alexandre de Streel, ‘Designing an EU Intervention Standard for Digital Platforms’ (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020.
[78] Damien Geradin, ‘What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms’ Market Power?’ (2018) TILEC Discussion Paper No. 2018-041, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967> accessed 20 April 2020.
[79] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 54; Hans Zenger and Mike Walker, ‘Theories of Harm in European Competition Law: A Progress Report’ in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law* (Bruylant, 2012); ibid.

number of commentators categorise the conduct as a refusal to deal, the most important reason being that the imposed remedy required Google to show product results or ads of competing comparison-shopping services in the same manner as those of its own comparison-shopping service.[80] Therefore, the Commission essentially argues that Google has a duty to supply access to its search engine on equal footing to competitors of Google's affiliated comparison-shopping business.[81] Such an obligation to deal, requiring Google to assist its competitors, is the same remedy that would be imposed if Google's search engine would be deemed an 'essential facility'.[82]

Consequently, categorising the conduct as a refusal to deal means that the refusal is only abusive when the requirements of the essential facilities doctrine – indispensability of the input, elimination of all effective competition and the absence of an objective justification – are met. Google itself argued that the conduct amounts to a refusal to deal and that access to the general search results pages is not indispensable for competing comparison-shopping services to compete.[83] The Commission dismissed these arguments and found the conduct to be abusive

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[80] See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 541; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020; Thomas Graf and Henry Mostyn, 'European Union – Access to Online Platforms and Competition Law' in Claire Jeffs, *E-Commerce Competition Enforcement Guide* (Global Competition Review 2019) <https://globalcompetitionreview.com/insight/e-commerce-competition-enforcement-guide/1177728/european-union-%E2%80%93-access-to-online-platforms-and-competition-law#footnote-016> accessed 29 April 2020; Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309; Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 6; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020; Martin Herz, 'Google Search and the Law on Dominance in the EU: An Assessment of the Compatibility of Current Methodology with Multi-Sided Platforms in Online Search' (2014) SSRN, 52-53 <https://www.rug.nl/research/portal/files/28798358/SSRN_id2497932.pdf> accessed 28 April 2020. See for a United States perspective Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' (2013) 11 Northwestern Journal of Technology and Intellectual Property 275, 292; 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 The George Washington Law Review 721, 758.
See differently Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2012) TILEC Discussion Paper No. 2012-036, 17-21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169343> accessed 19 May 2020; Eduardo Aguilera Valdivia, 'The Scope of the 'Special Responsibility' upon Vertically Integrated Dominant Firms After the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Related Business?' (2018) 41(1) World Competition Law and Economics Review 43.

[81] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020; Thomas Graf and Henry Mostyn, 'European Union – Access to Online Platforms and Competition Law' in Claire Jeffs, *E-Commerce Competition Enforcement Guide* (Global Competition Review 2019) <https://globalcompetitionreview.com/insight/e-commerce-competition-enforcement-guide/1177728/european-union-%E2%80%93-access-to-online-platforms-and-competition-law#footnote-016> accessed 29 April 2020.

[82] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[83] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 645; Case T-612/17 *Google and Alphabet v Commission* (Report for the Hearing), paras 295, 330-337

on the basis of the aforementioned two-pronged test, thereby disregarding the strict requirements of the essential facilities doctrine.[84]

As some authors note, the Commission might be purposefully circumventing the refusal to deal theory of abuse, because it is aware of the difficulty of proving that access is indispensable for downstream competitors to compete.[85] This is undesirable from the perspective of internal consistency of competition law.[86] Thus, the conduct *should* be categorised as a refusal to deal. With indispensability being the key requirement in finding a refusal to deal abusive, the main question is then: is access to Google's search engine indispensable for competing comparison-shopping services?

2.1.2. *Google Android*

The same question arguably arises in *Google Android*. In *Google Android*, the Commission concluded that Google had abusively leveraged its dominant position in the worldwide market for Android app stores and all EU national markets for general search services.[87] This case is currently also under appeal.[88]

Three types of contractual restrictions were found to be abusive, of which only the first is relevant for the purpose of this thesis. Therefore, only this restriction is discussed.[89] The restriction consisted of making the licensing of Google's Android app store (Google Play Store) to Android device manufacturers conditional on these manufacturers pre-installing Google's search app (Google Search) and browser app (Google Chrome) on their devices.[90] This conduct is categorised by the Commission as tying.[91] However, it has been argued that in fact, this conduct amounts to a refusal to deal rather than tying.[92]

<https://leconcurrentialiste.com/wp-content/uploads/2020/02/report-for-the-hearing-google-tribunal.pdf> accessed 18 May 2020.

[84] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], paras 341, 651.

[85] Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 9; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[86] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[87] *Google Android* (Case AT.40099) European Commission Decision C(2018) 4761 final [2018], paras 7-14.

[88] Case T-604/18 *Google and Alphabet v Commission* [2018] OJ C445/26.

[89] The other two types of conduct found to be abusive were i) making 'share revenue' payments to manufacturers and mobile network operators conditional on the exclusive pre-installation of Google Search, and ii) the licensing of Google Play Store on the condition that device manufacturers agreed not to sell devices which run alternative versions of Android not approved by Google. See *Google Android* (Case AT.40099) European Commission Decision C(2018) 4761 final [2018], para 12-13; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[90] *Google Android* (Case AT.40099) European Commission Decision C(2018) 4761 final [2018], para 11.

[91] ibid.

[92] Pinar Akman, 'A Preliminary Assessment of the European Commission's Google Android Decision' (2018) Winter 1(3) CPI Antitrust Chronicle 1, 6-7; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU

In tying cases, the harm follows from the fact that buyers are coerced to purchase the tied product once they decide to buy the tying product.[93] However, the issue in *Google Android* is that Google refuses to supply Google Play Store without the pre-installation of Google Chrome and Google Search.[94] Manufacturers cannot freely decide to license Google Play Store.[95] Rather, manufacturers do not have access *at all* if they do not agree to the condition of pre-installation of Google Chrome and Search.[96] In other words, if they do not want to pre-install Google Chrome and Search, they will not get access to Google Play Store.[97] Thus, it is argued that the conduct relates more to the conditions that Google sets for manufacturers that want to gain access to Google's vertically integrated platform.[98]

Support for the fact that this conduct indeed more resembles a refusal to deal is also found in the Commission's own wording, as it stated that the Google Play Store is a 'must-have' for device manufacturers.[99] Furthermore, it is argued that the remedy imposed by the Commission also appears to be aimed more at the conditions under which the Play Store is licensed, rather than at unbreaking a tie.[100] The Commission might therefore, again, be purposefully circumventing the refusal to deal theory of abuse, this time by broadening the scope of the tying abuse.[101] Again, this would be undesirable from the perspective of internal consistency of

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Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16-17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020; Konstantinos Stylianou, 'Help Without Borders: How the Google Android Case Threatens to Derail the Limited Scope of the Obligation to Assist Competitors' (2016) SSRN, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766062> accessed 30 May 2020.

[93] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 710; Konstantinos Stylianou, 'Help Without Borders: How the Google Android Case Threatens to Derail the Limited Scope of the Obligation to Assist Competitors' SSRN, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766062> accessed 30 May 2020.

[94] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[95] Konstantinos Stylianou, 'Help Without Borders: How the Google Android Case Threatens to Derail the Limited Scope of the Obligation to Assist Competitors' (2016) SSRN, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766062> accessed 30 May 2020; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[96] ibid.

[97] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[98] Pinar Akman, 'A Preliminary Assessment of the European Commission's Google Android Decision' (2018) Winter 1(3) CPI Antitrust Chronicle 1, 6; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[99] European Commission, 'Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (Press Release, 18 July 2018) <http://europa.eu/rapid/press-release_IP-18-4581_en.htm> accessed 27 April 2020.

[100] *Google Android* (Case AT.40099) European Commission Decision C(2018) 4761 final [2018], 312-13; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[101] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

competition law.[102] Proceeding on the assertion that the conduct thus amounts to a refusal to deal, the question thus arises whether access to Google Play Store is indispensable for downstream device manufacturers to compete.

2.1.3. *Amazon* investigation

Another example of an online platform that is currently being investigated by the Commission for alleged abusive leveraging conduct is Amazon.[103] The investigation is being carried under both Article 101 and 102 TFEU.[104] However, the conduct being investigated possibly amounts to a refusal to supply access to the platform to downstream competitors.[105] Specifically, the investigations are focussed on Amazon's use of agreements with third-party retailers who sell on Amazon's online marketplace. These agreements allegedly allow Amazon to use and analyse competitively sensitive data from these third-party retailers.[106] Amazon, playing a dual role as platform operator (in the upstream market) and seller on its own platform (in the downstream market), could then use this data to learn about consumer preferences and popular products. This allows Amazon to more effectively promote its own direct sales or provide competing products through their own downstream retail service on its own platform.[107]

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[102] ibid.

[103] European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Amazon' (Press Release, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 27 April 2020. By opening the investigations, the European Commission relieved the German and Austrian NCAs which had previously started similar investigations into the terms and conditions used by Amazon. See Bundeskartellamt (Germany), 'Bundeskartellamt initiates abuse proceeding against Amazon' (Press Release, 29 November 2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.pdf> accessed 27 April 2020; Austrian Federal Competition Authority, 'Austrian Federal Competition Authority initiates investigation proceedings against Amazon' (Press Release, 14 February 2019) <https://www.bwb.gv.at/en/news/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon/> accessed 27 April 2020. In closing their procedures, these NCAs announced that Amazon had agreed to modify the terms and conditions towards which competition concerns were expressed. See Bundeskartellamt, 'Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces' (Press Release, 17 July 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html> accessed 27 April 2020; Austrian Federal Competition Authority, 'BWB informs: Amazon modifies its terms and conditions' (Press Release, 17 July 2019) <https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/> accessed 27 April 2020.

[104] Thomas Höppner and Philip Westerhoff, 'The EU's Competition Investigation into Amazon's Marketplace' (2019) SSRN, 3-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3495203> accessed 27 April 2020.

[105] ibid 6.

[106] European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Amazon' (Press Release, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 27 April 2020.

[107] Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 2 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 478; Damien Geradin, 'What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms' Market Power?' (2018) TILEC Discussion Paper No. 2018-041, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967> accessed 20 April 2020.

Amazon would thus leverage its dominant position as a platform to set advantageous terms and conditions in its contracts with third-party retailers. While the underlying theory of harm for the investigation has not been clarified by the Commission, the conduct could, similar to the conduct in *Google Shopping*, be seen as self-preferencing.[108] Like in Google Shopping, it is therefore argued that the conduct in fact amounts to a refusal to supply access (on equal footing) to Amazon's platform, as access is only possible on disadvantageous terms and conditions for competitors.[109] Such a refusal to deal would therefore only be abusive when access to Amazon's platform would be deemed an 'essential facility'. The question is then, again: is access to Amazon indispensable for competing downstream retailers?

2.1.4. *Apple* investigations

Finally, a refusal to deal could possibly also be at the basis of investigations into the conduct of Apple on its app store. For example, the Netherlands Authority for Consumers and Markets has recently launched an investigation into possible preferential treatment by Apple of its own apps in the Apple App Store.[110] Similarly, Spotify lodged an official complaint against Apple at the Commission for conduct which could also be categorised as a refusal to supply access to the Apple App Store.[111] The Commission will reportedly investigate the complaint.[112] The crux might lie in a refusal to deal theory of harm.[113] The question would then again be whether access

[108] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020; Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020; Damien Geradin, 'What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms' Market Power?' (2018) TILEC Discussion Paper No. 2018-041, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967> accessed 20 April 2020;
Friso Bostoen, 'Amazon cases on the move: Bundeskartellamt closes proceedings while European Commission opens formal investigation' (*CoRe Blog,* 18 July 2019) <https://coreblog.lexxion.eu/amazon-cases-on-the-move/> accessed 28 April 2020; Damien Geradin and Dimitrios Katsifis, 'An EU competition law analysis of online display advertising in the programmatic age' (2019) 15(1) European Competition Journal 55, 90.

[109] Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 3-4 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020.

[110] Netherlands Authority for Consumers and Markets, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (Press Release, 11 April 2019) <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 24 May 2020.

[111] Daniel Ek, 'A Level Playing Field: Consumers and Innovators Win on a Level Playing Field' (*Newsroom Spotify*, 13 March 2019) <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/> accessed 28 April 2020.

[112] Rochelle Toplensky, 'Brussels poised to probe Apple over Spotify's fees complaint' *Financial Times* (Brussels, 5 May 2019) <https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d> accessed 28 April 2020.

[113] Friso Bostoen, 'Spotify lodges antitrust complaint against Apple: it's 'time to play fair' in the music streaming industry' (*CoRe Blog*, 24 April 2019) <https://coreblog.lexxion.eu/spotify-apple/> accessed 24 May 2020.

to Apple's App Store is indispensable for competing downstream app developers.

2.1.5. Problematic avoidance of the refusal to deal theory of abuse by the Commission

The cases discussed in the previous sub-paragraphs can all be construed as refusal to deal cases. While there is discussion on how to categorise the conduct in these cases, a significant number of authors argue in favour of categorising the conduct as refusals to deal. The most compelling reason for this is that the remedies in these cases amount to obligations to deal, in the form of having to provide access to downstream competitors on equal footing with the platforms' own downstream businesses. The platforms would thus have to actively assist their downstream competitors. This is exactly the remedy that would be imposed if a refusal to deal is found abusive under the essential facilities doctrine.[114] This begs the question whether the Commission is circumventing the strict requirements of the essential facilities doctrine by broadening the scope of other abuses or devising new types of abuses.[115] This would not be desirable from the perspective of internal consistency of competition law.[116] For these reasons, this thesis will proceed on the assertion that the conduct in these cases *should indeed* be categorised as a refusal to deal.

Consequently, the key question in each of these cases is whether access to these vertically integrated online platforms is indispensable for downstream competitors to compete. The platforms subject to these investigations – Google's search engine, Google's and Apple's app stores and Amazons online marketplace – are generally referred to as 'gatekeeper' online platforms.[117] Thus, the question translates more broadly into whether access to vertically integrated 'gatekeeper' online platforms is indispensable for their downstream competitors to compete.

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[114] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[115] Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 9; ibid 12.

[116] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020.

[117] Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019), 29-30, 92-93 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 60 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Natali Helberger, Katharina Kleinen-von Königslöw and Rob van der Noll, 'Regulating the new information intermediaries as gatekeepers of information diversity' (2015) 17(6) Info 50, 51 <https://www.ivir.nl/publicaties/download/1618.pdf> accessed 28 April 2020; Orla Lynskey, 'Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 13-15 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020.

2.2. ‘Gatekeeper’ online platforms

To answer the question whether access to vertically integrated ‘gatekeeper’ online platforms is indispensable for their downstream competitors to compete, it is necessary to examine the characteristics of such platforms and the special position that they have.

2.2.1. Characteristics of online platforms

In this sub-paragraph, four characteristics of online platforms are first discussed (paragraphs 2.2.1.1-2.2.1.4). The combination of these characteristics can lead to an online platform becoming a ‘gatekeeper’. In paragraph 2.2.2, ‘gatekeeper’ online platforms will be conceptualised and the special position they are in will be explained.

2.2.1.1. Multi-sidedness and network effects

Online platforms operate on the internet, where they act as intermediaries to enable interaction between two or more distinct but interdependent groups of users, providing different products or services to each group of users.[118] Online platforms therefore operate on a ‘multi-sided market’.[119] A distinct characteristic of a multi-sided market is that the demand from one group of users depends on the demand of the other group(s) of users.[120] This interdependency of demand is known as ‘*indirect* network effects’.[121] Indirect network effects work as follows: when the online platform attracts more users to one side of the platform, the platform becomes more valuable to the group(s) of users on the *other* side.[122] For example, the more traders join an online marketplace such as Amazon, the more attractive the online marketplace will become for shoppers, as they will have more choice.[123] This can also work the other way around: the

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[118] OECD, ‘An Introduction to Online Platforms and their Role in the Digital Transformation’ (2019), 21 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 21; Jean-Charles Rochet and Jean Tirole, ‘Platform competition in Two-sided Markets’ (2003) 1 Journal of the European Economic Association 990, 990.
[119] OECD, ‘An Introduction to Online Platforms and their Role in the Digital Transformation’ (2019), 14 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 29.
[120] OECD, ‘An Introduction to Online Platforms and their Role in the Digital Transformation’ (2019), 14 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[121] David S Evans, ‘The Antitrust Economics of Multi-Sided Platform Markets’ (2003) 20(2) Yale Journal on Regulation 325, 331-33; OECD, ‘An Introduction to Online Platforms and their Role in the Digital Transformation’ (2019), 22 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[122] Anna den Boer, Nicole SR Rosenboom and Gareth Shier, ‘Onlineplatforms – kun je met het mededingingsbeleid nog alle kanten op?’ (2019) 2-3 Tijdschrift Mededingingsrecht in de Praktijk 32, 33.
[123] Daniel Mandrescu, ‘Applying EU Competition law to Online Platforms: The Road Ahead’ (2017) SSRN, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed 27 April 2020.

more shoppers use an online marketplace, the more attractive it will be for traders to join the platform.[124]

Platforms may also be subject to '*direct* network effects'. This means that the value of the platform for users on one side depends on the number of users on the *same* side of the platform.[125] For example, it will become more attractive for a person to use Facebook when a large number of other people use the platform. Online platforms can benefit significantly from these network effects.[126]

2.2.1.2. Critical mass and economies of scale

To benefit from positive network effects, online platforms must first reach and then maintain 'critical mass'.[127] This is the minimum number of users the platform needs to be profitable and to remain on the market.[128] This critical mass is reached when there is an adequate number of users on all sides of the platform to create sufficient value for all user groups.[129] Reaching this mass is difficult because online platforms are characterised by high fixed costs and low or near-zero marginal costs.[130] This means that online platforms have to make considerable investments in order to enter the market. These include investments into the necessary infrastructure, such as server capacity, and the development of the necessary software tools, such as algorithms.[131] However, once these costs have been absorbed, online platforms can serve vast amounts of new users without incurring any significant marginal costs: displaying an extra advertisement or recommended purchase will barely cost anything.[132] This allows platforms to grow quickly

[124] ibid.
[125] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 22 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[126] ibid 23.
[127] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 5 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 38.
[128] Daniel Mandrescu, 'Applying EU Competition law to Online Platforms: The Road Ahead' (2017) SSRN, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840> accessed 27 April 2020.
[129] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 38.
[130] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[131] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 43.
[132] ibid; OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 23 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.

once the initial investments have been absorbed.[133] This necessity to reach critical mass and the high fixed costs associated with it, make it difficult for new online platforms to enter the market.

2.2.1.3. Economies of scale and scope in data collection and analysis

Another important characteristic of online platforms is their ability to collect and analyse data.[134] As an intermediary, online platforms are naturally in a position to collect great volumes of various and valuable data about user behaviour on all sides of the platform.[135] Many online platforms, such as search engines, social networks and online marketplaces, rely on the acquisition and monetisation of such data.[136] The collected data enables a platform to enhance and personalise its services or develop new products.[137] The improved service will then attract more users, which allows the platform to collect more data. This data can then be used to improve the service even further. In combination with networks effects, again, more users will be attracted, and so forth. This phenomenon is called a 'feedback loop' and is an important reason for the emergence of 'Big Data'.[138] When an undertaking possesses Big Data, this means that it collects, processes and analyses a large volume of diverse data which is economically valuable.[139]

Possession of Big Data is typical for online platforms and leads to economies of scale and scope in data collection and analysis: online platforms that possess Big Data will be better able to improve their services than platforms which are not capable of collecting and processing as large amounts of diverse and valuable data.[140] Big Data are therefore an important competitive asset for many online platforms.[141]

The benefits that can be derived from these economies of scale and scope due to Big Data are also an important reason for online platforms to create an 'ecosystem' of integrated products

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[133] ibid.

[134] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.

[135] Bertin Martens, 'An Economic Policy Perspective on Online Platforms' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05, 3-4 <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101501.pdf> accessed 26 April 2020.

[136] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 246.

[137] Netherlands Authority for Consumers and Markets, 'Grote Platforms, Grote Problemen? Een beschouwing van online platforms vanuit mededingingsperspectief' (2016), 4 <https://www.acm.nl/sites/default/files/old_publication/publicaties/16333_toezicht-online-platforms.pdf> accessed 1 May 2020.

[138] Andres V Lerner, 'The Role of 'Big Data' in Online Platform Competition' (2014) SSRN, 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780> accessed 25 April 2020.

[139] Ariel Ezrachi and Maurice E Stucke, *Virtual Competition* (Harvard University Press 2016) 15; Daniel L Rubinfeld and Michal S Gal, 'Access Barriers to Big Data' (2017) 59 Arizona Law Review 339, 347.

[140] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 47, 50, 246.

[141] Ariel Ezrachi and Maurice E Stucke, *Virtual Competition* (Harvard University Press 2016) 14; Daniel L Rubinfeld and Michal S Gal, 'Access Barriers to Big Data' (2017) 59 Arizona Law Review 339, 341-42.

and services around their platforms.[142] Creating additional services by entering different, associated markets allows online platforms to gather even more data. This data can then be used to improve the platforms services even further, so as to benefit from the network effects and the feedback loop.[143] Simply put, once the platform offers another service, it becomes more efficient at offering its primary and other services.[144]

2.2.1.4. Switching costs and 'lock-in'

Finally, another characteristic of online platforms is the existence of 'switching costs'.[145] These are costs that users incur when switching from one platform to another.[146] Users often have to make specific 'investments' to use a platform. These investments can be contractual or financial, but also include the time it takes to get used to the functioning of an online platform.[147] For example, social networks are typically subject to high switching costs. These switching costs include setting up a profile, establishing a community and uploading content.[148] If a user would later want to switch to another platform, he will lose (part of) his investments made into the previous platform, while he would have to make new investments into the platform he wishes to join.[149]

The degree of switching costs is, however, linked to the degree to which users 'multi-home'.[150] Multi-homing means that a user simultaneously uses more than one platform for the same service.[151] For example, users may simultaneously use Facebook Messenger and WhatsApp as

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[142] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 2 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.
[143] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[144] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 33 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.
[145] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 50.
[146] Joseph Farrell and Paul Klemperer, 'Coordination and lock-in: competition with switching costs and network effects' in M Armstrong and R Porter (eds), *Handbook of Industrial Organization*, vol 3 (Elsevier 2007) 1971.
[147] Aaron S Edlin and Robert G Harris, 'The Role Of Switching Costs In Antitrust Analysis: A Comparison Of Microsoft And Google' (2013) 15(2) Yale Journal of Law and Technology 169, 178-84.
[148] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[149] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 50.
[150] ibid 54.
[151] Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990, 992-993; David S Evans, 'Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy' (2008) SSRN, 10-11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090368> accessed 27 April 2020.

communications apps. If a user does not use more than one platform for the same service at once, he is 'single-homing'.[152] When users multi-home, switching costs will be lower.[153]

When the switching costs are high and users cannot sufficiently multi-home, users can get 'locked-in'. This means that the costs of switching platforms is so high that users will not switch platforms, even if they would prefer to.[154] A 'lock-in' will be stronger if a user is part of a bigger ecosystem in which the platform functions.[155] The user is then less likely to multi-home. Online platforms are therefore incentivised to create a platform or ecosystem in which users are encouraged to only use the platform's own affiliated services.[156]

2.2.2. Conceptualising 'gatekeeper' online platforms

Markets which are characterised by a combination of (a number of) the characteristics discussed in the previous sub-paragraphs – strong network effects, difficulty to achieve critical mass and economies of scale, economies of scale and scope in data collection and analysis, and high switching costs and lock-in of users – tend to be concentrated, because these markets are prone to 'tipping'.[157] This refers to platforms on these markets being able to grow significantly in a relatively short amount of time once they have gained an initial edge over competitors.[158] As a result, only a limited number of platforms with (significant) market power can exist on the market.[159] Examples of highly concentrated online platform markets are the markets on which

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[152] David S Evans, 'Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy' (2008) SSRN, 11.
[153] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 54.
[154] Aaron S Edlin and Robert G Harris, 'The Role Of Switching Costs In Antitrust Analysis: A Comparison Of Microsoft And Google' (2013) 15(2) Yale Journal of Law and Technology 169, 176.
[155] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.
[156] David S Evans, 'Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy' (2008) SSRN, 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090368> accessed 27 April 2020; European Commission, 'Commission Staff Working Document. Online Platforms. Accompanying the document Communication on Online Platforms and the Digital Single Market' COM(2016) 288 final, 5.
[157] Jens-Uwe Franck and Martin Peitz, 'Market Definition and Market Power in the Platform Economy' (Centre on Regulation in Europe Report, 2019), 73 <https://www.cerre.eu/sites/cerre/files/2019_cerre_market_definition_market_power_platform_economy.pdf> accessed 3 May 2020.
[158] Michael L Katz and Carl Shapiro, 'Systems Competition and Network Effects' (1994) 8(2) Journal of Economic Perspectives 93, 105-06.
[159] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 5 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020. Whether the 'market power' these gatekeepers possess also translates into dominance within the meaning of Article 102 TFEU is a topic of debate. This has to do with the suitability of the tools that have traditionally been used to establish dominance. Important questions are, for example, how to define the relevant market for multi-sided platforms and whether competitive advantages such as network effects and 'Big Data' are barriers to entry or not. For the purpose of this thesis, it is assumed that this market power translates into dominance. See for example Orla Lynskey, 'Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 7-8 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020; Stefan Holzweber, 'Market Definition for Multi-Sided Platforms: A Legal Reappraisal' (2017) 40(4) World Competition Law and

the platforms in the cases discussed in paragraph 2.1 operate: the market for search engines, online marketplaces and app stores, on which Google, Amazon and Apple have significantly more market power than competitors.[160]

These kinds of platforms can have such a degree of market power, that they come to play a pivotal role in the digital economy.[161] This means that the platform is 'vital' for the existence of other businesses and their ability to compete, because it controls access to competitively important infrastructure and to users.[162] Such a platform thus holds a strategic position along the value chain, which allows it to set the rules on the basis of which users on all sides of the market interact with each other.[163] For example, it will be in a position where it can regulate access and exclusion from the platform, it can regulate the way in which business users can present their products or services or it can decide who has access to the information that is generated on the platform.[164] Such a platform therefore has significant influence over the relationship between users.[165]

This ability to control access to economically and strategically important markets for businesses and consumers, which is derived from the platform's significant market power, makes an online platform a 'gatekeeper'.[166] The platforms subject to the investigations discussed in paragraph

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Economics Review 563, 565; Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41(3) World Competition Law and Economics Review 453; Thomas Höppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' (2015) 38(3) World Competition Law and Economics Review 349, 352-53; Nicolas Petit and Thibault Schrepel, 'Evaluation of the Commission Notice on market definition in EU competition law. Comments by Professors Nicolas Petit & Thibault Schrepel' (Response to the Evaluation of the Commission Notice on market definition in EU competition law, May 2020), 1-2 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law/F519594> accessed 1 June 2020.

[160] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 119.

[161] Orla Lynskey, 'Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 9 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020.

[162] ibid.

[163] ibid; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 449; Pablo Solano Díaz, 'EU Competition Law Needs to Install a Plug-in' (2017) 40(3) World Competition Law and Economics Review 393, 412.

[164] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 60 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[165] ibid 6; Orla Lynskey, 'Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 9 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020.

[166] Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019), 41 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 54 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020; French Competition Authority, 'Contribution to the debate on competition policy and digital challenges' (Report, 2020), 7 <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 5 May 2020; German Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy' (Report by

2.1 are generally referred to as gatekeeper online platforms: Google’s search engine, Google’s and Apple’s app stores and Amazon’s online marketplace.[167] For many businesses, and small and medium-sized enterprises in particular, these gatekeeper platforms are the main entry points to access certain markets.[168] These businesses can therefore, in varying degrees, be dependent on access to these platforms.[169] As a result, gatekeeper platforms have a superior bargaining position in relation to these business users.[170]

This superior bargaining position and the ability to set ‘the rules of the game’ are not necessarily problematic. After all, online platforms rely on business users to create value for the other side(s) of the platform.[171] Gatekeepers therefore have incentives to provide ‘fair’ rules to make the platform attractive for business users and thus more valuable for users on all sides of the platform.[172] Additionally, writing fair rules can also be a form of competition between platforms: the platform with the better rules may attract users from other platforms with less attractive rules.[173] However, this gatekeeper position can also lead to potentially abusive leveraging behaviour.

As was already briefly touched upon in the previous sub-paragraphs, online platforms have strong incentives to create an ecosystem around their platform because of the benefits arising from network effects and economies of scale and scope in data possession. This can clearly be observed in the case of gatekeeper online platforms such as Google, Facebook, Amazon and Apple. These platforms offer a wide range of integrated products and services around their platform, such as operating systems, app stores and cloud services.[174] To offer these products and services, they enter markets closely related to their core online platform market, among

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the Commission Competition Law 4.0, 2019), 47 <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed 5 May 2020.

[167] Jason Furman and others, ‘Unlocking digital competition. Report of the Digital Competition Expert Panel’ (Report for the UK government, 2019), 29-30, 92-93 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the digital era’ (Report for the European Commission, 2019), 60 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Natali Helberger, Katharina Kleinen-von Königslöw and Rob van der Noll, ‘Regulating the new information intermediaries as gatekeepers of information diversity’ (2015) 17(6) Info 50, 51 <https://www.ivir.nl/publicaties/download/1618.pdf> accessed 28 April 2020; Orla Lynskey, ‘Regulating 'Platform Power'' (2017) LSE Legal Studies Working Paper No. 1/2017, 13-15 <http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf> accessed 24 May 2020.

[168] Inge Graef, ‘Differentiated Treatment in Platform-to-Business Relations’ [2019] Yearbook of European Law 448, 448-49.

[169] Jason Furman and others, ‘Unlocking digital competition. Report of the Digital Competition Expert Panel’ (Report for the UK government, 2019), 41-42 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020.

[170] Inge Graef, ‘Differentiated Treatment in Platform-to-Business Relations’ [2019] Yearbook of European Law 448, 448-49.

[171] ibid.

[172] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the digital era’ (Report for the European Commission, 2019), 61-62 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[173] ibid 61.

[174] ibid 33.

which are downstream markets.[175] The vertically integrated gatekeeper online platform will then perform a *dual role*: the downstream business of the platform is active on its own upstream platform and will therefore directly compete with other downstream competitors offering services or products on the platform.[176]

As mentioned, this vertical integration can lead to considerable benefits for consumers.[177] However, the strong incentives for gatekeeper online platforms to create an ever more comprehensive ecosystem can give rise to the leveraging of the platforms' upstream market power to downstream markets.[178] If this leveraging, like in the cases discussed in paragraph 2.1 amounts to a refusal to deal, the most important question for finding such a refusal to deal abusive is then indeed: is the input – in this case access to the vertically integrated gatekeeper online platform – indispensable for the platform's downstream competitors to compete?

2.3. Indispensability of access to vertically integrated gatekeeper online platforms for downstream competitors

As was discussed in paragraph 1.2.3.1, establishing the indispensability of an input for downstream competitors is particularly difficult, as it must be shown that there are no economically viable actual or potential substitutes for the input.[179] The question is therefore: is

[175] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020.

[176] Examples of this 'dual role' are plentiful: Amazon offers products on its own platform, Google offers comparison-shopping services on its own search engine and Apple provides its own music apps in its own app store.

[177] European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2008] OJ C265/6, para 13; European Commission, 'Guidelines on Vertical Restraints' [2010] OJ C130/1, para 98; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 546; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 454; Dirk Auer and others, 'Why sound law and economics should guide competition policy in the digital economy' (Contribution of ICLE to the European Commission's inquiry on 'Shaping Competition Policy in the Era of Digitisation', 2018), 3-4, 7 <https://laweconcenter.org/wp-content/uploads/2018/10/ICLE-EU-Comments.pdf> accessed 24 May 2020.

[178] OECD, 'An Introduction to Online Platforms and their Role in the Digital Transformation' (2019), 24 <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1586854465&id=id&accname=guest&checksum=09BB62E69847441474411EB832367E43> accessed 27 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 65-66 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019), 31 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020.

[179] See paragraph 1.2.3.1. Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 52.

access to a vertically integrated gatekeeper online platform indispensable for its downstream competitors to compete?

Gatekeeper platforms control competitively important infrastructure and access to users. They therefore have control over the main entry point to the market for downstream competitors, which can be dependent on this access. However, the common opinion in the literature appears to be that, despite this dependency and the characteristics of vertically integrated gatekeeper online platforms, access to these platforms is unlikely to be deemed indispensable for downstream competitors to compete.[180] Assessing indispensability will, of course, have to be done a case-by-case basis.[181] However, economically viable *actual* substitutes for vertically integrated gatekeeper online platforms are arguably always available in some form. The fact that these alternatives may be less advantageous than the access to the gatekeeper platform does not lead to the conclusion that they are not economically viable. These substitutes can include the possibility to reach consumers through alternative platforms (with or without a similar functionality), through their own websites or apps, through agreements with independent software or hardware developers or by more traditional means of marketing.[182]

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[180] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 4-5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020; Robert H Bork and J Gregory Sidak, 'What Does The Chicago School Teach About Internet Search And The Antitrust Treatment Of Google?' (2012) 8(4) Journal of Competition Law and Economics 663, 678-83; John Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39(1) World Competition Law and Economics Review 5, 7; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 476; Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 316; Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 8; Geoffrey A Manne, 'The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment' in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade Essays. On the Future of the Internet* (TechFreedom 2010), 429-30, 434; Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' (2013) 11 Northwestern Journal of Technology and Intellectual Property 275, 299-301; Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 6-7 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020; Pablo Solano Díaz, 'EU Competition Law Needs to Install a Plug-in' (2017) 40(3) World Competition Law and Economics Review 393, 412; Pablo Ibáñez Colomo, 'Amazon's Antitrust Paradox (the real one): The Strange Case of the Bundeskartellamt' (*Chillin'Competition*, 13 November 2018) <https://chillingcompetition.com/2018/11/30/amazons-antitrust-paradox-the-real-one-the-strange-case-of-the-bundeskartellamt-by-pablo/> accessed 28 April 2020; Friso Bostoen, 'Spotify lodges antitrust complaint against Apple: it's 'time to play fair' in the music streaming industry' (*CoRe Blog*, 24 April 2019) <https://coreblog.lexxion.eu/spotify-apple/> accessed 24 May 2020.
See differently 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 The George Washington Law Review 721; Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2012) TILEC Discussion Paper No. 2012-036, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169343> accessed 19 May 2020; Jay Matthew Strader, 'Google, Monopolization, Refusing to Deal and the Duty to Promote Economic Activity' (2019) 50(5) International Review of Intellectual Property and Competition Law 559.
[181] Pablo Ibañéz Colomo, 'Anticompetitive Effects in EU Competition Law' (2020) SSRN, 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599407> accessed 1 June 2020.
[182] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 4-5

Furthermore, proving indispensability would also require proving that no economically viable *potential* substitutes exist. This means that the claimant must show that a hypothetical 'as-efficient competitor' could not create a second online platform of similar size and efficiency as the gatekeeper platform. Proving this would require a concrete empirical analysis, which will be particularly difficult for the claimant.[183]

For these reasons, it is unlikely that access to vertically integrated gatekeeper online platforms will be deemed indispensable for their downstream competitors to compete. This also explains why the Commission seems to be circumventing the refusal to deal theory of abuse in its recent cases.

2.4. Sub-conclusion

The goal of this chapter was to analyse whether access to vertically integrated 'gatekeeper' online platforms is indispensable for downstream competitors of these platforms to compete. This question arises from four recent cases investigated by the Commission and NCAs: *Google Shopping*, *Google Android*, the *Amazon* investigation and the *Apple* investigations. To answer this question, vertically integrated 'gatekeeper' online platforms were conceptualised. It was explained that gatekeeper online platforms are platforms with significant market power, which control competitively important infrastructure and access to users. This gives them the ability to control access to users and economically and strategically important markets for businesses and consumers. While many downstream competitors are (in varying degrees) 'dependent' on access to these platforms, it was found that it is unlikely that access to vertically integrated gatekeeper online platforms will be deemed indispensable for their downstream competitors to compete.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020; Robert H Bork and J Gregory Sidak, 'What Does The Chicago School Teach About Internet Search And The Antitrust Treatment Of Google?' (2012) 8(4) Journal of Competition Law and Economics 663, 678-83; John Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39(1) World Competition Law and Economics Review 5, 7; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 476; Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 316; Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1(1) Competition Law & Policy Debate 4, 8; Geoffrey A Manne, 'The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment' in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade Essays. On the Future of the Internet* (TechFreedom 2010), 429-30, 434; Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' (2013) 11 Northwestern Journal of Technology and Intellectual Property 275, 299-301; Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 6-7 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020; Pablo Solano Díaz, 'EU Competition Law Needs to Install a Plug-in' (2017) 40(3) World Competition Law and Economics Review 393, 412.

[183] Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2012) TILEC Discussion Paper No. 2012-036, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169343> accessed 19 May 2020.

Chapter 3 – A normative analysis of the need for the indispensability requirement

The goal of this chapter is to assess whether the indispensability requirement should be abandoned or held on to in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors.

In the previous chapter it was established that access to a vertically integrated gatekeeper online platform is unlikely to be deemed indispensable for downstream competitors of these platforms to compete. It has recently been argued by several competition authorities and authors that refusals to supply such access should be found abusive more easily. To that end, they propose that such refusals become subject to a different legal test, in which there would be no need to establish the indispensability of the access. As the indispensability requirement is a particularly difficult requirement to meet, abandoning it would mean that competition law intervention would be more easily justified. These proposals are therefore, not unsurprisingly, contested by commentators. This discussion is presented in paragraph 3.1.

The question that arises from this discussion is whether the indispensability requirement should indeed be abandoned in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors. Paragraph 3.2 aims to contribute to this discussion, by linking the answer to this question to the main goal of European competition law: *consumer welfare*. However, as consumer welfare is a broad and ambiguous concept, the competition parameter of *innovation*, which is a key contributor to consumer welfare in online platform markets, will be used as a *proxy* for consumer welfare. This means that it will be assessed what the effects are of either abandoning or holding on to the requirement of indispensability on the *overall level of innovation*.

In paragraph 3.3, a sub-conclusion will be drawn on the chapter.

3.1. The 'more regulatory approach' to online platform markets: abandonment of the requirement of indispensability in online platform markets?

In *Google Shopping*, the Commission argued that the self-preferencing conduct of Google constituted an abuse, because the conduct was capable or likely to have anti-competitive effects.[184] Proceeding on the assertion that the conduct in this case should be categorised as a refusal to deal, the refusal to deal would thus be abusive below the threshold of indispensability. After all, as was established in the previous chapter, it is unlikely that access to a vertically integrated gatekeeper online platform such as Google's search engine would be deemed indispensable for downstream competitors to compete. If one construes the *Google Android* case as a refusal to deal case, the refusal to supply access in this case was also found abusive below the threshold of indispensability.

[184] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 341.

The Commission's approach in these cases can be understood as part of the 'more regulatory approach'[185] that the Commission and NCAs currently advocate with regard to online platform markets.[186] This 'more regulatory approach' is found in a number of recent reports issued by competition authorities (hereinafter: the Reports), and is also exemplified by the fact that the Commission is currently working on an *ex ante* regulatory framework for gatekeeper online platforms.[187] The idea is that greater competition law scrutiny is justified in online platform markets, because the characteristics of these markets lead to significant and structural market failures.[188] These characteristics are a high degree of network effects, extreme economies of scale, lock-in and data advantages for incumbents.[189] These market features would provide

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[185] As coined by Cappai and Colangelo in Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020.

[186] ibid 21.

[187] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 54 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; French Competition Authority, 'Contribution to the debate on competition policy and digital challenges' (Report, 2020), 7 <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 5 May 2020; German Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy' (Report by the Commission Competition Law 4.0, 2019) <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed 5 May 2020; Jason Furman and others, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (Report for the UK government, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 April 2020; Nicolai van Gorp and Paul de Bijl, 'Digital Gatekeepers. Assessing Exclusionary Conduct' (Report for the Dutch Ministry of Economic Affairs and Climate, 2019) <https://www.government.nl/binaries/government/documents/reports/2019/10/07/digital-gatekeepers/Digital+Gatekeepers.pdf> accessed 1 June 2020; European Commission, 'New competition tool' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 4 June 2020; European Commission, 'Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 4 June 2020; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Shaping Europe's digital future' COM (2020) 67 final, 10; Damien Geradin, 'European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"' (*The Platform Law Blog*, 11 May 2020) <https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/> accessed 1 June 2020; Kay Jebelli, 'The Paradox of EU Ex-Ante Market Regulation for Gatekeepers' (*ProjectDisco*, 19 May 2020) <http://www.project-disco.org/european-union/051920-the-paradox-of-eu-ex-ante-market-regulation-for-gatekeepers/> accessed 1 June 2020.

[188] Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 13 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020.

[189] These are the same characteristics as discussed in paragraph 2.2. See Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 15, 19-24 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

significant competitive advantages for incumbent platforms. This leads to highly concentrated markets which would not be sufficiently contestable.[190] This means that incumbent online platforms are able to extend their dominance in time, not as a result of their competitive success, but because of the market situation that has developed around their dominance.[191]

Greater competition law scrutiny would especially be justified with regard to gatekeeper online platforms, as these platforms benefit from a high degree of the aforementioned market characteristics.[192] As was established in the previous chapter, gatekeeper platforms control competitively important infrastructure and access to users, which makes them vital for other businesses. This allows them to set the rules on the basis of which users on all sides of the platform interact with each other and determine the way in which competition takes place.[193] This rule-setting is deemed to be particularly problematic when a gatekeeper platform performs a *dual role*.[194] As discussed previously, this is the case when the platform is vertically integrated: the downstream business of the platform is active on its own upstream platform and, as such, directly competes with other downstream competitors. A vertically integrated

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[190] Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 13, 15 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 19-24 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020. See also Damien Geradin, 'European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"' (*The Platform Law Blog*, 11 May 2020) <https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/> accessed 1 June 2020; European Commission, 'New competition tool' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 4 June 2020; European Commission, 'Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers' (Legislative initiative by the European Commission, 2 June 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 4 June 2020.

[191] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 190-91.

[192] Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 21-22 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020.

[193] Examples of such rule-setting are the development of ranking algorithms or determining the conditions under which business users can enter the network. See also paragraph 2.2.2. See ibid 15; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 60 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[194] Damien Geradin, 'European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"' (*The Platform Law Blog*, 11 May 2020) <https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/> accessed 1 June 2020; Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 15 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020.

gatekeeper online platform would therefore be incentivised to discriminate in favour of its own downstream business – self-preference – at the cost of its downstream competitors.[195]

While it is recognised that giving preferential treatment is a 'natural award' for the successful management of the platform, it is argued that the distortive effects on downstream markets of such preferential treatment by gatekeeper platforms are so substantial, that it constitutes a 'disproportionate form of reward'.[196] As such, the conduct would decrease the already limited contestability of online platform markets even further.[197] Therefore, in most of the Reports it is argued that self-preferencing by vertically integrated dominant online platforms should be prohibited, unless an objective justification is provided.[198] The authors of the recent Commission *Competition Policy for the Digital Era* report (hereinafter: the Report) propose a slightly more nuanced approach and argue that

> self-preferencing by a vertically integrated dominant digital platform can be abusive not only under the preconditions set out by the "essential facility" doctrine, but also wherever it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale.[199]

The authors thus argue that self-preferencing by vertically integrated dominant platforms 'is not abusive *per se*, but should be subject to an effects test'.[200] Furthermore, with regard to vertically integrated *gatekeeper* online platforms *specifically*, the authors of the Report propose to reverse the 'burden of proving that self-preferencing has no long-run exclusionary effects on product markets'.[201]

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[195] ibid.

[196] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 66 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[197] Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 22 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020; Damien Geradin, 'European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"' (*The Platform Law Blog*, 11 May 2020) <https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/> accessed 1 June 2020.

[198] French Competition Authority, 'Contribution to the debate on competition policy and digital challenges' (Report, 2020), 7 <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 5 May 2020; German Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy' (Report by the Commission Competition Law 4.0, 2019), 50-51 <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed 5 May 2020; Nicolai van Gorp and Paul de Bijl, 'Digital Gatekeepers. Assessing Exclusionary Conduct' (Report for the Dutch Ministry of Economic Affairs and Climate, 2019), 41-42 <https://www.government.nl/binaries/government/documents/reports/2019/10/07/digital-gatekeepers/Digital+Gatekeepers.pdf> accessed 1 June 2020.

[199] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 7 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020 (emphasis added).

[200] ibid 66.

[201] The authors do not call these platforms 'gatekeepers', but they do aim at platforms which have been conceptualised as gatekeeper online platforms in the second chapter. See ibid.

In the previous chapter, this self-preferencing was categorised as a refusal to deal. The proposals in the Reports would thus lead to the abandonment of the indispensability requirement in cases where a vertically integrated dominant online platform denies access to its platform to its downstream competitors.[202] Vertically integrated *gatekeeper* online platforms would be subject to an even stricter regime, as they would have to provide an objective justification for a refusal to supply access to their downstream competitors. This means that a *per se* prohibition would be created for such refusals by these platforms. This would be a significant change of policy.[203] After all, it has long been recognised that (further) vertical integration, which is the consequence of such a refusal to deal, can lead to considerable pro-competitive gains.[204]

Therefore, it is not unsurprising that these proposals are contested, as is the 'more regulatory approach' in general.[205] For example, it is argued that the characteristics of online platform markets which would justify the 'more regulatory approach' to online platforms are not unique to these markets.[206] Rather, many of the markets in which the current legal standards such as the requirement of indispensability were developed, were, just like online platform markets, also characterised by strong network effects, significant returns to scale and lock-in.[207] For example, in the *Microsoft* case, where network effects and lock-in played a prominent role, the

[202] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[203] Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 25 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020.
[204] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 5 May 2020. See also Geoffrey A Manne, 'Against the vertical discrimination presumption' (2020) 2 Concurrences Competition Law Review 1, 2-3.
[205] See for example David S Evans, 'Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights, But Not Sleepy Monopolies' (2017) SSRN, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438> accessed 12 May 2020; Geoffrey A Manne, 'Against the vertical discrimination presumption' (2020) 2 Concurrences Competition Law Review 1, 1-2; Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Auer D and others, 'Why sound law and economics should guide competition policy in the digital economy' (Contribution of ICLE to the European Commission's inquiry on 'Shaping Competition Policy in the Era of Digitisation', 2018) <https://laweconcenter.org/wp-content/uploads/2018/10/ICLE-EU-Comments.pdf> accessed 24 May 2020; Kay Jebelli, 'The Paradox of EU Ex-Ante Market Regulation for Gatekeepers' (*ProjectDisco*, 19 May 2020) <http://www.project-disco.org/european-union/051920-the-paradox-of-eu-ex-ante-market-regulation-for-gatekeepers/> accessed 1 June 2020.
[206] Pablo Ibáñez Colomo, 'The report on 'Competition policy for the digital era' is out: why change the law if there is no evidence? And how?' (*Chillin'Competition*, 5 April 2019) <https://chillingcompetition.com/2019/04/05/the-report-on-competition-policy-for-the-digital-era-is-out-why-change-the-law-if-there-is-no-evidence-and-how/> accessed 6 May 2020.
[207] Pablo Ibáñez Colomo, 'A Contribution to 'Shaping Competition Policy in the Era of Digitisation' (Contribution to 'Shaping Competition Policy in the Era of Digitisation', 2018), 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257998> accessed 6 May 2020.

indispensability requirement also had to be met.[208] Therefore, there would be insufficient reason to abandon the indispensability requirement.[209]

Furthermore, it is argued that there is no strong evidence that supports the claim that conduct such as self-preferencing is more likely to lead to anti-competitive effects in online platform markets than in other markets.[210] Without consensus on this topic, legal standards such as the indispensability requirement should not be changed.[211]

3.2. The requirement of indispensability from the perspective of innovation as a key contributor to consumer welfare in online platform markets

Whether or not to abandon the requirement of indispensability is thus debated. The aim of the remainder of this chapter is to contribute to this discussion by assessing the requirement of indispensability from the perspective of the main goal of European competition law: *consumer welfare*. More specifically, it will be argued that *innovation* is a key contributor to consumer welfare in online platform markets and can therefore serve as an appropriate *proxy* for consumer welfare in these markets. Thus, the question whether the requirement of indispensability should be abandoned or held on to in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors, will be analysed by assessing whether the indispensability requirement benefits *consumer welfare* by means of benefitting the *overall level of innovation*.[212]

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[208] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 191.

[209] Pablo Ibáñez Colomo, 'The report on 'Competition policy for the digital era' is out: why change the law if there is no evidence? And how?' (*Chillin'Competition*, 5 April 2019) <https://chillingcompetition.com/2019/04/05/the-report-on-competition-policy-for-the-digital-era-is-out-why-change-the-law-if-there-is-no-evidence-and-how/> accessed 6 May 2020.

[210] Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.' (2020) Transatlantic Technology Law Forum Working Papers No. 55, 26 <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 5 May 2020; Pablo Ibáñez Colomo, 'A Contribution to 'Shaping Competition Policy in the Era of Digitisation' (Contribution to 'Shaping Competition Policy in the Era of Digitisation', 2018), 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257998> accessed 6 May 2020. See also Geoffrey A Manne, 'Against the vertical discrimination presumption' (2020) 2 Concurrences Competition Law Review 1, 1; Kay Jebelli, 'The Paradox of EU Ex-Ante Market Regulation for Gatekeepers' (*ProjectDisco*, 19 May 2020) <http://www.project-disco.org/european-union/051920-the-paradox-of-eu-ex-ante-market-regulation-for-gatekeepers/> accessed 1 June 2020.

[211] Pablo Ibáñez Colomo, 'The report on 'Competition policy for the digital era' is out: why change the law if there is no evidence? And how?' (*Chillin'Competition*, 5 April 2019) <https://chillingcompetition.com/2019/04/05/the-report-on-competition-policy-for-the-digital-era-is-out-why-change-the-law-if-there-is-no-evidence-and-how/> accessed 6 May 2020.

[212] An often-advanced approach to assessing the appropriateness of competition law rules is the 'error-cost framework'. This framework is based on economic decision theory and compares the social costs and benefits of alternative legal approaches to a competition law problem. That rule which minimises 'total social costs' would then be the optimal rule. The relevant costs include the costs of 'false positives' – finding violations when the conduct did not harm competition – and 'false negatives' – not finding violations when the conduct harmed competition – and 'institutional costs'. As such, the error-cost framework takes a broad view on the welfare implications of legal rules. The framework furthermore depends on economic input. While simpler-to-use rules

3.2.1. Innovation as the main contributor to consumer welfare in digital markets

European competition law has pursued many different objectives over the years. These include the promotion of market integration, the protection of economic freedom and the enhancement of consumer welfare.[213] Currently, the latter is often recognised as the main goal of European competition law.[214] The Commission, for example, holds that competition is protected 'as a means of enhancing consumer welfare and of ensuring efficient allocation of resources'.[215] As such, the others goals of competition law centre around consumer welfare.[216]

However, 'consumer welfare' is a broad and ambiguous concept, which does not embody universally agreed properties.[217] While the concept is generally used by the Commission as its main policy objective, the concept does not appear often in EU case law, nor has its content been (precisely) formulated in this case law.[218] Nevertheless, it has been argued that taking a 'narrow' view of consumer welfare may best serve as a standard for assessing the impact of conduct on 'consumer welfare'.[219] This means that competition law must benefit the economic interests of consumers.[220] To that end, the impact of conduct on competition parameters such

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for judges and lawyers have been developed in the literature (specifically also with regard to markets characterised by a high degree of innovation such as online platform markets), the assumptions on which these rules are based are contested (on the basis of economic arguments), under the allegation that they would lead to a non-interventionist bias. See Jonathan B Baker, 'Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' (2015) 80(1) Antitrust Law Journal 1. See for simpler-to-use rules for example Geoffrey A Manne and Joshua D Wright, 'Innovation And The Limits Of Antitrust' (2010) 6(1) Journal of Competition Law & Economics 153. For these reasons – i.e. the economic nature of a true error-cost analysis and the discussion on the merits of any assumptions on which an analysis in this thesis could be based –, it would be outside the scope of this thesis to analyse the desirability of applying the requirement of indispensability from the perspective of the error-cost framework.

[213] Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012) 64-69. See also Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 15-18.

[214] Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 18-19; Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012) 81.

[215] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 13.

[216] Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 4-5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020.

[217] ibid. See also Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) CLES Working Paper Series 3/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> accessed 31 May 2020.

[218] See Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 22-23, 27-28, 41. This has given rise to the discussion whether the goal of consumer welfare is merely a policy objective or a legislative objective. An extensive review of this discussion would be outside the scope of this thesis, however. This thesis will therefore proceed on the assertion that consumer welfare is currently *indeed* regarded as the main (but not the sole) goal of European competition law.

[219] ibid 24-25, 28, 42-44. See also Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020.

[220] Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 12, 24. Consumers under this interpretation are mainly, but not exclusively, final consumers.

as price, output, choice, quality and innovation is relevant.[221] This 'narrow' approach is also the one generally used by competition authorities to approximate the effects of conduct on consumer welfare.[222] Conduct which has a 'net' negative effect on these parameters will harm consumers and will therefore be detrimental to consumer welfare.

Consumer harm can arise both directly and indirectly.[223] Consumers will, for example, be harmed directly when an undertaking charges a price that is higher than the competitive price.[224] Consumers will be harmed indirectly when the practice of an undertaking negatively affects the competitive process itself.[225] In the *T-Mobile* case, the ECJ held that competition law rules are not only designed to protect 'the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such'.[226] This is also true for Article 102 TFEU, which, as follows from recent case law, is aimed at protecting effective competition in order to enhance consumer welfare.[227] However, protecting the competition process does not equal protecting individual competitors.[228] As the Commission notes in its Enforcement Priorities, 'that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.'[229]

In other words, as has also been stressed by the Commission and by the ECJ in numerous cases, competition law only protects 'as-efficient' competitors.[230] Thus, in the context of a vertically

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[221] ibid; Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(1) The Competition Law Review 121, 145; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 31; Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11(1) The Competition Law Review 131, 132-33, 145-46.
[222] Also referred to as the 'consumer surplus benchmark'. See Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 5-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020.
[223] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 19.
[224] The concept of 'consumers' encompasses both final and intermediate consumers. See European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 84. See also ibid.
[225] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 19.
[226] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343, [2009] ECR-I 4529, para 38.
[227] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, para 24; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, paras 20-24; Case T-286/09 *Intel Corp. v European Commission* ECLI:EU:T:2014:547, para 105; Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 26.
[228] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 22, 200-03; Pablo Ibañéz Colomo, 'Exclusionary discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review 141, 153-55; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 450.
[229] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 6.
[230] Case C-280/08 P *Deutsche Telekom AG v Commission* ECLI:EU:C:2010:603, [2008] ECR-I 9555, para 177; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, paras 31-33, 39-40, 43, 63-64, 67, 70, 73; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, paras 21-22, 25, 38; Case C-413/14 P *Intel Corp. v Commission* ECLI:EU:C:2017:632, paras 133-134, 136, 139, 140; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC

integrated gatekeeper online platform which refuses to supply access to its platform to its downstream competitors, consumers will be harmed indirectly if this conduct leads to foreclosure of as-efficient competitors on the downstream market.

In practice, assessments of the effects of conduct on consumer welfare by courts and competition authorities have traditionally focussed on *short-term* effects.[231] Furthermore, the parameter of price is generally used as the main indicator for the effects on consumer welfare.[232] However, in digital markets such as online platform markets, this approach is problematic.[233]

Merely focussing on *short-term* (price) effects is only sufficiently indicative of the actual effects on consumer welfare in markets which are characterised by 'static' competition.[234] In such markets, undertakings are under pressure to compete by offering the lowest price. To that end, they must operate at the lowest cost possible by best utilising the limited resources available.[235] Competition on these markets is not associated with intense competition by means of offering new products or new product features.[236] Thus, if the conduct of an undertaking on a 'static' market leads to higher prices, this can be sufficiently indicative of a consumer welfare loss.[237]

This is not the case in online platform markets. Online platform markets are not characterised by 'static' competition, but by 'dynamic' competition.[238] This means that firms compete by innovating.[239] Indeed, online platforms often provide services to consumers at zero-price.[240]

Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 23; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 202-03.

[231] Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(1) The Competition Law Review 121, 122, 166; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[232] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020; Wolfgang Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) MAGKS Joint Discussion Paper Series in Economics, No. 42-2017, 2-3 <https://www.econstor.eu/bitstream/10419/174338/1/42-2017_kerber.pdf> accessed 1 May 2020.

[233] Carl S Mair, 'Taking Technological Infrastructure Seriously' (DPhil thesis, University of Leiden 2017), 103.

[234] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke, 'How Google and others upset competition analysis: disruptive innovation and European competition law' (Disruptive Innovation in the ICT Industries: Challenges for European Policy and Business conference, Brussels, June 2014), 1-2 <https://www.econstor.eu/bitstream/10419/101378/1/795226780.pdf> accessed 1 May 2020.

[235] ibid 2.

[236] J Gregory Sidak and David J Fleece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) Journal of Competition Law & Economics 581, 602.

[237] Wolfgang Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) MAGKS Joint Discussion Paper Series in Economics, No. 42-2017, 4 <https://www.econstor.eu/bitstream/10419/174338/1/42-2017_kerber.pdf> accessed 1 May 2020.

[238] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke, 'How Google and others upset competition analysis: disruptive innovation and European competition law' (Disruptive Innovation in the ICT Industries: Challenges for European Policy and Business conference, Brussels, June 2014), 1 <https://www.econstor.eu/bitstream/10419/101378/1/795226780.pdf> accessed 1 May 2020.

[239] J Gregory Sidak and David J Fleece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) Journal of Competition Law & Economics 581, 603.

[240] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41-42 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

Therefore, users rather choose their provider on the basis of parameters such as innovation and quality of the product or service.[241] In such conditions, the price parameter is useless for establishing harm to consumers.[242] The impact of innovation on consumer welfare is, however, *longer-term* in nature.[243] Merely focussing on *short-term* effects is therefore problematic.[244]

There is indeed broad consensus that innovation is the key driver to the success of digital markets such as online platform markets.[245] Innovation is therefore also a key contributor to consumer welfare in those markets. This means that promoting consumer welfare in online platform markets is closely linked with the safeguarding and promotion of innovation.[246] Conversely, the effects that the conduct of a dominant undertaking has on innovation is particularly relevant to assess the impact of the conduct on consumer welfare.[247]

Therefore, this thesis will take the competition parameter of *innovation* as a *proxy* for consumer welfare in order to assess the desirability of abandoning or holding on to the indispensability requirement. In other words, the question is whether applying the indispensability requirement in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors *benefits the overall level of innovation*. As will be discussed in the next sub-paragraphs, this will come down to whether the indispensability requirement helps provide a *balance* between two types of innovation which cannot be promoted simultaneously, and which balance would not be provided if the indispensability requirement were to be abandoned.

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[241] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke, 'How Google and others upset competition analysis: disruptive innovation and European competition law' (Disruptive Innovation in the ICT Industries: Challenges for European Policy and Business conference, Brussels, June 2014), 1-2 <https://www.econstor.eu/bitstream/10419/101378/1/795226780.pdf> accessed 1 May 2020.
[242] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41-42 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.
[243] Carl S Mair, 'Taking Technological Infrastructure Seriously' (DPhil thesis, University of Leiden 2017), 103.
[244] ibid.
[245] As noted by Wolfgang Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) MAGKS Joint Discussion Paper Series in Economics, No. 42-2017, 2, 4, 19 <https://www.econstor.eu/bitstream/10419/174338/1/42-2017_kerber.pdf> accessed 1 May 2020. See also Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Thibault Schrepel, 'The European Commission Is Undermining R&D and Innovation: Here's How to Change It' (2018) ICLE Antitrust & Consumer Protection Research Program Issue Brief 2018-2, 2 <https://laweconcenter.org/wp-content/uploads/2018/07/schrepel-eu_is_undermining_innovation_20180718_final.pdf> accessed 7 May 2020.
[246] See also Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; Damien Geradin, 'What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?' (Contribution to 'Shaping Competition Policy in the Era of Digitisation, 2018), 8-9 <https://ec.europa.eu/competition/information/digitisation_2018/contributions/damien_geradin.pdf> accessed 7 May 2020.
[247] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

3.2.2. Two types of innovation: *sustaining* innovation and *disruptive* innovation

A distinction can be made between two types of innovation: '*sustaining* innovation' and '*disruptive* innovation'.[248] *Sustaining* innovation refers to innovation that makes an improvement to an already existing product.[249] As such, this type of innovation takes place '*within* a value network' of established firms: it provides consumers with an improvement to a product or service they already value.[250] For example, the improvement of storage space of smart phones classifies as *sustaining* innovation. Such improvements can consist of small advances or major breakthroughs, but they *do not* affect existing markets.[251] Incumbent firms on an existing market tend to focus on *sustaining* innovation by improving their products or services for their most profitable consumers.[252] Focussing on these consumers, the incumbent will ignore the needs of other consumers.[253] It is these overlooked segments that the second type of innovation, '*disruptive* innovation', targets.[254]

Disruptive innovation comes from '*outside* the value network' of established firms and leads to the displacement of established markets. Contrary to *sustaining* innovation, *disruptive* innovation therefore *does* affect existing markets.[255] *Disruptive* technologies will have features that are different from the product or service valued by consumers in the established markets.[256] These technologies will initially perform worse in dimensions which are valuable to the consumers in the established market.[257] However, they are often cheaper and more convenient to use.[258] Consequently, the technology attracts new consumers from outside the established market who value these features. A new market is then created.[259]

Once this market is established, the *disruptive* technology is characterised by quick further improvements.[260] At some point the features that are also valued by the consumers in the

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[248] Joseph L Bower and Clayton M Christensen, 'Disruptive Technologies: Catching the Wave' (1995) 73(1) Harvard Business Review 43, 45.

[249] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.

[250] ibid.

[251] Clayton M Christensen, Michael E Raynor and Rory McDonald, 'What Is Disruptive Innovation?' (2015) 12 Harvard Business Review 1, 5-6.

[252] ibid 4.

[253] ibid.

[254] ibid.

[255] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.

[256] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 78.

[257] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.

[258] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 78.

[259] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.

[260] ibid.

mainstream market, but which previously performed worse, will start to meet the demands of the consumers in the established mainstream market.[261] Additionally, however, the *disruptive* innovation also maintains the advantages that drove its previous success.[262] At this point, the *disruptive* innovation becomes more attractive to consumers from the established market than the products or services on the established market. The *disruptive* innovation will then pull away consumers from the established market to the new market, thereby displacing – 'disrupting' – the established market.[263]

Both types of innovation are important for consumer welfare. However, more than in traditional sectors of the economy, digital markets such as online platform markets are subject to waves of *disruptive* innovation.[264] *Disruptive* innovation is therefore also particularly important in online platform markets.[265] Recent examples of *disruptive* innovation are the rise of online video streaming, which displaced the market for DVD's and Blu-ray, the rise of smartphones and tablets which disrupted the market for PC's and the rise of online content distribution, which displaced traditional content industries.[266]

3.2.3. Competition *in* the market and competition *for* the market

The types of competition associated with *sustaining* and *disruptive* innovation are known as 'competition *in* the market' and 'competition *for* the market'. Competition *in* the market refers to competition within established markets and thus encompasses competition on the basis of *sustaining* innovation, but also on the basis of parameters such as price and output.[267] Competition *in* the market puts pressure on firms to operate as efficiently as possible and to invest in *sustaining* innovation in order to gain an edge over competitors in the same, existing market.[268] This leads to complementary products or services, or improvements to the already existing ones. As such, competition *in* the market contributes to consumer welfare.[269]

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[261] ibid.
[262] Clayton M Christensen, Michael E Raynor and Rory McDonald, 'What Is Disruptive Innovation?' (2015) 12 Harvard Business Review 1, 4.
[263] ibid 4-6. See also Francisco Costa-Cabral, 'Innovation in EU Competition Law: The Resource-Based View and Disruption' (2018) 37(1) Yearbook of European Law 305, 331.
[264] David S Evans, 'Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights, But Not Sleepy Monopolies' (2017) SSRN, 18, 33-34 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438> accessed 12 May 2020; Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.
[265] Renato Nazzini, 'Online Platforms and Antitrust: Evolution Or Revolution? (2018) September CPI Antitrust Chronicle 1, 6.
[266] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020.
[267] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 80.
[268] A Pierre Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation' (2008) TILEC Discussion Paper No. 2008-021, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165> accessed 9 May 2020.
[269] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 81.

On the other hand, competition *for* the market, refers to competition by introducing *disruptive* innovation, which leads to the displacement of an existing market.[270] Competition *for* the market usually leads to a dominant market position for the successful disruptive innovator.[271] This dominant position will then continue to exist until a new disruptive innovator, attracted by the possibility of acquiring market power, displaces the dominant firm.[272] This competitive pressure from future competitors leads to a different type of innovation than competition *in* the market and therefore contributes to consumer welfare in a different way.[273]

Thus, both types of competition contribute to the *overall level of innovation* and thereby to *consumer welfare* in their own way.[274] As both types of innovation are key drivers of competition in online platform markets, consumer welfare will benefit from a *balance* between competition *in* and competition *for* the market.[275] However, only one type of competition can be promoted at once.[276] In other words, a trade-off has to be made between promoting competition *in* and competition *for* the market.[277]

3.2.4. Indispensability as a safeguard for a balance between competition *in* and competition *for* the market

The trade-off that has to be made in refusal to deal cases, as discussed in the first chapter, can in fact be constructed as the trade-off between competition *in* and competition *for* the market and is a good example of why only one type of competition can be promoted at once.

The trade-off discussed in the first chapter was that between the *short-term* and *long-term* effects of an obligation to deal on competition. Applying the framework of competition *in* and

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[270] ibid 80, 83.

[271] A Pierre Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation' (2008) TILEC Discussion Paper No. 2008-021, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165> accessed 9 May 2020.

[272] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 80.

[273] Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020. There is indeed much anecdotal and empirical evidence showing that competitive pressure from 'non-substitute' products, including *disruptive* innovation, is particularly present in digital markets such as online platform markets. See Nicolas Petit and Thibault Schrepel, 'Evaluation of the Commission Notice on market definition in EU competition law. Comments by Professors Nicolas Petit & Thibault Schrepel' (Response to the Evaluation of the Commission Notice on market definition in EU competition law, May 2020), 1 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law/F519594> accessed 1 June 2020.

[274] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 83.

[275] Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 3 June 2020; ibid 185.

[276] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 185.

[277] A Pierre Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation' (2008) TILEC Discussion Paper No. 2008-021, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165> accessed 9 May 2020.

competition *for* the market, the trade-off is formulated as follows: the imposition of a duty to deal does not only promote *short-term* competition on the basis of price or choice, but also on the basis of *sustaining* innovation. This means that when a competition authority imposes a duty to supply an input on a vertically integrated dominant undertaking, downstream competitors will be able to offer complementary products to that of the dominant firm.[278] Competition *in* the market would then be promoted. However, this would disincentivise market participants to invest in *disruptive* innovation and thus to compete *for* the market: it would become more attractive to free-ride on the investments of the dominant undertaking by introducing *sustaining* innovations. Furthermore, an important reason to innovate *disruptively* is the prospect of market power in the new market and the profits associated with it.[279] If duties to deal would be imposed *too easily*, market participants would be disincentivised to innovate *disruptively*, because they know they would have to share their input when they acquire market power.[280] Promoting competition *in* the market, by imposing a duty to deal, therefore goes at the cost of competition *for* the market.

On the other hand, if *no* obligation to deal is imposed, competitors will not be able to compete with the vertically integrated dominant undertaking. Market participants are therefore incentivised to compete *for* the market by investing in *disruptive* innovation.[281] However, the vertically integrated dominant undertaking will then face less competition *in* the market. This can lead to less product variety and higher prices.[282] Promoting competition *for* the market, which is achieved by *not* imposing a duty to deal therefore goes at the cost of competition *in* the market.[283]

Thus, as is illustrated by the trade-off above, only one type of competition can be promoted at once: competition *in* the market can be promoted by intervening, while competition *for* the market can only be promoted by *not* intervening. Which type of competition is promoted is a matter of policy.[284] However, this does not mean that the other type of competition should be ignored.[285]

As follows from *Google Shopping*, *Google Android* and the Reports discussed in paragraph 3.1, competition authorities advocate an interventionist policy with regard to vertically integrated gatekeeper online platforms. This would lead to significant promotion of competition *in* the market, at the cost of competition *for* the market. However, in online platform markets,

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[278] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 181.
[279] Also referred to as 'monopoly rents'.
[280] A Pierre Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation' (2008) TILEC Discussion Paper No. 2008-021, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165> accessed 9 May 2020.
[281] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 181.
[282] ibid 80.
[283] ibid.
[284] ibid 180-81.
[285] ibid 182.

competition usually takes place *for* the market by means of *disruptive* innovation.[286] While this might be the very reason it is argued that competition *in* the market should be promoted more, it also means that consumer welfare in online platform markets is to a large extent derived from what competition *for* the market brings: *disruptive* innovation.[287] In finding a balance, competition *for* the market incentives should thus be preserved. Any legal test must therefore reflect this balance and not allow for intervention *too easily*.

The legal tests proposed for establishing the abusiveness of a refusal by a vertically integrated gatekeeper online platform to supply access to its platform to its downstream competitors either come down to an *effects test* or to a general prohibition with the possibility to provide an objective justification. Both approaches are problematic from the perspective of securing a balance between competition *in* and competition *for* the market.

As discussed, competition authorities and courts tend to focus on *short-term* effects when assessing the impact of conduct on consumer welfare.[288] Such an approach *may* be able to account for *sustaining* innovation. This type of innovation is relatively foreseeable as it takes place in existing markets and usually consists of fairly small improvements to a product.[289] However, the focus on *short-term* effects is insufficient to account for the effects of competition *for* the market, as *disruptive* innovation has *long-term* effects and is practically impossible to predict.[290] Not unsurprisingly, there are (currently) no appropriate analytical tools for taking such *long-term* effects into account.[291] The consequence of applying an effects test would therefore be that competition authorities and courts are likely to conclude that a refusal to supply access to a gatekeeper platform is abusive, because the negative *short-term* effects outweigh

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[286] ibid 83. See also Renato Nazzini, 'Online Platforms and Antitrust: Evolution Or Revolution? (2018) September CPI Antitrust Chronicle 1, 6; David S Evans, 'Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights, But Not Sleepy Monopolies' (2017) SSRN, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438> accessed 12 May 2020. Nicolas Petit and Thibault Schrepel, 'Evaluation of the Commission Notice on market definition in EU competition law. Comments by Professors Nicolas Petit & Thibault Schrepel' (Response to the Evaluation of the Commission Notice on market definition in EU competition law, May 2020), 1 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law/F519594> accessed 1 June 2020.

[287] See also Alexandre De Streel and A Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (2015) OECD Working Paper DAF/COMP/GF(2015)7, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678890> accessed 2 May 2020. It is therefore not infrequently argued that taking a middle- to long-term view of consumer welfare is a more appropriate representation of the effects of conduct on consumer welfare. See for example Carl S Mair, 'Taking Technological Infrastructure Seriously' (DPhil thesis, University of Leiden 2017), 103.

[288] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 41 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[289] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke, 'How Google and others upset competition analysis: disruptive innovation and European competition law' (Disruptive Innovation in the ICT Industries: Challenges for European Policy and Business conference, Brussels, June 2014), 2 <https://www.econstor.eu/bitstream/10419/101378/1/795226780.pdf> accessed 1 May 2020.

[290] Francisco Costa-Cabral, 'Innovation in EU Competition Law: The Resource-Based View and Disruption' (2018) 37(1) Yearbook of European Law 305, 333.

[291] Wolfgang Kerber, 'Competition, Innovation, and Competition Law: Dissecting the Interplay' (2017) MAGKS Joint Discussion Paper Series in Economics, No. 42-2017, 19-20 <https://www.econstor.eu/bitstream/10419/174338/1/42-2017_kerber.pdf> accessed 1 May 2020.

the positive *short-term* effects. After all, a refusal to supply access prevents competitors from introducing *sustaining* innovation. In the *short-term*, consumers are thus harmed. However, the possibly significant positive effects of such a refusal to supply access would not be taken into account, because they are *long-term* and come from competition *for* the market. Therefore, the outcome of an *effects test*-approach would be that competition *in* the market is likely always promoted at the cost of competition *for* the market. The balance between promoting competition *in* and *for* the market is then lost.

This would also be the case when vertically integrated gatekeeper online platforms would be prohibited to refuse access to their platform to their downstream competitors unless they can prove an objective justification. It would then be up to these platforms to prove that the refusal to supply access has overriding positive effects on consumer welfare. Such effects would to a large extent be derived from competition *for* the market, which effects are by their nature practically impossible to prove.[292] Furthermore, unilateral conduct under Article 102 TFEU is virtually never justified on the basis of an efficiencies defence.[293] Such an approach would thus amount to a *per se* prohibition of refusals to supply access to the platform. Again, the consequence would be that competition *in* the market is promoted to such a degree that the balance between competition *in* and *for* the market is lost.

As such, these approaches create a significant risk for 'false positives'[294] and they would significantly chill the incentives of not only the gatekeeper platforms themselves to invest in *sustaining* and *disruptive* innovation, but also that of (future) competitors to invest in *disruptive* innovation, as these competitors will know that they will be obligated to share their property if they become dominant themselves.

On the contrary, in the absence of appropriate analytical tools to take into account the effects that competition *for* the market has on consumer welfare, holding on to the indispensability requirement *will* ensure that competition *for* the market incentives are safeguarded and that a balance between competition *in* and competition *for* the market is secured.

The indispensability requirement was devised to link the abusiveness of a refusal to deal to a foreclosure of a downstream market that is detrimental to consumer welfare.[295] As such, the requirement is a high, but not insurmountable standard for finding a refusal to deal abusive. While the requirement thus limits the applicability of Article 102 TFEU in refusal to deal cases, it does not lead to *per se* legality of refusals to deal. Rather, intervention is only likely to be justified when the negative effects on competition *in* the market clearly outweigh the positive effects on competition *for* the market. Incentives for competition *for* the market, which are especially important in online platform markets, are therefore safeguarded, even where the

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[292] This is also recognised by the authors of the *Competition Policy for the Digital Era* report. See Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 71 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.
[293] Alfonso Lamadrid de Pablo, 'Shortcuts and Courts in the Era of Digitization' (2019) October CPI Antitrust Chronicle 1, 6.
[294] This means that conduct of an undertaking which is actually beneficial to consumer welfare is prohibited. See Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 199.
[295] ibid 717.

policy of competition authorities is to predominantly promote competition *in* the market, which is currently the case. Thus, the indispensability requirement safeguards the balance between competition *in* and *for* the market, which balance would be lost when the indispensability requirement would be abandoned. The *overall level of innovation* benefits from this balance. Taking the *overall level of innovation* as a proxy for consumer welfare, it must therefore be concluded that *holding on* to the requirement of indispensability will benefit consumer welfare.

It must be noted, however, that it could be argued that the indispensability requirement is such a difficult criterion to meet in online platform markets, that the balance between competition *in* and competition *for* the market disproportionately tips the scale towards the side of the latter. As was established in the second chapter, it is unlikely that access to a vertically integrated gatekeeper online platform will be deemed indispensable for downstream competitors. This primarily has to do with the nature of the online environment in which they function, in which many *actual* substitutes are readily available, even though they may be less advantageous, and with the fact that it is very difficult to prove that *potential* substitutes are present. Consequently, it would be *too* difficult for an obligation to deal to be justified and thereby for competition *in* the market to be promoted where necessary. This would create a risk for 'false negatives', which means that conduct that is actually anti-competitive is not prohibited.[296]

However, as noted in paragraph 3.1, there is no empirical evidence that a refusal to supply access by a vertically integrated gatekeeper online platform is more damaging than a refusal to supply access in a more 'traditional' scenario. It is therefore questionable whether there is sufficient reason to justify closer competition law scrutiny by means of abandoning the indispensability requirement.[297] Even if such evidence would be found, this does not necessarily imply that the indispensability requirement should be abandoned completely.

As is argued by the authors of the Report themselves, the basic framework of competition law provides a 'sound and sufficiently flexible basis for protecting competition in the digital era'.[298] Therefore, rather than abandoning the requirement of indispensability completely, it might be possible to reconsider the strictness of the requirement in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors. For example, it could be possible to determine the strictness of the indispensability requirement on a case-by-case basis depending on the degree of *external market failures* in the market. This is essentially what Graef proposes in her dissertation on a more comprehensive revitalisation of the essential facilities doctrine for the digital era.[299]

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[296] ibid 199.

[297] The need for empirical evidence to justify closer competition law scrutiny is also an important argument made in the error-cost debate with regard to innovation-driven markets. See Geoffrey A Manne and Joshua D Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2011) 34(1) Harvard Journal of Law and Public Policy 171, 180.

[298] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (Report for the European Commission, 2019), 3 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 May 2020.

[299] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 190-91, 220-21. See also in short Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) TILEC Discussion Paper No. 2019-028, 12

External market failures allow incumbent online platforms to extend their dominance in time, not as a result of their competitive success, but because of the market situation that has developed around the incumbent's dominance. Such external market failures *can* arise when network effects and switching costs lead to lock-in of consumers and this prevents competitors from competing effectively due to the fact that consumers are not switching to their products.[300] Imposing an obligation to supply access would be more justified in such a situation, because the market itself is less likely to restore competition *in* the market. However, if there are few external market failures, the market *will* be able to restore itself. Imposing obligations to supply access when there are few external market failures would be undesirable, because it would undermine the incentives for competition *for* the market: it would become more attractive for competitors to free-ride on the investments made by the platform and the prospect of dominance for future competitors would be removed.[301]

Thus, if it would indeed be shown empirically that a refusal by a vertically integrated gatekeeper online platform to supply access to its platform to its downstream competitors would justify closer competition law scrutiny, than such an approach to the indispensability requirement can help maintain a balance between promoting competition *in* and competition *for* the market *more so* than completely abandoning the indispensability requirement. After all, the indispensability requirement will then still be a difficult requirement to meet, albeit slightly less than under the current interpretation. Thereby, it ensures that competition *in* the market is not promoted *too easily* and competition *for* the market incentives are secured.

3.3 Sub-conclusion

The goal of this chapter was to assess whether the indispensability requirement should be abandoned in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors.

It is submitted that the requirement of indispensability *should not* be abandoned. When the requirement *would* be abandoned in these cases, the balance between competition *in* and competition *for* the market in online platform markets would be lost. This would be detrimental to the *overall level of innovation* and thereby to *consumer welfare*.

Rather, the indispensability requirement should be held on to. The indispensability requirement functions as an important safeguard for the promotion of competition *for* the market, the effects of which are a large contributor to consumer welfare in online platform markets. As such, a *balance* between competition *in* and competition *for* the market is preserved, even where competition authorities aim to promote competition *in* the market, as they currently do with regard to online platform markets.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457> accessed 22 May 2020 where Graef argues that the European Commission and the General Court may have attuned the strictness of the essential facilities doctrine (and therefore the requirement of indispensability) in *Microsoft* to the specific circumstances in those case, these circumstances being the presence of strong network effects and lock-in of users.

[300] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 191.

[301] ibid 190.

Finally, the concern that applying the indispensability requirement makes it too difficult to promote competition *in* the market where necessary because of the difficulty of meeting the requirement in online platform markets, should *not* lead to the wholesale abandonment of the indispensability requirement. At most, if empirical evidence would be found that a refusal to supply access by a vertically integrated gatekeeper online platform is indeed more damaging than a refusal to supply access in a more 'traditional' scenario, the strictness of the indispensability requirement could be reconsidered. For example, it could be possible to determine the strictness of the indispensability requirement on a case-by-case basis depending on the degree of *external market failures* in the market.

Chapter 4 – Three purported exceptions to the applicability of the indispensability requirement

In the previous chapter it was established that, *in general*, from the perspective of innovation as a key contributor to consumer welfare, it is undesirable to abandon the indispensability requirement in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors. However, courts, commentators and the Commission have argued that there are justifications *not* to apply the indispensability requirement in three *more specific* refusal to deal scenarios: when the refusal to deal constitutes a '*constructive* refusal to deal', when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature and when the refusal to deal constitutes a '*termination* of supply'.[302] The aim of this chapter is to answer the question whether the requirement of indispensability should also be applied in these three specific refusal to deal scenarios.

As will be discussed, these purported exceptions are particularly important for denials of access by gatekeeper online platforms.[303] It is therefore relevant to assess these exceptions specifically with regard to those platforms. In making this assessment, more general legal arguments will be raised. Importantly, however, this chapter will also build on the findings from the previous chapter. This means that it will also be assessed whether it is justified to strike a *different balance* between the promotion of competition *in* and competition *for* the market in online platform markets in these specific refusal to deal scenarios. If there is, not applying the indispensability requirement might be beneficial to consumer welfare and may therefore be justified.

The structure of this chapter is as follows: in paragraph 4.1, the purported exception to the applicability of the indispensability requirement in *constructive* refusal to deal cases is discussed and then 'appraised' on its merits. Similarly, in paragraph 4.2, the purported exception to the applicability of the indispensability requirement in cases where the refusal to deal is remedied by a *reactive* remedy is discussed and appraised. In paragraph 4.3, finally, the purported exception to the applicability of the indispensability requirement in *termination* of supply cases is discussed and appraised.

Finally, in paragraph 4.4, a sub-conclusion is drawn on the chapter.

4.1. Constructive refusals to deal

One distinction that is made between refusals to deal it that between *constructive* refusals to deal and *outright* refusals to deal. A refusal to deal is *constructive* when a dominant undertaking deals with a competitor under unreasonable terms and conditions or needlessly delays

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[302] The distinction between c*onstructive* refusals to deal and *outright* refusals to deal, and *terminations* of supply and *de novo* refusals to deal was already briefly touched upon in paragraph 1.3.

[303] As will be explained in the following sub-paragraphs, many of the cases discussed in chapter 2 – *Google Shopping*, *Google Android*, the *Amazon* investigation and the *Apple* investigations – can be constructed as one or more of these exceptions.

dealing.[304] The dominant undertaking *does*, however, deal with the other undertaking. On the contrary, an '*outright* refusal to deal' means that a dominant undertaking refuses to deal with a customer *entirely*.[305]

This distinction is particularly relevant in cases regarding vertically integrated gatekeeper online platforms. Refusals by these platforms will often be *constructive* in nature, which is evident from the fact that many of the cases discussed in the second chapter can be categorised as *constructive* refusals to deal. For example, in *Google Shopping*, Google (allegedly) demoted competing comparison-shopping services in its general search results by degrading their visibility on the general search results pages. Such conduct can be categorised as a *constructive* refusal to deal, as these competing comparison-shopping services *do* get access, but (allegedly) under *unreasonable conditions*.[306] The same could be said with regard to the allegedly disadvantageous terms and conditions imposed by Amazon in relation to its downstream retail competitors. Perhaps, the conduct investigated in the Apple investigations can also be categorised as a *constructive* refusal to deal.[307] The outcome of these cases could therefore be drastically different if indispensability of the access would not have to be shown in *constructive* refusal to deal cases. After all, the indispensability requirement, which is the main hurdle to finding a refusal to deal abusive, would not have to be met.

4.1.1. The purported exception to the applicability of the indispensability requirement in constructive refusal to deal cases

To understand why it is argued that *constructive* refusals to deal do not require indispensability of the input to be proven, it is necessary to specifically discuss 'margin squeezes', which are essentially a '*price*-based' category of *constructive* refusals to deal.[308] As follows from the Commission's Enforcement Priorities,[309] 'margin squeeze' refers to a vertically integrated

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[304] Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* ECLI:EU:T:2009:317, [2009] ECR II-3155; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 79; David Bailey and Laura E John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, OUP 2018), para 10.151.
[305] David Bailey and Laura E John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, OUP 2018), para 10.151.
[306] Renato Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in *Google*' (GCLC 11th Annual Conference, Brussels, February 2016), 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815081> accessed 15 May 2020; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 477.
[307] Friso Bostoen, 'Spotify lodges antitrust complaint against Apple: it's 'time to play fair' in the music streaming industry' (*CoRe Blog*, 24 April 2019) <https://coreblog.lexxion.eu/spotify-apple/> accessed 24 May 2020.
[308] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 80; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) ch 7; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020. See also Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 273-75.
[309] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7.

dominant undertaking charging 'a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis'.[310]

From the Enforcement Priorities it appears as if the indispensability requirement also has to be met for margin squeezes, as the topic of margin squeezes is mentioned under the header of refusals to deal.[311] However, in *TeliaSonera*, the ECJ confirmed that margin squeeze is 'an independent form of abuse distinct from that of a refusal to supply' and argued that the criteria set out in *Bronner* – most importantly the indispensability requirement – do not necessarily also apply 'when assessing the abusive nature of conduct which consists in supplying services or selling goods on *conditions which are disadvantageous* or on which there might be no purchaser'.[312] Moreover, the Court considers that

> if *Bronner* were to be interpreted otherwise (…) that would (…) amount to a requirement that before any conduct of a dominant undertaking in relation to its *terms of trade* could be regarded as abusive, the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU.[313]

Thus, it would suffice to show that a margin squeeze has an exclusionary effect on an as-efficient competitor.[314] Therefore, the indispensability requirement does not have to be met to establish the abusiveness of a 'margin squeeze', which is a *price*-based constructive refusal to deal.[315]

Based on *TeliaSonera*, in *Slovak Telekom* the GC concluded that for *non*-price-based *constructive* refusals to deal, the indispensability requirement does not apply either.[316] In this case, several forms of conduct were found abusive, some of which were labelled as a margin squeeze, and others as a refusal to supply access to a network of 'unbundled local loops'.[317] More specifically, the latter conduct amounted to the imposition of *unfair terms and conditions*.[318] Therefore, this conduct amounts to a *non*-price-based *constructive* refusal to deal.[319] The GC, referring to the terminology used by the ECJ in *TeliaSonera* – '*conditions*

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[310] ibid, para 80.
[311] ibid, paras 79-80.
[312] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, paras 55-59 (emphasis added). Margin squeeze was already categorised as a stand-alone abuse in Case C-280/08 P *Deutsche Telekom AG v Commission* ECLI:EU:C:2010:603, [2008] ECR-I 9555, para 167.
[313] ibid, para 58 (emphasis added).
[314] ibid, paras 31-33, 56-77; Friso Bostoen, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2017) Stockholm Faculty of Law Research Paper Series No. 42, 5-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075237> accessed 12 May 2020.
[315] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[316] Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929.
[317] ibid, paras 27-28; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 540.
[318] Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929, para 27.
[319] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 540.

which are disadvantageous' and '*terms of trade*' – concluded that the indispensability requirement would not have to be met in case the refusal to deal is *constructive* in nature:

> [s]uch wording suggests that the exclusionary practices to which reference was therefore made concerned not solely a margin squeeze, but also other business practices capable of producing unlawful exclusionary effects for current or potential competitors, like those classified by the Commission as an implicit refusal to supply access to the applicant's local loop.[320]

Thus, contrary to *outright* refusals to deal, the indispensability requirement would not have to be satisfied in case the conduct amounts to a (*non*-price-based) *constructive* refusal to deal.[321] The case is currently under appeal.[322]

4.1.2. Appraisal

There are compelling reasons to believe that the requirement of indispensability *should* apply in cases that concern *constructive* refusals to deal. First of all, the approach towards *constructive* refusals to deal in *Slovak Telekom* is inconsistent with previous case law in which *non*-price-based *constructive* refusals to deal were (implicitly) assessed under the *Bronner*-criteria.[323] This means that indispensability *was* a requirement in these cases. Furthermore, the Commission's arguments in *Slovak Telekom* that indispensability would not have to be proven in *constructive* refusal to deal cases are not in line with its own position in its Enforcement Priorities.[324]

Moreover, applying a different legal test with regard to *constructive* and *outright* refusals to deal makes for an arbitrary distinction, as it can be difficult to distinguish between the two in practice.[325] For example, the conduct in *Slovak Telekom* is categorised as a *constructive* refusal to supply access. However, the case could also be construed as a number of individual *outright* refusals to provide access to some types of information that are ancillary, but indispensable for the downstream competitors of the dominant undertaking to compete.[326]

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[320] Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929, para 126.
[321] ibid, paras 123-128. See also Case T-398/07 *Kingdom of Spain v European Commission* ECLI:EU:T:2012:173, para 68.
[322] C-165/19 P *Slovak Telekom v Commission* [2019] OJ C148/32.
[323] Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, paras 814-1090; Case C-123/16 P *Orange Polska v Commission* ECLI:EU:C:2018:590; *ARA Foreclosure* (Case AT.39759) Commission Decision C(2016) 5586 final [2016]; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 21-22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[324] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, paras 79-81; Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 496.
[325] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 542.
[326] ibid 542-43. See also Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020, explaining that *Microsoft* shows that access can be a matter of degree rather than a 'strict binary' between

Furthermore, if *constructive* refusals to deal could be found abusive *without* the need to establish indispensability of the input, whereas *outright* refusals to deal *would* require indispensability of the input to be shown, this could give rise to the perverse incentive for a dominant undertaking to rather refuse to deal *outright* than refuse to deal *constructively*.[327] After all, *without* the need to establish indispensability of the input, *constructive* refusals to deal would be found abusive more easily than *outright* refusals to deal, which *would* require the indispensability of the input to be shown. As such, *constructive* refusals to deal would become subject to greater competition law scrutiny than *outright* refusals to deal, while *outright* refusals to deal are deemed to be more anti-competitive, as they result in the loss of an alternative product or service on the market.[328]

Conversely, the remedies to margin squeeze and non-price-based *constructive* refusals to deal require an obligation to deal to be effective, just like an *outright* refusal to deal.[329] If the remedy would only be to stop the margin squeeze or non-price-based *constructive* refusal to deal, the dominant undertaking could simply stop dealing with the downstream competitor all together rather than continue on equal footing so as to comply with the remedy.[330]

Most importantly, however, the underlying rationale for requiring indispensability is present in both *outright* and *constructive* refusal to deal cases (whether *price*- or *non*-price-based). This was highlighted by Advocate General Mazák with regard to margin squeezes in his opinion on the *TeliaSonera* case. The same reasoning applies to *non*-price-based *constructive* refusals to deal. The Advocate General noted that a margin squeeze, just like a refusal to deal, concerns a *vertical* foreclosure strategy.[331] This means that the conduct is aimed at excluding downstream competitors from the downstream market.[332] As the Advocate General remarks, '[t]here is no independent competitive harm caused by the margin squeeze over and beyond the harm which would result from a duty-to-deal violation at the wholesale level.'[333]

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outright and *constructive* refusals to supply access. See Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, para 119.

[327] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 477; Gianluca Faella and Roberto Pardolesi, 'Squeezing Price Squeeze under EC Antitrust Law' (2010) 6(1) European Competition Journal 255, 271.

[328] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 428; Annalies Azzopardi, 'No abuse is an island: the case of margin squeeze' (2017) 13 European Competition Journal 228, 245. See also the argument raised by the defendant in Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929, para 130.

[329] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 274.

[330] ibid.

[331] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, Opinion of AG Mazák, para 16.

[332] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 258, 273.

[333] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, Opinion of AG Mazák, para 16; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 273.

The ECJ appears to have failed to acknowledge this when it argued that abandoning the requirement of indispensability with regard to margin squeezes was justified.[334] The Court argued that if indispensability would have to be shown in margin squeeze cases, it would become impossible to pursue '*any* conduct of a dominant undertaking *in relation to its terms of trade*' under Article 102 TFEU without demonstrating that the input at hand is indispensable.[335] This argument is incorrect, as it appears to be based upon an erroneous analogy between abuses concerning *terms of trade* resulting in *vertical* foreclosure and abuses concerning *terms of trade* resulting in *horizontal* foreclosure.[336]

Margin squeezes and refusals to deal are *vertical* foreclosure strategies, which means that they result in excluding downstream competitors from the downstream market.[337] These abuses presuppose vertical integration of the dominant undertaking and they are remedied by an obligation to actively assist (downstream) competitors.[338] The Court likely had abuses such as predatory pricing, exclusive dealing obligations and loyalty rebates in mind when it stated that it would become impossible to pursue '*any* conduct of a dominant undertaking *in relation to its terms of trade*' under Article 102 TFEU without demonstrating that the input at hand is indispensable.[339] These categories of abuses are indeed also concerned with the *terms of trade* used with customers in a *vertical* relation. However, they *do not* result in foreclosing a *vertical* market (such as the downstream market). Rather, they result in foreclosure of a *horizontal* market – a market at the same level of the distribution chain.[340] Therefore, contrary to abuses resulting in *vertical* foreclosure, these abuses *do not* presuppose vertical integration of the dominant undertaking and they are *not* remedied by actively assisting (downstream) competitors of the dominant undertaking.

The duty for a dominant undertaking to actively assist its competitors will thus only be present in *vertical* foreclosure cases where the dominant undertaking is vertically integrated.[341] As competitors generally do not have a duty to assist each other, such a duty is only justified in 'exceptional circumstances'.[342] It is exactly for this reason that an obligation to deal with

[334] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 273-75.
[335] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, para 58 (emphases added); Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929, para 124.
[336] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 273-75.
[337] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, Opinion of AG Mazák, para 16; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 258, 273.
[338] Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309.
[339] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 274-75.
[340] ibid 258, 274.
[341] Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309.
[342] Romano Subiotto and Robert O'Donoghue, 'Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC' (2003) 24(12) European Competition Law Review 683, 687.

downstream competitors is only justified when the vertically integrated dominant undertaking controls an indispensable input.[343] After all, if the input is not indispensable, the downstream market is not foreclosed, as competitors can simply switch to another supplier.[344] Similarly, as *constructive* refusals to deal *and outright* refusals to deal both result in *vertical* foreclosure, which are remedied by a duty to actively assist competitors, the policy implications of such remedies on the investment incentives of undertakings are the same.[345] As Advocate General Mazák noted:

> charging a price (margin squeeze) which prevents an as-efficient competitor from competing downstream operates in effect as a refusal to deal and implies that the same framework of analysis *and the general concerns about the incentives of dominant undertakings to invest* should apply.[346]

The Advocate General refers here to the trade-off that a competition authority or court has to make when deciding whether to intervene in refusal to deal cases. As was discussed in the first and third chapter, this trade-off amounts to balancing the *short-term* and *long-term* effects of imposing an obligation to deal on the incentives of undertakings to invest and innovate. In the context of online platforms this comes down to balancing the effects on the incentives of undertakings to compete *in* and *for* the market. This trade-off is present in *all* vertical foreclosure cases concerning vertically integrated dominant undertakings – but is *not* present in horizontal foreclosure cases –, as all such cases are remedied by a duty to assist competitors.[347] Therefore, there is no reason to assume that this trade-off is not equally present in *outright* and *constructive* refusal to deal cases.[348] Furthermore, both the Commission *and* the GC have argued that the form of the refusal to supply does not determine the seriousness of a refusal to deal.[349] The implications of *outright* refusals to deal and *constructive* refusals to deal

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[343] ibid. This is also exemplified by the discussion on the applicable legal tests in tying cases. When tying concerns a *vertical* foreclosure strategy, it is often argued that indispensability should also be part of the legal test. Such tying is referred to as 'non-traditional' tying. See for example Nicolas Petit and Norman Neyrinck, 'Back to Microsoft I and II: Tying and the Art of Secret Magic' (2011) 2 Journal of European Competition Law & Practice 117. 'Traditional' tying, on the contrary, is a *horizontal* foreclosure strategy. In such cases, indispensability as part of the legal test to establish an abuse would not be desired. See for a more comprehensive discussion on this topic Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 536-38.

[344] Romano Subiotto and Robert O'Donoghue, 'Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC' (2003) 24(12) European Competition Law Review 683, 687.

[345] See also Hendrik Auf'mkolk, 'The "Feedback Effect" of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze' (2012) 2 Journal of European Competition Law & Practice 149, 154-55.

[346] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, Opinion of AG Mazák, para 16 (emphasis added). Advocate General Mazák explicitly refers here to the trade-off as posed by Advocate General Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, Opinion of AG Jacobs, para 57.

[347] Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309.

[348] See also specifically with regard to margin squeezes Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 274.

[349] *Slovak Telekom* (Case AT.39523) European Commission Decision C(2014) 7465 final [2014], para 367; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, para 133; Alison

on the *overall level of innovation*, and consumer welfare accordingly, are therefore not *by nature* different.

Hence, being able to impose a duty to deal on a dominant undertaking in *constructive* refusal to deal cases without the safeguard of the requirement of indispensability gives rise to a significant risk of lowering the incentives of undertakings to invest and innovate (in the first place). This would be detrimental to the *overall level of innovation* and therefore to consumer welfare.[350] From the perspective of consumer welfare, it is therefore undesirable *not* to apply the indispensability requirement in *constructive* refusal to deal cases. With regard to online platform markets *specifically*, making a distinction between the applicability of the indispensability requirement in *constructive* and *outright* refusal to deal cases would be even more problematic for the reasons already more extensively discussed in the third chapter.

In essence, these reasons are the particularly unpredictable nature of the *long-term* effects of *disruptive* innovation on consumer welfare, the absence of any analytical tools to account for such effects and the current focus of competition authorities and courts on the *short-term* effects on consumer welfare, which is accompanied by an interventionist policy with regard to online platform markets. Due to these factors, any *constructive* refusal by a vertically integrated gatekeeper online platform to supply access to its platform to downstream competitors is likely to be found abusive in the absence of the indispensability requirement, even if the outcome of such a refusal to deal would actually be pro-competitive in the long run.

Consequently, if one would abandon the requirement of indispensability, the balance between the promotion of competition *in* and competition *for* the market incentives would be lost. This is problematic, as the effects of *disruptive* innovation are a large contributor to consumer welfare in online platform markets, and competition *for* the market incentives are therefore particularly important in these markets. Holding on to the requirement of indispensability helps provide a balance between competition *in* and competition *for* the market incentives and is therefore *especially* important in online platform markets.

Many commentators have previously stated that *TeliaSonera* and *Slovak Telekom* should be overruled and that the approach to margin squeeze and non-price-based *constructive* refusals to deal should be rethought.[351] It is submitted that this should indeed be done, so as to prevent that

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Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 496.

[350] See also Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309.

[351] See Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 274; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020; Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 496. See also Hendrik Auf'mkolk, 'The "Feedback Effect" of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze' (2012) 2 Journal of European Competition Law & Practice 149, 154-55; Jean-Yves Art, 'Highway 102: A Nice Turn with Still Some Miles to Go' (2011) 2(3) Journal of European Competition Law & Practice 183, 184; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 403; Annalies Azzopardi, 'No abuse is an island: the case of margin squeeze' (2017) 13 European Competition Journal 228, 242-48; Gianluca Faella and Roberto Pardolesi, 'Squeezing Price Squeeze under EC Antitrust Law'

the arbitrary and unjustified distinction between *constructive* refusals to deal and *outright* refusals to deal does not lead to outcomes which are detrimental to the *overall level of innovation* and thereby to *consumer welfare* in online platform markets. In other words, the requirement of indispensability *should* be applied in cases where a vertically integrated gatekeeper online platform *constructively* denies access to its platform to its downstream competitors.

4.2. Nature of the remedy

Another interpretation of the case law is that the applicability of the indispensability requirement depends on the nature of the remedy.[352] The indispensability requirement would *not* apply in cases where the remedy to a refusal to deal is '*reactive*' in nature.[353] *Reactive* in this sense refers to a remedy which imposes a *negative* obligation on an undertaking that can be administered on a one-off basis.[354] For example, a cease-and-desist order is a *reactive* remedy.[355]

On the other hand, the indispensability requirement *would* apply when the remedy is '*proactive*' in nature. *Proactive* in this sense refers to a remedy which imposes a *positive* obligation on an undertaking. A remedy is *proactive*, for example, when it consists of a duty to supply access on regulated terms and conditions or when it is structural in nature, which means that business segments of the undertaking must be separated.[356]

This reading of the case law is advanced by the Commission in its *Google Shopping* decision and on appeal to that decision.[357] Referring to *Van den Bergh Foods*, the Commission argues that indispensability of the input would not have to be shown as the remedy in *Google Shopping* did not involve 'imposing a duty on [Google] *to transfer an asset or enter into agreements with persons with whom it has not chosen to contract*'.[358] Rather, it merely required Google to cease

(2010) 6(1) European Competition Journal 255, 271, 283-84; Damien Geradin, 'Refusal to Supply and Margin Squeeze: A Discussion of Why the "Telefonica Exceptions" are Wrong' (2011) TILEC Discussion Paper No. 2011-009, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762687> accessed 15 May 2020.

[352] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 651; Case T-612/17 *Google and Alphabet v Commission* (Report for the Hearing) <https://leconcurrentialiste.com/wp-content/uploads/2020/02/report-for-the-hearing-google-tribunal.pdf> accessed 18 May 2020, para 303; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 536.

[353] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 536.

[354] ibid.

[355] ibid.

[356] ibid.

[357] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 651; Case T-612/17 *Google and Alphabet v Commission* (Report for the Hearing) <https://leconcurrentialiste.com/wp-content/uploads/2020/02/report-for-the-hearing-google-tribunal.pdf> accessed 18 May 2020, para 303.

[358] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 651 (emphasis added). Thereby referring to Case T-65/98 *Van den Bergh Foods Ltd v Commission* ECLI:EU:T:2003:281, [2003] ECR-II 4653, para 161 upheld on appeal in Case C-552/03 P *Unilever Bestfoods Ireland v Commission* ECLI:EU:C:2006:607, [2006] ECR I-9091, paras 113, 137; Case C-457/10 P *AstraZeneca*

its conduct.[359] Therefore, the indispensability of equal access to Google's general search results for Google's downstream comparison-shopping service competitors would not have to be shown.[360]

4.2.1. The purported exception to the applicability of the indispensability requirement when the refusal to deal is remedied by a reactive remedy

Ibáñez Colomo argues that it is indeed most sensible that the applicability of the indispensability requirement depends on the nature of the remedy.[361] From a sample of relevant cases, he shows that every case which required indispensability to be proven was remedied by a *proactive* remedy.[362] Conversely, every case which that was redressed by means of a *reactive* remedy did not require indispensability of the input to be shown.[363] Other possibly determinant factors for the applicability of the indispensability requirement are not consistent with whether indispensability was in fact a requirement in the sampled cases.[364]

Ibañéz Colomo then argues that *proactive* remedies will negatively influence the incentives of undertakings to invest and innovate. Furthermore, such *proactive* remedies would be demanding for competition authorities and courts as they will be burdened with the design, implementation and monitoring of these remedies. *Such factors* would not be relevant where the remedy is *reactive*, because competition authorities and courts *do not* have to concern themselves with complex issues such as the design, implementation and monitoring of the remedy. Rather, they can suffice with a simple cease-and-desist order.[365]

On the basis of this comparison, Ibañéz Colomo concludes that indispensability is logically only a requirement when the remedy is *proactive* and not when the remedy is *reactive*. However, in making this comparison between the consequences of *proactive* and *reactive*

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v Commission ECLI:EU:C:2012:293, Opinion of AG Mazák, paras 94-95. See also Case T-612/17 *Google and Alphabet v Commission* (Report for the Hearing), para 339 <https://leconcurrentialiste.com/wp-content/uploads/2020/02/report-for-the-hearing-google-tribunal.pdf> accessed 18 May 2020.

[359] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 651.

[360] ibid.

[361] See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532.

[362] ibid 543. Referring to the decisions of the ECJ in *Commercial Solvents*, *CBEM-Telemarketing*, *Magill* and *Bronner*. See Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223; Case 311/84 *CBEM v CLT & IPB* ECLI:EU:C:1985:394, [1985] ECR 1125; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791.

[363] See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 543. Referring to the decisions of the ECJ in *Deutsche Telekom*, *TeliaSonera* and *Slovak Telekom*. See Case C-280/08 P *Deutsche Telekom AG v Commission* ECLI:EU:C:2010:603, [2008] ECR-I 9555; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527; Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929.

[364] See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 542-43.

[365] ibid 543.

remedies, Ibañéz Colomo omits to pay attention to the consequences of a *reactive* remedy (in *vertical* foreclosure situations) on the incentives for undertakings to invest and innovate. This is an important caveat, which will be discussed in the next sub-paragraph.

4.2.2. Appraisal

The interpretation of the case law by the Commission in *Google Shopping*, which is that the applicability of the indispensability requirement depends on the nature of the remedy, should not be followed.[366] This interpretation would give the Commission the discretion to determine when to apply the indispensability requirement.[367] The Commission argues that it would not have to show the indispensability of the input when it imposes a remedy in which it does not lay down a specific measure (such as a duty to transfer an asset), but rather commands an undertaking to cease the conduct and abide by the principle to treat competitors equally.[368] Such a remedy would be *reactive* according to the Commission. However, in practice, a *reactive* remedy will often lead to *positive* obligations for the dominant undertaking to change its business practices.[369] For example, the remedy imposed on Google actually led to a *positive* obligation for Google to alter the design and operation of its search engine.[370]

The Commission thus places the *form* of the remedy over its *actual outcome*. Following this interpretation would give the Commission the discretion to decide whether or not to apply the indispensability requirement: simply imposing a cease-and desist-order in combination with an order to abide by the principle of equal treatment would lead to the inapplicability of the indispensability requirement, even when in practice the remedy leads to a positive obligation on the dominant undertaking. As such, the standard would become subject to policy, rather than law and make it significantly less difficult for competition authorities to prove the abusiveness of a refusal to deal.[371] This is undesirable, even more so in the context of the 'more regulatory approach' to online platforms advocated by the Commission and other NCAs.[372] As was established in the third chapter, the indispensability requirement precisely *is* an important safeguard against overly active policy-induced enforcement in online platform markets: it

[366] See also Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 476-77; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 32-36 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[367] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 548.
[368] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 651; ibid 544.
[369] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 34 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 544.
[370] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 544.
[371] ibid 548.
[372] As Ibañéz Colomo notes, the consequence of the Commission's interpretation would be that the decision whether or not to apply the requirement of indispensability would, as matter of policy rather than law, also become subject to limited judicial review. See ibid 548.

protects competition *for* the market incentives, which are particularly important in online platform markets, even where the policy of competition authorities is to promote competition *in* the market. Giving the Commission the discretion to decide whether or not to apply the indispensability requirement would therefore be problematic. It would also not be unlikely that competition authorities would start a larger number of cases with regard to conduct of gatekeeper online platforms.[373] Conduct in these cases would then be found abusive *too easily* due to the inability to account for the *long-term* positive effects of *disruptive* innovation. This 'formalistic' interpretation of the case law advocated by the Commission should therefore not be followed.

Contrary to the Commission, Ibañéz Colomo argues that the *actual outcome* of the remedy should be determinative of the applicability of the indispensability requirement: when the remedy in practice leads to a *positive* obligation, the indispensability requirement should apply.[374] However, there are several reasons why this interpretation should also *not* be followed.

First of all, as Dunne notes, if the applicability of the indispensability requirement would depend on the nature of the remedy, courts and competition authorities would have to decide upon the necessary remedy before identifying the applicable legal test and before establishing the abusiveness of the conduct.[375] This would be the only area in European competition law where the matter of the remedy would precede the assessment of abusiveness.[376] Indeed, as Dunne notes, in *Commercial Solvents* the ECJ remarked that the abusiveness of the conduct should *not* be linked to the question of what remedy should be imposed.[377]

Furthermore, the value of the precedent of *Van den Bergh Foods* to which the Commission refers in the *Google Shopping* case is also questionable. As Dunne argues, the paragraph of this judgment that the Commission quotes simply explains why the indispensability requirement was not applicable: the case concerned (de facto) exclusive dealing obligations.[378] This is a valid point. Exclusive dealing obligations are abusive under another test, which does *not* require indispensability of the input to be shown. As was discussed in paragraph 4.1.2, an exclusive dealing obligation is an abuse which results in *horizontal* foreclosure, rather than *vertical* foreclosure, even though the conduct targets the vertical relation between a dominant upstream undertaking and a downstream undertaking.[379] As indispensability is only a requirement in

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[373] See also ibid 548 more generally on the expectation of increased enforcement under a formalistic approach to the nature of the remedy as a determinant factor for the applicability of indispensability.
[374] ibid 544-45.
[375] Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 33-34 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[376] ibid 34.
[377] Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223, paras 45-46; ibid 32.
[378] Case T-65/98 *Van den Bergh Foods Ltd v Commission* ECLI:EU:T:2003:281, [2003] ECR-II 4653, para 161; Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 33 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[379] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 274-75.

vertical foreclosure cases, the fact that the Commission did not have to prove the indispensability of the input in *Van den Bergh Foods* is plainly intelligible.

Most importantly, however, – and this point was highlighted as the caveat in the argument of Ibañéz Colomo – the distinction between *proactive* and *reactive* remedies is inconsistent with the implications of an obligation to deal on the investment incentives of undertakings, and the effects that these investment incentives have on the *overall level of innovation* and *consumer welfare* accordingly. Ibañéz Colomo states that the incentives of undertakings to invest and innovate will be negatively impacted when the remedy is *proactive*. However, he does not state anything about the investment incentives in case of a *reactive* remedy.[380] Nevertheless, he does state that *constructive* refusals to deal can sometimes be remedied by a *reactive* remedy and sometimes by a *proactive* remedy.[381] This exemplifies the aforementioned inconsistency, as it was already established in paragraph 4.1.2 that *constructive* refusals to deal have the same impact on investment incentives of undertakings as *outright* refusals to deal.

Indeed, *all vertical* foreclosure abuses by vertically integrated dominant undertakings are remedied by an obligation to actively assist their competitors.[382] As such, whether the remedy is *proactive* or *reactive*, the vertically integrated undertaking will be obligated to actively assist its competitors. Consequently, regardless of whether the remedy is *proactive* or *reactive*, the same trade-off must be made by courts and competition authorities between the *short-term* and *long-term* effects of imposing an obligation to deal on the incentives of undertakings to invest and innovate. Again, in the context of online platforms this comes down to balancing the effects on the incentives of undertakings to compete *in* and *for* the market. The implications of refusals to deal, whether remedied by a *proactive* or *reactive* remedy, on the *overall level of innovation* and *consumer welfare* accordingly, are therefore not *by nature* different.

Thus, being able to impose a duty to deal on a dominant undertaking when the remedy to a refusal to deal is *reactive* without the safeguard of the requirement of indispensability gives rise to a significant risk of lowering the incentives of undertakings to invest and innovate (in the first place). This would be detrimental to the *overall level of innovation* and therefore to consumer welfare.[383] While the interpretation advanced by the Commission and Ibañéz Colomo may make sense from the perspective of institutional costs associated with imposing *proactive* and *reactive* remedies, the similar impact of these remedies on consumer welfare does not justify abandoning the indispensability requirement with regard to abuses remedied by a *reactive* remedy.

Making an arbitrary distinction between the applicability of the indispensability requirement based on the nature of the remedy would be *especially* problematic in online platform markets

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[380] See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 543.
[381] ibid 549.
[382] Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309. Indeed, as Dunne notes, the implications of a cease-and-desist order may be even more burdensome than a positive, explicit duty to contract. See Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper No. 15/2019, 35 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938> accessed 2 June 2020.
[383] See also Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' (2015) 6(5) Journal of European Competition Law & Practice 301, 309.

for the reasons already more extensively discussed in the third chapter and under the appraisal of *constructive* refusals to deal in paragraph 4.1.2. Briefly summarised, however, this comes down to the fact that courts and competition authorities cannot properly account for the positive effects of *disruptive* innovation, which are a particularly large contributor to consumer welfare in these markets. The requirement of indispensability is an especially useful safeguard in online platform markets for competition *for* the market incentives. Without this safeguard, the balance between competition *in* and *for* the market would be lost. Thus, the applicability of the requirement of indispensability should *not* depend on the nature of the remedy.

4.3. Terminations of supply

Finally, another distinction made between refusals to deal is that between '*terminations* of supply' and '*de novo* refusals to deal'. A *termination* of supply means that an undertaking refuses to deal with a customer it *has* previously dealt with.[384] A *de novo* refusal to deal means that an undertaking refuses to deal with a customer it has *not* previously dealt with.[385]

This distinction is also particularly relevant for cases concerning access to vertically integrated gatekeeper online platforms, as denials of access by such platforms will often take the form of *terminations* of supply.[386] Equally, the conduct in some of the pending cases discussed in the second chapter can be categorised as a *termination* of supply. For example, in *Google Shopping*, the Commission found that Google started the self-preferencing of its own comparison-shopping service once it realised that its own service was not successful.[387] In other words, at some point in time Google allegedly *terminated* the supply of access to its general search results

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[384] When the dominant undertaking terminates its supply only with regard to a limited number of competitors, such conduct could also be construed as discriminatory conduct. In that situation, indispensability would not be a requirement of the legal test. See Romano Subiotto and Robert O'Donoghue, 'Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC' (2003) 24(12) European Competition Law Review 683, 688; Liyang Hou, 'Refusal to Deal within EU Competition Law' (2010) SSRN, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623784> accessed 20 May 2020. However, as the conduct in the cases discussed in chapter 2 concerns refusals to deal with *all* competitors and a discussion on discriminatory abuses would be outside the scope of this thesis, this thesis will not discuss such discriminatory abuses. This paragraph is therefore, albeit implicit in its wording, specifically aimed at *terminations* of supply with *all* downstream competitors, although the fact that the supply to a single downstream competitor is *terminated* does not necessarily imply that the refusal to deal theory of abuse is not applicable.

[385] David Bailey and Laura E John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, OUP 2018), para 10.152. The distinction between *terminations* of supply and *de novo* refusals to deal does not coincide with the distinctions made in the previous paragraphs. This means that both *terminations* of supply and *de novo* refusals to deal can be *constructive* or *outright* in nature and be redressed by a *proactive* or *reactive* remedy.

[386] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 482.

[387] *Google Search (Shopping)* (Case AT.39740) European Commission Decision C(2017) 4444 final [2017], para 343; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 541; Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2012) TILEC Discussion Paper No. 2012-036, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169343> accessed 19 May 2020.

pages on equal footing to its competitors.[388]

4.3.1. The purported exception to the applicability of the indispensability requirement in termination of supply cases

Some commentators have argued that the requirement of indispensability should not be part of the legal test for establishing the abusiveness of a *termination* of supply, when this supply has previously been granted voluntarily.[389] Höppner bases this on the ruling of the ECJ in *Sot Lélos v GlaxoSmithKline*, which concerned a refusal of a dominant pharmaceutical undertaking to supply existing customers with the aim of restricting parallel trade.[390] The ECJ held that

> established case-law of the Court shows that the refusal by an undertaking occupying a dominant position on the market for a given product to meet the orders *of an existing customer* constitutes abuse of the dominant position under Article [102 TFEU] where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor.[391]

With 'established case-law', the Court refers to *Commercial Solvents* and *United Brands*, which also concerned *terminations* of supply.[392] These cases were decided before *Bronner*, in which the requirement of indispensability was explicitly devised as part of the legal test to establish the abusiveness of a refusal to deal. The legal test applied by the ECJ in *Commercial Solvents* and *United Brands* cases did not (explicitly) require indispensability of the input. Rather, in *Commercial Solvents* the ECJ found that a refusal to deal, taking the form of a *termination* of supply, could be abusive when the refused input was required by existing downstream competitors and the refusal was likely to eliminate all competition from those competitors.[393] Similarly, in *United Brands*, the ECJ found an abuse without establishing the indispensability

[388] As such, the *termination* of supply would be *constructive* in nature.
[389] Most notably advocated by Höppner and Coates. See Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208; Kevin Coates, 'The Estoppel Abuse' (*21st Century Competition Blog*, 28 October 2013) <http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/> accessed 13 May 2020. See also Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2012) TILEC Discussion Paper No. 2012-036, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169343> accessed 19 May 2020.
[390] Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia EE v GlaxoSmithKline* ECLI:EU:C:2008:504, [2008] ECR I-7139; Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 218; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 239.
[391] Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia EE v GlaxoSmithKline* ECLI:EU:C:2008:504, [2008] ECR I-7139, para 34 (emphasis added).
[392] ibid. Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223, para 25; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* ECLI:EU:C:1978:22, [1978] ECR 207, paras 182-83.
[393] Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* ECLI:EU:C:1974:18, [1974] ECR 223, para 25; Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 217.

of the input.[394] It held that a dominant undertaking with a strong brand reputation which is valued by consumers cannot 'stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'.[395]

The fact that the ECJ referred to *Commercial Solvents* and *United Brands* and not to *Bronner* and *Magill*, in which it established stricter requirements for finding a refusal to deal to be abusive – indispensability of the input and elimination of all competition[396] –, may indicate that the Court is of the opinion that a different legal test applies with regard to *terminations* of supply.[397]

Höppner argues that *Sot Lélos v GlaxoSmithKline*, *Commercial Solvents* and *United Brands* should indeed be interpreted as such.[398] He argues that the introduction of the requirement of indispensability in *Magill* and *Bronner* was linked to the fact that these cases concerned *de novo* refusals to deal.[399] In his view, *de novo* refusals to deal constitute a more drastic intrusion on the property rights and freedoms of the dominant undertaking than a *termination* of supply.[400] An obligation to deal would therefore only be justified in very exceptional circumstances, which is reflected in the strict indispensability requirement.[401]

The interference would be more significant, first of all, because a dominant undertaking that refuses to deal *de novo* is not actively altering its conduct so as to leverage its market power from an upstream market to a downstream market. The dominant undertaking would merely aim at maintaining its position.[402] On the contrary, a termination of supply *is* an active change of conduct and *would* therefore be leveraging conduct.[403]

Furthermore, a *de novo* refusal to deal does not disturb any legitimate expectations of a downstream competitor that the input will be continuously available, on the basis of which it may have made investments in order to operate on the downstream market.[404] After all, a *de novo* refusal to deal implies that there has been no previous dealing.[405] On the contrary, a *termination* of supply *could* violate the expectations of downstream competitors as to the

[394] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 234.
[395] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* ECLI:EU:C:1978:22, [1978] ECR 207, para 182.
[396] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* ECLI:EU:C:1998:264, [1998] ECR-I 7791, para 41; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ECLI:EU:C:1995:98, [1995] ECR-I 743, para 56. 'All competition' later became all *effective* competition in Microsoft, as was already discussed in paragraph 1.2.3.2. See Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601, para 563.
[397] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 239.
[398] Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 217-18.
[399] ibid 217.
[400] ibid.
[401] ibid.
[402] ibid.
[403] ibid.
[404] ibid.
[405] ibid.

continuous availability of the input.[406] Similarly, Coates argues that if a vertically integrated dominant undertaking has voluntarily decided to supply a downstream competitor, it can no longer refuse to deal.[407] Rather, it must keep on supplying on such terms that the competitor can compete effectively, as the competitor will have already made commercial decisions in the expectation of the continuous supply of the input by the dominant undertaking.[408] This 'reliance' should be protected according to Coates.[409]

Finally, when the refusal to deal constitutes a *termination* of supply, it would not be possible to argue that it is commercially unviable for the dominant undertaking to provide access to the input. After all, it has previously found it profitable to do so.[410] In that sense, it would also not be possible to argue that an obligation to deal would negatively influence the incentives of the dominant undertaking to invest and innovate.[411] It is in light of these reasons that the requirement of indispensability should only be applicable in *de novo* refusal to deal scenarios.

4.3.2. Appraisal

The requirement of indispensability *should*, however, be part of the legal test for establishing the abusiveness of a *termination* of supply, specifically in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors. There are several reasons for this.

First of all, the Commission states in its Enforcement Priorities that it will assess *terminations* of supply under the same conditions as *de novo* refusals to deal.[412] These conditions also include the requirement of indispensability.[413] However, the Commission does state that it deems a *termination* of supply more likely to be abusive than a *de novo* refusal to deal when the requesting undertaking has made 'relationship-specific investments in order to use the subsequently refused input'.[414] Furthermore, if the owner of the essential input has found it in

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[406] ibid.
[407] Kevin Coates, 'The Estoppel Abuse' (*21st Century Competition Blog*, 28 October 2013) <http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/> accessed 13 May 2020. See also Nicolas Petit, 'Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) SSRN, 8-9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253> accessed 16 May 2020.
[408] Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 323; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 240.
[409] Kevin Coates, 'The Estoppel Abuse' (*21st Century Competition Blog*, 28 October 2013) <http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/> accessed 13 May 2020; Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 323.
[410] Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 217.
[411] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 534-35.
[412] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, paras 81, 84.
[413] The Commission refers to indispensability as 'objective necessity'. See European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 81.
[414] ibid, para 84.

its interest to supply the input in the past, this is 'an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment'.[415] Nevertheless, the Commission states that it *will* apply the requirement of indispensability to *termination* of supply cases.[416]

Furthermore, the case law is not uniform. In *Microsoft*, which also concerned a *termination* of supply, the GC *did* apply the requirement of indispensability.[417] *Microsoft* was not appealed and the judgment is therefore authoritative. However, it is unsure whether the ECJ would have applied a different legal test similar to the one in *Sot Lélos v GlaxoSmithKline* if the case would have been appealed.

Moreover, it is questionable whether the cases referred to by Höppner are strong precedents for the purported exception to the applicability of the indispensability requirement in *termination* of supply cases. First of all, it is often argued that, while the indispensability requirement was not explicitly part of the legal test in *Commercial Solvents*, the input was in fact indispensable by the standards later established in *Bronner*.[418]

Furthermore, the inapplicability of the indispensability requirement in *United Brands* can be explained on the basis of two reasons.[419] In *United Brands*, the refusal to supply the long-standing customer was aimed at dissuading customers to promote the products of the dominant undertakings' *horizontal* competitors.[420] As such, the conduct was aimed at *horizontal* foreclosure and not at *vertical* foreclosure.[421] As was already discussed in paragraph 4.1.2, it is therefore logical that the indispensability requirement does not apply: the indispensability requirement only makes sense in *vertical* foreclosure situations with regard to vertically integrated dominant undertakings.

Moreover, refusals to deal can be used as part of enforcing another abuse.[422] This was also the case in *United Brands*: the refusal to deal was aimed at punishing customers for dealing with competitors, which is a way to enforce 'single branding'.[423] If the refusal to deal is used to enforce other anti-competitive conduct, the refusal to deal must be assessed in line with the

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[415] ibid.
[416] ibid.
[417] Case T-201/04 *Microsoft Corp. v Commission* ECLI:EU:T:2007:289, [2007] ECR-II 3601; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 233.
[418] See for example Jonathan Faull, Ali Nikpay and Deirdre Taylor, *The EU Law of Competition* (3rd edn, OUP 2014) para 4.595; Romano Subiotto and Robert O'Donoghue, 'Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC' (2003) 24(12) European Competition Law Review 683, 687.
[419] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 272-73.
[420] ibid 272.
[421] ibid 194, 272. See also Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 725.
[422] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 77.
[423] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 272.

legal test applicable to that main abuse, which for single-branding would merely be the as-efficient competitor-test.[424]

Finally, it has been argued that the legal test applied in *Sot Lélos v GlaxoSmithKline* was unjustified and incorrect.[425] The case was aimed at restricting parallel trade.[426] Such conduct should therefore be found abusive on the basis of the specific legal test for conduct aimed at restricting parallel trade, which, other than the test for refusals to deal, does not require that the input is indispensable.[427] The test applied by the ECJ would therefore be unjustified.

Thus, it is questionable whether the abovementioned cases provide valuable precedents to base upon the purported exception to the applicability of the indispensability requirement in *termination* of supply cases. Indeed, the majority of commentators is of the opinion that indispensability *should* be part of the legal test for establishing the abusiveness of a *termination* of supply.[428] Furthermore, the *substantive* arguments raised by Höppner and Coates also do *not* justify disapplication of the indispensability requirement in *termination* of supply cases.

First of all, the argument that a *termination* of supply is an active change of conduct and therefore constitutes leveraging conduct, in and on itself cannot justify a lower threshold for abusiveness by means of disapplication of the indispensability requirement.[429] After all,

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[424] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 77; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 272.

[425] See Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 272-73.

[426] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 77; ibid 273.

[427] Referred to as the 'naked exclusion-test'. See Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 193-95, 273; Case 26/75 *General Motors Continental NV v Commission* ECLI:EU:C:1975:150, [1975] ECR 1367, para 12; Case 226/84 *British Leyland Public Limited Company v Commission* ECLI:EU:C:1986:421, [1986] ECR 3263, para 24; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 77.

[428] As noted by Ibañéz Colomo. See Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) Journal of European Competition Law & Practice 532, 538. Ibañéz Colomo refers to Jonathan Faull, Ali Nikpay and Deirdre Taylor, *The EU Law of Competition* (3rd edn, OUP 2014) para 4.581; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 575-76; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 717-723. See also Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 235; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 272-73; Liyang Hou, 'Refusal to Deal within EU Competition Law' (2010) SSRN, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623784> accessed 20 May 2020; Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Bloomsbury Publishing 2012) 105-06.

[429] A predatory intent of a *termination* of supply cannot be inferred from the mere fact that the supply is terminated. See Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Bloomsbury Publishing 2012) 105. See also Kathryn McMahon, 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 Tulane Journal of Technology and Intellectual Property 123, 158.

leveraging conduct is not abusive *an sich*, as the benefits from vertical integration that are achieved by it, can outweigh the anti-competitive effects.[430]

Furthermore, the concern that downstream competitors have made relationship-specific investments on the basis of 'legitimate expectations' as to the availability of the input, *cannot* contribute to the conclusion that the requirement of indispensability should *not* apply in *termination* of supply cases. This issue of relationship-specific investments is particularly likely to be present in cases where a vertically integrated gatekeeper online platform *terminates* access to its platform to its downstream competitors. After all, as was discussed in the second chapter, for many downstream competitors, and small and medium-sized enterprises in particular, gatekeeper platforms are the main entry points to access certain markets.[431] Indeed, they may have made relation-specific investments on the basis of expectations that access would be continuously available (on similar conditions), which makes them 'dependent' on the gatekeeper platform.

Höppner and Coates essentially argue that such 'dependency' should be protected and that a lower threshold for finding the *termination* of supply abusive is therefore justified. In other words, the requirement of indispensability should therefore *not* apply. However, such dependency *is not* (and *should not* be) protected under European competition law. As was already briefly touched upon in paragraph 3.2.1, there is wide consensus that competition law – and Article 102 TFEU specifically – aims to protect consumer welfare by protecting the competition process and *not* individual competitors.[432] This means that competition law only protects 'as-efficient' actual or potential competitors.[433]

The interpretation advocated by Höppner and Coates is not in line with this principle. Under their interpretation, the fact that *any random* downstream competitor has made relationship-specific investments on the basis of 'legitimate expectations' of continuous availability of the input should contribute to the conclusion that a lower threshold for abusiveness applies. This

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[430] This is implicitly acknowledged by the fact that some commentators have proposed a different legal test for terminations of supply. See Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 234-37. The crux of this test, inspired by the legal test applicable under United States antitrust law, is that the anti-competitive nature of a termination of supply would only be found when such leveraging could be deemed *predatory*, whereas the requirement of indispensability would still be part of the legal test.

[431] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 448-49.

[432] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 22, 200-03; Pablo Ibañéz Colomo, 'Exclusionary discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review 141, 153-55; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 450.

[433] Case C-280/08 P *Deutsche Telekom AG v Commission* ECLI:EU:C:2010:603, [2008] ECR-I 9555, para 177; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, [2011] ECR I-527, paras 31-33, 39-40, 43, 63-64, 67, 70, 73; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, paras 21-22, 25, 38; Case C-413/14 P *Intel Corp. v Commission* ECLI:EU:C:2017:632, paras 133-134, 136, 139-140; European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 23; Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 202-03.

could in practice lead to protecting individual competitors, even if they are not as-efficient as the dominant undertaking.

The argument that dependency of downstream competitors based on relationship-specific investments should be protected is therefore not in line with the principle that competition law does not protect individual competitors. Consequently, this dependency does not justify a lower threshold for the finding of an abuse. In other words, the argument *cannot* contribute to the conclusion that indispensability should *not* be a part of the legal test of *terminations* of supply.[434] Rather, on the contrary, downstream competitors of gatekeeper platforms that make large relationship-specific investments without a contingency plan – for example, protecting themselves contractually – are engaging in a calculated risk, which they should be able to manage.[435] It is therefore not necessary to protect such risks by means of competition law, nor is this desirable.[436]

Finally, there is the argument that the imposition of an obligation to deal in response to a *termination* of supply would *not* negatively influence the incentives of the dominant undertaking to invest and innovate, as the dominant undertaking has previously found it profitable to deal. This argument does not hold either.

First of all, this argument is not necessarily true in fast-changing high-tech markets such as online platform markets, where it is often needed to quickly change distribution.[437] A striking example in this regard is provided by Akman with respect to the situation in which a certain website appears at the top of Google's search results in response to a certain search query.[438] If this website becomes 'dependent' on this top ranking in the search results, and this would justify a (significantly) lower threshold for imposing a duty to deal, Google would in practice be obligated to keep on displaying this website at this top position indefinitely. Google could then never update and improve its search algorithm for its users, which clearly contradicts its

[434] This does not mean that this dependency cannot be indicative of anti-competitive effects. However, as Nazzini also notes: '[w]hether the circumstance that the dominant undertaking was supplying the customer in question will help to establish a prima facie case of abuse depends on the facts and evidence of each individual case and in no way relieves a competition authority or claimant from proving that all the elements of the legal test have been met.' See Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 273.

[435] Geoffrey A Manne, 'Against the vertical discrimination presumption' (2020) 2 Concurrences Competition Law Review 1, 3; Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 7 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020; Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Bloomsbury Publishing 2012) 105, 223.

[436] ibid.

[437] Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Bloomsbury Publishing 2012) 105; Kathryn McMahon, 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 Tulane Journal of Technology and Intellectual Property 123, 158.

[438] Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 325.

business model. The imposition of a duty to deal in such a situation *would* in fact be a significant restraint on the incentives of the dominant undertaking to invest and innovate.[439]

Moreover, not applying the requirement of indispensability with regard to *terminations* of supply would give rise to the perverse incentive for the dominant undertaking not to deal with any competitors *in the first place* out of fear that it may be forced to deal with them for as long as they require access to the input.[440] Such conduct would actually be more anti-competitive, as it would result in the loss of an alternative product or service on the market.[441]

This raises the third, and most important issue with the argument that a *termination* of supply would *not* negatively influence the incentives of the dominant undertaking to invest and innovate: the argument takes too narrow a view of the implications on the incentives of undertakings to invest and innovate.

Consistently applying a lower threshold for imposing an obligation to deal in response to *terminations* of supply will also impede the incentives of (other) undertakings to invest *in the first place*. With regard to gatekeeper online platforms specifically, not applying the requirement of indispensability to *terminations* of supply would be particularly problematic, as refusals to deal by these platforms often take the form of *terminations* of supply.[442] For the reasons already extensively discussed in the third chapter, competition authorities would likely always find such *terminations* of supply abusive, as they are unable to account for the *long-term* positive effects of *disruptive* innovation. Not only would this impede the incentives of the gatekeeper platform to invest in *sustaining* (or perhaps *disruptive*) innovation in the first place, but it will also impede the incentives of *other* undertakings to compete *for* the market. First of all, it would become much easier to compete *in* the market, as competitors can free-ride on the investments of the gatekeeper platform. Furthermore, competitors would be disincentivised to compete *for* the market, knowing that once they become dominant on the new market, they will be obligated to (indefinitely) provide access on the same terms and conditions once they have provided such access to their future downstream competitors.

The consequence of accepting the argument that a *termination* of supply would *not* negatively influence the incentives of a gatekeeper platform to invest and innovate would thus be that the balance between promoting competition *in* and competition *for* the market incentives is lost, while the effects on consumer welfare of the latter are also particularly important in online

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[439] ibid.

[440] Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Bloomsbury Publishing 2012) 105; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 238; Kathryn McMahon, 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 Tulane Journal of Technology and Intellectual Property 123, 158. See also Kristian Stout and Geoffrey A Manne, 'Amazon is not essential, except to the EU's flawed investigations. An examination of the EU's misguided application of "essential facilities" theories to Amazon's e-Commerce platform' (2019) ICLE Antitrust & Consumer Protection Research Program, Issue Brief 29-03-28, 10 <https://laweconcenter.org/wp-content/uploads/2019/03/Amazon-is-not-Essential-Issue-Brief-v-1.pdf> accessed 1 June 2020.

[441] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 428; Annalies Azzopardi, 'No abuse is an island: the case of margin squeeze' (2017) 13 European Competition Journal 228, 245.

[442] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations' [2019] Yearbook of European Law 448, 482.

platform markets. Therefore, the argument cannot hold. Thus, the requirement of indispensability *should* be applied in cases where a vertically integrated gatekeeper online platform *terminates* access to its platform to its downstream competitors.

4.4. Sub-conclusion

The aim of this chapter was to answer the question whether the requirement of indispensability should also be applied when a refusal to deal constitutes a '*constructive* refusal to deal', when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature or when a refusal to deal constitutes a '*termination* of supply'.

It was argued that the cases on which these purported exceptions are based are of questionable value as precedents. Furthermore, *practical* arguments were raised which plead against the disapplication of the indispensability requirement in these specific scenarios. Moreover, *substantive* arguments raised in defence of these purported exceptions were criticised. Most importantly, however, building on the findings in the third chapter, it was argued that none of these purported exceptions are consistent with the consequences that intervention in refusal to deal cases has on the incentives of undertakings to compete *in* and *for* the market, and the effects that these incentives have on the *overall level of innovation* and *consumer welfare* accordingly. This inconsistency would be particularly problematic in online platform markets. There is therefore no reason to strike a *different balance* between the promotion of competition *in* and competition *for* the market when the refusal to deal takes any of the three forms discussed.

It is therefore concluded that the requirement of indispensability *should* be applied in cases where a vertically integrated gatekeeper online platforms denies access to its platform to its downstream competitors, regardless of the form this refusal takes and regardless of the nature of the remedy.

Chapter 5 – Conclusion

This thesis has sought to answer the question whether the essential facilities doctrine requirement of indispensability under Article 102 TFEU should be applied in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors. This question has arisen, first of all, in light of the 'more regulatory approach' that the Commission and NCAs are currently advocating with regard to online platform markets and vertically integrated gatekeeper online platforms specifically, and in view of the fact that it is unlikely that access to vertically integrated gatekeeper online platforms will be deemed indispensable for their downstream competitors to compete. Furthermore, the question has also arisen in light of the recent discussion about the applicability of the indispensability requirement in cases where the refusal to deal is '*constructive*' in nature, where the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature or when the refusal constitutes a '*termination of supply*'.

In order to answer the research question, it was assessed whether applying the requirement of indispensability leads to outcomes which are beneficial to *consumer welfare*. *Innovation* was argued to be a key contributor to consumer welfare in online platform markets. Therefore, the *overall level of innovation* was taken as a proxy to assess the impact on consumer welfare of abandoning or holding on to the requirement of indispensability.

To that end, two types of innovation were distinguished: *sustaining* and *disruptive* innovation, which respectively lead to competition *in* and competition *for* the market. Both types of competition contribute to consumer welfare in their own way, as they lead to different types of innovation. However, more than in traditional sectors of the economy, online platform markets are subject to waves of *disruptive* innovation. *Disruptive* innovation and competition *for* the market is therefore also particularly important in online platform markets. Consumer welfare will thus benefit from a *balance* between competition *in* and competition *for* the market.

However, only one type of competition can be promoted at once by authorities: competition *in* the market can be promoted by imposing an obligation to deal, whereas competition *for* the market can only be promoted by *not* imposing an obligation to deal. The current policy of the Commission and NCAs with regard to online platform markets is aimed at promoting competition *in* the market. However, because of the need for a *balance*, competition *for* the market incentives should not be ignored. To attain such a balance, an appropriate threshold for establishing the abusiveness of a refusal by a vertically integrated gatekeeper online platform to supply access to its downstream competitors should therefore not allow for intervention *too easily*.

With regard to such refusals by vertically integrated gatekeeper online platforms, it has been proposed in recent competition authority reports to apply either an *effects test* or a *per se* prohibition, with the possibility for the gatekeeper platform to prove an objective justification. However, an analysis of these tests shows that they would lead to intervention being justified *too easily*. This is due to the fact that such tests cannot account for the positive *long-term* effects of *disruptive* innovation. As courts and competition authorities mostly focus on *short-term* effects, the outcome would be that refusals to supply access by a vertically integrated

gatekeeper online platform are almost always found abusive because the negative *short-term* effects generally outweigh the positive *short-term* effects. These tests therefore do not provide a balance between the promotion of competition *in* and *for* the market. The requirement of indispensability should therefore *not* be abandoned.

On the contrary, as a high, but not insurmountable standard for finding a refusal to deal abusive, the requirement of indispensability provides a clear indication of when the negative effects of a refusal to deal on competition *in* the market are greater than the positive effects on competition *for* the market. In the absence of appropriate analytical tools to take into account the effects that competition *for* the market has on consumer welfare, holding on to the indispensability requirement in online platform markets *will* therefore ensure that competition *for* the market incentives are safeguarded. As such, a *balance* between competition *in* and competition *for* the market is secured, even where competition authorities aim to promote competition *in* the market, as they currently do with regard to online platform markets.

Furthermore, the concern that applying the indispensability requirement makes it too difficult to promote competition *in* the market where necessary, because the requirement would be too difficult to meet in online platform markets, does not justify the wholesale abandonment of the indispensability requirement. At most the strictness of the requirement could be reconsidered when empirical evidence would be found that a refusal to supply access by a vertically integrated gatekeeper online platform is indeed more damaging than a refusal to supply access in a more 'traditional' scenario. For example, it could be possible to determine the strictness of the indispensability requirement on a case-by-case basis depending on the degree of *external market failures* in the market.

Finally, it is submitted that there is no reason to strike a *different balance* between the promotion of competition *in* and competition *for* the market in cases where the refusal to supply access by a vertically integrated gatekeeper online platform constitutes a *constructive* refusal to deal, when the remedy to the refusal to deal is '*reactive*' rather than '*proactive*' in nature or when the refusal is a '*termination of supply*'. For this reason, and in light of other legal arguments raised, these three purported exceptions to the applicability of the indispensability requirement should *not* be accepted.

It is therefore concluded that, regardless of the form the refusal to deal takes, the essential facilities doctrine requirement of indispensability under Article 102 TFEU *should* be applied in cases where a vertically integrated gatekeeper online platform denies access to its platform to its downstream competitors.

With the *Google Shopping* and *Google Android* decisions and the GC judgment in *Slovak Telekom* currently being under appeal, the European courts have the opportunity to ensure that the indispensability requirement provides a counterbalance to the policy-driven interventionist agenda of the Commission and NCAs towards online platform markets. Such a counterbalance is desirable considering that innovation is a key contributor to consumer welfare in these markets. It is therefore to be hoped that the courts recognise the important role that the indispensability requirement has to play in this regard.

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