

Contractual Leverages in Multi-sided Platforms:  
A Legal and Economic Analysis under EU Competition Law

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ABSTRACT

As multi-sided platforms proliferate and wield considerable sway across diverse sectors, their tactics increasingly obfuscate actions that potentially compromise the equitable distribution among participants within ecosystems they engender. One of these tactics, as identified by this paper, is to stipulate contractual terms between the platform themselves and its users, which redistribute the contractual rights and obligations, favouring a particular group while exploiting the economic dependence of another group. This paper conceptualizes such tactics as ‘contractual leverages’ and articulates their features, namely deviations from default rules, differential treatments based on economic dependence, and a zero-sum nature. Furthermore, this paper delineates the tangible manifestation of contractual leverage and its impact on different user groups within the platform ecosystem and highlights the vulnerability of users manifesting economic dependence on the platform. Lastly, this paper reviews the EU legal framework governing such contractual arrangements, and examines the multi-step legal evaluation of proportionality that determines their fairness. The paper emphasizes the importance of striking a balance of interests, ensuring that no significant imbalance exists in the distribution of interests among all user groups within a platform.

*JEL:* K21 Antitrust Law, L81 e-Commerce

I. INTRODUCTION

The emergence of the platform-based economy has precipitated a fundamental shift in the production, exchange, and consumption of goods and services. This revolutionary economic model has been facilitated by the rise of multi-sided platforms (‘MSP’) that effortlessly connect producers, retailers and buyers, as well as service providers and service recipients. Distinctive characteristics of MSPs include the presence of multiple different user groups and inherent externalities.<sup>1</sup> Consequently, when an observable transaction or interaction transpires between end-users, an MSP possesses the capacity to modulate the transaction volume by implementing different pricing schemes, such as charging higher fees to one side of the market while proportionally reducing the price for another.<sup>2</sup> Even in scenarios devoid of a direct transaction, a platform might charge a price based on the volume of customers on the opposing side.<sup>3</sup> For instance, an MSP might adopt a low price that lures a substantial user base, subsequently capitalizing on this by selling user attention to advertisers or monetizing accumulated user data.<sup>4</sup>

This underscores the crucial role of the non-neutral price structure in MSPs, as they must design it in a manner that effectively engages both sides of the market and consider the price elasticity of demand and the extent of multi-homing within each user group to create indirect network effects.<sup>5</sup> Despite the different pricing schemes employed, the logic remains the same: subsidizing price-sensitive users and recouping losses on the other side(s).<sup>6</sup>

Such pricing leverage strategies, also known as cross-subsidization,<sup>7</sup> have been consistently applied by MSPs in different industries. Notably, within the European Union (‘EU’), almost all the leading MSPs, such as online marketplaces (e-commerce platforms) Amazon and eBay, social media platforms Facebook and Instagram, mobility platforms Uber and Bolt, provide basic services without charge to attract their end customers. Pricing

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<sup>1</sup> David S Evans, ‘The Antitrust Economics of Multi-Sided Platform Markets’ (2003) 20 *Yale Journal on Regulation* 325.

<sup>2</sup> Jean-Charles Rochet and Jean Tirole, ‘Two-Sided Markets: A Progress Report’ (2006) 37 *The RAND Journal of Economics* 645, 664–665.

<sup>3</sup> Mark Armstrong, ‘Competition in Two-Sided Markets’ (2006) 37 *The RAND Journal of Economics* 668.

<sup>4</sup> Vincent Sabourin, ‘Multi Sided Platforms (MSPs) Value Captation and Monetization Strategies: A Strategic Management Perspective’ [2016] *Business Management and Strategy* 191–192 <<https://www.macrothink.org/journal/index.php/bms/article/download/9332/7831>>.

<sup>5</sup> Bernard Caillaud and Bruno Jullien, ‘Chicken & Egg: Competition Among Intermediation Service Providers’ (2003) 34 *RAND Journal of Economics*; Armstrong (n 3) 673.

<sup>6</sup> Caillaud and Jullien (n 5) 310.

<sup>7</sup> Susan Gates, Paul Milgrom and John Roberts, ‘Deterring Predation in Telecommunication: Are Line-of-Business Restraints Needed?’ (1995) 16 *Managerial and Decision Economics* 427, 427–429.

their digital services free, however, raises concerns about predatory pricing because a price of zero seems to be necessarily below cost.<sup>8</sup> In *Google v Bottin Cartographes*, for instance, Google was accused of pricing predation in the market for mapping apps because it provided its mapping service free of charge. The Paris Commercial Court first found Google’s free pricing strategy predatory.<sup>9</sup> However, the decision was overturned by the Paris Court of Appeals, who held that the revenues from the advertisement side of Google, which substantially exceed the costs, indicates a reasonable pricing structure.<sup>10</sup> The decision of the appeal is aligned with certain economic views on MSPs, which suggest that the overall price level should be compared with the joint marginal cost of the different sides of the market when examining if prices are predatory in MSPs.<sup>11</sup>

Concentrating on the overall welfare of different sides of the platform, this approach is also termed the ‘net-effects analysis’.<sup>12</sup> However, as it is reasonably foreseeable, when one user group on the platform receives services freely or even with a subsidy, the platform must offset its losses on the other side, potentially culminating in exploitative abusive behaviours. Under the purview of net-effects analysis, such exploitation, even when manifestly unfair and disproportionate, is permissible provided the detriment to one user group can be counterbalanced by benefits to another. Falling short in evaluating fairness, this methodology presents a conundrum, particularly considering the formidable influence of MSPs and the dependency of their users, especially when such platforms command a dominant position within the relevant market.

As it will be illustrated in the following sections of this paper, exploitation of this nature can manifest not only through pricing strategies but also via non-pricing mechanisms. With an increasing number of MSPs offering their basic services ‘free’ of charge, the efficacy of zero-pricing strategies in enticing customers has started to diminish. To secure and maintain user engagement and market shares, various MSPs have developed an alternative non-pricing strategy to leverage their market position. In contrast to pricing leverages, non-pricing leverages do not affect transaction volume or user scale through price adjustments. These strategies, instead, involve the contractual arrangement between the MSP and its users by redistributing the contractual rights and obligations among its users, such as offering buyers more favorable terms and implementing policies that prioritize their interests throughout different stages of the contract.

Yet, a nuanced legal vocabulary has not yet been developed to effectively encapsulate the characteristics of such practices within the platform economy. In addressing this challenge, this paper conceptualizes such strategies as ‘contractual leverages’ and articulates their features, namely deviations from default rules, differential treatments based on economic dependence, and a zero-sum nature. Furthermore, this paper delineates the tangible manifestation of contractual leverage and its impact on different user groups within the platform ecosystem and highlights the vulnerability of users manifesting economic dependence on the platform. Lastly, this paper reviews the EU legal framework governing such contractual arrangements, and examines the multi-step legal evaluation of proportionality that determines their fairness.

**Table 1.** Comparison of pricing and non-pricing (contractual) leverages

	Pricing leverages	Non-pricing (contractual) leverages
Used by?	Multi-sided platforms	Multi-sided platforms
Creating network effects through?	Pricing structure	(Re)allocation of contractual duties and rights
In forms of?	Subsidy (for one side) and markup (for another side)	Favorable terms (for one side) and unfavorable terms (for another side)
In favor of?	Customers that are more sensitive to changes of prices	Customers that are more sensitive to changes of contractual terms
Influenced by?	Market power, price elasticity of demand, degree of multi-homing, etc.	Market power, economic dependence, degree of multi-homing, etc.

<sup>8</sup> Friso Bostoën, ‘Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products’ (2019) 35 Computer Law & Security Review 263, 267.

<sup>9</sup> *Case 2009061231 Bottin Cartographes/Google France, Google Inc* (Tribunal de commerce de Paris).

<sup>10</sup> *Case 12/02931 Google France, Google Inc/Bottin Cartographes* (Cour d’appel de Paris).

<sup>11</sup> David S Evans and Michael Noel, ‘Defining Antitrust Market When Firms Operate Two-Sided Platforms’ (2005) 3 Columbia Business Law Review 127; Bostoën (n 8) 268.

<sup>12</sup> Michael Katz and Jonathan Sallet, ‘Multisided Platforms and Antitrust Enforcement’ (2018) 127 Yale Law Journal 2142, 2145.

## II. CONCEPTUALIZATION OF CONTRACTUAL LEVERAGES

This paper defines contractual leverages as ‘the contractual arrangements established by the platform, in forms of redistributing the contractual rights and obligations among its users to exploit their economic dependence without the improvement of overall quality of the platform’s intermediary service.’ Such leverages emerge from power asymmetries in the platform economy, where MSPs control access to the network and its resources, thereby permitting or restricting users on one side from accessing users on the other side(s).<sup>13</sup> Additionally, MSPs own and maintain the ecosystem they created, endowing them with the authority to establish and enforce rules and policies within the ecosystem.<sup>14</sup> The roles of gatekeeper and governor enable MSPs to wield their powers over the contractual relationship between different user groups, despite not being a party to individual transactions.<sup>15</sup> The following parts of this section articulate three essential features that characterize contractual leverages.

### A. Deviation from default rules

Under the influence of contractual leverages, the rights and duties of users, as delineated in the terms and policies established by the platform, substantially deviate from the default rules provided by the law. This includes terms and policies that are not explicitly agreed upon in the terms of service but are stipulated separately on the platform’s webpages and enforced by the platform operator.

In the context of two-sided transaction markets, for instance, e-commerce platforms can design their rules to diverge from these default rules in order to attract their end customers, i.e., buyers. Such a deviation then exceeds what consumer protection law necessitates, not the reverse because if the deviation is less than what the law requires, the terms and policies could be perceived as non-compliant and, therefore, would not be enforceable.

Numerous online marketplaces operating in Europe have implemented return policies that exceed what the law necessitates and strongly favour their end-customers. Under EU consumer protection legislation, consumers ‘have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason’.<sup>16</sup> Amazon demands its sellers to offer a 30-day withdrawal period, irrespective of whether they are professional or non-professional sellers.<sup>17</sup> Similarly, OTTO.nl obliges its retailers to provide a withdrawal period of 30 days.<sup>18</sup> Zalando partners with professional traders who adhere to its 100-day withdrawal period requirement.<sup>19</sup> Notably, all of these online marketplaces refer to their extended withdrawal periods as ‘voluntary’, although they are only voluntary in the sense that the platforms’ extension of the withdrawal period is an addition to the legally required period of 14 days. For third-party sellers, the option is not voluntary: these provisions are either explicitly stated in the terms and conditions, or stipulated elsewhere on the platforms’ websites. In either case, third-party sellers must comply with these terms and policies. In the fashion sector, many online marketplaces, including Amazon

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<sup>13</sup> Silvia Martinelli, ‘The Vulnerable Business User: The Asymmetric Relationship Between The Business User And The Platform’ (2020) 2020 European Journal of Privacy Law & Technologies 84 <<https://universitypress.unisob.na.it/ojs/index.php/ejpl/article/view/1261/541>>; Orla Lynskey, ‘Regulating “Platform Power”’ (2017) 2017 LSE Legal Studies Working Paper 13.

<sup>14</sup> Martinelli (n 13) 84; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition Policy for the Digital Era: Final Report’ (European Commission 2019) KD-04-19-345-EN-N 60 <<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>>.

<sup>15</sup> Inge Graef, ‘Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence’ (2019) 38 Yearbook of European Law 448, 486.

<sup>16</sup> Consumers have 14 days to indicate that they wish to return a product and another 14 days to deliver it. This paper focuses on the first 14 days. See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (‘Consumer Rights Directive’) 2011 64, arts 9, 14.

<sup>17</sup> Amazon.com.be, ‘Marketplace Returns and Refunds - Amazon Customer Service’ <<https://www.amazon.com.be/-/nl/gp/help/customer/display.html?nodeId=GV38326YW5JX9V9X>> accessed 1 June 2023; Amazon.de, ‘Marketplace Returns and Refunds - Amazon Customer Service’ <<https://www.amazon.de/-en/gp/help/customer/display.html?nodeId=GV38326YW5JX9V9X>> accessed 1 June 2023; Amazon.es, ‘Devoluciones y Reembolsos de Marketplace - Servicio de Atención al Cliente de Amazon’ <<https://www.amazon.es/gp/help/customer/display.html/?nodeId=GV38326YW5JX9V9X>> accessed 1 June 2023; Amazon.fr, ‘Marketplace Retours et Remboursements - Service Client Amazon’ <[https://www.amazon.fr/gp/help/customer/display.html?ref\\_hp\\_left\\_v4\\_sib&nodeId=GV38326YW5JX9V9X](https://www.amazon.fr/gp/help/customer/display.html?ref_hp_left_v4_sib&nodeId=GV38326YW5JX9V9X)> accessed 1 June 2023; Amazon.it, ‘Resi e Rimborsi per Articoli Marketplace - Servizio Clienti Amazon’ <<https://www.amazon.it/gp/help/customer/display.html/?nodeId=GV38326YW5JX9V9X>> accessed 1 June 2023; Amazon.nl, ‘Marketplace Returns and Refunds - Amazon Customer Service’ <<https://www.amazon.nl/gp/help/customer/display.html?nodeId=GV38326YW5JX9V9X>> accessed 1 June 2023.

<sup>18</sup> OTTO.nl, ‘Conditions Return & Trial Period | Customer Service | OTTO’ <<https://www.otto.nl/klantenservice/retourmeren-ruilen/voorwaarden-retourmeren-zichttermijn/>> accessed 1 June 2023.

<sup>19</sup> Zalando.be, ‘Returns & Refunds’ <<https://fr.zalando.be/aide/Retour-and-Remboursement/Retourner-un-article-partenaire.html>> accessed 1 June 2023; Zalando.de, ‘Returns & Refunds’ <<https://en.zalando.de/faq>Returns-and-Refunds/How-do-I-return-my-order.html>> accessed 1 June 2023; Zalando.es, ‘Returns & Refunds’ <<https://www.zalando.es/preguntas-frecuentes/Devolucion-y-reembolso/Como-devolver-un-articulo.html>> accessed 1 June 2023; Zalando.fr, ‘Returns & Refunds’ <<https://www.zalando.fr/aide/Retour-and-Remboursement/Combien-coute-le-retour-d'une-commande.html>> accessed 1 June 2023; Zalando.it, ‘Returns & Refunds’ <<https://www.zalando.it/aiuto/Reso-e-Rimborso/100-giorni-per-rendere-il-tuo-ordine.html>> accessed 1 June 2023; Zalando.nl, ‘Returns & Refunds’ <<https://www.zalando.nl/faq/Retour-and-Terugbetaling/Hoe-stuur-ik-een-artikel-retour.html>> accessed 1 June 2023.

and Zalando, require their sellers to provide free returns and transfer either partial or total costs of the return deliveries to them although the EU consumer legislation does not stipulate such duties for sellers.<sup>20</sup>

## B. Differential treatment based on economic dependence

Similar to pricing leverages, contractual leverages operates within the context of the non-neutral price structure of MSPs and the cross-group effects of externalities. It seeks to attract the side that is more sensitive to the change of contractual arrangements, which is closely related to economic dependence. In online marketplaces, for instance, the deviation inherent in contractual leverages usually manifests itself as favorable treatment towards buyers and unfavorable treatment towards sellers, exploiting the economic dependence of sellers.

The concept of economic dependence, as stipulated in national competition laws in several member states in EU, has various legal definitions, such as ‘insufficient and unacceptable means of switching to other undertakings’ (Germany),<sup>21</sup> ‘the difficulty for the retailer to find other equivalent products from other suppliers’ (France)<sup>22</sup> and ‘the lack of reasonable alternative’ (Belgium),<sup>23</sup> etc. The common elements underscored by these national legislations and case laws, despite having different focuses, are the difficulty and costs related to switching from one trading partner to another one. From an economic perspective, such a dependence occurs can be traced back to two primary factors: switching costs and opportunity costs. Switching costs consist of the economic expenditures, both tangible and intangible, that sellers bear when transitioning from one platform to another.<sup>24</sup> Such costs can be considerable, especially for sellers who have devoted substantial time and resources to establish their presence on a specific platform. The sunk costs associated with platform-specific investments, such as personalized storefronts, product listings, and customer reviews, can increase the difficulty of multi-homing<sup>25</sup> and act as a deterrent for sellers contemplating a switch to a different platform, thereby exacerbating their economic dependence. Opportunity costs, conversely, refer to the potential benefits that sellers relinquish upon deciding to exit a platform. In *Google Android*, the European Court of Justice (‘ECJ’) referenced the findings of the European Commission (‘Commission’), highlighting that an app developer would likely continue to operate for Android even if there were small quality degradation in the operating system because such developers inherently aim to cater to the vast majority of users.<sup>26</sup> Consequently, the opportunity costs associated with departing platforms that command a substantial user base can be significant. A seller exiting Amazon, for instance, would forfeit access to its extensive customer base, potentially leading to a great decline in sales and revenue. This potential loss can render the prospect of platform departure economically unviable, thereby reinforcing the sellers’ economic dependence on the platform.

On the other hand, buyers typically face less switching costs and opportunity costs. Switching costs for buyers predominantly encompass the temporal and cognitive investments necessitated by acquainting themselves with a new platform’s user interface, policies, and operational procedures. However, these costs are generally less substantial than those encountered by sellers, given that buyers are not typically required to make significant investments to utilize a platform. For instance, they are not obliged to establish a storefront or list products. Moreover, the ubiquity of similar interfaces and functionalities across numerous online marketplaces can attenuate the learning curve for buyers transitioning between platforms. Opportunity costs for buyers primarily pertain to the breadth and diversity of products accessible on a given platform. Large-scale platforms such as Amazon and Zalando proffer an extensive array of products, rendering them appealing to a broad spectrum of buyers. Should a

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<sup>20</sup> Under EU consumer protection legislation, consumers shall bear the direct cost of returning the goods unless the seller has agreed to bear them or the seller failed to inform the consumer that the consumer has to bear them. See Consumer Rights Directive art 12; Yibo Li, ‘Vulnerable Sellers and Favored Consumers: A Critical Analysis of Distributive Equity in Multi-Sided Platforms’ (2023) 11 *International Journal on Consumer Law and Practice* <<https://repository.nls.ac.in/ijclp/vol11/iss1/1/>>.

<sup>21</sup> *Case WuW/E 1391 Rossignol* (German Federal Court (Bundesgerichtshof) [A.I.2]; Pranvera Këllezi, ‘Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence’ in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 62 <[https://doi.org/10.1007/978-3-540-69965-1\\_3](https://doi.org/10.1007/978-3-540-69965-1_3)> accessed 3 August 2023).

<sup>22</sup> French Competition Council (Autorité de la concurrence), ‘Décision N° 05-D-44 Du 21 Juillet 2005 Relative à Des Pratiques Mises En Oeuvre Par Le Groupe La Provence (Anciennement Dénommé Le Provençal) Dans Le Secteur de La Publicité Dans La Presse Quotidienne Régionale à Marseille’ (2005) 23; Këllezi (n 21) 64.

<sup>23</sup> Judgment of 15 October 2020 of *Case C/20/00057 Legio Sales Belgium/X20/Geberit* (Brussels Enterprise Court (Tribunal de l’entreprise de Bruxelles)); Judgment of 11 February 202 of 1 *Case AR/20/03061 Legio Sales & X20 badkamers/Geberit* (Brussels Enterprise Court (Tribunal de l’entreprise de Bruxelles)); Judgment of 28 October 2020 of *Case A/20/02490 GD / The Woody Group BV* (Ghent Enterprise Court (Ondernemingsrechtbank Gent)); Judgment of 16 April 2021 of *Case A/21/00024 Pletsers NV / Blaser Jagdwaaffen GmbH and Mauser Jagdwaaffen* (Antwerp Enterprise Court (Tongeren) (Ondernemingsrechtbank Antwerpen (Tongeren))). For more detailed discussion on these Belgium cases, see Jeroen Dewispelaere and Heinen Victoria, ‘Prohibition on Abuse of Economic Dependence: First Lessons from the Case Law’ (2021) 5 *European Competition and Regulatory Law Review* 394.

<sup>24</sup> European Commission, ‘Study on Contractual Relationships between Online Platforms and Their Professional Users: Final Report’ (2018) KK-01-18-452-EN-N 60 <<https://doi.org/10.2759/950526>>.

<sup>25</sup> Digital Competition Expert Panel, ‘Unlocking Digital Competition, Report of the Digital Competition Expert Panel’ (2019) PU2242 36 <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>>.

<sup>26</sup> *Case T-604/18 Google and Alphabet v Commission (Google Android)* (2022) EU:T:2022:541 (European General Court (Sixth Chamber, Extended Composition)) [218].

buyer opt to depart from such a platform, they may confront the opportunity cost associated with a potentially reduced selection of products. However, this cost is frequently mitigated by the prevalence of product availability across multiple platforms. Furthermore, specialized or niche platforms may proffer unique products or superior deals, which can counterbalance the opportunity cost incurred from departing a larger platform.

A prevailing consensus among many scholars<sup>27</sup> and legislators<sup>28</sup> posits that the degree of economic dependence principally relates to user types: business users are generally more dependent on the MSPs than individual users. However, as demonstrated above, within the context of e-commerce, economic dependence hinges more on whether users are sellers or buyers, rather than whether they are business users or individual users. Many online marketplaces do not differentiate between business users and individual users when formulating their terms and conditions for sellers. The categorization predominantly employed in online marketplaces is ‘seller versus buyer,’ as opposed to ‘business user versus individual user.’ For instance, Amazon offers two selling plans for sellers - the Individual Selling Plan and the Professional Selling Plan - each with varying subscription fees and per-item fees.<sup>29</sup> However, sellers under both plans are required to comply with the same user agreement, wherein no substantial differences exist in the rights and duties between the two plans concerning return policies.<sup>30</sup> Similarly, eBay does not establish separate terms for business users and individual users. Instead, it delineates terms and policies for sellers and buyers.

Moreover, differential treatment under contractual leverages is different from the one caused by user behavior. For instance, users who are more active or have a longer history with the platform may inherently accrue more benefits or rewards. This is a natural outcome of user behavior and platform interaction dynamics, rather than a deliberate result of contractual leverage strategies. Differential treatment under contractual leverages is also different from market segmentation, a prevalent business strategy wherein a company segregates its market into distinct groups of customers with divergent needs, preferences, or behaviours. Although contractual leverages and market segmentation do share certain similarities, their motivations and pursued outcomes are intrinsically different. For example, a platform may offer disparate terms or benefits to business users as opposed to individual users, reflecting the distinct needs and usage patterns of these two segments. Conversely, such dichotomy would not occur under contractual leverages unless one of the groups exhibits greater economic dependence on the platform.

### C. Zero-sum nature

Contractual leverages do not inherently contribute to the overall quality or efficiency of a platform’s service, which distinguishes them from quality competition. Quality competition involves the improvement of the quality, and in the context of zero-price services, also the variety and innovation of services.<sup>31</sup> Contractual leverages, on the other hand, reallocate contractual rights and duties among users in a manner that benefits one group at the expense of another, creating a zero-sum situation where the gains of one group are counterbalanced by the losses of another. Similar to predatory pricing where a firm recoups its loss either from the future or from the other side of the market, the deviation and differential treatment inherent in contractual leverages merely constitute a transfer

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<sup>27</sup> Graef (n 15); Donato Cutolo and Martin Kenney, ‘Platform-Dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy’ [2019] *Academy of Management Perspective*.

<sup>28</sup> For example, recital 2 of P2B Regulation states that ‘the providers of those (online intermediation) services often have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their business users and, indirectly, also of consumers’. See Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (‘P2B Regulation’) 2019 57.

<sup>29</sup> Amazon.com.be, ‘Amazon Pricing & Fees in BE | Choose Your Selling Plan’ <<https://sell.amazon.com.be/tarifs>> accessed 1 June 2023; Amazon.de, ‘Seite nicht gefunden - Amazon Services Europa | Amazon DE’ (*Amazon Seller Services DE*) <<https://sell.amazon.de/404>> accessed 1 June 2023; Amazon.es, ‘Página no encontrada - Amazon Services Europe | Amazon ES’ (*Servicios de vendedor de Amazon ES*) <<https://sell.amazon.es/404>> accessed 1 June 2023; Amazon.fr, ‘Tarifs Amazon Et Plans De Vendeur Amazon | Amazon FR’ (*Amazon Seller Services FR*) <<https://sell.amazon.fr/tarifs>> accessed 1 June 2023; Amazon.it, ‘Pagina non trovata - Amazon Services Europe | Amazon Italia’ (*Servizi per venditori Amazon Italia*) <<https://sell.amazon.it/404>> accessed 1 June 2023; Amazon.nl, ‘Amazon Prijsstelling & Commissie Voor Verkopers in NL’ <<https://sell.amazon.nl/prijsstelling>> accessed 1 June 2023.

<sup>30</sup> Amazon.com.be, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.com.be/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023; Amazon.de, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.de/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023; Amazon.es, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.es/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023; Amazon.fr, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.fr/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023; Amazon.it, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.it/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023; Amazon.nl, ‘Amazon Services Europe Business Solutions Agreement’ <<https://sellercentral.amazon.nl/help/hub/reference/external/201190440?locale=en-US>> accessed 1 June 2023.

<sup>31</sup> *Case T-604/18 Google and Alphabet v Commission (Google Android)* (n 26) para 177; Organisation for Economic Co-operation and Development (OECD), ‘Quality Considerations in the Zero-Price Economy – Note by the European Union’ (2018) DAF/COMP/WD(2018)135 7 <<https://www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm>>.

of contractual rights or duties from one group of users to another, without corresponding enhancements in the quality or efficiency of the service provided by the platform.

The return policies of online marketplaces, such as those implemented by Amazon and Zalando, demonstrate the zero-sum nature of contractual leverages. Firstly, extended withdrawal periods, such as Zalando's 100-day policy or Amazon's 30-day policy, confer substantial non-pricing benefits and contractual advantages to buyers, albeit at the expense of sellers. Such extended withdrawal periods can have adverse effects on sellers by creating cash flow problems, complicating inventory management, increasing return rates, incurring opportunity costs, escalating operational expenses, and diminishing profit margins. Secondly, although buyers are offered with free returns for fashion products from platforms, third-party sellers have to bear (most of) the burden: Amazon's sellers are required to bear the entire return costs of fashion products for seller-fulfilled orders<sup>32</sup> and 50% of the return costs for fulfilled-by-Amazon orders.<sup>33</sup> Zalando's sellers are required to bear the return costs in their entirety.<sup>34</sup>

The zero-sum nature can also be observed in the design of the internal dispute resolution system of MSPs, a mechanism not mandated by EU consumer law or platform regulations but established by most of the online marketplaces to handle disputes between sellers and buyers.<sup>35</sup> By granting unequal access to information and unequal access to the service, MSPs such as Amazon and Zalando ensure that buyers' interests are prioritized during the post-contractual stage.<sup>36</sup> Similar to their return policies, such a deliberate differentiated treatment of the design of internal dispute resolution system benefit the buyers at the expense of sellers' interests.

#### D. Conclusion

Contractual leverages in MSPs exhibit three distinct features. First, there's a 'deviation from default rules,' where platform-established terms and policies significantly diverge from standard legal provisions, often exceeding what consumer protection law mandates. Second, 'differential treatment based on economic dependence' highlights the varying degrees of economic reliance among platform users. This dependence is exploited by MSPs, which often favour buyers over sellers in their terms and conditions. Lastly, the 'zero-sum nature' of contractual leverages indicates that these mechanisms do not inherently enhance a MSP's service quality or efficiency. Instead, they reallocate rights and duties among users, benefiting one group at the detriment of another. In essence, while MSPs may present certain policies as advantageous or voluntary, the underlying contractual leverages often shift burdens and responsibilities in a manner that prioritizes one user group over another, without necessarily improving the overall platform experience.

### III. LEGAL ASSESSMENT UNDER EU COMPETITION LAW

#### A. Introduction

The theory of harm of contractual leverages, as shown in previous sections, is predominantly exploitative. A MSP can impose unfavourable or unfair terms and policies on one group of users, thereby shifting contractual rights or interests to another group, which can lead to the exploitation of users who are more economically dependent on the MSP. The overarching question, set against the backdrop of EU competition law, is whether such utilization of contractual leverages is illegal and, if so, under what legal framework they should be assessed.

Under EU competition law, the assessment of exploitative effects of contractual leverages are intricately tied to the unfairness of the contractual arrangements. As stipulated in Article 102(a) of the Treaty on the Functioning of the European Union ('TFEU'), the imposition of trading conditions by a dominant firm is prohibited if they are unfair.<sup>37</sup> The notion of 'unfairness' in such contexts was initially broached by the ECJ in *BRT v SABAM*.<sup>38</sup> According to the judgment, the assessment of unfairness of contractual terms aligns closely with a proportionality

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<sup>32</sup> Amazon.de, 'Free Returns on Fashion Items for Seller-Fulfilled Orders' <<https://sellercentral.amazon.de/help/hub/reference/external/GEKBRFKQE38CQA6V?locale=en-US>> accessed 1 June 2023; Amazon.es, 'Free Returns on Fashion Items for Seller-Fulfilled Orders' <<https://sellercentral.amazon.es/help/hub/reference/external/GEKBRFKQE38CQA6V?locale=en-US>> accessed 1 June 2023; Amazon.fr, 'Free Returns on Fashion Items for Seller-Fulfilled Orders' <<https://sellercentral.amazon.fr/help/hub/reference/external/GEKBRFKQE38CQA6V?locale=en-US>> accessed 1 June 2023; Amazon.it, 'Free Returns on Fashion Items for Seller-Fulfilled Orders' <<https://sellercentral.amazon.it/help/hub/reference/external/GEKBRFKQE38CQA6V?locale=en-US>> accessed 1 June 2023.

<sup>33</sup> Amazon.com.be, 'Returns Processing Fee' <<https://sellercentral.amazon.com.be/help/hub/reference/201112630>> accessed 1 June 2023; Amazon.de, 'Returns Processing Fee' <<https://sellercentral.amazon.de/help/hub/reference/external/201112630>> accessed 1 June 2023; Amazon.es, 'Returns Processing Fee' <<https://sellercentral.amazon.es/help/hub/reference/external/201112630>> accessed 1 June 2023; Amazon.fr, 'Returns Processing Fee' <<https://sellercentral.amazon.fr/help/hub/reference/external/201112630>> accessed 1 June 2023; Amazon.it, 'Returns Processing Fee' <<https://sellercentral.amazon.it/help/hub/reference/external/201112630>> accessed 1 June 2023; Amazon.nl, 'Returns Processing Fee' <<https://sellercentral.amazon.nl/help/hub/reference/201112630>> accessed 1 June 2023.

<sup>34</sup> Zalando, 'Platform Rules (Version 6) (EN)' 19 <<https://partnerportal.zalando.com/s/article/Platform-Rules>> accessed 1 June 2023.

<sup>35</sup> Li (n 20).

<sup>36</sup> *ibid.*

<sup>37</sup> Treaty on the Functioning of the European Union ('TFEU') 2012 (Official Journal C 326) 1, art 102(a).

<sup>38</sup> *Case 127/73 BRT v SABAM* (1974) EU:C:1974:25 (European Court of Justice).

assessment: the objective of the clause is first considered, followed by an examination of necessity and balance of interests.<sup>39</sup> Following the established case law, the legal evaluation of the abusiveness of contractual leverages can be delineated into the following steps: (1) defining the relevant market(s);<sup>40</sup> (2) establishing the dominance of the MSP within the relevant market(s);<sup>41</sup> (3) establishing restrictions or adverse impacts of contractual arrangements;<sup>42</sup> (4) identifying the objective(s) of the deployment of contractual arrangements;<sup>43</sup> (5) assessing the necessity and balance of interests;<sup>44</sup> and (6) assessing any available objective justifications.<sup>45</sup>

## B. Market definition in multi-sided markets

The assessment of abusive conducts under Article 102 first mandates the definition of the relevant product and geographic market.<sup>46</sup> However, the definition of the relevant market in the context of multi-sided markets has been at the forefront of debates after the emergence and proliferation of MSPs since traditional methodologies for assessing dominance in single-sided markets appear to be ill-suited for these contexts.<sup>47</sup>

A central issue in the discourse is the determination of the number of markets that should be defined. Within a multi-sided market, a platform may offer two or more distinct products (or services) to different user groups. Consequently, the pertinent inquiry is whether multiple interrelated markets should be defined or if a singular market, encompassing the multiple sides, suffices. Given the intrinsic differences in the business models of transactional and non-transactional MSPs, scholars have argued that two-sided non-transaction markets should be defined as two separate but interrelated markets, whereas two-sided transaction markets should be defined as one single market.<sup>48</sup> The Commission, on the other hand, suggested to define distinct markets ‘where there are significant differences in the substitution possibilities on the different sides of the platform’.<sup>49</sup> According to its draft revised Market Definition Notice in 2023, it mainly assesses (1) degree of substitutable supply differentiation on each side,<sup>50</sup> (2) degree of product differentiation on each side, (3) degree of multi-homing, and (4) the presence of direct transactions.<sup>51</sup> Meanwhile, the ECJ has shown reticence in engaging with the discourse on market definition within these contexts.<sup>52</sup>

A further point of contention is the problem related to the use of the Small Significant Non-Transitory Increase in Price (‘SSNIP’) test. The SSNIP test faces two main challenges when it is applying to multi-sided markets. Firstly, the test tends to result in a narrower market definition given its inability to encapsulate the indirect network

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<sup>39</sup> *ibid* 15.

<sup>40</sup> *Case T-604/18 Google and Alphabet v Commission (Google Android)* (n 26) para 104; *Case C-307/18 Generics (UK) and Others* (2020) EU:C:2020:52 (European Court of Justice (Fourth Chamber)) [127–128]; *Case 6-72 Europemballage and Continental Can v Commission* (1973) EU:C:1973:22 (European Court of Justice) 32.

<sup>41</sup> *Case 62/86 AKZO v Commission* (1991) EU:C:1991:286 (European Court of Justice (Fifth Chamber)) [60]; *Case T-30/89 Hilti v Commission* (1991) EU:T:1991:70 (European Court of Justice of First Instance (Second Chamber)) [92]; *Joined Cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v Commission* (2003) EU:T:2012:172 (European Court of First Instance) [907]; *Case C-202/07 P France Télécom v Commission* (2009) EU:C:2009:214 (European Court of Justice (First Chamber)) [100]; *Case T-66/01 Imperial Chemical Industries v Commission* (2010) EU:T:2010:255 (European General Court (Sixth Chamber)) [257].

<sup>42</sup> *Case 127/73 BRT v SABAM* (n 38) para 8; European Commission, ‘Antitrust: Commission Opens Investigations into Apple’ (16 June 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073)> accessed 20 June 2023; Netherlands Authority for Consumers and Markets (ACM), ‘Decision of the Netherlands Authority for Consumers and Markets within the Meaning of Section 56 of the Dutch Competition Act and Section 5:32(1) of the Dutch General Administrative Law Act (Awb) Regarding the Imposition of an Order Subject to Periodic Penalty Payments on Apple Inc. and Apple Distribution International Ltd for the Violation of Section 24 of the Dutch Competition Act and Article 102 TFEU (ACM/UIT/559984)’ (2021) ACM/19/035630 para 16 <<https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf>>.

<sup>43</sup> *Case 127/73 BRT v SABAM* (n 38) para 15.

<sup>44</sup> *ibid* 8; *Case 52/07 Kanal 5 and TV 4* (2008) EU:C:2008:703 (European Court of Justice (Fourth Chamber)) [31].

<sup>45</sup> *Case C-209/10 Post Danmark I* (2012) EU:C:2012:172 (European Court of Justice (Grand Chamber)) [40–41]; *Case C-52/09 Konkurrenter v TeliaSonera Sverige AB* (2011) EU:C:2011:83 (European Court of Justice (First Chamber)) [31,75]; *Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission* (1995) EU:C:1995:98 (European Court of Justice) [54–55]; *Case 27/76 United Brands v Commission* (1978) EU:C:1978:22 (European Court of Justice) [184].

<sup>46</sup> *Case T-604/18 Google and Alphabet v Commission (Google Android)* (n 26) para 104; *Case C-307/18 Generics (UK) and Others* (n 40) paras 127–128; *Case 6-72 Europemballage and Continental Can v Commission* (n 40) 32.

<sup>47</sup> Evans and Noel (n 11); Stefan Behringer and Lapo Filistrucchi, ‘Areeda-Turner in Two-Sided Markets’ (2015) 46 *Review of Industrial Organization* 287; Stefan Holzweber, ‘Market Definition for Multi-Sided Platforms: A Legal Reappraisal’ (2017) 40 *World Competition* 563; Sung Yoon Yang, ‘Rethinking Modes of Market Definition for Multi-Sided Platforms’ (2018) 9 *International Journal of Trade, Economics and Finance* 164; Organisation for Economic Co-operation and Development (OECD), ‘Rethinking Antitrust Tools for Multi-Sided Platforms’ (2018) <<https://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm>>.

<sup>48</sup> David S Evans and Michael D Noel, ‘The Analysis of Mergers That Involve Multisided Platform Businesses’ (2008) 4 *Journal of Competition Law and Economics* 663; Lapo Filistrucchi and others, ‘Mergers in Two-Sided Markets - A Report to the NMA’ (Nederlandse Mededingingsautoriteit 2010) 136.

<sup>49</sup> European Commission, ‘Draft Revised Text of the Commission Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law (“Draft Revised Market Definition Notice”)’ (2022) para 95.

<sup>50</sup> This refers to the question of whether the undertakings offering substitutable products for each user group differ.

<sup>51</sup> European Commission, ‘Draft Revised Market Definition Notice’ (n 49) para 95.

<sup>52</sup> Jens-Uwe Franck and Martin Peitz, ‘Market Definition and Market Power in the Platform Economy’ (Centre on Regulation in Europe 2019) 29–30 <<https://cerre.eu/publications/market-definition-and-market-power-platform-economy/>> accessed 18 August 2023.

effects inherent to MSPs.<sup>53</sup> Secondly, the test falls short when defining markets with zero-price services because an percentage increase of a zero price, regardless of the percentage, invariably remains zero.<sup>54</sup> To address these shortcomings, an examination of overall profitability - which mitigates the first challenge - and the introduction of an alternative Small But Significant Non-Transitory Decrease in Quality ('SSNDQ') test - which offers a solution to the second challenge - have been proposed by scholars,<sup>55</sup> suggested by the Commission in its draft revised Market Definition Notice,<sup>56</sup> and applied by recent EU case law.<sup>57</sup> By combining these two proposals, this paper suggests that the enhanced SSNDQ test could serve as a more efficacious tool for defining markets in cases concerning contractual leverages since more and more MSPs have constructed their ecosystems with zero-price services for end-customers.

### C. Establishing dominance within relevant market(s)

Exploitative abuses are only prohibited for undertakings that hold a dominant position within the relevant market. The legal test therefore requires the establishment of dominance and the measurement of market power in multi-sided markets after defining the relevant market.

While market shares serve as one of the most evident indications of the existence of dominance and market power, there remains a combination of several factors which should be taken into account,<sup>58</sup> particularly in the contexts of MSPs. For example, in the *Google Android* case, the Commission established Google's dominance through the assessment of multiple factors such as market shares, the quantity and popularity of products or services, barriers to entry and expansion, countervailing buyer power and competitive constraints, etc.<sup>59</sup> In the *Google Shopping* case, the Commission examined elements such as market shares, barriers to expansion and entry, multi-homing, brand effects and countervailing buyer power, etc.<sup>60</sup>

### D. Restrictions or adverse impact

As illustrated by the *BRT v SABAM* and two recent antitrust investigations against Apple, the determination of the unfairness of contractual terms and policies necessitates an initial identification of restrictions or harm imposed upon the users by these terms and policies.

In business contexts, such restrictions typically manifest themselves as restrictions of freedom of business operation. In the *BRT v SABAM* case, one question referred to the ECJ was whether the copyright association, SABAM was imposing unfair trading conditions by requiring an author to transfer both current and future rights and, without any form of accountability, allowing SABAM to continue exercising these rights for a period of five years following a member's withdrawal.<sup>61</sup> The ECJ discerned the detrimental effects of such terms, recognizing them as restrictions of authors' freedom to dispose of their works.<sup>62</sup>

In 2020, the Commission embarked on an investigation into the rules governing Apple's App Store.<sup>63</sup> Specifically, the focus was on the anti-steering provisions.<sup>64</sup> As articulated by the Commission, the negative impact of anti-steering provisions lies in restricting the ability of developers to inform users of alternative purchasing possibilities outside of apps.<sup>65</sup> In another investigation opened by the Netherlands Authority for Consumers and

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<sup>53</sup> Filistrucchi and others (n 48) 25–26; David S Evans, 'Two-Sided Markets' in ABA Section of Antitrust Law, *Market definition in antitrust: theory and case studies* (2012).

<sup>54</sup> Organisation for Economic Co-operation and Development (OECD) (n 31) 5; Lapo Filistrucchi, 'Market Definition in Multi-Sided Markets' in Organisation for Economic Co-operation and Development (OECD), *Rethinking Antitrust Tools for Multi-Sided Platforms* (2018) 48 <<https://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm>>.

<sup>55</sup> Organisation for Economic Co-operation and Development (OECD) (n 31) 6.

<sup>56</sup> European Commission, 'Draft Revised Market Definition Notice' (n 49) paras 95–98.

<sup>57</sup> The application of SSNDQ test in market definition can be observed in the *Google Android*, where the Commission and the General Court examined the likelihood of users and app developers to leave Google's licensable operating system when facing small quality degradation. See *Case T-604/18 Google and Alphabet v Commission (Google Android)* (n 26) paras 174–181.

<sup>58</sup> *Case 62/86 AKZO v. Commission* (n 41) para 60; *Case T-30/89 Hilti v. Commission* (n 41) para 92; *Joined Cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v Commission* (n 41) para 907; *Case C-202/07 P France Télécom v Commission* (n 41) para 100; *Case T-66/01 Imperial Chemical Industries v Commission* (n 41) para 257.

<sup>59</sup> European Commission, 'Commission Decision of 18 July 2018 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40099 — Google Android)' (2018) C/2018/4761 89–161.

<sup>60</sup> European Commission, 'Summary of Commission Decision of 27 June 2017 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping))' (2017) 2018/C 9/08 para 8.

<sup>61</sup> *Case 127/73 BRT v SABAM* (n 38) para 7.

<sup>62</sup> *ibid* 8.

<sup>63</sup> European Commission, 'Commission Opens Investigations into Apple' (n 42).

<sup>64</sup> The Commission started its investigation with two charges: (1) Apple's imposition of in-app purchase payment technology on music streaming app developers, and (2) Apple's restriction of app developers' ability to inform iPhone and iPad users of alternative music subscription services. However, in its Statement of Objections sent to Apple, the Commission no longer pursues the first charge. See European Commission, 'Antitrust: Commission Sends Statement of Objections to Apple' (28 February 2023) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_1217](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217)> accessed 16 June 2023.

<sup>65</sup> European Commission, 'Commission Opens Investigations into Apple' (n 42).



Markets ('ACM'), the ACM reviewed Apple's App Store's mandatory in-app purchase ('IAP') obligation and pinpointed its harmful effect, a restriction of the freedom of dating-app providers to choose payment systems.<sup>66</sup>

However, the aforementioned cases may not epitomize quintessential examples of contractual leverages, given that the repercussions of such leverages are often two-sided, implying detriment to one party whilst benefiting the other. To be specific, contractual terms disputed in the *BRT v SABAM* were stipulated in an one-sided market framework,<sup>67</sup> whereas anti-steering provisions and IAP obligation in the two Apple cases manifest disadvantages for both users and app providers.<sup>68</sup> In contrast, inequitably structured return policies and internal dispute resolution systems, as shown in prior sections, exhibit two-sided effects, characterized by counterbalance of interests and harms across different sides of markets.

Yet, the mere presence of a restriction or adverse impact does not inherently render it subject to Article 102(a). In the commercial realm, especially within two-sided and multi-sided markets, a modicum of favoritism or prioritization of one group over another is not only commonplace but occasionally indispensable for platforms aiming for profitability. How then does one differentiate a conventional business strategy, which opts to cater to specific users, from an inequitable utilization of contractual leverage yielding restrictive outcomes? Despite the fact that all businesses are subject to the fundamental right to freedom of enterprise and conduct business,<sup>69</sup> special obligations not to impair competition are stipulated for dominant undertakings under EU competition law.<sup>70</sup> As interpreted recently by the District Court of Rotterdam in its preliminary ruling on the requests for interim relief submitted by Apple against the ACM, dominant MSPs must ensure that the contractual arrangement they imposes are not so detrimental to a specific group of their users that the conditions are disproportionate to them.<sup>71</sup>

Adhering to such reasoning, and given the unique characteristic of contractual leverages, this paper proposes that, for competition authorities or judicial organs, finding of prima facie evidence of such restrictions or harm can hinge on the extent to which a contractual framework diverges from default rules established by legislation. If such a deviation is negligible and that such an adverse impact is inconsequential to the business operation or consumption of users, then such contractual arrangements should remain beyond the purview of Article 102(a). Conversely, if the deployment of contractual leverages shows significant deviation to the benchmark and inflicts a observable or even evident detrimental effect on users, the examination must then proceed to the assessment of proportionality which requires the establishment of objective(s) and its necessity followed by the balance of interests of such an objective and its adverse impacts.

## E. Establishment of objective(s)

Identifying the objectives underpinning contractual leverages is relatively straightforward. The primary objectives of these MSPs can be bifurcated into two distinct categories: (1) the maintenance or improvement of the platform service's quality or efficiency; and (2) the safeguarding or augmentation of the platform users' interests or welfare. In the context of multi-sided markets, the two category of objective often intertwine because when the platform's service and efficiency is improved, the platform becomes more attractive for its customers, and vice-versa.

These objectives can be established in antitrust proceedings. For instance, in ACM's investigation on Apple in 2021, Apple contended before the District Court of Rotterdam that its IAP obligation serves to construct a secure and reliable technological platform (first category), and to prevent fraud risks for its app users (second category).<sup>72</sup> These objectives can also be discerned from various sources such as terms of service, policy documents, or even interviews. For example, Amazon openly declares its ambition to 'be Earth's most customer-centric company,' an objective that aligns with the first category.<sup>73</sup> On its webpages for the A-to-Z Guarantee, Amazon unequivocally states that these policies are formulated with the intention of safeguarding the interests of its buyers, which squarely aligns with the second category.<sup>74</sup> Another example of the second category of objectives is evident in an interview

<sup>66</sup> Netherlands Authority for Consumers and Markets (ACM) (n 42) para 16.

<sup>67</sup> *Case 127/73 BRT v SABAM* (n 38).

<sup>68</sup> Preliminary ruling of 24 December 2021 on the requests for interim relief in *Case ROT 21/4781 and ROT 21/4782 Apple v ACM* (2021) NL:RBROT:2021:12851 (District Court of Rotterdam) [11.3-14]; European Commission, 'Statement of Objections' (n 64).

<sup>69</sup> *Case 4-73 Nold KG v Commission* (1974) EU:C:1974:51 (European Court of Justice) [14]; *Case 230/78 Eridania* (1979) EU:C:1979:216 (European Court of Justice) [20, 31].

<sup>70</sup> *Case C-413/14 P Intel v Commission* (2017) EU:C:2017:632 (European Court of Justice (Grand Chamber)) 135; *Case C-209/10 Post Danmark I* (n 45) para 23; *Case C-202/07 P France Télécom v Commission* (n 41) para 105; *Case 322/81 Michelin v Commission* (1983) EU:C:1983:313 (European Court of Justice) [57].

<sup>71</sup> Preliminary ruling of 24 December 2021 on the requests for interim relief in *Case ROT 21/4781 and ROT 21/4782 Apple v. ACM* (n 68) para 9.

<sup>72</sup> *ibid* 24.

<sup>73</sup> Amazon, 'Amazon Strives to Be Earth's Most Customer-Centric Company, Where People Can Find and Discover the Widest Possible Selection of Safe Goods' (*Amazon and Product Safety*, 1 June 2022) <<https://www.aboutamazon.eu/news/policy/amazon-and-product-safety>> accessed 4 August 2023.

<sup>74</sup> Amazon.com.be, 'A-to-Z Guarantee' <<https://www.amazon.com.be/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023; Amazon.de, 'A-to-Z Guarantee'

conducted by *Les Echos* with Jonathan Trépo, the director of Zalando France. In this discourse, the director emphasized the long-term value of a loyal buyers and underscored the instrumental role of the free-return policy in fostering customer satisfaction and loyalty.<sup>75</sup>

## F. Necessity and balance of interests

Upon identifying the objective(s), the legal examination advances to the assessment of necessity and the balance of interests, which present a complex challenge - both legal and factual - in practical scenarios. The central inquiry of the determination of necessity revolves around whether there exists a less restrictive or less harmful alternative to achieve the objective. For instance, in the Statement of Objections sent to Apple in 2023, the Commission posited that the anti-steering provisions are unfair under Article 102(a) because: (1) they are unnecessary and disproportionate for the operation of the App Store; (2) they are detrimental to users of apps; and (3) they negatively impact the interests of app providers.<sup>76</sup> The ACM, when determining the fairness of Apple's IAP obligation, assessed the objectives that Apple claimed, and held that the imposed conditions on dating app developers are unnecessary and disproportionate because 'Apple can also achieve these objectives in other less harmful ways'.<sup>77</sup>

As illustrated by the *BRT v SABAM* and *Kanal 5*, the legal test does not culminate merely upon establishing necessity.<sup>78</sup> Rather, it mandates an appropriate balance of interests between the beneficiaries of the objective's realization and those whose interests are restricted or adversely impacted.<sup>79</sup> This balance of interests is paramount, as a contractual term, even if deemed necessary, might still be disproportionate if the benefits derived from the objective are marginal in comparison to the significant detriments induced by the contractual term. Thus, in scenarios involving contractual leverages in multi-faceted markets, the proportionality test mandates an evaluation of the distributive equity among the platform and all ecosystem participants affected, be it positively or negatively.

This paper argues that in the context of multi-sided markets, each user group inherently merits competitive advantages, and when conducting the balance of interests, it must be ensured that no significant imbalance exists in the distribution of interests among users of all sides of the market. Such balance of interests cannot be simplistically reduced to a net-effects calculation by counterbalancing the accrued benefits and harms. In other words, the harm suffered by one group due to the exploitation of contractual leverages cannot be justified by the benefit of another group of users of the platform. This perspective is concurred with by other scholars who had analyzed the balance of interests between different groups of users due to pricing leverage conducts of MSPs.<sup>80</sup>

Although no established principle exists under EU competition law concerning the conflict of interests of different sides of the platform in MSPs, such an approach has been employed in the *MasterCard* judgment, a case involves a two-sided market for payment systems. In its evaluation of the advantages and disadvantages engendered by the multilateral interchange fees ('MIF') levied by the dominant platform, the ECJ posited:

*Where, as in the present case, restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such a character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market ... where the consumers on those markets are not substantially the same.*<sup>81</sup>

As the ECJ astutely highlighted, the advantages flowing from the MIF for cardholders cannot compensate for the disadvantages suffered by the merchants resulting from those fees. Following the decision, any detriment experienced by one user group due to anti-competitive practices should not be justified by advantages conferred upon another group as a result of the same practices.<sup>82</sup> This resonates with the function of EU competition law, and in particular, the function of Articles 101 and 102, which 'is precisely to prevent competition from being

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<<https://www.amazon.de/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023; Amazon.es, 'A-to-Z Guarantee' <<https://www.amazon.es/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023; Amazon.fr, 'A-to-Z Garantie' <<https://www.amazon.fr/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023; Amazon.it, 'A-to-Z Guarantee' <<https://www.amazon.it/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023; Amazon.nl, 'A-to-Z Garantie' <<https://www.amazon.nl/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV>> accessed 1 June 2023.

<sup>75</sup> Pauline Houédé, 'Zalando poursuit sa croissance rapide au détriment de ses marges' (*Les Echos*, 17 January 2018)

<<https://www.lesechos.fr/2018/01/zalando-poursuit-sa-croissance-rapide-au-detriment-de-ses-marges-982104>> accessed 4 August 2023.

<sup>76</sup> European Commission, 'Statement of Objections' (n 64).

<sup>77</sup> Netherlands Authority for Consumers and Markets (ACM) (n 42) para 1.

<sup>78</sup> *Case 127/73 BRT v SABAM* (n 38) para 8; *Case 52/07 Kanal 5 and TV 4* (n 44) para 31.

<sup>79</sup> *Case 127/73 BRT v SABAM* (n 38) para 8; *Case 52/07 Kanal 5 and TV 4* (n 44) para 31.

<sup>80</sup> Katz and Sallet (n 12) 2164–2168.

<sup>81</sup> *Case C-382/12 P MasterCard and Others v Commission* (2014) EU:C:2014:2201 (European Court of Justice (Third Chamber)) [242].

<sup>82</sup> Katz and Sallet (n 12) 2145–2146.

distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union'.<sup>83</sup>

### G. Objective justification

After identifying anticompetitive effects resulting from the trading condition of a dominant firm, such a MSP is, nevertheless, still entitled to offer justification for actions. According to established jurisprudence, there exist two forms of objective justifications: (1) technical or commercial necessity, and (2) efficiency that benefit consumers, which can counterbalance or outweigh the anticompetitive effects.<sup>84</sup> In the realm of assessing unfair trading conditions, however, both justifications appear analogous, bordering on redundancy, when compared to the legal assessment of fairness and proportionality. Within this framework, dominant undertakings would have already delineated their objectives and demonstrated the necessity of the contractual arrangement before invoking any objective justification.

### H. Conclusion

This section delved deep into the nuances of EU competition law, particularly Article 102(a) of the TFEU, and its application in determining the unfairness of contractual leverages. Through a meticulous examination of landmark cases and ongoing antitrust investigations against Apple, the section underscored the multi-step legal evaluation required to ascertain the abusiveness of contractual leverages. This includes defining relevant markets, establishing dominance, identifying restrictions or adverse impacts, and assessing necessity and balance of interests, among other steps. In particular, it highlighted the challenges and debates surrounding market definition in the context of multi-sided markets. Traditional methodologies, which were primarily designed for single-sided markets, often fall short in addressing the complexities of MSPs. The section also emphasized the importance of striking a balance of interests, ensuring that no significant imbalance exists in the distribution of interests among all user groups within a platform. Lastly, regarding objective justification, this section posited that the lines between objective justifications and the prior assessment of fairness and proportionality often blur, making the scrutiny of such justifications redundant.

## IV. CONCLUSION

The ascent of MSPs and the maturation of their strategic methodologies herald a novel epoch in economic dynamics. As these platforms proliferate and wield considerable sway across diverse sectors, their tactics increasingly obfuscate actions that potentially compromise the equitable distribution among participants within ecosystems they engender. The concept of contractual leverage, as suggested in this paper, represents a significant challenge in this regard. This paper has sought to articulate the concept of contractual leverages, which are characterized by deviations from default rules, differential treatments based on economic dependence, and a zero-sum nature. Furthermore, this paper delineates the tangible manifestation of contractual leverage and its impact on different user groups within the platform ecosystem and highlighted the vulnerability of users manifesting economic dependence on the platform.

In probing the theory of harm of contractual leverages, this paper reviewed the EU legal framework governing such contractual arrangements, and embarked on a rigorous examination of the multi-step legal evaluation of proportionality that determines their fairness. This paper underscored the challenges inherent in defining markets and establishing dominance in multi-sided contexts, the complexities of establishing restrictive effects or adverse impacts, and the tricky assessment of necessity of contractual terms and the balance of interests across user groups.

In particular, this paper highlighted the need to scrutinize the existence and observability of transactions between the user groups of the ecosystem and define one market for transaction MSPs and separate markets for non-transaction MSPs accordingly. It further postulates that the enhanced SSNDQ test could serve as a more efficacious tool for defining markets in cases concerning contractual leverages. Regarding the identification and establishment of restrictive effects resulting from unfairly designed contractual arrangements, courts and antitrust agencies can find *prima facie* evidence based on the extent to which a contractual framework diverges from default rules established by legislation or, in the absence of such legislation, commercial practices external to the ecosystem devoid of MSP presence.

Moreover, the paper emphasizes that when applying the principle of proportionality in the context of multi-sided markets, the balance of interests cannot be simplistically reduced to a net-effect calculation by counterbalancing the accrued benefits and harms. Since each user group inherently merits competitive advantages,

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<sup>83</sup> *Case T-691/14 Servier and Others v Commission* (2018) EU:T:2018:922 (European General Court (Ninth Chamber, Extended Composition)) [238]; *Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB* (n 45) paras 22–22.

<sup>84</sup> *Case C-209/10 Post Danmark I* (n 45) paras 40–41; *Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB* (n 45) para 31,75; *Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission* (n 45) paras 54–55; *Case 27/76 United Brands v. Commission* (n 45) para 184.

any detriment experienced by one user group due to anti-competitive practices should not be justified by advantages conferred upon another group as a result of the same practices.

Recognizing that the evolution of MSPs and their strategic methodologies is a fluid trajectory, the legal and regulatory countermeasures must exhibit commensurate adaptability. In counteracting challenges elicited by contractual leverages, this paper advocates that the Commission and National Competition Authorities ('NCA') might proactively oversee the distributive equity of contractual frameworks of dominant platforms, thereby bolstering the enforcement of Article 102(a). Alternatively, the Commission and NCAs might champion and expedite the development of voluntary codes of conduct at the Union level by platform operators, stakeholders within the ecosystem, or relevant authorities to promote distributive equity within MSPs. Potential domains encompassed by these codes might include equal access to information, fair return policies, equitable access and due procedure in dispute resolution, among others.

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