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Assessing access problems in online media platforms¹

Inge Graef,² Sih Yuliana Wahyuningtyas³ & Peggy Valcke⁴

Abstract

Online media platforms have the characteristics of a particular type of market known as ‘multi-sided’. These businesses create value by bringing advertisers and users together. Access to user data is critical to this process. On the basis of economic literature, the features of multi-sided platforms will be discussed. It will be argued that the characteristics of multi-sided platforms increase the likelihood that successful companies become dominant due to the existence of indirect network effects. In these circumstances, dominant platforms may foreclose competition by raising barriers to entry in the large collections of user data. This may give rise to access problems for competitors and new entrants that need access to data gathered by dominant platforms in order to provide competing or complementary services. A comparative legal analysis will be used to assess the standards that apply in the United States (US) and the European Union (EU) for finding liability for refusals to deal under antitrust or competition law. The private antitrust cases that have already occurred regarding access to user data in the US show that the scope of applicability of the essential facilities doctrine is very limited after the judgment of the Supreme Court in *Trinko*. Although the European Commission and the Court of Justice seem to be willing to accept liability for a refusal to deal more easily than their US counterparts, high legal hurdles still have to be met under the essential facilities doctrine in the EU. Nevertheless, there are scenarios in which liability for refusals to give access to data will likely be accepted in the EU.

Keywords

Multi-sided platforms; access regulation; user data; essential facilities; search engines; online social networks; e-commerce platforms

1. Introduction

Since several years companies in the internet economy have been offering online media platforms such as YouTube, Google and Facebook. These platforms are multi-sided markets. Instead of targeting one customer group, platform providers are competing for users and

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advertisers. Contrary to ‘traditional’ companies in the information technology sector like Intel and Microsoft, platform providers do not gain revenue by selling their technology to consumers but rely on deriving benefits from valuable information they collect about their users. The collection of user data enables them to offer targeted advertising services to advertisers who fund the platform. In addition, the quality of the services that can be offered to users depends to a large extent on the nature and amount of the data collected. As they are dependent on their user base, platform providers may not be willing to give competitors access to the information they have gathered about users. For example, social network providers typically do not allow third-party websites to directly acquire the user’s information.⁵ This paper aims to analyze how European competition law may intervene to redress potential data access problems in multi-sided online media platforms.

In section 2, economic literature on multi-sided markets will be reviewed to highlight the main characteristics of multi-sided platforms. Section 3 presents the importance of user data as a competitive asset for online media platforms. In section 4, a comparative law approach will be used to study how European competition law can approach access problems in online media platforms. While there is no decision or judgment on these issues yet in the European Union, a few private antitrust cases dealing with these problems have already occurred in the United States. The US cases will be discussed and it will be analyzed whether EU competition authorities and courts will take the same approach. Section 5 concludes.

2. Multi-sided nature of online media platforms

By focusing on online media platforms, this paper intends to concentrate on internet services that act as an intermediary or a platform between users and advertisers.⁶ Web-based businesses such as search engines and social networks aim to build an audience for advertisers. In order to attract users, these platforms offer users access to content such as videos (YouTube), or provide users a service like search functionality (Google) or social networking possibilities (Facebook). Access to the user traffic is sold to advertisers who generate the money for the platform. Although transaction or e-commerce platforms such as Amazon still mainly rely on income from fees they charge sellers on their platform, the provision of advertising services also starts to raise a considerable amount of revenue.⁷ E-commerce platforms therefore also seem to be evolving into online media platforms. The different types of advertising-based online media can be seen as multi-sided platforms (MSPs).

⁵ Under Facebook’s Terms of Services on Safety, Facebook prohibits automatic collection of user content: ‘*You will not collect users’ content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our prior permission*’, available at <https://www.facebook.com/legal/terms>.

⁶ A third customer group that is present on some online media platforms, particularly social networks, is application developers. To simplify the analysis, the role of developers will not be discussed.

⁷ In addition to the fees it charges sellers, Amazon receives income from its own sales. Amazon’s revenues from its ad business in 2013 were estimated to amount to \$835 million, placing it ahead of Twitter that accounted for \$583 million in advertising revenues. See R. Hof, ‘Amazon’s Ad Business Suddenly Looks Real’, 5 June 2013, available at <http://www.forbes.com/sites/roberthof/2013/06/05/amazons-ad-business-suddenly-looks-real/>.

A body of literature has been developed by economists that explains the nature of MSPs. MSPs have been long recognized in traditional advertising-supported media like newspapers or magazines. The advantage of using MSPs lies in minimizing transaction costs between customers of different sides of a platform that can benefit from getting together. Understanding how MSPs work is important for competition law analysis, because the specific characteristics of MSPs bring certain implications that differ from single-sided markets. The main characteristic of MSPs is the interdependence of the different sides of the platform which is reflected in the existence of indirect network effects.⁸ In addition, the skewed price structure has been described as a distinctive feature of MSPs.⁹ In this section, these two characteristics are highlighted.

2.1 Indirect network effects

According to Rochet and Tirole's definition, two-sided - or more generally multi-sided - markets are '*markets in which one or several platforms enable interactions between end-users and try to get the two (or multiple) sides "on board" by appropriately charging each side*'.¹⁰ The term 'market' here is used with a loose meaning, unlike the use of the term in competition law analysis,¹¹ such as in 'relevant market'. The term 'market' is often used interchangeably with 'platform'. Both refer to a place where different groups of customers meet and interact. Instead of MSPs, the term two-sided platforms has been commonly used for the purposes of simplicity, while the insights of two-sided platforms are also applicable to MSPs. We intentionally choose to use the term 'MSP' to emphasize that this type of business can involve more than two different groups of customers.

MSPs serve as intermediaries which bring different groups of customers together. The essential characteristic of MSPs is that one group of customers will value the platform more when there are more customers of another group.¹² For instance, eBay is interesting for sellers, because it has many buyers, and *vice versa*. Google attracts advertisers because it has a large number of users as audience and at the same time as potential buyers for the advertisers. On the other hand, users who look for information to buy certain products benefit from the number of advertisements, since it will increase the probability to find relevant products.

⁸ D.S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets', 20(2) *Yale Journal on Regulation* 325 (2003), p. 331-333; L. Filistrucchi, D. Geradin & E. Van Damme, 'Identifying Two-Sided Markets', 36(1) *World Competition* 33 (2013), p. 37-39.

⁹ J.C. Rochet and J. Tirole, 'Two-Sided Markets: A Progress Report', 37(3) *The RAND Journal of Economics* 645 (2006), p. 646.

¹⁰ J.C. Rochet and J. Tirole, 'Two-Sided Markets: A Progress Report', 37(3) *The RAND Journal of Economics* 645 (2006), p. 645.

¹¹ D.S. Evans and R. Schmalensee, 'The Organization of Markets with Two-Sided Platforms', in D.S. Evans, ed., *Platform Economics: Essays on Multi-Sided Business*, Competition Policy International, 2011, p. 3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974020.

¹² D.S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets', 20(2) *Yale Journal on Regulation* 325 (2003), p. 331-333; L. Filistrucchi, D. Geradin & E. Van Damme, 'Identifying Two-Sided Markets', 36(1) *World Competition* 33 (2013), p. 37-39; Armstrong and J. Wright, 'Two-sided Markets, Competitive Bottlenecks and Exclusive Contracts', 32(2) *Economic Theory* 353 (2007), p. 353.

This implies that a group of customers is influenced by another group of customers. The link between the two groups is called ‘indirect network effects’, or ‘indirect network externalities’, as the two groups do not internalize the networks effects among themselves.¹³ Rather, the network effects are internalized by the platform that provides intermediary services to enable different group of customers to interact with each other.¹⁴ The number of customers of one group will increase when there are more customers of other groups in the same network. Indirect network effects require an MSP to attract customers on either side of its platforms. In other words, it has to obtain a critical mass to stimulate the growth of the platforms. The platforms will have to secure enough customers on both sides and bring enough value to either group of customers.¹⁵

2.2 Price structure

The implication of indirect network effects is that it may be necessary to charge asymmetrical pricing to different groups of customers (‘skewed pricing’)¹⁶ in order to recover most costs for one side of the platforms while favouring the other. Therefore, it is common to find platforms that charge prices at marginal cost or even provide services for zero price to a group of customers, while charging higher prices to the other group. In other words, the prices charged on the different sides of an MSP often do not reflect the real costs of providing the service to a particular customer group.

This pricing character is an important notion of MSPs. As Rochet and Tirole point out, MSPs are identified by price structure, in which the platform is able to influence the volume of transactions by imposing different prices to different sides. In a single-sided market, on the contrary, the customers of different services provided by the undertakings bargain among themselves the allocation of the prices.¹⁷

Google, for example, provides users with zero price services for searching, mailing, maps, translating, calendar or chat program, while getting revenues from advertisers. Users, in return, provide Google with different types of data that enables Google to analyze their behaviour and this enables Google to offer behavioural advertising services. Indeed, one may argue that users do not really get the services for free because they incur certain costs, for instance having to see advertisements or to reveal certain personal data. However, being exposed to advertisements and revealing personal data can be seen as costs only so far as the

¹³ J.C. Rochet and J. Tirole, ‘Platform Competition in Two-Sided Markets’, 1(4) *Journal of the European Economic Association* 990 (2003), p. 995.

¹⁴ D.S. Evans, ‘The Antitrust Economics of Multi-Sided Platform Markets’, 20(2) *Yale Journal on Regulation* 325 (2003), p. 331-333.

¹⁵ C. Shapiro and H.R. Varian, *Information Rules: A Strategic Guide to the Network Economy*, Harvard, Harvard Business Press, 1999, p. 14.

¹⁶ W. Bolt and A.F. Tieman, ‘Heavily Skewed Pricing in Two-sided Markets’, 26(5) *International Journal of Industrial Organization* 1250 (2008), p. 1250; W. Bolt and A.F. Tieman, ‘Skewed Pricing in Two-Sided Markets: An IO Approach’, *Money Macro and Finance (MMF) Research Group Conference 2005*, p. 2-3, available at <http://econpapers.repec.org/paper/mmfmfc05/75.htm>.

¹⁷ J.C. Rochet and J. Tirole, ‘Two-Sided Markets: A Progress Report’, 37(3) *The RAND Journal of Economics* 645 (2006), p. 665.

respective user does not like either of those. Furthermore, even if these are considered as costs, they are difficult to convert into price.

This concept of price structure is important for competition law considerations, because not taking this into account could lead to a false perception of a selling below cost on one side of the platform. Drawing from this explanation, it is also incorrect to conclude that there is no market, simply because the services are offered at zero price.¹⁸

3. User data as a competitive asset

3.1 User data and users

User data comprises various types of information. On the one hand, users provide data themselves in the form of, for example, profile information, pictures and lists of friends or contacts on social networks and search queries inserted in the search box of search engines. On the other hand, platform providers create or obtain data by means of analyzing the behaviour and habits of users on their platform.

Users have certain rights under European data protection legislation with regard to collected information that directly or indirectly leads to his or her identification.¹⁹ An important right which protects the interest of users in their own personal data is the right of access. This includes a limited right to rectify, erase or block data in case the processing does not comply with the necessary rules.²⁰ Although users have a right of access to their data, under the current European data protection regime there is no right for users to directly transfer their data from one platform to another. In this situation, lock-in may occur. Users are not hindered to provide their data to another platform. However, not allowing users to move or duplicate their data, for example a social networking profile, requires users to invest time and effort into inserting their data in the new platform manually, which could lead them to decide to stay with their current platform.²¹

¹⁸ See the *KinderStart v. Google* case in which the Court for the Northern District of California declined to apply antitrust law to internet search on the ground that the claimants had not cited any authority indicating that antitrust law is concerned with competition in the provision of free services (*KinderStart.com, LLC v. Google*, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. March 16, 2007)).

¹⁹ Under Article 2(a) of Directive 95/46/EC (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (23.11.1995)), personal data is defined as ‘any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity’. See also Article 29 Working Party, ‘Opinion 4/2007 on the concept of personal data’, WP 136, 20 June 2007.

²⁰ Article 12 of Directive 95/46/EC.

²¹ To address this user lock-in problem, the European Commission introduced the ‘right to data portability’ in the proposal for a General Data Protection Regulation. See further section 4.2.2.

3.2 User data and online media platforms

Next to users who have an interest in their data relating to the right to personal data protection,²² online media platforms have an interest in user data for commercial reasons. On both the advertiser and user side of online media platforms access to user data is important for providing services that meet the needs of customers. Because of the existence of indirect network effects, advertisers value the presence of users. However, due to the advent of behavioural or targeted advertising the mere presence of users does not seem to be sufficient to attract advertisers to online media platforms. Through online advertising, a more targeted audience can be reached in a more effective way by combining available information about the interests and preferences of users.²³ As the amount of data that the online media platform collects about its users increases, the indirect network effects that the user side exerts on the advertiser side will thus become stronger. Data about the interests and needs of users enable the online media platform provider to offer better targeted advertising services to advertisers who have an interest in displaying their advertisements to users that are interested in buying their product or service. Relevant data includes the number and type of advertisements clicked on, the amount of time spent on the webpage of the advertiser and whether the user made a purchase. Since the availability of user data is vital for improving the targeting possibilities of advertising, an online media platform will attract more advertisers as the amount of data that it holds about its users increases. Furthermore, because advertisers fund the platform, it is important for the provider to ensure good targeting. This is especially the case for online media platforms employing a pay-per-click advertising model which entails that an advertiser only pays when a user clicks on its advertisement. To gain revenue, the platform thus has to ensure that the advertisements displayed to a specific user are so relevant that he or she clicks on them. The accumulation of user data is vital in this perspective.

On the user side, access to data can play different roles depending on the online media platform concerned. With regard to a search engine, the availability of data is crucial for providing relevant search results. Since the search functionality is provided for free to users, quality and in particular the relevance of search results is an important parameter of competition.²⁴ Search engines collect personal information of users including Internet Protocol (IP) addresses and create profiles on the basis of the search queries that the user has entered into the search engine as well as of the links that he or she has subsequently clicked on. These query logs or search logs are used by the search engine to improve the relevance of its search results in the future by looking at, for example in which language, from which geographical location, and at what time of the day a user enters a particular search query.²⁵ As more users search via a certain search engine, that search engine gets more data about the

²² See Article 8 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1 (18.12.2000).

²³ This is also one of the arguments on the basis of which the European Commission has consistently held that online and offline advertising do not fall within the same relevant market for competition purposes. See Case IV/JV.1 – *Telia/Telenor/Schibstedt*, 27 May 1998; Case IV/M.1439 – *Telia/Telenor*, 3 October 1999; Case IV/M.0048 – *Vodafone/Vivendi/Canal Plus*, 20 July 2000; Case No COMP/M.4731 – *Google/DoubleClick*, 11 March 2008 and Case No COMP/M.5727 – *Microsoft/Yahoo! Search Business*, 18 February 2010.

²⁴ See the statements of the European Commission in Case No COMP/M.5727 – *Microsoft/Yahoo! Search Business*, 18 February 2010, par. 100 and Case No COMP/M.6281 – *Microsoft/Skype*, 7 October 2011, par. 81.

²⁵ See, for example F. Silvestri, 'Mining Query Logs: Turning Search Usage Data into Knowledge', 4(1-2) *Foundation and Trends in Information Retrieval* 1 (2010).

search queries users look for and the search results that are subsequently clicked on. This way the search engine can improve the relevance of its results as a consequence of which it will attract even more users.

For e-commerce platforms, data about the purchasing behaviour of users creates advantages for incumbent providers that can improve their recommendation system with every new purchase. The collection and analysis of information on the behaviour and preferences of users enables the platform to better predict what users will like based on their similarity with other users.²⁶ A user will rather return to a platform that makes relevant suggestions for future purchases. As platforms such as Amazon are mainly funded by way of transaction fees, it is vital to provide relevant suggestions to users so that they will engage in as many purchases as possible.

For social networks, access to user data also results in a competitive advantage for incumbents. The value that a user derives from a social network directly increases in accordance with the number of other users that are on the network and the variety of personal information, such as pictures, videos and other content, which is available. Because of this direct network effect, the more users and data are available on the social network, the more attractive the platform will be for new users.²⁷

3.3 User data and competition

For establishing itself, an online media platform, for example a social network, needs to achieve a critical mass on both sides of the platform. Demands on one side of the platform depend on whether or not there are sufficient demands on the other side. Without a user base, the social network will not attract advertisers, on which it relies to make the platform profitable. The advertisers will join the platform that has the most solid user base, since they have an interest in displaying their products or services to as most users as possible. Once one social network has achieved a critical mass, it is very hard for a competing platform to gain a foothold on the market. It needs a strong user base itself before advertisers will be interested in joining the new network, as they can already reach users through the social network that has established itself first. Due to direct network effects, it could be hard to attract users. Since a social network with an installed user base is also more beneficial to users, users that are new to the social network environment may therefore join the system that has the most users. Due to network effects, the market is very concentrated and competition is harder to achieve. Because of the network effects and the economies of scale, only a few social network

²⁶ See also J.P. Mangalindan, 'Amazon's recommendation secret', *Fortune*, 30 July 2012, available at <http://fortune.com/2012/07/30/amazons-recommendation-secret/>.

²⁷ S.W. Waller, 'Antitrust and Social Networking', 90(5) *North Carolina Law Review* 1771 (2012), p. 1787-1788.

providers will be able to survive. Multi-sided markets are therefore often referred to as ‘winner-take-most’ or ‘few-winners-take-all’ markets.²⁸

The characteristics of MSPs thus increase the likelihood that successful online media platforms become dominant in the market. Since the quality of the services that the online media platform provider offers to both users and advertisers depends to a large extent on the nature and amount of the data collected, there are increasing returns to data potentially giving rise to entry barriers for firms wishing to enter the market. Because of the dependence on their user base, online media platforms have an interest in keeping their systems closed. This may lead to access problems for competitors and new entrants that need access to user data in order to provide competing or complementary services. In this context, the question arises whether the data can qualify as an essential facility and whether a refusal to give access to user data can qualify as a breach of competition law.

4. Access issues in online media platforms

The access to data on online platforms is mentioned by scholars as one of the issues that are likely to attract scrutiny of competition authorities and courts worldwide.²⁹ The denial of a dominant platform provider to give access to user data could constitute a refusal to deal and lead to liability under the so-called ‘essential facilities doctrine’.³⁰ Originating in the United States under Section 2 of the Sherman Act,³¹ the doctrine attacks the refusal of a dominant firm to give access to a type of infrastructure or other form of facility to which rivals need access in order to be able to compete. The doctrine is also applied in the European Union under Article 102 of the Treaty of the Functioning of the European Union (TFEU) where it developed along a different line. While the US Supreme Court has considerably limited the scope of application of the doctrine in its *Trinko* judgment, the European Commission and the European Court of Justice seem to favour a more extensive interpretation.³² This may lead to differences in the enforcement of access to data on online media platforms between the two jurisdictions.

²⁸ D.S. Evans, ‘Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy’, SSRN Working Paper, March 2008, p. 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090368.

²⁹ D.S. Evans, ‘Antitrust Issues Raised by the Emerging Global Internet Economy’, 102 *Northwestern University Law Review Colloquy* 285 (2008), p. 304; C.S. Yoo, ‘When Antitrust Met Facebook’, 19(5) *George Mason Law Review* 1147 (2012), p. 1154-1158; S.W. Waller, ‘Antitrust and Social Networking’, 90(5) *North Carolina Law Review* 1771 (2012), p. 1799-1800.

³⁰ Although the United States Supreme Court and the European Court of Justice have never formally recognized the existence of the essential facilities doctrine, both institutions have made clear that there are circumstances in which a refusal to supply an indispensable or essential input leads to antitrust liability. While some scholars differentiate between the concepts refusal to deal and essential facilities, the difference only seems to be a matter of semantics. For this reason, the two terms are used interchangeably in this paper. See also D. Geradin, ‘Limiting the scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court’s judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*’, 41(6) *Common Market Law Review* 1519 (2004), p. 1525-1526.

³¹ *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

³² S.W. Waller & W. Tasch, ‘Harmonizing Essential Facilities’, 76(3) *Antitrust Law Journal* 741 (2010), p. 741-742.

4.1 US approach

Except for an investigation that the United States Federal Trade Commission (FTC) reportedly started against Twitter on the restrictions that it allegedly imposes on companies which develop applications using Twitter data,³³ no online media providers have been under the scrutiny of US antitrust authorities for issues relating to access to user data on their platforms.³⁴ Nevertheless, a few relevant private antitrust cases have emerged in the US courts. These cases will be discussed in the following subsections with reference to the general standards that apply for refusals to deal under US antitrust law.³⁵

4.1.1 *LiveUniverse v. MySpace*

LiveUniverse operated an online social networking website called vidiLife. Users of MySpace were able to incorporate content from vidiLife in their MySpace profile until MySpace redesigned its platform and started preventing users from loading and displaying vidiLife videos on MySpace. MySpace also deleted all references to vidiLife and prevented its users to include links to vidiLife in their MySpace profiles. LiveUniverse filed a complaint before the competent district court asserting that this behaviour constituted a violation of US antitrust law.³⁶

Although the district court found that LiveUniverse had sufficiently alleged the monopoly power of MySpace in the relevant market, it dismissed the claim for failure to establish actionable exclusionary conduct and causal antitrust injury.³⁷ LiveUniverse alleged that the conduct of MySpace formed part of a pattern of anticompetitive behaviour against other social networking sites that discouraged and effectively precluded new competitors from entering the market. MySpace argued that its behaviour was not anticompetitive, since it has a right to refuse to deal with a rival and to prevent a competitor from free riding on its investment and innovation.³⁸

The district court distinguished the present case from *Aspen*³⁹ which is the leading case finding US antitrust liability for a refusal to deal. In *Trinko*, the Supreme Court refused to extend liability for refusals to deal beyond the circumstances present in *Aspen* and stated that *Aspen* is ‘at or near the outer boundary’ of antitrust liability. The Supreme Court made clear

³³ A. Efrati, ‘Antitrust Regulator Makes Twitter Inquiries’, *Wall Street Journal*, 1 July 2011, available at <http://online.wsj.com/article/SB10001424052702304450604576418184234003812.html>. To date, the FTC has not issued any statement about the alleged investigation.

³⁴ The investigation of the Federal Trade Commission into the allegations of Google’s search bias that ended in January 2013 by way of the adoption of a consent decree, did not involve issues related to end user data. While Google offered commitments with regard to advertising portability, access to user data was not at issue. For the commitments that Google offered towards advertisers, see the letter of David Drummond in *Google Inc.* File No. 111-0163, 27 December 2012, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart/130103googleletterchairmanleibowitz.pdf>.

³⁵ Whereas in the US the term ‘antitrust’ is mostly used, it is more common to refer to ‘competition’ in the EU. In this paper, both terms are used synonymously.

³⁶ *LiveUniverse, Inc. v. MySpace, Inc. (LiveUniverse)*, No. CV 06-6994 AHM (RZx), 2007 WL 6865852 (C.D. Cal. June 4, 2007), at 1.

³⁷ *LiveUniverse*, at 1.

³⁸ *LiveUniverse*, at 11.

³⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

in its *Trinko* judgment that *Aspen* was an exception upon which can only be relied in situations where a monopolist terminates a voluntary and profitable prior course of dealing.⁴⁰ As a result, the applicable test consists of two prongs: (1) there has to be a pre-existing voluntary course of dealing, and (2) the monopolist must be willing to sacrifice short-term profits in order to achieve an anticompetitive end.⁴¹ These conditions were not met in *Trinko* in the view of the Supreme Court considering that the monopolist at issue had not voluntarily entered into a course of dealing with its rivals as a result of which its prior conduct could shed no light upon whether the refusal to deal was ‘prompted not by competitive zeal but by anticompetitive malice’.⁴²

The district court made clear that the course of dealing here concerned the relationship between LiveUniverse and its users and that there was no evidence of a decision, an arrangement or even an informal agreement between MySpace and LiveUniverse to cooperate. In addition, the district court found that the decision of MySpace to eliminate references to vidiLife could be viewed as merely preventing LiveUniverse from advertising its website free of charge on the MySpace platform. Since MySpace had not taken any action that prevented LiveUniverse from operating its own website, the court concluded that MySpace’s conduct did not constitute a refusal to deal.⁴³

With regard to the establishment of causal antitrust injury, the district court noted that LiveUniverse failed to allege harm to consumers. In its view, the time and effort that consumers invested in creating content was not wasted as a consequence of MySpace’s design changes: ‘The “long hours” that consumers devoted to “self-expression” have not been wasted; the content they created is still available, and readily accessible. Internet aficionados easily move from one website to another in seconds’.⁴⁴ For these reasons, the district court concluded that LiveUniverse had not sufficiently alleged exclusionary conduct or causal antitrust injury.⁴⁵

The Ninth Circuit affirmed the district court’s ruling. Since LiveUniverse had not alleged either that a voluntary agreement between it and MySpace existed, or that such agreement was profitable to MySpace, the Ninth Circuit argued that the district court rightly dismissed LiveUniverse’s claims for failure to establish exclusionary conduct. In addition, the Ninth Circuit followed the district court’s finding that LiveUniverse had not alleged causal antitrust injury. LiveUniverse had not explained how MySpace’s actions on its own platform would reduce consumers’ choice or diminish the quality of their experience on other social networking websites. In particular, MySpace had not prevented consumers from accessing

⁴⁰ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP (Trinko)*, 540 U.S. 398 (2004), at 409.

⁴¹ See also *Novell, Inc. v. Microsoft Corp.*, No. 12-4143, 2013 WL 5303259 (10th Circ. September 23, 2013), at 9.

⁴² *Trinko*, at 409.

⁴³ *LiveUniverse*, at 13-14.

⁴⁴ *LiveUniverse*, at 15.

⁴⁵ *LiveUniverse*, at 16. The district court also rejected the claim of LiveUniverse for attempted monopolization in the market for Internet-based social networking websites as well as the claims alleging monopolization and attempted monopolization in the market for advertising on Internet-based social networking websites for the same reasons, *i.e.* failure to establish exclusionary conduct and causal antitrust injury. Lastly, the district court dismissed LiveUniverse’s unfair competition claim under Section 17200 of the California Business & Professions Code.

vidiLife's social network. As a result, consumers remained free to choose which online social network to join and on which platform to create content.⁴⁶ The *LiveUniverse* case demonstrates the limited scope of applicability of the essential facilities doctrine after *Trinko*. Only if the two strict conditions laid down in that case are met, will a refusal to deal lead to antitrust liability in the US.

4.1.2 *Facebook v. Power Ventures*

Another case that concerned access to data on an online platform is *Facebook v. Power Ventures*. On its website Power.com, Power Ventures enabled users to integrate all their social networking activities in one profile. Power.com used account information provided by Facebook users to access Facebook's website and to scrape data off the platform that was displayed on Power.com. Facebook started court proceedings alleging that Power Ventures violated Facebook's Terms of Use and several state and federal statutes protecting against, amongst others, fraud, copyright infringements and unauthorized access to computer data.⁴⁷ In turn, Power Ventures filed a counterclaim arguing that Facebook breached US antitrust law.⁴⁸ Power Ventures claimed that Facebook engaged in exclusionary conduct by soliciting its users to provide it with login information for their email and social networking accounts on third party websites (such as Google's Gmail, AOL, Yahoo and Hotmail) to enable Facebook to extract, amongst other data, their lists of friends from these websites and use that information to fuel Facebook's growth, while barring competitors from doing the same.

The district court argued that the fact that other third party websites allowed Facebook to access them did not place Facebook under the obligation to provide third party websites with unrestricted access to its own platform.⁴⁹ In addition, Power Ventures argued that Facebook had maintained its monopoly power by systematically threatening new entrants with baseless intellectual property claims with the objective of discouraging market entry and stifling competition. The district court found that this allegation could not support an antitrust claim. Since Facebook has a right to manage access to and use of its platform, there could be nothing anticompetitive about taking legal action to enforce that right.⁵⁰ For these reasons, the district court dismissed Power Ventures' antitrust counterclaim.

In February 2012, the district court ruled in Facebook's favour ordering Power Ventures to pay damages for violating federal legislation on the sending of commercial e-mail and computer fraud, and state criminal law as Power Ventures was found to have engaged in computer crimes by unauthorized accessing Facebook's website and obtaining information

⁴⁶ *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. Appx. 554 (9th Circ. December 22, 2008), at 556-557.

⁴⁷ In particular, Facebook argued that Power Ventures breached the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act, the Computer Fraud and Abuse Act ("CFAA"), the California Comprehensive Computer Data Access and Fraud Act (Section 502 of the California Penal Code), the Digital Millennium Copyright Act ("DMCA"), California's Unfair Competition Law ("UCL"), state and federal trademark law as well as that Power Ventures committed direct and indirect copyright infringement.

⁴⁸ *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JF (RS), 2009 WL 3429568 (N.D. Cal. Oct. 22, 2009), at 1. In this judgment, the district court dismissed the counterclaim because of lack of specificity. Afterwards, Power Ventures amended its pleading.

⁴⁹ *Facebook, Inc. v. Power Ventures, Inc. (Power Ventures)*, No. C 08-05780 JW, 2010 WL 3291750 (N.D. Cal. July 20, 2010), at 13.

⁵⁰ *Power Ventures*, at 13-14.

about users.⁵¹ This case demonstrates that a unilateral decision of an aggregation website to scrape data off other platforms and to solicit users for their account information may lead to civil and criminal liability in the US. To prevent liability, an aggregation website thus has to explicitly request a platform provider to give access to its data. If such a request is denied, the aggregation website can start a private antitrust case arguing that the refusal to deal amounts to a violation of US antitrust law. However, since the district court dismissed the antitrust counterclaim of Power Ventures on the basis that Facebook has a right to manage, and thus restrict, access to and use of its platform, it is hard to think of circumstances in which such a case would be successful. One could argue that, once it would have been given access to the data and content that users have uploaded on several individual platforms including Facebook, Power Ventures would be able to bring a new product to the market of substantial value to users that are active on several platforms at the same time. An integration of all social networking activities in one profile would obviate the need for users to visit all the platforms on which they are active separately. Such an aggregation service could be detrimental to the business models of existing online social networks, but on the other hand it would also encourage the development of new types of services potentially improving the user experience and thus leading to increased consumer welfare which is the ultimate goal of antitrust enforcement.

4.1.3 *PeopleBrowsr v. Twitter*

The similarity between the two cases discussed so far is that the rivals LiveUniverse and Power Ventures had not interacted directly with the social network providers MySpace and Facebook. In both cases, users intervened to give the rival social networks access to data on the platforms of MySpace and Facebook. In *LiveUniverse v. MySpace*, users of MySpace decided themselves to incorporate content from vidiLife into their MySpace profiles, as a result of which LiveUniverse gained access to personal data on MySpace. In *Facebook v. Power Ventures*, Power Ventures asked for the account information of Facebook users in order to extract data from Facebook's platform and display that information on Power Ventures' own website. A competitor can also directly deal with an online platform to get access to data without any help from users. The case *PeopleBrowsr v. Twitter* is an example of such a scenario.

In November 2012, a San Francisco court granted PeopleBrowsr a temporary restraining order that prevented Twitter to terminate the long-standing full access to its data. PeopleBrowsr is a company that analyzes Twitter data in order to sell information to clients about, for example, consumer reactions to products and services and identification of the Twitter users who have the most influence in certain communities. Twitter had informed PeopleBrowsr (and several other third-party developers) that as from 30 November it would be losing its full access to the Twitter 'firehose' which is the entirety of tweets that are passing through Twitter on a second-by-second basis. Instead of having direct access to the Twitter data, PeopleBrowsr would have to approach one of Twitter's certified data resellers to gain access to the required

⁵¹ *Facebook, Inc. v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025 (N.D. Cal. February 16, 2012). The district court ruled that Power Ventures had violated the CAN-SPAM Act, the CFAA and Section 502 of the California Penal Code.

data. PeopleBrowsr argued that it needed full firehose access to be able to deliver its services to customers.⁵² The present case is thus, unlike *LiveUniverse* and *Power Ventures*, not about access *per se* but about the terms under which access is granted. Another difference with the two other US cases is that the competitor of the online media platform, PeopleBrowsr, is requesting access to data as an input for a product that does not stand in direct competition with the main product that the online media platform provider at issue, in this case Twitter, provides. Unlike the *LiveUniverse* and *Power Ventures* cases which involved access requests from undertakings wishing to introduce competing online social networks, the statistical analytics services that PeopleBrowsr would be able to (continue) to offer if access to the required user data was given, are complementary to the main services that Twitter provides to its customers and would therefore not form part of the same relevant product market in a competition analysis.

The competent state court mandated Twitter to temporarily continue providing PeopleBrowsr full access to its data by way of the imposition of a temporary restraining order.⁵³ While PeopleBrowsr could have based its reasoning on a breach of antitrust law, it alleged several violations of private law and California unfair competition law.⁵⁴ After the imposition of the temporary restraining order, Twitter tried to remove the case to the federal court on the ground that PeopleBrowsr's unfair competition law claim in fact invoked federal antitrust law and should thus be dealt with on federal court level. However, the district court dismissed Twitter's request in March 2013 and argued that the claim was not necessarily federal in character. The district court even stated that the fact that the removal of the case came right after the imposition of the temporary restraining order by the state court '*suggests that Twitter's decision to remove this case was born out of a desire to find a more sympathetic forum*'.⁵⁵

In April 2013, PeopleBrowsr and Twitter settled the dispute. The parties agreed that PeopleBrowsr would have continued full firehose access until the end of 2013. As from 2014, PeopleBrowsr would have to transition over to an authorized Twitter Data Reseller for getting access to Twitter data.⁵⁶ Therefore, it is unclear what the outcome of the case would have been if the case was decided by the court. While the claims were not based on antitrust law, the application of California unfair competition law to the case would have given some guidance about the obligations of Twitter under US antitrust law in the present case. Indeed, precedent had established that '*unfair*' means '*conduct that threatens an incipient [as opposed to an actual] violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or*

⁵² *PeopleBrowsr, Inc. et al. v. Twitter, Inc. (PeopleBrowsr)*, No. C-12-6120 EMC, 2013 WL 843032 (N.D. Cal. March 6, 2013), at 1.

⁵³ See 'PeopleBrowsr Wins Temporary Restraining Order Compelling Twitter to Provide Firehose Access', 28 November 2012, available at <http://blog.peoplebrowsr.com/2012/11/peoplebrowsr-wins-temporary-restraining-order-compelling-twitter-to-provide-firehose-access/>.

⁵⁴ PeopleBrowsr brought claims for intentional interference with contractual relations, intentional interference with prospective economic advantage, promissory estoppel and violations of Section 17200 of the California Business & Professions Code (*PeopleBrowsr*, at 1).

⁵⁵ *PeopleBrowsr*, at 4.

⁵⁶ See 'PeopleBrowsr and Twitter settle Firehose dispute', 25 April 2013, available at <http://blog.peoplebrowsr.com/2013/04/peoplebrowsr-and-twitter-settle-firehose-dispute/>.

otherwise significantly threatens or harms competition'.⁵⁷ Since the *PeopleBrowsr* case only involved the imposition of a temporary restraining order, no strong conclusions can be drawn from it. Because the case was not decided on the merits, it remains unsettled whether Twitter could have been obliged to give *PeopleBrowsr* full access to its data under US federal or state antitrust law. Contrary to the factual situations in the *LiveUniverse* and *Power Ventures* cases, it is clear that there was a pre-existing voluntary course of dealing between the dominant platform and the access seeker in *PeopleBrowsr*. It would therefore have been instructive to see how the district or federal court had applied the other condition put forward in *Trinko* regarding the sacrifice of short-term profits to the present case.

4.2 EU approach

4.2.1 Refusal to deal case law

Commercial Solvents is the first case in the European Union in which a refusal to deal was at stake. *Commercial Solvents* was the manufacturer of a raw material, called aminobutanol, necessary for the production of ethambutol, a pharmaceutical substance used in the treatment of tuberculosis. *Commercial Solvents* stopped to supply the raw material to Zoja, its regular customer and competitor on the downstream market for ethambutol.⁵⁸ While the *Commercial Solvents* case dealt with a disruption of supply, in later cases the European Commission and the Court of Justice have recognized that, unlike the judgment of the Supreme Court in *Trinko*, it is not necessary under European competition law for the refused product to have been already traded by the dominant firm to the rival.

The *Magill* case involved three broadcasting companies based in the United Kingdom which refused to provide the publishing company *Magill* with weekly listings of their TV programmes. Each station published its own weekly TV guide and also granted a license to daily papers to publish programme listings one day in advance. However, a weekly TV guide including the programme listings of all three stations was not available. The broadcasting companies based the refusal on the copyright protection of their programme listings. In its judgment, the European Court of Justice argued that although there was no earlier contractual relationship between *Magill* and the TV stations, in the exceptional circumstances present in the case the refusal to give *Magill* a license to use the programme listings qualified as abuse of dominance.⁵⁹ Termination of a prior course of dealing is thus not required to establish liability under the essential facilities doctrine in Europe.

Like under US antitrust law, in principle dominant undertakings are entitled to decide freely with whom they wish to deal under the abuse of dominance regime of European competition law. Only in exceptional circumstances an obligation to contract can be imposed on the basis of the essential facilities doctrine. In *IMS Health*, the European Court of Justice established

⁵⁷ *PeopleBrowsr*, at 4.

⁵⁸ Joined cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223.

⁵⁹ Joined cases C-241/91 and C-242/91 *Telefis Eireann and Independent Television Publications Ltd v. Commission of the European Communities (Magill)* [1995] ECR I-743.

four criteria for holding a refusal to deal abusive under European competition law: the refusal has to concern a product or service that is indispensable for carrying out a particular business on a related market; the refusal is of such a kind as to exclude any effective competition on this secondary market; the refusal prevents the appearance of a new product for which there is a potential consumer demand and the refusal cannot be objectively justified.⁶⁰ With regard to the condition on the exclusion of any effective competition on the secondary market, the Court held that two markets have to be distinguished: ‘*an upstream market, constituted by the product or service*’, and a ‘*downstream market, on which the product or service in question is used for the production of another product or the supply of another service*’. The Court explicitly stated that the fact that a product or service is not marketed separately does not necessarily preclude the possibility of identifying a separate market. According to the Court, it is sufficient that a potential or even a hypothetical market can be identified.⁶¹

In the *Microsoft* judgment, the General Court confirmed these four criteria.⁶² However, in several respects it seems to have lowered the standards for their fulfilment. With regard to the indispensability requirement, the Court argued that competitors should be put on an equal footing with Microsoft. As a result, although Microsoft put forward five alternative methods that in its view would ensure a minimum level of interoperability sufficient for effective competition,⁶³ the Court required Microsoft to give competitors full access to its interoperability information.⁶⁴ This stands in contrast with the statement of the European Court of Justice in *Bronner* that it is not decisive whether the good or service to which access is demanded is the most advantageous possibility, as long as there are alternatives which are economically viable for competitors.⁶⁵ Similarly, in respect to the new product requirement the General Court seems to have taken a less strict attitude. In particular, the Court argued that the appearance of a new product is not the only indicator for determining whether a refusal to deal causes consumer harm. In accordance with the wording of Article 102(b) TFEU, the Court stated that ‘*such prejudice may arise where there is a limitation not only of production or markets, but also of technical development*’.⁶⁶ Since Microsoft did not appeal the judgment of the General Court, it is not clear whether the European Court of Justice endorses these lower standards. Commentators have argued that the statements of the General Court might be specific to the *Microsoft* case considering that Microsoft was almost holding a monopoly position in the relevant market.⁶⁷

4.2.2 Data portability

While no competition cases concerning competitors’ access to user data on online media platforms have occurred in the European Union, legislative action has been undertaken in

⁶⁰ Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* [2004] ECR I-5039 (*IMS Health*), par. 38.

⁶¹ *IMS Health*, par. 42-45.

⁶² Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 (*Microsoft*), par. 332-333.

⁶³ *Microsoft*, par. 345-347.

⁶⁴ *Microsoft*, par. 421.

⁶⁵ Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs* [1998] ECR I-7791, par. 43-46.

⁶⁶ *Microsoft*, par. 647.

⁶⁷ See notably, P. Larouche, ‘The European *Microsoft* Case at the Crossroads of Competition Policy and Innovation’, 75(3) *Antitrust Law Journal* 601 (2008), p. 628.

order to redress the lock-in of users in the online media environment. In the proposal for a General Data Protection Regulation, an article is included that would introduce a ‘right to data portability’.⁶⁸ This right would enable users *‘to transfer data from one electronic processing system to and into another, without being prevented from doing so by the controller’*.⁶⁹ When entered into force, the right to data portability would enable users to move their profile and other data contained in an online platform, for example a social network, to another service.⁷⁰ Although the right to data portability is introduced in a data protection instrument, it also has a competition law angle. In a speech, the Commissioner for Competition argued that the proposed right to data portability *‘goes to the heart of competition policy’*. He also stated that *‘[c]ustomers should not be locked-in to a particular company just because they once trusted them with their content’* and he concluded that *‘[w]hether this is a matter for regulation or competition policy, only time will tell’*.⁷¹ This approach stands in contrast to some of the statements of the US district court in *LiveUniverse v. MySpace*. For analyzing potential restrictions on data portability, the behaviour of the provider to which users originally supplied their data should be examined. The *LiveUniverse* case dealt instead with the behaviour of the provider which would be receiving user data from the platform to which users had provided their data in the first place. Although the case thus did not deal with data portability concerns in the strict sense, the statement of the district court that Internet aficionados easily move from one website to another⁷² demonstrates a reluctance to accept that consumer harm occurs when users cannot move their data across services.

Portability already plays a role in the pending *Google* investigation that the European Commission opened in November 2010 after complaints from competitors about Google’s search activities.⁷³ One of the concerns that the Commission expressed in this case relates to the limitations that Google allegedly imposes on the portability of advertising campaigns on AdWords. In particular, the Commission is worried that Google puts *‘contractual restrictions on software developers which prevent them from offering tools that allow the seamless transfer of search advertising campaigns across AdWords and other platforms for search advertising’*.⁷⁴ Although the *Google* case does not relate to limitations on the portability of user data, the fact that the Commission is taking action to enable the transfer of advertising campaigns demonstrates that portability can be regarded as a competition issue. In the remedy package that Google offered to alleviate the competition concerns of the Commission, Google made a commitment to stop imposing any obligations that will prevent *‘advertisers from*

⁶⁸ Article 18 of the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

⁶⁹ Proposal for a General Data Protection Regulation, p. 9.

⁷⁰ In the recitals social networks are mentioned as an example of an automated processing system to which the new right would apply (Recital 55 of the Proposal for a General Data Protection Regulation).

⁷¹ Commissioner Almunia, ‘Competition and personal data protection’, speech given at the *Privacy Platform event: Competition and Privacy in Markets of Data* in Brussels on 26 November 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm.

⁷² *LiveUniverse*, at 15.

⁷³ European Commission, ‘Antitrust: Commission probes allegations of antitrust violations by Google’, 30 November 2010, available at http://europa.eu/rapid/press-release_IP-10-1624_en.htm.

⁷⁴ Statement of Commissioner Almunia on the Google antitrust investigation, Press room Brussels, 21 May 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm.

porting and managing search advertising campaigns across Google AdWords and non-Google advertising services'.⁷⁵ If the commitments become final, Google will no longer be able to prevent developers from offering functionality that copies online advertising campaigns between advertising services. Such a tool will enable advertisers to transfer their campaigns across different platforms.⁷⁶ In the US, Google offered similar commitments to address concerns of FTC Commissioners that restrictions on advertising portability would impair competition in search advertising.⁷⁷ The FTC thus acknowledged that portability is important to promote competition in the advertising market. Although the *LiveUniverse* case tends to suggest that potential limitations on the ability of users to transfer data across platforms do not give rise to consumer harm under US antitrust law, it would be striking if restrictions on portability are considered a competition issue on only one side of the platform. Considering the above mentioned statements of Commissioner Almunia on data portability and the fact that advertising portability was one of the concerns that the Commission identified in the *Google* investigation, the European Commission seems to be of the view that portability is important for ensuring competition on both the user and advertiser side of online media platforms.

4.3 Way forward under European competition law

4.3.1 Comparing the EU with the US

While the right to data portability put forward in the proposal for a General Data Protection Regulation will give users the possibility to transfer their data between online platforms, it does not entitle competitors of online platform providers access to user data. The new right will only affect the relationship between users and their provider.⁷⁸ Even though the enforcement of the right to data portability would increase competition between online media platforms, competitors still have to rely on competition law in order to get access to user data as input for developing their own products or services. Whereas US courts seem very reluctant to force social network providers to give access to their platforms, under European competition law more lenient standards are applied to hold a refusal to deal abusive. In

⁷⁵ Commitments of Google in Case COMP/C-3/39.740 *Foundem and others*, 3 April 2013, par. 27-31, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf. In October 2013, Google offered improved commitments to the Commission which included a new proposal providing stronger guarantees against circumvention of the earlier commitments regarding portability of advertising campaigns (Statement of Commissioner Almunia, 'The Google antitrust case: what is at stake?', European Parliament, 1 October 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm).

⁷⁶ A similar commitment was adopted in the US by way of a consent decree that put an end to the Google investigation, see FTC Press Release, 'Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search', 3 January 2013, available at <http://ftc.gov/opa/2013/01/google.shtm>.

⁷⁷ See the letter of David Drummond in *Google Inc.* File No. 111-0163, 27 December 2012, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/google-agrees-change-its-business-practices-resolve-ftc-competition-concerns-markets-devices-smart/130103googleletterchairmanleibowitz.pdf>.

⁷⁸ D. Geradin & M. Kuschewsky, 'Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue', SSRN Working Paper February 2013, p. 10. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088.

particular, in the EU ‘absolute’ refusals to deal, where no prior contractual relationship between the dominant firm and its rival is present, can also be held abusive if the other criteria of the essential facilities doctrine are met.⁷⁹ Therefore, liability of a dominant platform provider for a refusal to give access to user data is likely to be accepted easier in the European Union. Nevertheless, a significant legal burden has to be met in order to force a dominant platform provider to give competitors access to its data under European competition law. Especially the requirement of indispensability which demands that there are no economically viable alternatives for the required input seems hard to meet.

With regard to the indispensability of data for providing advertising services on search platforms, the US and EU decisions approving the acquisition of DoubleClick, a company that develops and provides online ad serving, by Google are instructive. The European Commission concluded that the combination of information on search behaviour from Google and web-browsing behaviour from DoubleClick would not give the merged entity a competitive advantage that could not be matched by competitors.⁸⁰ The Federal Trade Commission similarly argued that the data of both Google and DoubleClick does not constitute an essential input to a successful online advertising product.⁸¹ Both the EU and US authorities thus came to the conclusion that the data of Google and DoubleClick is not necessary or essential for providing advertising services in an online environment. The European Commission stated in particular that similar data was already available to Google’s competitors, including Microsoft and Yahoo!, and that the data could also be acquired from third parties and internet service providers.⁸² It therefore seems that access to user data of dominant online media platforms will not easily be considered indispensable for the provision of advertising services as the required data can be acquired in alternative ways.⁸³

4.3.2 Indispensability of data for offering services to users

However, these considerations focus on the indispensability of user data for the advertising side of a search engine. For the user side of search engines, the availability of data is also crucial, because the results that the search engine produces will become more relevant in accordance with the number of searches conducted. In turn, the more accurate the results are, the more users the search engine will attract. While the European Commission found no evidence that scale leads to more relevant search results in the *Microsoft/Yahoo!* merger decision, the respondents to the market investigation in that case almost anonymously indicated that a large volume of search queries is an important aspect of a successful search

⁷⁹ J. Drexler, ‘Intellectual Property and Antitrust Law - IMS Health and Trinko - Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases’, 35(7) *International Review of Intellectual Property and Competition Law* 788, p. 790-791.

⁸⁰ Case No COMP/M.4731 – *Google/ DoubleClick* (*Google/DoubleClick*), 11 March 2008, par. 366.

⁸¹ Statement of the Federal Trade Commission concerning *Google/DoubleClick* FTC File No. 071-0170, 20 December 2007, p. 12, available at <http://www.ftc.gov/sites/default/files/documents/cases/2007/12/071220statement.pdf>.

⁸² *Google/DoubleClick*, par. 365.

⁸³ See also D. Geradin & M. Kuschewsky, ‘Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue’, SSRN Working Paper February 2013, p. 15.

engine.⁸⁴ Future cases could therefore revolve around requests of competitors for access to data on search queries collected by a dominant search engine provider.⁸⁵

A similar reasoning could be applied to incumbent e-commerce platforms that hold data about previous purchasing behaviour of users that enable them to make more relevant suggestions for future purchases than new platforms which have just entered the market. Although it was held in *Bronner* that the indispensability requirement would not be met as soon as economically viable alternatives for the required input were available, in *Microsoft* the General Court argued that in the circumstances of that case competitors should be put on an equal footing with the dominant firm. If this new standard is followed in future cases, competitors of online media platforms would be more easily entitled access to user data under the essential facilities doctrine.

4.3.3 *Most likely scenario*

The scenario in which the finding of liability under Article 102 TFEU seems most likely is where an access seeker needs the user data as an input for a new product that would not stand in direct competition to the main product that the online media platform provider offers to its customers. Of the three private antitrust cases that already occurred in the US, the *PeopleBrowsr* case comes closest to this scenario. PeopleBrowsr needed access to Twitter data to be able to offer analytics services which cannot be regarded as a substitute to the services that Twitter provides on its platform. The facts of the *PeopleBrowsr* case thus point to the typical ‘leveraging’ behaviour whereby an undertaking seeks to extend its dominant position in the upstream market, the market for social networks or (more narrowly) microblogging services, to the downstream market, the market for data analytics services, by refusing to give access to the necessary input which in the present case amounted to Twitter’s full firehose data.⁸⁶ One could argue that Twitter was trying to foreclose competition on the downstream market in which its certified data resellers were active by way of providing third parties access to a processed or analyzed form of Twitter data.

However, the product that PeopleBrowsr would be offering with the full firehose data as input was not entirely new, considering that other companies, including Twitter’s own certified data resellers, already offered similar data analytics services. Nevertheless, if the new standards set by the General Court in its *Microsoft* judgment are upheld in the future, a mere technological development would be sufficient for overcoming the new product requirement of the essential facilities doctrine. In other words, in case PeopleBrowsr could show that the analytics services that it would be able to offer, once given access to the required Twitter data, were different from or better than existing services, it would probably pass the new product condition. Since data has become a critical asset in the online media environment, it is inevitable that cases

⁸⁴ Case No COMP/M.5727 – *Microsoft/Yahoo! Search Business*, 18 February 2010, par. 160-174.

⁸⁵ See also C. Argenton and J. Prüfer, ‘Search Engine Competition with Network Externalities’, 8(1) *Journal of Competition Law and Economics* 73 (2012) who show that the market for search engines in the current state of affairs will develop into a monopoly. To prevent this, they propose to require search engines to share their data on search queries. As a result of this, search engines would only be competing on search algorithm and not on the amount of user data they hold.

⁸⁶ It should be noted that in the US *PeopleBrowsr* case Twitter did not refuse PeopleBrowsr access to its data altogether. Instead, the case dealt with the conditions under which Twitter offered access.

about refusals to give access to user data will also start occurring in the EU. Future cases will hopefully clarify the status of the *Microsoft* judgment as well as indicate under which circumstances data access refusals should be held abusive under Article 102 TFEU.

5. Conclusion

The review of economic literature on the one hand, and legal analysis of relevant US and EU competition cases and recent legislative initiatives, has shown that access issues in online media platforms in relation to user data are becoming more important. User data is of considerable value for online media platforms to keep advertisers on board, to enable the provision of services to users that are of the quality and relevance they expect, and to maintain the platforms' strong position on the market. Hence, user data is becoming a crucial tool to compete. Because of the dependence on their user base, online media platforms have an interest in keeping their systems closed. The characteristics of MSPs increase the likelihood that successful companies in the market become dominant. In this context, the concentration of user data may lead to entry barriers giving rise to access problems for competitors and new entrants that need user data as input for providing competing or complementary services.

The fact that the courts in the *LiveUniverse v. MySpace* and *Facebook v. Power Ventures* cases dismissed claims alleging exclusionary conduct may point to the reluctance of US authorities to force providers to give access to their platforms on the basis of US antitrust law. In the EU, a stricter approach is taken towards refusals to deal as a result of which liability for abusive conduct of dominant undertakings can be established more easily. Nevertheless, a considerable legal burden has to be met especially with regard to proving the indispensability of the data to which access is sought. The statements of the European Commission in the *Google/DoubleClick* merger decision indicate that a plea of a competitor in which it claims that user data of an incumbent online media platform constitutes an essential input for advertising services will likely be rejected. A request for access to user data with the goal of providing (new) services to users or, in particular, introducing complementary products on a downstream market seems to stand a better chance of success. While so far only social networks have been under scrutiny for refusals to share user data, search engine providers and providers of e-commerce platforms may also be confronted with competitors seeking access to user data. Although a considerable legal hurdle has to be overcome, there seem to be circumstances in which the European Commission can force a dominant online platform provider to give access to user data under the new standards established by the General Court in the *Microsoft* case. Future cases will tell whether these standards should also be applied to data access refusals.